Neutral Citation Number: [2023] EAT 31

Case No: EA-2022-000087-BA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 March 2023

**Before** :

**THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE**

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**Between :**

**(1) MINISTRY OF JUSTICE**
**(2) LORD CHANCELLOR** **Appellant**
**- and -**
**MR R DODDS & OTHERS** **Respondent**

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**Andrew Allen KC & Alexander Line** (instructed by the Government Legal Department) for the **Appellants**
**Robin Allen KC & Chesca Lord** (instructed by Leigh Day and Sintons LLP) for the **Respondents**

Hearing dates: 23 & 24 January 2023

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# JUDGMENT

## Paragraphs 208 and 218 amended on 24 May 2023 under Rule 33, Employment Appeal Tribunal Rules to correct clerical mistakes.



 

## SUMMARY

## PART-TIME WORKERS

The Ministry of Justice and the Lord Chancellor appealed the judgment of the London (Central) Employment Tribunal ("ET") which upheld claims brought under the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("PTWR") by three circuit judges who from time to time sat in the High Court pursuant to authorisations under section 9(1) **Senior Courts Act 1981** ("SCA 1981") and a district judge, Mr Atherton, who sat in the Crown Court and county court pursuant to his appointment as a recorder. On the days when they "sat up" the claimants were paid at the rate applicable to their salaried office. The ET accepted that when they "sat up" they were part-time workers in respect of these roles; that they could compare themselves to a full-time judicial office holder of the higher role; that the payment of a lower rate of remuneration than their comparators was on the ground of their part-time status; and that this less favourable treatment was not justified on objective grounds. The appellants (the respondents below) challenged each of these findings on the appeal (save that they had earlier conceded that Mr Atherton was a part-time worker once he sat as a district judge at 90% and that his work as a recorder was comparable to that of a full-time circuit judge.)

The claimants were selected as sample representatives from a larger number of stayed claims brought by judges who sat at various levels in the judiciary.

The Employment Appeal Tribunal ("EAT") allowed the appeal and remitted the four claimants' cases to the ET to re-determine the issues relating to them as identified in the agreed List of Generic Issues. The EAT found that the ET had erred in law in finding that the claimants were part-time workers within the meaning of regulation 2(2) **PTWR**, in that: (i) it focused upon the alleged part-time work rather than considering the totality of the claimants' work in circumstances where the respondents' case was that the sitting up was part of their full-time salaried offices; (ii) it drew an unwarranted


 

distinction between their "core" duties and their other duties for this purpose; (iii) it failed to have regard to relevant considerations regarding the respondents' custom and practice; and (iv) it introduced a fairness or equity test into the question of whether the worker was a part-time worker. Although the ET had based its decision upon the **PTWR**, **Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-Time Working** did not alter the position in this regard.

The EAT decided that it was appropriate to remit the case, rather than decide the question of the claimants' status, given, in particular, the outstanding areas of fact-finding.

In light of the appeal against the findings that the claimants were part-time workers succeeding, the ET's conclusions on comparability (as between section 9(1) judges and High Court judges), causation and justification could not stand, as they were predicated on the tribunal's decision in respect of the claimants' status.

In any event, the ET erred in law in its conclusion on causation, in that: (i) it took into account a perceived unfairness in the respondents' reason for the less favourable treatment, rather than confining its consideration to the ground of the less favourable treatment; (ii) it failed to have regard to a relevant consideration namely the basis upon which deputy judges of the High Court appointed pursuant to section 9(4) **SCA 1981** were paid if they held a salaried office; (iii) it failed to have regard to the meaning and effect of sections 9(1) and 9(6), when placing reliance upon section 9(5) **SCA 1981**; (iv) it relied on the flawed "core" duties distinction; and (v) it failed to give adequate reasons in relation to the position of Mr Atherton.

The ET also erred in law in its conclusion on justification, in that: (i) it relied on its earlier erroneous reasoning in respect of the claimants' status; and (ii) it dismissed the respondents' aim of the fair allocation of resources on the flawed basis that: (a) the case on administrative difficulties was a separate aim that had not been properly pleaded; and (b) it wrongly characterised the respondents as impermissibly relying simply upon the saving of cost.


 

**MRS JUSTICE HEATHER WILLIAMS:**

## Introduction

1. The Ministry of Justice and the Lord Chancellor appeal the decision of the London (Central) Employment Tribunal ("the ET"), comprised of Employment Judge S J Williams sitting alone ("the EJ"), sent to the parties on 16 December 2021. I will refer to the parties as they were known below.

2. The hearing before the ET concerned five claimants who had been selected as sample representatives from a larger number of judges who sit at various levels in the judiciary and who had brought similar complaints under the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("PTWR") and **Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-Time Working** ("PTWD"). The five claimants are not lead claimants in the sense envisaged by rule 36, schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, but the parties envisage that determination of the issues arising in these claims will assist in resolving the wider cohort of claims that have been brought.

3. Each of the claimants has from time to time sat in a judicial capacity that is remunerated, on a substantive basis, at a higher level than their respective salaries. The EJ referred to this as "sitting up" and I will adopt that terminology. The claimants claim that when sitting up they are part-time workers and the respondents have infringed their right not to be treated less favourably than comparable full-time workers in failing to remunerate them at the *per diem* equivalent of the higher rate that is paid to those who sit full-time in the more senior judicial capacity.

4. In common with the approach adopted by the EJ, I will not use honorific titles in relation to the parties and the witnesses other than in respect of Sir Brian Leveson. I intend no discourtesy in taking this approach.

5. Simon Barker, Jane George and Mark Everall are, or were at the material time, circuit judges


 

or (in Mr Barker's case) a senior circuit judge, authorised pursuant to section 9(1) **Senior Courts Act 1981** ("SCA 1981") to act as judges of the High Court. Ian Atherton was a district judge who also held the appointment of recorder pursuant to section 21(1) **Courts Act 1971** ("CA 1971"). Patrick Field is a circuit judge authorised pursuant to section 9(1) **SCA 1981** to act as a judge of the Court of Appeal (Criminal Division) ("CACD"). Pursuant to a Presidential Case Management Order dated 13 March 2020, the other claims, including that of Mr Dodds the first-named claimant, were stayed pending the outcome of these proceedings.

6. The hearing below was only concerned with liability. Four of the five claimants were successful. Mr Field's claim failed on the basis that a High Court judge was not an appropriate comparable full-time worker in respect of his sittings in the CACD pursuant to section 9(1) **SCA 1981**. He has not appealed this decision. In this judgment I refer to Mr Barker, Ms George, Mr Everall and Mr Atherton collectively as "the claimants"; and to Mr Barker, Ms George and Mr Everall collectively as "the section 9(1) claimants". I refer to "section 9(1) judges" as a shorthand for circuit judges who hold an authorisation to sit in the High Court pursuant to section 9(1) **SCA 1981**; and to "section 9(4) judges" as a shorthand for deputy judges of the High Court appointed pursuant to section 9(4) **SCA 1981**.

7. As indicated at paragraphs 90 - 91 of the Reasons, the ET's findings, in summary, were:

   i) When, Mr Barker, Ms George and Mr Everall act or acted as judges of the High Court pursuant to their section 9(1) **SCA 1981** authorisations and when Mr Atherton sits as a recorder, they are or were each part-time workers, within the meaning of regulation 2(2) **PTWR**;

   ii) A full-time High Court judge is a comparable full-time worker in relation to the part-time work undertaken by the section 9(1) claimants; and a full-time circuit judge is a comparable full-time worker to Mr Atherton's part-time work as a recorder, within the meaning of regulation 2(4) **PTWR**;


 

iii) The claimants were each treated less favourably than a comparable full-time worker on the ground that they were part-time workers, contrary to regulation 5(1) **PTWR;** and

iv) The less favourable treatment of them was not justified on objective grounds.

8. As reflected on the "Agreed List of Generic Issues" provided to the ET, all of the above matters were disputed in relation to the section 9(1) claimants. However, the respondents accepted that Mr Atherton "was a part-time worker from 1 November 2011 when he went down to 90%" in respect of his salaried district judge appointment; and also that full-time circuit judges were valid comparators in respect of the work that he undertook as a recorder (paragraphs 3 and 6 of the list).

9. In relation to causation, the respondents accepted that if the claimants succeeded on the part-time worker and comparability issues, they were treated less favourably than their chosen comparators in terms of remuneration; however, they argued that this was not on the ground of part-time status, but because their primary office was a full-time salaried one.

10. In relation to justification, the respondents relied upon the following aims: (i) fair and flexible deployment of judges to courts and tribunals whose office holders may be paid at rates which are different from theirs; (ii) fair allocation of resources; and (iii) reflecting the difference in hierarchy and the differences in full-time roles as between different judicial roles. The ET found that all three were legitimate aims, but that the approach taken by the respondents was not a suitable or reasonably necessary means of achieving those aims.

11. The respondents' grounds of appeal contend that all four of the findings that I have listed at paragraph 7 above were flawed by legal error. The grounds are identified in further detail at paragraphs 66 – 82 below. I will give a short summary of them at this stage:

(i) Ground 1 concerns alleged errors made by the ET when addressing the question of part-time worker status (Issue 1 before the ET.) It comprises the following sub-grounds:



 

(a) Ground 1A: the ET erred in failing to consider the totality of the claimants' work as salaried judges, focusing only upon the aspect that was alleged to constitute part-time work;

(b) Ground 1B: the ET erred in drawing a distinction between "core" work (when the claimant was sitting in his or her salaried capacity) and "non-core" work (when the claimant was sitting as a section 9(1) judge or a recorder);

(c) Ground 1C: the ET failed to have regard to relevant considerations in relation to the respondents' custom and practice; took into account irrelevant considerations; wrongly introduced a test of fairness and/or equity into this issue; and/or failed to give adequate reasons;

(d) Ground 1D: the ET did not properly consider whether a part-time salaried circuit judge could undertake section 9(1) sittings in their non-salaried time;

(e) Ground 1E: the ET wrongly conflated the circumstances of Mr Atherton and the section 9(1) claimants;

(ii) Ground 2 relates to alleged errors in respect of the comparison exercise (Issue 2 before the ET.) It comprises the following sub-grounds:

(a) Ground 2A: the ET failed to properly assess the differences between section 9(1) judges and High Court judges;

(b) Ground 2B: the ET took into account an irrelevant consideration, namely the position of section 9(4) judges;

(iii) Ground 3 relates to alleged errors by the ET in concluding that the less favourable treatment was on the ground of the claimants' part-time status (Issue 3 before the ET.) It comprises the following sub-grounds:

(a) Ground 3A: the ET took into account an irrelevant consideration and/or misdirected itself in law in considering the position of the section 9(4) judges;



 

(b) Ground 3B: the ET erred in rejecting the respondents' case that the less favourable treatment was because the claimants held salaried office, including in the approach taken to section 9(5) **SCA 1981** and in applying a "core work" distinction. Additionally, the ET failed to provide adequate reasons in relation to Mr Atherton;

(c) Ground 3C: the ET erred in concluding that if the claimants had sat for 100% of their time in the High Court or in the Crown Court (in Mr Atherton's case), they would have been paid at the higher rate; and/or arrived at a perverse conclusion in relation to causation;

(iv) Ground 4 is concerned with the ET's conclusion that the less favourable treatment was not objectively justified (Issue 4 before the ET.) Grounds 4A, 4B and 4C, respectively, criticise the ET's reasoning and conclusions in relation to each of the aims that the respondents relied upon by way of justification.

12. The claimants contest the appeal and support the reasoning of the EJ. In addition, Mr Robin Allen KC advances arguments that are based on the **PTWD**. These points were not addressed by the EJ (presumably because he had in any event found for the successful claimants on the basis of the **PTWR** provisions). Mr Andrew Allen KC objected to the **PTWD** submissions being raised. Accordingly I need to determine: (i) whether the claimants' submissions in this respect are within the scope of their answer to the appeal or whether permission to amend that document is required; and (ii) if permission to amend is required, whether I should grant it. In order to minimise disruption of the hearing and to enable it to be completed within the scheduled two days, I indicated that I would hear the substantive arguments on a provisional basis and address the questions I have just referred to as part of my reserved decision.

13. The EJ heard evidence from the five claimants. The respondents adduced evidence from Sir Brian Leveson, former President of the (then) Queen's Bench Division, and from Simon Masterson, the Deputy Director of the Judicial Pay and Pensions Division of the Judicial and Legal Services


 

Policy Directorate in the Ministry of Justice. (The respondents also adduced evidence from Clement Goldstone, former Resident Judge and Honorary Recorder of Liverpool, but that was not referred to during the course of this appeal.)

14. By order dated 7 October 2022, I set down the appeal for a full hearing and (at the parties' request) gave directions providing for some expedition of the usual timetable because of the issues raised and the number of cases that are stayed pending the resolution of these claims.

15. The structure of this judgment is as follows:

(i) The legal framework (paragraphs 16 – 42);

(ii) The EJ's judgment (paragraphs 43 – 65);

(iii) The grounds of appeal (paragraphs 66 – 84);

(iv) The claimants' application to amend their answer (paragraphs 85 – 96);

(v) Ground 1: Discussion and conclusions (paragraphs 97 – 167);

(vi) Ground 2: Discussion and conclusions (paragraphs 168 – 181);

(vii) Ground 3: Discussion and conclusions (paragraphs 182 – 205);

(viii) Ground 4: Discussion and conclusions (paragraphs 206 – 218);

(ix) Overall summary of conclusions and outcome (paragraphs 219 – 223).

## The legal framework

16. I will set out the relevant provisions and the non-contentious legal principles in this part of my judgment. Whilst the law is very much in issue in relation to Ground 1, there is little between the parties in terms of the correct approach to the question of comparability under the **PTWR** and they are agreed as to the applicable principles relating to causation and justification.

17. In **O'Brien v Ministry of Justice** [2013] UKSC 6, [2013] ICR 499 ("**O'Brien**") the Supreme Court rejected the proposition that the **PTWR** did not apply to judicial office holders. It is accepted that the claimants are "workers" for the purposes of the legislation.



 

## The PTWD

18. The **PTWD** was concluded on 6 June 1997 and extended to the United Kingdom by **Directive 98/23/EC**. It was transposed into domestic law by the **PTWR** which were made under section 19 of the **Employment Relations Act 1999**. The **PTWR** came into force on 1 July 2000.

19. Recital (11) of the **PTWD** says that the parties to the annexed framework agreement wish "to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike". Recital (16) states:

> "Whereas, with regard to terms used in the framework agreement which are not specifically defined therein, this Directive leaves member states free to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that the said definitions respect the content of the framework agreement."

20. Article 1 states that the purpose of the Directive is to implement the framework agreement.

21. For the avoidance of doubt, when I refer to clauses of the **PTWD** below, I am referring to the clauses of the framework agreement. The relevant provisions of the agreement are as follows:

> "*Clause 1: Purpose*
> The purpose of this framework agreement is: (a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work; (b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.
>
> *Clause 2: Scope*
> 1. This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.
> 2. …
>
> *Clause 3: Definitions*
> 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.
>
> When there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.
>
> *Clause 4: Principles of non-discrimination*
> 1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time


 

unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of pro rata temporis shall apply.

3. The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to the European legislation, national law, collective agreements and practice.

4. …

*Clause 6: Provisions on implementation*

1. Member States and/or social partners may maintain or introduce more favourable provisions than set out in this agreement."

22. As explained at para 29 in the joint judgment of Lord Hope of Craighead DPSC and Baroness Hale of Richmond JSC in **O'Brien**:

> "The PTWD and the framework agreement do not aim at complete harmonisation of national laws in this area, but only, as the agreement's name indicates, to establish a general framework for eliminating discrimination against part-time workers…The discretion given to member states is however qualified by the need to respect the effectiveness of the PTWD, and general principles of EU law…"

23. It was common ground in **O'Brien** that the **PTWD** had direct effect against an emanation of the state and that the Ministry of Justice was such an emanation, so that judicial office holders were able to rely on the provisions of the **PTWD** via the jurisdiction conferred by the **PTWR**; and that the provisions of the **PTWR** had to be read and applied consistently with the **PTWD**. These principles are not disputed in the present appeal either (subject to the question of whether the claimants can rely on submissions based on the **PTWD**, which I address at paragraph 85 – 96 below.)

## The PTWR

24. The relevant provisions of the **PTWR** are as follows:

"**2. – Meaning of full-time worker, part-time worker and comparable full-time worker**

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

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

(3) …

(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at



 

> the time when the treatment that is alleged to be less favourable to the part-time worker takes place-
>
> (a) both workers are-
>
> (i) employed by the same employer under the same type of contract, and
>
> (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and
>
> (b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.
>
> **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 ground that the worker is a part-time worker, and
>
> (b) the treatment is not justified on objective grounds.
>
> (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.
>
> …
>
> **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."

25. As Judge David Richardson emphasised in **Engel v Ministry of Justice** [2017] ICR 277: "the purpose of the legislation is not to redress any and all injustices that may exist; it is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time workers" (paragraph 18).

26. I also note Lord Carnwarth JSC's observation in **Miller v Ministry of Justice** [2019] UKSC 60, [2020] ICR 1143 (paragraph 31) regarding the difficulties of applying the **PTWR** to judicial office holders:

> "…it must be borne in mind that the Regulations have to be construed in a highly artificial context. That results not only from the need to conform to the requirements of European law, but also from the special characteristics of judicial appointments and judicial pensions under domestic law. In the first place, while the Regulations assume the existence of a 'contract' of employment …, a judicial officer is not employed under a contract…so that references to the 'terms of a contract' can at best be applied by analogy."

## Part-time workers

27. A part-time worker is defined by reference to what they are not; they are a worker who is not



 

a full-time worker. Counsel have been unable to identify any caselaw that bears directly on the issues of law that I have to resolve in relation to Ground 1. It appears that in the vast majority of cases there has been no dispute over whether the claimant is a part-time worker for the purposes of the **PTWR**. In their section on part-time workers, the authors of **Harvey on Industrial Relations and Employment Law** observe of the identification of a part-time worker by reference to custom and practice: "In spite of the resemblance that this may be to the classic 'elephant' definitional problem (ie that you cannot define it, but know one when you see it) this element of the regulatory scheme has hitherto not caused litigated problems" (paragraph 133.02). The authors of **Tolley's Employment Handbook** say of regulations 2(1) and (2) **PTWR**: "Despite the vagueness of these definitions, there are remarkably few cases in which there has been any argument over whether a worker is full- or part-time". However, perhaps prophetically, they continue: "But there are some questions which will one day need answering" (page 1010). I return to the legal issues raised by Ground 1 from paragraph 97 below.

**A "comparable full-time worker"**

28. The correct approach to the identification of a "comparable full-time worker", as contemplated by regulation 2(4) and 5(1) **PTWR** was identified by the House of Lords in **Matthews v Kent and Medway Towns Fire Authority** [2006] UKHL 8, [2006] ICR 365 ("**Matthews**"). Baroness Hale explained the position as follows:

> "43. …The sole question for the tribunal at this stage of the inquiry is whether the work on which the full-time and part-time workers are engaged is 'the same or broadly similar'. I do not accept the applicants' argument…that this involves looking at the similarities and ignoring any differences. The work which they do must be looked at as a whole, taking into account both similarities and differences. But the question is not whether it is different but whether it is the same or broadly similar. That question has also to be approached in the context of Regulations which are inviting a comparison between two types of worker whose work will almost inevitably be different to some extent.
>
> 44. In making that assessment, the extent to which the work that they do is exactly the same must be of great importance. If a large component of their work is *exactly the same*, the question is whether any differences are of such importance as to prevent their work being regarded overall as 'the same or broadly similar'. It is easy to imagine workplaces where both full- and part-timers do the same work, but the full-timers have extra activities with which to fill their time. This should not prevent their work being regarded as the same or broadly similar overall. Also


 

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

29. In **Moultrie v Ministry of Justice** [2015] IRLR 264 ("**Moultrie**"), the Employment Appeal Tribunal ("EAT") upheld a tribunal's finding that fee-paid medical members of tribunals such as the mental health tribunal were not engaged in "the same or broadly similar work" as full-time salaried regional medical members, although 85% of their work was identical. Mr Justice Lewis (as he then was) concluded that the tribunal had faithfully applied the test identified in **Matthews**. During the course of his analysis he observed:

> "29. The only basis upon which the appellants' submission could be correct would be if the approach in *Matthews* meant that once a large component of the work was the same and once that work was recognised as being important, then the two groups had to be engaged in the same or broadly similar work. But that is not what *Matthews* decides. Indeed, it is clear that particular weight must be given to those factors and then the question becomes whether the remaining differences are of such importance to prevent the work being regarded as broadly similar. It is not the case that whenever a large component of the work of the two groups is the same, and is of importance, it necessarily follows that the work is broadly similar."

30. It is well established that the comparison must be made with an actual, rather than a hypothetical comparator: **Carl v University of Sheffield** [2009] ICR 1286 ("**Carl**") at paragraph 23.

## Causation

31. Regulation 5(2)(a) **PTWR** refers to less favourable treatment "on the ground" that the worker is a part-time worker, whereas the **PTWD** prohibits such treatment "solely because" the part-time worker works part-time (clause 4.1). Whilst some of the earlier cases pointed in different directions on this point, the parties are agreed that the correct approach is that identified by Elias J (as he then was) in **Sharma v Manchester City Council** [2008] ICR 623 and followed in **Carl**, where Judge Peter Clark said:


 

> "42. …we agree with Elias J in *Sharma* that, whereas domestic law must provide the protection contained in the Directive, it is not limited to such protection. 'On the ground that' in regulation 5(2)(a) means what Mummery J said the similar expression in the Sex Discrimination Act 1975 meant. Part-time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause."

## Justification

32. The case law on what is required to establish justification on objective grounds was reviewed by Lord Hope and Baroness Hale in **O'Brien**. The key parts of their analysis was as follows:

> "44. There is, however, little guidance from the Court of Justice as to what might constitute such objective grounds, other than that which we have been given in this particular case [2012] ICR 955, paras 64 – 66:
>
> > "64. …the concept of 'objective grounds'…must be understood as not permitting a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. On the contrary, that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose: see, by way of analogy with clause 5.1(a) of the Framework Agreement on Fixed-term Work, *Del Cerro Alonso* [2008] ICR 145, paras 57 and 58.
> >
> > 65. …
> >
> > 66. It must be recalled that budgetary considerations cannot justify discrimination…
>
> 45. The first sentence of para 64 means no more than that it is not enough for a member state to provide for the difference in treatment in its law (or enforceable collective agreement): see *Adeneler v Ellenikos Organismos Galaktos* (Case C-212/04) [2007] All ER (EC) 82; [2006] ECR I-6057. The fact that regulation 17 of the domestic 2000 Regulations excludes fee-paid part-time judicial officers from the protection given by the Regulations is neither here nor there. The second sentence of para 64 repeats the familiar general principles applicable to objective justification: the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary to do so.
>
> 46. The opinion of Advocate General Kokott [2012] ICR 955, para 62, is slightly more expansive:
>
> > "The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued: see *Del Cerro Alonso* [2008] ICR 145, para 58 and *Angé Serrano v European Parliament* (Case C-496/o8P) [2010] ECR I-1793, para 44."
>
> This court proposes to follow the guidance given by the Court of Justice and the Advocate General in those passages."

33. The caselaw on whether a respondent may rely upon costs savings as a justification defence was reviewed by Underhill LJ in **Heskett v Secretary of State for Justice** [2020] EWCA Civ 1487, [2021] ICR 110 ("**Heskett**"). The case concerned an age discrimination claim under the **Equality**


 

**Act 2010**, but the parties are agreed that the principles summarised by Underhill LJ apply to part-time worker claims. At paragraph 79 he noted that when expressing the applicable principles, the CJEU authorities distinguished between cases where the discrimination was the result of a measure taken by central government, where "budgetary considerations" was the phrase used and cases where it resulted from the decision of the employer, where reference was made to "solely [to avoid] increased costs". He did not consider this distinction to be significant but indicated that he would use the later formulation in summarising the principles. He continued:

> "81. I turn to the fundamental question, which is what is meant by the phrase "solely [to avoid] increased costs"…On this it seems to me that we are bound by the guidance given by Rimer LJ at paras 66-67 of his judgment in *Woodcock* [2012] ICR 1126, but even if we were not, I would respectfully agree with it. He says in para 66 that the CJEU's language "cannot mean more than that the saving or avoidance of costs, will not, *without more*" – my emphasis – "amount to the achieving of a 'legitimate aim'". In other words to take the paradigm case of discriminatory pay, an employer cannot "justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B."
>
> 82. That might seem too trite to need saying…but it is not difficult to understand why the CJEU thought it important to spell it out. It is the same obvious but important point that the Supreme Court makes at several points in *O'Brien*…: see para 67 of its judgment ("very different from deliberately discriminating against part-time workers *in order to save money*"), para 69 ("a legitimate aim *other than the simple saving of cost*") and the example given at the end of para 74 ("it would not be legitimate to pay women judges less than men judges *on the basis that it would cost less*").
>
> 83. It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle…but it is real.
> …..
> 88. …there is certainly an established principle that, to take Rimer LJ's formulation in *Woodcock* [2012] ICR 1126, para 66, "the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim" for the purpose of the defence of justification in a discrimination claim; but that that principle needs to be understood in the way that I have sought to explain it in the preceding paragraphs. It only bites where the aim is, as the CJEU put it in *Hill v Revenue Comrs* [1999] ICR 48, "solely" to avoid costs.
>
> 89. …It is better, in any case where the issue arises, to consider how the employer's aim can most fairly be characterised, looking at the total picture. It is only if the fair characterisation is indeed that the aim was *solely* to avoid increased costs that it has to be treated as illegitimate." (Emphasis in the original text.)

## **Keegan v Ministry of Justice**

34. In **Keegan v Ministry of Justice** (2017) (Case Ref 1910/12) the Northern Ireland Industrial Tribunal upheld a claim under the **Part-Time Workers (Prevention of Less Favourable**


 

**Treatment) Regulations (NI) 2000** and the **PTWD** brought by five salaried district judges who 'sat up' as deputy county court judges. The less favourable treatment related to the lower remuneration they received when sitting up as compared to the salary of full-time county court judges. The disputed issues before the tribunal concerned whether the claimants were part-time workers for these purposes and whether the causation test was met. It was accepted that they could compare themselves to full-time county court judges if they established that they were part-time workers. The respondents did not rely upon a justification defence. The respondents appealed the outcome, but the claims were then settled. Mr Robin Allen relies upon **Keegan**; whereas Mr Andrew Allen submits that it was wrongly decided. The EJ indicated he had considered **Keegan**, but that he not relied upon it as an authority when reaching his decision (Reasons, paragraph 38). I have taken a similar approach. I have read the judgment, but as it was based on different facts, its reasoning is contentious and it was not relied upon by the EJ in reaching his conclusions, I do not find it to be of direct assistance.

## The judicial roles

35. I return in more detail to the relevant judicial offices from paragraph 100 below. I will set out the material statutory provisions at this juncture (as they are referenced in the ET's Reasons, which I will turn to next).

36. Section 4 **SCA 1981** identifies the judicial officers that comprise the High Court. This includes at section 4(1)(e) "the puisne judges of that court, of whom the maximum full-time equivalent number is 108". Section 4(2) indicates that the puisne judges of the High Court shall be styled "Justices of the High Court". Section 4(3) states:

> "All the judges of the High Court shall, except where this Act expressly provides otherwise, have in all respects equal power, authority and jurisdiction."

37. Section 9 **SCA 1981** is particularly important in terms of the section 9(1) claimants. Section 9(1) provides:

> "(1) A person within any entry in column 1 of the following Table may…at any time, at the



 

request of the appropriate authority, act-

(a) as a judge of a relevant court specified in the request; or

(b) if the request relates to a particular division of a relevant court so specified, as a judge of that court in that division."

The table that follows includes at entry 5, a "Circuit Judge" in column 1, with column 2 ("where competent to act on request") as "The High Court and the Court of Appeal". (The reference to the Court of Appeal "only authorises such a judge" to sit in the CACD; but I will not address that aspect further, given that Mr Field's claim is not part of the appeal.) Section 9(2) explains that the "appropriate authority" means the Lord Chief Justice or a judicial office holder that he has nominated to exercise that function.

38. The following provisions of section 9 are also of relevance:

> "(2CA) In the case of a request to a person within entry 5…in column 1 of the Table to act as a judge of the High Court, the appropriate authority may make the request only if the person is a member of the pool for requests under subsection (1) to persons within that entry.
>
> (3) The person to whom a request is made under subsection (1) must comply with the request…
>
> (4) Without prejudice to section 24 of the County Courts Act 1971 (temporary appointment of deputy Circuit Judges…) if it appears to the Lord Chief Justice, after consulting the Lord Chancellor, that it is expedient as a temporary measure to make an appointment under this subsection in order to facilitate the disposal of business in the High Court or the Crown Court or any other court or tribunal to which persons appointed under this subsection may be deployed, he may appoint a person qualified for appointment as a puisne judge of the High Court to be a deputy judge of the High Court during such period or on such occasions as the Lord Chief Justice may, after consulting the Lord Chancellor, think fit; and during the period or on the occasions for which a person is appointed as a deputy judge under this subsection, he may act as a puisne judge of the High Court.
>
> (5) Every person while acting under this section shall, subject to subsections (6) and (6A), 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.
>
> (6) A person shall not by virtue of subjection (5)-
>
> (a) be treated as a judge of the court in which he is acting for the purposes of section 98(2) or of any statutory provision relating to-
>
> (i) the appointment, retirement, removal or disqualification of judges of that court;
>
> (ii) the tenure of office and oaths to be taken by such judges; or
>
> (iii) the remuneration, allowances or pensions of such judges; or
>
> (b) …"

39. Section 9(8) provides that such remuneration and allowances as the Lord Chancellor may (with the concurrence of the Minister for the Civil Service) determine may be paid out of money provided by Parliament to any deputy judge of the High Court appointed under subsection (4). Section



 

9(8B) says that a person appointed under section 9(4) is to hold and vacate office as a deputy judge of the High Court "in accordance with the terms of the person's appointment, which are to be such as the Lord Chancellor may determine".

40. Section 16 **CA 1971** states (as relevant):

> "(1) Her Majesty may from time to time appoint as Circuit judges, to serve in the Crown Court and county courts and to carry out such other judicial functions as may be conferred on them under this or any other enactment, such qualified persons as may be recommended to Her by the Lord Chancellor."

41. Section 18(1) **CA 1971** provides that there shall be paid to circuit judges such salary as may be determined by the Lord Chancellor with the consent of the Minister for the Civil Service.

42. Section 21 **CA 1971** is headed "Appointment of Recorders". Subsection (1) says:

> "(1) Her Majesty may from time to time appoint qualified persons, to be known as Recorders, to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them under this or any other enactment."

Section 21(3)(a) and (b) provide that the appointment of a person as a recorder shall specify the term for which he or she is appointed and the frequency and duration of the occasions during that term on which they will be required to be available to undertake the duties of a recorder.

## The EJ's judgment

### The claimants

43. The EJ described the personal circumstances of the claimants as follows:

> "7. Mr Barker was appointed on 27 October 2010 as a Specialist Senior Circuit Judge to the Birmingham Civil and Family Justice Centre; he retired in October 2020. Pursuant to an authorisation under section 9 (1) SCA, he acted as a judge of the High Court both at his base court and in London, sitting in both the Chancery and Queen's Bench Divisions. His salary was that of a senior circuit judge. He described his as a full-time, 100% appointment as specialist circuit judge, with a section 9 authorisation. From the outset of his appointment he was authorised pursuant to section 9.
>
> 8. Mr Barker also sat in the Upper Tribunal Immigration and Asylum Chamber (UTIAC) and, from about 2013, UTIAC boxwork, of which there was a large backlog, predominated over High Court work…In addition to work at his base court he sat 30 days per annum in the Chancery Division in London. He estimated that 80-85% of his work at Birmingham was High Court work and 15-20% was county court or UTIAC. Whilst these statistics caused some surprise, there was no direct challenge to Mr Barker's evidence, which I accept. He accepted that section 9 judges did not do the most serious cases, which would be designated Category A, but he estimated that those amounted to no more than 10% in London; in Birmingham they would be only 1-2% of the High Court work. That evidence was not challenged…


 

9. Ms George was appointed as a salaried circuit judge on 22 October 2014 to sit at Northampton and Leicester. Pursuant to an authorisation under section 9 (1) SCA, she acts as a judge of the High Court sitting in family cases at her base court in Leicester. With effect from 3 December 2018 she became the Designated Family Judge for Leicestershire. Her salary is that of a circuit judge, save for a leadership allowance which is not relevant to this case. She was pleased to be given section 9 authorisation as it meant a greater range of work was available to her. Over 4-5 years she has done approximately 60-70 days per annum on section 9 work, not necessarily all day. If she did not have a section 9 authorisation it would be difficult for the court at Leicester to function. Describing her work, she said that she sat as a judge full-time in family work for 210 days per annum, and thought of herself as a county court judge sitting part of the time as a High Court judge…

11. Mr Everall was a salaried circuit judge who was appointed on 10 April 2006 to sit at Luton County Court. For part of the year he sat in the Principal Registry of the Family Division in London. Between 2012 and 2014 his base court was Reading County Court, and from 2014 until his retirement on 3 June 2020 he sat at the Central Family Court in the Financial Remedy Unit in London. Prior to his appointment as a circuit judge he sat as a deputy judge of the High Court pursuant to section 9 (4) SCA; for those sittings he was paid a *per diem* rate based on a High Court judge's salary. Whilst a circuit judge and pursuant to an authorisation under section 9 (1) SCA he acted as a judge of the High Court sitting in family cases at his base courts and in London. His salary was that of a circuit judge. He described himself as a full-time salaried circuit judge throughout. The time he spent on High Court work reduced over time; he estimated 1-5 times per month.

16. Mr Atherton was appointed a district judge in 2000 to sit in the Leeds Combined Court Centre. In 2002 he was appointed a recorder and sat between 15 and 30 days per annum, usually in the Crown Court. On rare occasions he was asked to help out by sitting as a recorder in the county court. From 2011 he opted to become salaried part-time in his role as a district judge and reduced his sitting in that capacity to 90%. Thereafter Mr Atherton sat as a recorder partly during the 90% of time for which he was salaried as a district judge, and partly during the 10% of time for which was not salaried. When the days on which he sat as a recorder in the Crown Court coincided with the 90% of time for which he was salaried he received no additional remuneration; conversely, when he sat as a recorder during the remaining 10% of the time, for which he was not salaried, he received a daily fee based on the salary of a circuit judge. This arrangement was sanctioned by Judicial Office. He retired from the salaried office of district judge in 2019, but continues to sit as a recorder and deputy district judge."

## Further findings of fact

44. The EJ included the following factual findings under the heading "General findings":

" 18. The purpose of section 9 SCA is to facilitate assistance with judicial business…There are currently some 110 High Court judges compared with 416 section 9 (1) and 112 section 9 (4) judges. At the same time, both the volume and complexity of the workload of the High Court has increased. One result is that the system has relied increasingly, and now relies very heavily, on section 9 judges to do a very substantial part of High Court sittings…Lord Woolf noted in 2000 that in the previous 12 months the total number of sitting days by section 9 judges in the three divisions of the High Court was 2,301. Further, it was not in dispute that in 2005 section 9 judges did approximately 45% of High Court sitting days. The evidence suggested strongly that those figures have increased rather than decreased in recent years.

19. A second result is that the practice of allocating to section 9 judges work of lower complexity and importance, as Sir Brian Leveson described it, cannot, as he also acknowledged, always be maintained; work which would otherwise have been allocated to a High Court judge is heard by section 9 judges. Sir Brian said that that 'sometimes' happened; in the cases of Mr Barker and Ms George, it clearly happened more frequently than that word suggests.

20. …There is no doubt that the three section 9 judges who sit up in the High Court from whom I heard undertake at times very serious cases in their particular jurisdictions. All also


 

agreed that there was High Court work at the most serious, upper end of the spectrum that they were never, and never would be, asked to do as section 9 judges. Such work would only ever be dealt with by substantive High Court judges. Whilst no precise figures were put before me, on the evidence I heard I was satisfied that this category of work, designated Category A in the civil courts, formed a small portion of the overall volume of High Court work. I saw no reason not to accept as typical Mr Barker's estimate for the Chancery Division of no more than 10% in London and very much less in provincial centres such as Birmingham. At the other end of the spectrum, Category C cases, normally one-day hearings not raising novel or difficult points might be tried by a master or district judge. Between those two extremes there are cases designated Category B which form the bulk of the work done by section 9 judges. As to the nature and seriousness of the work done respectively by High Court judges and section 9 judges, I accept that in that middle ground, predominantly represented by Category B cases, there is, to adopt Sir Brian Leveson's phrase, 'an enormous overlap.' In provincial trial centres visiting High Court judges who had capacity in their lists would hear Category B cases; but otherwise, and more commonly, such cases would be heard by a section 9 judge…

22. Whilst the findings in the foregoing paragraph apply to the work of the county court and the High Court, the same is not true of … the work of a district judge and a recorder in the Crown Court. In the latter two cases the demarcation is clear and sharp … Mr Atherton's work as a recorder is fundamentally different from his work as a district judge. In those cases there is no overlap.

23. The interlocutory work, commonly referred to as boxwork, done by section 9 judges acting as judges of the High Court is mixed as between county court and High Court work. Accordingly, no record is currently kept and no statistics are available concerning the respective volume of each or the time spent on each by section 9 judges.

24. I heard some evidence, necessarily largely speculative in nature, concerning the difficulties … that might arise if circuit judges were paid at a higher rate when they sat in their section 9 capacity. If those same circuit judges were responsible for allocating cases to be heard by themselves or colleagues, as section 9 judges, it might be thought that a conflict of interest would arise because judges in that position might be influenced improperly by financial considerations when making such decisions. To a greater or lesser extent, the claimants accepted that such a perception might arise and would need to be guarded against. Whilst it is not for this tribunal to propose procedures, I was satisfied that, if necessary, appropriate checks could be put in place to guard against any such perception. In like vein, I was satisfied that, if necessary, appropriate systems could be devised to determine how much of a judge's time was spent on county court and how much on section 9 work.

25. Beyond court work itself, it was accepted by the four claimants who were section 9 judges that substantive High Court judges undertake a variety of other duties which they as section 9 judges were not asked to perform. Sir Brian Leveson itemised this non-court work at paragraph 84 a-k of his witness statement, about which there was no significant disagreement.

26. By contrast with judges authorised pursuant to section 9 (1) SCA, a judge appointed pursuant to section 9 (4) to be a deputy judge of the High Court is paid a fee *pro rata temporis* based on the salary of a High Court judge. Section 9 (4) judges do not routinely do boxwork, though they may do so if their list goes short. In so far as any distinction between the work of the two could be drawn, it is the work of the section 9 (1) judge which is therefore somewhat heavier.

27. A section 9 authorisation gives a judge the opportunity to undertake work at High Court level, which, as well as being more demanding, is more rewarding from a professional point of view. In the event that such a judge applied for appointment to the High Court bench, the experience of having done such work would enable an applicant to provide examples of competency. The appointment of deputy High Court judges under section 9 (4) was seen as a potential move towards appointment to the High Court bench. Similarly, sitting as a recorder would enhance the prospects of a district judge who wished to apply for the circuit bench.

28. The terms and conditions on which circuit judges are appointed have been updated from time to time. The most recent version to which I was referred, that of October 2019, provides, at


 

> paragraph 37, that circuit judges are required 'to devote at least 210 days in each year, and perhaps more, to the business of the courts'. The terms and conditions on which district judges are appointed have been similarly updated. The most recent version to which I was referred, that of December 2009, provides, at paragraph 37, that district judges are required 'to devote 215 days in each year to judicial business', and at paragraph 81, that a district judge appointed as a recorder 'will be expected to sit for a minimum of 15 days a year in that capacity and ..... [that] [n]o extra remuneration in addition to his/her salary as a district judge may be claimed in these circumstances'."

45. The respondents do not challenge those factual findings in this appeal, save for those contained within paragraph 24, which I address when considering Ground 4.

## The EJ's conclusions

46. After setting out material provisions of the **CA 1971**, **SCA 1981** and **PTWR**, the EJ summarised the parties' respective submissions. He set out his conclusions from paragraph 39 onwards, beginning with a reminder to himself that the claimants' cases did not necessarily stand or fall together and should be considered individually. He noted that the **PTWR** required a number of questions to be considered sequentially and he said he would consider the claims by reference to the framework of the agreed generic issues (paragraph 41).

Issue 1: Whether the claimants were part-time workers within the meaning of the PTWR

47. The EJ began his consideration of Issue 1 (whether the claimants were part-time workers) by discussing what was required by regulations 2(1) and (2) **PTWR**. The reference to "regulation 2(2)" in paragraph 42 of his Reasons was clearly intended to be a reference to regulation 2(2) **PTWR**, and "**PTWD**" is a typographical error. He said:

> "42. Stripped of its subordinate clause and phrase, regulation 2 (2) PTWD defines a part-time worker as one who is 'not identifiable as a full-time worker'. Mr Robin Allen is right therefore to say that the definition of part-time worker itself involves a comparison between a full- and a part-time worker. That is so even before one moves on to consider, under regulation 2(4), the comparability of the work done by the claimants and their comparators."

48. The EJ considered that the terms of regulation 2(1) and (2) meant that the tribunal could only take two matters into account in determining whether a worker was "not identifiable as a full-time worker", namely whether they were paid wholly or partly by reference to the time they worked and


 

the custom and practice of the employer in relation to workers employed by the employer under the same type of contract (paragraph 43).

49. The EJ's reasoning then continued as follows:

> "44. There is nothing to prevent a worker from being both a full-time and a part-time worker; many workers are. In a typical industrial context a worker may have a full-time job during the normal working day, working, say, 37 hours per week as a check-out operator, and another job, for the same or a different employer, working evening shifts in a warehouse. Similarly, a worker may have two part-time jobs. In those circumstances, the demarcation between the two jobs is usually clear. In this case the full-time and the alleged part-time work are both done for the same employer; moreover, in three of the cases there is a fluidity between what may be thought of as the 'core' county court work and the alleged part-time work in the High Court, such that on some days, when the judge's list is mixed, no very clear demarcation line is drawn between the two. The latter point is not true of … Mr Field's cases; their work as recorder… is done discretely on separate days and in a different place. In their cases there are no mixed lists.
>
> 45. A further complication is that in all five instant cases the alleged part-time work is done during hours which would otherwise (i.e. if there were no 'part-time' work to be done) form part of the hours for which each claimant was paid a salary. Regulations 2 (1) and (2) contemplate that a worker must be identifiable either as a full-time or a part-time worker. That must be so, in my judgment, at any point in time under consideration. Thus where a judge works in two separate jurisdictions, if it is right to say that he/she is working part-time in one jurisdiction, he/she cannot be working full-time in another jurisdiction during the self-same hours. For instance, when Mr Barker acts as a judge of the High Court, or Mr Atherton sits as a recorder, they are not at exactly the same time sitting as a circuit judge or district judge. Therefore, if it is right to say that each claimant works part-time in one jurisdiction, he/she must necessarily be working pro tanto less than full-time, therefore part-time, in the other also. I cannot see that it is possible, consistent with the meaning of regulation 2 (1)-(2) for a worker to be **both** full-time **and** part-time during exactly **the same** period of time." (Emphasis in original.)

50. The respondents emphasise the distinction between the example that is given in paragraph 44 and the position of the claimants. In the EJ's example, the worker works at different times of day as a check-out operator and in the warehouse. As will be seen, the EJ returned to this example in paragraph 50, in a passage containing a key part of his reasoning in respect of Issue 1. In paragraph 45 the EJ concluded that a worker could not be both full-time and part-time during the same period of time. The parties agree with that proposition.

51. The EJ then summarised the parties' contentions. He noted that the respondents' submitted that there was only one, full-time employment; the sitting up occurred within the claimants' salaried time and the sitting up duties were performed as part and parcel of that employment. He said the claimants argued that it was necessary to split what they did into the core duties of their salaried role and the duties they performed when sitting up. He observed that on this analysis, the claimants were


 

part-time in their salaried role as well (paragraph 47). The EJ then said that for him to resolve Issue 1, he had to decide what period of time it was appropriate to consider, given that the respondents' analysis looked at the claimants' working time as a whole, whereas the claimants focused their attention on the period of the alleged part-time working (paragraphs 48 – 49). The EJ set out his conclusion on this point as follows:

> "50. In the industrial example given above, in order to determine whether the hypothetical worker is a part-time worker when working evenings in the warehouse, it is in my judgment obviously necessary to focus on the time when he does that job, and to answer the questions posed by regulation 2 (1)-(2) with specific reference to that time and that job. It does not assist the analysis to look at how the worker fills the rest of his working time, for example doing daytime shifts on the check-out. In Mr Atherton's case the way in which he fills the rest of his working time, has varied. He was firstly a district judge salaried at 100%, then reduced to 90%, then retired as a district judge; during all of those periods he also did the work of a recorder for approximately 20 days a year in the Crown Court. It seems to me that, in order to determine whether Mr Atherton meets the definition of a part-time worker when sitting as a recorder, I have to ask the relevant questions specifically in relation to the time he spends performing the duties of a recorder. And the same is true mutatis mutandis also in relation to the other four claimants." (Emphasis added.)

The respondents contends that this was the fundamental error of law that the ET made in relation to Issue 1.

52. The EJ then observed that the respondents accepted that Mr Atherton was a part-time worker when he sat as a recorder after retiring from his salaried role, yet there had been no material change in the way that he performed the work of a recorder since his retirement (para 51). He said that, similarly, if a barrister sat part-time as a recorder but then became a salaried district judge, on the respondents' case he would cease to be a part-time worker when sitting as a recorder, but he could see no support in the **PTWR** for the proposition that part-time status depended upon what the worker did outside of their alleged part-time working hours (paragraph 52). Next the EJ noted that the claimants described themselves as full-time circuit judges or, in Mr Atherton's case, a full-time district judge (until he became part-time at 90%). He then said:

> "53. …Nevertheless, as I noted above, it is perfectly clear on the evidence that none of the five claimants spent 100% of their time on the 'core' duties of a circuit judge or district judge. It is therefore not accurate to describe the claimants as full-time circuit judges or a full-time district judge when they spend significant portions of their working time performing duties entirely separate from their 'core' duties. That must be obvious to the respondents; it was they who authorised, or appointed, the claimants to do other duties besides their 'core' duties. The way in which the claimants describe themselves may have some relevance to a consideration of the 'custom and practice' of the employer under regulation 2 (1)-(2), but cannot *per se* be


 

> determinative of the issue. It is the custom and practice of the *employer* upon which the regulation focuses.
>
> 54. Some aspects of the respondents' custom and practice are clearly established in evidence. The practice of authorising circuit judges pursuant to section 9 (1) to act as judges of the High Court was widespread; it was the respondents' practice to rely heavily on section 9 (1) and section 9 (4) judges, as evidenced by their doing approximately 50% of High Court sittings in recent years. The latter were regarded by the respondents as part-time workers. When they acted as judges of the High Court, there was no material distinction between the work done by section 9 (1) judges and section 9 (4) judges, save that the latter did fewer out-of-court duties. There was, therefore, in my judgment no basis for the respondents' distinction between the latter as part-time workers and the former as not so. Neither were identifiable – nor were they identified by the respondents – as full-time workers when acting as judges of the High Court. In so far as the distinction was based on the former receiving a salary, and the latter not, they received that salary – the same base salary as circuit judges with no section 9 authorisation – for performing the 'core' duties of the respective roles to which they were appointed. In relation to recorders, section 21 CA establishes the statutory position that recorders are part-time judges of the Crown Court…" (Emphasis in original.)

53. Ground 1 also contends that the EJ erred in his paragraph 53 in the distinction he drew between "core" duties and duties that were not part of the claimants' "core" work. I will refer to the latter as "non-core" duties as a shorthand. The respondents also allege that the EJ fell into error in his reasoning concerning section 9(4) judges in paragraph 54.

54. The EJ then set out his conclusions in respect of Issue 1 as follows:

> "55. In answer to questions 1-3 posed in the agreed list of generic issues …. Firstly, there was no argument before me on the question of the basis on which the claimants were paid. In each case the claimants' terms and conditions of service require or required them to devote a certain number of days per year to judicial business or to the business of the courts. If a claimant opted to work a fraction of those hours which was less than 100%, he/she was paid *pro rata temporis* less. Within the stipulated number of days the hours actually worked by a judge might, and in most cases almost certainly did, vary, but his/her salary did not. The claimants are, or were, therefore all paid in part by reference to the time they work or worked.
>
> 56. On the second matter, I find that, having regard to the custom and practice of the respondents in relation to workers employed by them under the same type of contract as the claimants, each claimant was 'not identifiable as a full-time worker' when he/she acted respectively as a judge of the High Court… or as a recorder. In those respective capacities, therefore, they were each part-time workers."

55. I note that in paragraph 55 the EJ appears to have addressed the first criteria in regulation 2(1) and (2), namely whether the claimants were "paid wholly or in part by reference to the time" they worked, by considering the terms and conditions attaching to their salaried roles as circuit judges or, in Mr Atherton's case, as a district judge, rather than by focusing on their alleged part-time roles, in contrast to the approach he took to determining whether they were identifiable as full-time workers or not.


 

Issue 2: Whether High Court judges are comparable full-time workers to circuit judges acting as section 9(1) judges of the High Court?

56. At his paragraphs 59 – 60 the EJ identified the approach he should take to determining whether a full-time worker was comparable to the part-time worker for the purposes of the **PTWR**. He referred to Baroness Hale's speech in **Matthews** and to Lewis J's judgment in **Moultrie** (paragraphs 28 and 29 above). No complaint is made about his summary of the legal principles. He then set out his conclusions on Issue 2 as follows:

> "61. There is no doubt, and it was not the subject of argument before me, that, as in **Moultrie** so in the instant case, the work done by section 9 judges and by recorders is of the highest importance to the business of the respondents. It is clear also on the evidence before me that a very large part of the work done by section 9 judges is not distinguishable from the work done by High Court judges; the former do approximately 50% of High Court sittings. In the absence of section 9 judges that work would necessarily have to be done by High Court judges. The differences between the two are essentially twofold. Firstly, the very weightiest, most valuable and most important cases are reserved in all divisions of the High Court for substantive High Court judges. All four circuit judge claimants acknowledged that High Court judges did work, both in the High Court and CACD, which they would not be asked to do. Secondly, substantive High Court judges are required to undertake a variety of duties outside their court work which, once again, section 9 judges are not required to do. These duties in many cases require a level of seniority and experience: for example leadership and management, mentoring and career guidance, training and recruitment. Sir Brian Leveson's evidence concerning the differences, both in court and outside, between the work of High Court judges and section 9 judges was subject to very little challenge and I accept it. Unlike **Moultrie**, the evidence before me does not enable me to apportion percentages to the differences and similarities between the two.
>
> 62. Baroness Hale posed the question thus: 'If a large component of their work is exactly the same, the question is whether any differences are of such importance as to prevent their work being regarded overall as "the same or broadly similar"'. I am satisfied, consistently with all the evidence I heard, that a large part of the work of section 9 judges is exactly the same as that of substantive High Court judges. I therefore turn to the second limb of the question posed by Baroness Hale. I find that there is a logical difficulty in the respondents' position. Deputy judges of the High Court appointed under section 9 (4) are paid a daily rate equivalent pro rata to the salary of a High Court judge. That is, in my judgment, an implicit acknowledgement by the respondents that while there are some differences between the work of the two, they are not of such importance as to prevent their work from being regarded overall as 'the same or broadly similar'. In monetary terms the respondents value the two equally. If the work of a section 9 (4) judge is 'the same or broadly similar' to that of a High Court judge, such that the two are paid the same per diem, then on what basis can it be said that the work of a section 9 (1) judge is not so also? The more so as section 9 (1) judges undertake additional functions, such as boxwork, rarely asked of section 9 (4) judges. Thus, by their treatment of section 9 (4) judges, the respondents demonstrate that they do not consider those differences between section 9 judges and High Court judges, which I have accepted from Sir Brian Leveson's evidence, as being of such importance as to prevent their work from being regarded overall as 'the same or broadly similar'. In my judgment, on the evidence before me, the respondents are right to adopt that position. It would be contrary to the evidence to suggest – adopting Baroness Hale's terminology – that section 9 judges are brought in to do 'the more peripheral tasks.'
>
> 63. In answer to question 4 posed in the agreed list of generic issues, I find that the work


 

> of full-time High Court judges is not the same as that of circuit judges acting as judges, or deputy judges, of the High Court, pursuant to authorisation under section 9 (1) or appointment under section 9 (4) SCA. However, the differences between the work of full-time High Court judges and that of both categories of section 9 judges are not of such importance as to prevent their work from being regarded overall as 'broadly similar'. I am therefore satisfied that a High Court judge is a comparable full-time worker for Mr Barker, Ms George and Mr Everall when they acted as judges of the High Court pursuant to their section 9 authorisation."

Issue 3: Whether the less favourable treatment of the claimants was on the ground that they were part-time workers?

57. At paragraph 68 the EJ correctly directed himself as to the legal test to apply (paragraph 31 above). At paragraph 69 he referred to the fact that section 9(4) judges are paid a daily rate based on the salary of a High Court judge. He noted that there was no requirement that all who shared a characteristic had to suffer the same less favourable treatment; and the fact that section 9(1) judges were less favourably treated than section 9(4) judges, was only relevant in so far as it shed light on the question of whether the less favourable treatment of the claimants as compared to High Court judges was on ground of their part-time status (paragraph 69). The parties do not criticise this self-direction.

58. The EJ noted that there were two strands to Mr Masterson's evidence regarding the respondents' policy, namely that: (i) it was to pay at the full High Court rate where the section 9 judge held no other salaried appointment, so that section 9(4) judges, who were ordinarily practitioners, received a daily rate based on a High Court judge's salary, whereas section 9(1) judges were paid their substantive salary, and section 9(1) sittings were not expected to be a substantial part of the judge's work; and (ii) section 9(1) judges were paid less than their comparators because they did not carry out all of the functions of a High Court judge (paragraphs 70 – 71). The EJ then set out his reasoning in the following terms:

> "72. I was unable to reconcile the two strands in Mr Masterson's evidence. Neither section 9 (1) nor section 9 (4) judges perform all of the functions of a High Court judge. The work of a section 9 (4) judge is not materially distinguishable from that of a section 9 (1) judge (any distinction there may be suggests that the section 9 (1) judge's work is more rather less demanding); that proposition was not challenged. The respondents value a section 9 (4) judge's work the same, in monetary terms, as a High Court judge's. How, therefore, can it be said that a comparison of their work explains the difference in payment between the claimant section 9 judges and their comparators? I find that the respondents' treatment of section 9 (4) judges undermines their argument that the claimants acting as judges of the High Court are paid differently because they do not perform all the functions of a High Court judge. The respondents'


 

> evaluation of the work done by a section 9 (1) judge compared with that of a substantive High Court judge could not therefore satisfactorily explain the pay differential between them.
>
> 73. The evidence of Mr Barker, Ms George and Mr Everall demonstrated that section 9 work was very far from exceptional. In Mr Barker's case it was the mainstay of his work, and in Ms George's case it was a very substantial part. I concluded that the respondents' policy on the payment of section 9 (1) judges was based not on a comparison of their work with that of a substantive High Court judge, nor on whether that work was either 'exceptional' or a 'mainstay', but on whether the section 9 judge did, or did not, simultaneously hold a salaried judicial office. That was consistent with the way in which all four circuit judge claimants, and *mutatis mutandis* Mr Atherton also, were paid." (Emphasis added.)

59. I address the reason why I have underlined part of paragraph 73 when I discuss the second part of Ground 3A at paragraphs 187 – 190 below.

60. In paragraph 75, the EJ summarised the respondents' argument that the claimants were paid as they were because they held full-time salaried offices, which required them to devote their working time to the business of the courts. He noted that Mr Robin Allen had submitted that the correct question to ask was not why the claimants were paid as they were, but rather why they were less favourably treated than their comparators. He set out his conclusion on Issue 3 in the following terms:

> "77. I do not think Mr Andrew Allen can be right to say that the work of a section 9 judge when acting as a judge of the High Court forms part of his/her salaried work. Section 9 (5) SCA provides that, except for the purposes of remuneration, such a judge shall 'be treated for all purposes as ... a judge of the court in which he is acting.' That seems to me to be inconsistent with Mr Allen's argument. The salaried work of a circuit judge is the 'core' work which he/she performs in the Crown Court or county court in accordance with the terms and conditions of their appointment and for which they receive their base salary. Without more, such a judge will never be requested to sit part-time in the High Court. But section 9 authorised judges may be so 'requested' by the Lord Chief Justice or his nominee at any time and, if so requested, 'must comply'. And at the times when they are so requested I have found above that they are not doing the 'core' work for which a circuit judge is salaried, but rather work which is broadly similar to a High Court judge's work. If one asks, as the regulation requires, on what ground they are not paid the respondents' rate for that High Court work, it cannot, in my judgment, be a satisfactory answer to say, because for the rest of their time they are paid a salary for doing other work which is different. The same reasoning applies by analogy to Mr Atherton whom the respondents have appointed to sit part-time in the Crown Court. If the claimants sat full-time in the High Court or Crown Court respectively, they would obviously be paid at the relevant higher rate. The reason why they are not so paid is because they do so part-time and not full-time.
>
> 78. In so far as the respondents' ground for treating the claimants less favourably was based on a policy decision … I do not think that assists the respondents. Policy considerations relating, for example, to cost or ease of administration, may be a motive for less favourable treatment; but I am not concerned at this stage with the respondents' motives, but rather with identifying why the claimants received less favourable treatment and whether it was on the ground of part-time status: per Lady Hale in **R v Governing Body of JFS and the Admissions Appeal Panel of JFS & Others [2010] IRLR 136**. It cannot in any event be legitimate to have a policy which results in discrimination contrary to the Regulations.
>
> 79. For the reasons set out above I cannot find that the reason for the less favourable treatment of the claimants is explained either by a distinction between their duties and those of their comparators, or by the fact of their being salaried when performing different work. In answer to question 8 posed in the agreed list of generic issues, I find that the less favourable


 

> treatment suffered by Mr Barker, Ms George, Mr Everall and Mr Atherton was on the ground that they were part-time workers." (Emphasis added.)

61. The respondents contend that this reasoning contains a number of errors, including: that it introduced a fairness / equity standard into the causation question; in the approach to section 9(5) **SCA 1981**; and in repeating the core / non-core distinction that is the subject of Ground 1B.

Issue 4: Whether the less favourable treatment of the claimants was justified on objective grounds?

62. At paragraph 80 the EJ identified the respondents' three aims (paragraph 10 above), noting that they were relied upon to justify the policy that "salaried judicial office-holders are paid at their salaried rate for work undertaken in their salaried time" (paragraph 83). He said it was common ground that if the claimants succeeded, the respondents would have to take corrective measures, but it was "not for this tribunal to propose such measures, but to examine whether any of the matters put forward constitutes objective justification" (paragraph 81).

63. In paragraph 83 the EJ summarised the legal requirements of the justification test. Neither party criticises this summary.

64. The EJ said that his impression was that practices, including the difference in pay between section 9(1) judges and section 9(4) judges, had grown up over time; and that there was no evidence that the respondents had revisited or reconsidered its policies in light of the **PTWD** or **PTWR** (paragraph 84).

65. The heart of the EJ's reasoning on the justification issue appears from paragraph 85 onwards. In paragraph 85 he said that the problem of working out how much time the circuit judges spent on section 9(1) work was not one of the grounds of justification that the respondents had relied upon, although it had been the subject of cross-examination. He then considered each of the grounds advanced by the respondents in turn, finding that they were legitimate aims, but that they were not suitable for achieving the objectives and/or were not reasonably necessary:

> "85. The practice of paying the claimants their base salary even when they were acting part-


 

time in another, higher paid role certainly solved the problem, in the cases of Mr Barker, Ms George and Mr Everall, of working out how much time they spent on High Court work. But no thought was given to whether that problem inevitably arose and, if so, to any other way in which it might be solved. In the cases of Field and Atherton the problem of recording time spent in the part-time role did not arise. Furthermore, although it was the subject of considerable cross examination, it is not explicitly one of the three matters relied on by the respondents as objective grounds for justification. On that basis I cannot find that the solution of the problem was a legitimate aim, nor, if it was, that payment of base salary only was a reasonably necessary means to solve it.

86. Turning to the first of the three matters relied on, fair and flexible deployment of judges, this is elaborated in Mr Andrew Allen's closing submissions (paragraph 117 (i)). I have no difficulty in finding, and the claimants accepted, that 'fair and flexible' deployment of judges is a legitimate aim, or genuine need, of the respondents. The claimants sat in varying locations and in various courts, within the scope of their 'core' duties; for example Mr Atherton occasionally sat as a recorder in the county court though he primarily sat in crime; and when requested pursuant to section 9 the circuit judge claimants complied with those requests. The position of Mr Barker, Ms George and Mr Everall might possibly be different if, in Mr Masterson's words, such sittings had been 'an exceptional feature to the judge's mainstay work'; if, for example, on isolated occasions a judge were asked to take over a list to 'fill a gap'. But the evidence here is very far from that position: section 9 High Court work was a regular and intrinsic part of their routine, in Mr Barker's case it was the mainstay. And in Mr Field's and Mr Atherton's case their part-time role was a planned part of their working schedule. Giving due weight to both limbs of 'fair and flexible', I cannot find on the evidence before me that the respondents' policy of deployment was both 'flexible' and 'fair'. Further, there was no evidence that the policy of paying the claimants only their base salary was either a suitable or a reasonably necessary means of achieving the aim of fair and flexible deployment. It could not seriously be suggested that the claimants would have been any less flexible if they had been paid the High Court or circuit judge's rate.

87. Turning to the second matter relied on, this is elaborated in Mr Allen's closing submissions (paragraph 117 (ii)). As a bald statement, I do not find it contentious that resources should be allocated fairly, or that office-holders should be paid in accordance with their terms and conditions for the work they undertake within their salaried time. What this statement does not touch on is what should happen when a judge is appointed to, or required to comply with a request that he/she undertake sittings which are outside those terms and conditions, and can be undertaken only pursuant to a further appointment or authorisation above and beyond those terms and conditions. Here also, if the requirement to sit at a higher level were a rare occurrence for Mr Barker, Ms George and Mr Everall, or if it were voluntary, the position might be different. But it is both routine and compulsory. Whilst fair allocation of resources is, I find, a legitimate aim, or genuine need, I cannot find that such aim is furthered by requiring a judge, as part of his/her routine work, to sit at a higher level than that to which he/she was appointed and not paying him/her appropriately for such work. It might be thought that fair allocation of resources required exactly the opposite.

88. The respondents assert that the 'contention that judges should be paid at a rate which reflects the level of work done during a particular period of time would, on a wider basis, have significant financial and administrative consequences'. This statement is at one level self-evident, and at another surprising. Self-evidently, paying any worker the rate for the job costs more than paying the worker less. It is surprising to hear the respondents submit that not paying the rate for the job is a component part of the fair allocation of resources. Less favourable treatment of part-time workers cannot be justified simply on the basis of saving cost. Furthermore, there was no evidence before me of the level of costs to which this part of the respondents' submissions is directed.

89. The third matter relied on by the respondents (Mr Allen's closing submissions paragraph 117 (iii)) is on its face also not contentious. The differences in the judicial hierarchy as between full-time roles are already reflected in the differences in pay attributable to those roles; and that no doubt does assist in attracting the best candidates for more senior roles. It is not at all clear, however, how it is said that that aim is advanced by differentiating in pay terms


 

> between judges who perform the same or broadly similar work. I find that the respondents' policy is not a suitable means, nor is it necessary, to achieve the stated aim." (Emphasis added.)

## The grounds of appeal

66. I will now identify the respondents' grounds of appeal in more detail. I have already summarised their content and indicated where the grounds do not apply to all of the claimants (paragraph 11 above).

### Ground 1: Whether the claimants were part-time workers

Ground 1A

67. The respondents contend that the ET erred in failing to consider the totality of the claimants' work, instead focusing only on the aspect of their work which was alleged to constitute part-time working (Grounds, paragraphs 15, 17 and 18). It is said that it was "highly artificial" to limit the assessment to the alleged part-time working as the alleged part-time work occurred within the worker's full-time salaried time. The key passage in this respect is paragraph 50 of the EJ's Reasons. In further support of this contention, the respondents submit that the ET applied an irrelevant analogy, as set out at paragraph 44 of the Reasons (Grounds, paragraph 16). The respondents say that had the ET considered the totality of the work performed by the claimants, it would have been bound to conclude that the alleged part-time work fell within their salaried time, counted towards their full-time salaried duties and was not part-time work (paragraph 19). They also allege that the ET's conclusion that the claimants were part-time workers was perverse (paragraph 20).

Ground 1B

68. Much of Ground 1B appears to repeat the contentions advanced under Ground 1A. However, it is also said that the ET erroneously drew a wrongful distinction between core and non-core judicial work and that it is permissible for a salaried worker to perform duties that are ancillary to their core duties without the same constituting severable part-time work. It is emphasised that the claimants'


 

sittings all occurred within their salaried time and their terms and conditions referred to the need to support the "business of the courts" or the equivalent (Grounds, paragraph 24).

Ground 1C

69. Ground 1C contends that the ET erred in its approach to the respondents' custom and practice, specifically in failing to have regard to relevant considerations and/or in failing to provide adequate reasons (Grounds, paragraphs 25 and 26). Considerations that were not taken into account, are said to include: the claimants' terms and conditions of office, which required them to assist the business of the courts; that the sitting up days counted towards the claimants' annual sitting commitments applicable to their salaried offices; and the respondents' general policy that all judicial sittings falling within salaried time are remunerated at the rate applicable to that salaried office.

70. Secondly, it is submitted that at paragraph 54 of the Reasons the ET focused unduly on the position of section 9(4) judges, thereby taking into account an irrelevant consideration and/or wrongly introducing a test of fairness and/or equity into the question of whether a worker is part-time.

Ground 1D

71. This ground asserts that the ET erred in failing to engage with the respondents' argument that as a matter of statutory construction, section 9(1) would not permit a circuit judge to be authorised to sit in the High Court during their non-salaried time.

Ground 1E

72. The respondents contend that the bulk of the ET's analysis focused solely upon Mr Atherton, in particular in paragraphs 51 – 54 of the Reasons; and that his situation was materially different to that of the other claimants.


 

## Ground 2: Comparability in respect of the section 9(1) judges and the High Court judges

Ground 2A

73. The respondents contend that the ET adopted the wrong test in finding that the section 9(1) judges were engaged in broadly similar work to High Court judges, in that he focussed only on the similarities between their work and did not properly considering the differences, contrary to the test identified in **Matthews** (Grounds, paragraph 34). They allege that although the tribunal accepted Sir Brian Leveson's evidence, it failed to analyse the differences he identified and/or, in so far as there was any assessment, insufficient reasoning was provided. The respondents also say that the ET wrongly "dismissed the relevance" of **Moultrie**, at paragraph 61 of the Reasons because the evidence in the present case did not enable the EJ to apportion percentages to the differences and the similarities. They contend that the final sentence of paragraph 62 of the Reasons erroneously focused on whether the work performed by the claimants as section 9(1) judges was "peripheral" (Grounds, paragraph 35).

Ground 2B

74. The respondents submit that the ET introduced an irrelevant consideration to the question of comparability, namely the position of section 9(4) judges, and in so doing introduced an equity and/or fairness test (Grounds, paragraph 36).

75. In addition, they say that the tribunal erred in approaching matters on the basis that all section 9(4) judges are paid *pro rata* to the salary of a High Court judge, when the undisputed evidence of Mr Masterson was that this is not so where section 9(4) sittings occur within salaried time, where the judge receives the pay applicable to their salaried office. Further or alternatively, they say that the ET failed to have regard to the evidence of Sir Brian Leveson and Mr Masterson as to the reasons for section 9(4) judges' level of pay (Grounds, paragraph 36(b)).

## Ground 3: The ground for the less favourable treatment

Ground 3A

76. The respondents contend that the ET erred in finding that the less favourable treatment was on the ground of the claimants' part-time worker status because it took into account an irrelevant consideration, namely the position of section 9(4) judges. Further, that it wrongly introduced a fairness and/or equity approach to the question (Grounds, paragraphs 39 – 40). The respondents say that in any event, their treatment of section 9(4) judges supports, rather than undermines, their case that the reason for the claimants' less favourable treatment was because they held salaried office. The respondents also rely on the alleged error identified at paragraph 36(b) of the grounds of appeal in relation to Ground 2B (Grounds, paragraph 42). Alternatively, it is said that the ET's conclusion on the causation issue was perverse (Grounds, paragraph 42).

Ground 3B

77. This ground focuses upon paragraph 77 of the ET's Reasons (Grounds, paragraph 44). It is said that: (a) in referring to section 9(5) **SCA 1981**, the ET failed to have regard to the full meaning and effect of the statutory provisions, in particular section 9(1) and section 9(6)(i); (b) the ET erred in distinguishing between core and non-core work, as identified in Ground 1B; (c) in referring to the section 9(1) sittings as "compulsory", the tribunal overlooked the fact that the claimants had chosen to apply to become section 9(1) judges; and (d) no specific reasoning was provided in relation to Mr Atherton.

Ground 3C

78. This sub-ground focuses on the ET's finding at paragraph 77 of the Reasons that if the claimants had sat full-time in the High Court or Crown Court respectively "they would obviously be paid at the higher rate". It is said that the only evidence on this point pointed to the opposite


 

conclusion.

## Ground 4: Objective justification

Ground 4A

79. Ground 4A concerns the ET's rejection of the respondents' case on their first aim (fair and flexible deployment of the judiciary). Part of this ground contends that the ET wrongly held at paragraph 85 of its Reasons that the problems relating to administration of pay did not form part of the respondents' case on justification, when in fact this was addressed in Mr Masterson's witness statement in support of the first pleaded aim (Grounds, paragraph 51(a)). In his oral submissions, Mr Andrew Allen accepted that Mr Masterson in fact raised this in support of the second pleaded aim (fair allocation of resources) and that, accordingly, this part of Ground 4A, should be treated as forming part of Ground 4B. In relation to the alleged administration difficulties, the respondents also contend that the ET erred in the finding made in the last sentence of paragraph 24 of the Reasons, as it was inadequately reasoned and/or lacked any identified evidential basis (Grounds, paragraph 51(b)).

80. In the remainder of Ground 4A, the respondents contend that the ET failed to address the respondents' case on the conflicts of interest that would arise if salaried judges were paid differently depending on the type of work that they did within salaried time; and/or failed to identify any evidential basis or proper reasons for its conclusion at paragraph 24 of the Reasons in relation to the management of such conflicts (Grounds, paragraphs 51(c) and (d)).

Ground 4B

81. The respondents allege that the ET erred in paragraph 87 in proceeding on the basis that the section 9(1) sittings were "outside" and "above and beyond" the claimants' terms and conditions of office (Grounds, paragraph 52). Further, that in so far as paragraph 88 of the Reasons was intended


 

to convey that the respondents sought to rely on saving costs, or costs alone, this was a perverse finding in light of the evidence submitted (Grounds, paragraph 53).

Ground 4C

82. The respondents assert that paragraph 89 of the ET's Reasons was flawed by reliance on the conclusion reached under Issue 2 that the roles of section 9(1) judges and High Court judges are broadly similar.

**The answer**

83. The claimants' answer to the notice of appeal stated that they relied upon the reasoning of the ET "and their arguments in Closing Submissions, including in particular that the judgment in … [**Keegan**] was correctly decided".

84. As I have indicated (paragraph 12 above), during the course of the appeal hearing, Mr Robin Allen submitted a draft amended answer, which he sought permission to rely upon if I took the view that the contentions regarding the **PTWD** that he wished to advance were not sufficiently identified in the text of the original answer. The additional wording in the amended version (which I reproduce without the underlining) is as follows:

> "In particular they also rely on the submissions as set out in Opening and repeated in Closing submissions that the issue of whether a worker is part-time for the purposes of the PTWD and the Framework Agreement annexed to the PTWD [and] the PTWR should be considered together with the question whether there is a comparable full-time work.
>
> It is submitted that –
> (1) This is the effect of Clause 3 of the Framework Agreement,
> (2) The PTWR must be construed as providing no less favourable rights than those in the PTWD and Framework Agreement annexed to it,
> (3) And/or the Claimants are entitled to rely on the Framework Agreement in relation to its definition of a part-time worker and a comparable full-time worker,
> (4) The conclusion of the ET as to part-time and comparable issues can and if necessary should be upheld further or additionally on this basis in order to comply with Clause 3 of the Framework agreement annexed to the PTWD."

**The claimants' application to amend their answer**

85. It is necessary for me to determine: (i) whether Mr Robin Allen's submissions in relation to


 

the **PTWD** are within the scope of the claimants' original answer to the appeal or whether permission to amend that document is required; and (ii) if permission to amend is required, whether I should grant it.

86. The respondents' notice of appeal was served on the claimants on 7 October 2022. Their original answer was served on 28 November 2022. The draft amended answer was provided at the end of the lunch break on the second day of the two day appeal hearing. As I have explained when setting out the ET's Reasons, the EJ dealt with the case on the basis of the **PTWR** and made little substantive reference to the **PTWD**. Mr Robin Allen's oral submissions responding to the grounds of appeal commenced towards the end of the first day of the appeal hearing. It became apparent that, amongst other contentions, he was advancing arguments based on the **PTWD**. Having had the opportunity to reflect on this, at the start of the second day I asked him to clarify the submissions he was making in relation to the **PTWD** and whether he contended that they were within the terms of his original answer.

87. Mr Robin Allen then summarised the submissions that he proposed to make in relation to the **PTWD**. After hearing this, Mr Andrew Allen indicated that he objected to these points being advanced as they were not identified in the answer to the appeal. Mr Robin Allen indicated that he would draft an amended answer over the lunch-time adjournment and rely upon this if I decided that he needed permission to amend. As I indicated earlier, I continued to hear the substantive submissions on a provisional basis (paragraph 12 above). Later in the day, Mr Robin Allen made his application to amend, which, as foreshadowed earlier, was opposed by Mr Andrew Allen.

88. Mr Robin Allen submitted that he did not need to amend the claimants' answer because the **PTWD** arguments were contained within the written opening and closing submissions that were provided to the ET and the latter were, in turn, referred to in the answer.

89. Paragraph 3.12 of the updated **Practice Direction (Employment Appeal Tribunal – Procedure) 2018** ("the EAT PD") states that no party has the right to amend an answer without the


 

prior permission of the EAT and that any application for permission to amend must be made as soon as practicable. Paragraph 11.2 of the **EAT PD** says that the answer should address the contentions set out in the notice of appeal. Paragraph 11.3 adds that a respondent to an appeal may rely on the tribunal's reasons and need not repeat those in the answer "but should shortly state any additional legal reasoning on which they wish to rely".

90. I do not consider that the answer's very general reference to the claimants' written closing submissions below and to **Keegan** (paragraph 34 above) amounted to compliance with paragraph 11.3 of the **EAT PD**. The claimants' closing submissions were 41 pages long. The claimants' submissions on the **PTWD** were primarily made in the 80 page opening submissions (which the closing submissions referred to). The judgment in **Keegan** was 48 pages long. Each of these documents addressed a range of relatively complex legal and factual issues. The wording of the original answer gave no indication as to which of these points were to be relied upon for the purposes of the appeal. In my judgement, paragraph 11.3 contemplates that the party in question will identify the particular line of legal reasoning or point upon which they seek to rely (where it goes beyond the tribunal's reasons). If the answer does not do so, the rationale behind paragraph 11.3 is negated; the other party and the EAT will likely not appreciate the particular issue that will be raised, leading, in turn, to potential delay and/or prejudice if the appellant is taken by surprise. Paragraph 3.5 of the **EAT PD** requires a notice of appeal to "clearly identify the point(s) of law" which form the grounds of appeal. I consider that a broadly analogous approach should apply to the answer in terms of the identification of the points of law relied upon by a respondent for resisting the appeal. This applies with particular force where, as here, the claimants seek to raise a free-standing basis for resisting the appeal, rather than simply additional support for a conclusion reached by the ET.

91. Accordingly, I consider that the claimants require permission to amend if they are to rely on the **PTWD** contentions that Mr Robin Allen wishes to advance.

92. The approach to be taken to applications to amend notices of appeal was addressed by HHJ



 

Serota at paragraph 86 in **Khudados v Leggate** (2005) ICR 1013. He noted that the ET has a "broad and generous discretion" in order to achieve the overriding objective of dealing with cases justly. He then set out a non-exhaustive list of considerations to be taken into account in determining whether or not an amendment should be allowed. I consider that these considerations are also relevant to an application to amend an answer. They were as follows:

> "(a) Whether the applicant is in breach of the Rules or Practice Direction; in our opinion compliance with the requirement … that an application for permission to amend a notice of appeal be made as soon as the need for amendment is known, is of considerable importance. The requirement is not simply aspirational or an expression of hope. It does not set a target but is a requirement that must be met in order to advance the efficient and speedy dispatch and conduct of appeals.
> (b) Any extension of time is an indulgence and the appeal tribunal is entitled to a full honest and acceptable explanation…
> (c) The extent to which, if any, the proposed amendment if allowed would cause any delay. Clearly proposed amendments that raise a crisp point of law closely related to existing grounds of appeal, or offering limited particulars that flesh out existing grounds, are much more likely to be allowed than wholly new grounds of perversity raising issues of complex fact and requiring consideration of a volume of documents, including statements and notes of evidence…
> (d) Whether allowing the amendment will cause prejudice to the opposite party, and whether refusing the amendment will cause prejudice to the applicant by depriving him of fairly arguable grounds of appeal…
> (e) In some cases it may be necessary to consider the merits of the proposed amendments…
> (f) Regard must be had to the public interest in ensuring that business in the appeal tribunal is conducted expeditiously and that its resources are used efficiently."

93. In the present case the following factors support the refusal of the amendment application:

(i) The application was made very late, and certainly not as soon as practicable, given that it should have been evident that an amendment was required to advance the **PTWD** contentions. It was made during the second day of an appeal hearing that was listed for two days;

(ii) No adequate explanation was given for the failure to make the amendment application at an earlier stage;

(iii) The **PTWD** contentions were not included in the claimants' skeleton argument for the appeal, which very much relied upon the EJ's reasoning;

(iv) The scope of the amendment is substantial in the sense that it introduces a free-standing basis for supporting the ET's conclusions, distinct from the EJ's reasoning;


 

(v) There is a degree of prejudice to the respondents. Mr Andrew Allen was taken by surprise; he had not addressed the **PTWD** contentions when he opened the appeal and he had to deal with them at relatively short notice during the course of his reply to Mr Robin Allen's submissions; and

(vi) The public interest referred to by HHJ Serota in **Khudados**.

94. In many circumstances the combined effect of factors of that nature would strongly point in favour of refusing the amendment. However, in this instance there are also substantial factors that support the grant of the application:

(i) The proposed amendment raises points of law. No additional evidential material needs to be referred to at this juncture;

(ii) The claimants' pleaded case and the wording of the generic list of issues made clear that they relied upon the **PTWD** in addition to the **PTWR**;

(iii) Submissions about the effect of the **PTWD** were made by both parties below. Mr Andrew Allen accepts that the contentions that Mr Robin Allen wishes to pursue were contained within his written opening submissions for the ET and that the respondents had the opportunity of addressing these matters below;

(iv) Prejudice that the respondents might otherwise have suffered was mitigated by the fact that I allowed Mr Andrew Allen an expanded period of time for his reply and I gave him seven days from the conclusion of the hearing to submit additional written submissions if his research indicated that there was any additional authority he wished to draw to my attention in relation to the **PTWD** contentions. (In the event, he indicated a nil return.) Although he explained that he would have liked to include the **PTWD** as part of his opening if he had known that these issues were to be raised by the claimants, I do not consider that the respondents were


 

significantly disadvantaged by the fact that the claimants were the first to present their arguments to me on this area. Mr Andrew Allen was able to make significant substantive points in his reply;

(v) As I explained in the introductory section of this judgment, it is hoped that determination of these claims will enable the many stayed claims to be resolved. This objective may not be achieved if the EAT does not hear the available legal arguments at this stage and the undesirable consequence could be further claims being litigated to trial and further appeals, which could otherwise have been avoided; and

(vi) In light of the way that the appeal hearing was case managed, the lateness of the application did not significantly disrupt or delay the proceedings.

95. For the avoidance of doubt, I have not taken into account the merits of the **PTWD** contentions in deciding whether to grant the amendment. I have approached the question of amendment as preliminary to that assessment.

96. On balance and having regard to the overriding objective, I consider that in these particular circumstances, the factors in favour of granting the amendment outweigh those that would support refusing it and that to grant the amendment is the just course to take. Accordingly, the application to amend the answer is allowed.

## Ground 1: Discussion and conclusions

97. I will first consider whether the EJ erred in law in terms of the reasons that he gave for concluding that the claimants were part-time workers. I consider this to be the logical approach to take, because if I do not accept that the EJ erred in law in his application of the **PTWR** as the respondents allege, then the appeal on Ground 1 will inevitably fail. However, if I conclude that the EJ's chain of reasoning appears to be flawed, then it is necessary for me to consider the impact of the


 

**PTWD** in order to decide if the EJ's conclusion that the claimants were part-time workers: (i) was nonetheless correct, albeit for different reasons to those that he identified; (ii) was wrong in law and the only correct conclusion on the facts found is that the claimants were not part-time workers, in which case I should substitute that finding; or (iii) was flawed by legal error, but on a correct application of the law, the ET could properly find either that the claimants were or were not part-time workers and/or that further fact-finding is required before the determination can be made, so that the appeal should be allowed but the cases remitted to the tribunal.

98. I remind myself that the position of the section 9(1) claimants and of Mr Atherton is not necessarily the same in relation to this or the other issues and that it is necessary to consider their positions individually.

99. Before I address the EJ's reasoning on this topic, I will return to the statutory provisions that I set out at paragraphs 36 – 42 above, as both legal teams place considerable reliance upon them.

**Provisions regarding the claimants' judicial roles**

Section 9(1) judges

100. I will firstly consider the provisions relating to the section 9(1) claimants. Whilst section 9(1) also applies to the other judicial office holders specified in column 1 of the table, my focus is upon the position of circuit judges who are authorised to sit up in the High Court, as I indicated in the introductory section of this judgment.

101. The terms of section 9(1) **SCA 1981** indicate that the claimants' authorisation to sit up as a section 9(1) judge in the High Court is dependent on the pre-existence of their salaried judicial office. Section 9(1) uses the language of authorisation, in contrast to the references to the "appointment" of section 9(4) judges.

102. Mr Andrew Allen submits that use of the phrase "act as" in section 9(1) indicates that the judge in question remains a circuit judge when sitting up, albeit they are entitled to act in another


 

capacity. He says that this is also shown by the reference in section 9(5) to "treated for all purposes as, and accordingly may perform any of the functions of a judge of the court in which he is acting", as this provision would not be necessary if the judge in question held a different status to their salaried role when sitting up in the High Court, simply by dint of section 9(1). Mr Andrew Allen also emphasises that section 9(5) is expressly subject to section 9(6), which provides that the reference to treating the judge as a judge of the court in which he is sitting (the High Court) does not apply to the "appointment … of judges of that court" or to the "remuneration, allowance or pensions of such judges". He says that "act as" in section 9(1) must be read in light of these subsequent provisions.

103. On the other hand, Mr Robin Allen submits that the reference to "act as" in section 9(1) was "the absolute foundation" of the case that the section 9(1) claimants worked in a distinct part-time capacity when sitting as section 9(1) judges. He says that "act as" meant that during the time when the section 9(1) claimants were undertaking their sitting up roles they were not circuit judges, rather they were undertaking a separate role; and that "jurisdiction was everything". He also relies upon the wording of section 9(5) "be treated for all purposes as…a judge of the court in which he was acting". He submits that section 9(6)(a)(i) was not in point as the section 9(1) role was not an "appointment" and all that section 9(6)(a)(iii) said was that the same entitlements to pay would not follow automatically and in any event this provision could not neuter the effect of the **PTWD** and **PTWR**.

104. I do not consider that section 9(1) and 9(5) **SCA 1981** bear the significance that the claimants suggest. I agree that "act as" tends to indicate that at the material time a circuit judge remains a circuit judge, but that he or she has the powers and authority of a High Court judge; if that were not the case the section 9(1) judge would not be able to carry out the judicial work of that jurisdiction in any meaningful sense when they sat in the High Court. Section 9(5) is needed to make clear that when the judge is sitting pursuant to section 9(1), they will be able to exercise the "functions" of a High Court judge. It is not intended to impact upon the judge's terms and conditions, as is clearly reinforced by section 9(6), which provides that "acting as" does not extend to the terms and conditions of the


 

judges of "that" court, which is to say the court in which he is sitting up. Accordingly, the "appointment" referred to in section 9(6)(a)(i) is the High Court judge's appointment.

105. I also note that section 9(1) identifies where the sitting up judge is "competent to act", which reinforces that these provisions are aimed at enabling such a judge to exercise the powers and functions of the higher office, not at placing them in a separate and distinct job.

106. The following are also of potential relevance to the status of the section 9(1) claimants:

(i) Section 16 **CA 1971,** which provides that circuit judges may serve not only in the Crown Court and county courts, but also "carry out such other judicial functions as may be conferred on them under this or any other enactment". This suggests that carrying out those "other judicial functions" is a part of the circuit judge's appointment;

(ii) The terms and conditions applicable to circuit judges, which stipulate that they must devote at least 210 days each year "to the business of the courts", without limiting this to the Crown Court and the county courts. The EJ referred to the October 2019 version of this document at paragraph 28 of his Reasons. I am informed that in addition the ET was shown the earlier versions of these terms and conditions from 2000 and 2009, which also contained this stipulation; and

(iii) When circuit judges sit in the High Court pursuant to section 9(1) those days are treated as contributing to the 210 days that they are required to sit as a circuit judge. Mr Masterson explained this at paragraph 14 of his witness statement and I understand that this it was not disputed by the claimants. It was not referred to in the EJ's Reasons.

107. For the avoidance of doubt, I accept, as Mr Robin Allen says, that the statutory provisions are not determinative of the position in favour of the section 9(1) claimants; an employer cannot avoid the operation of the **PTWD** and the **PTWR** simply by, to take an extreme example, labelling a worker



 

as "full-time" when for all intents and purposes that is not what they are "identifiable" as. However, these provisions are of significance because: (i) although Mr Robin Allen submits that they very strongly support the section 9(1) claimants' case that they are part-time workers, and thus the EJ's conclusion, my view is that they do not do so, for the reasons that I have just explained; (ii) regulations 2(1) and (2) **PTWR** require consideration to be given to the employer's custom and practice and these matters are of relevance to that; and (iii) I consider that the EJ was incorrect in saying at paragraph 77 of his Reasons that section 9(5) **SCA 1981** was inconsistent with the respondents' argument that the High Court sittings formed part of the claimants' salaried work. He made no reference to section 9(6). When section 9(5) is placed in the context of the other provisions I have discussed, including section 9(6), I do not see that there is any inconsistency. I return to this point in relation to Ground 3B at paragraph 195 below.

108. A section 9(4) deputy judge of the High Court has a free-standing appointment that is not dependent upon them having a pre-existing salaried office. Mr Masterson explained at paragraph 61 of his witness statement that the remuneration of a section 9(4) judge who has a full-time salaried judicial appointment will be linked to their salaried appointment; they will not receive a fee based on a High Court judge's salary, as other section 9(4) judges will. I understand that this was not disputed before the ET. It was not mentioned by the EJ. I return to this point below at paragraph 180 in relation to Ground 2B and paragraphs 191 – 192 in respect of Ground 3A.

109. Both counsel addressed me on the process of selection for the section 9(2CA) "pool" for section 9(1) judges by the Judicial Appointments Commission ("JAC"). They also addressed me on the evidence from Sir Brian Leveson and Mr Masterson as to the extent to which, respectively, section 9(1) judges and section 9(4) judges have been regarded as a pipeline for appointment to the High Court bench. However, the ET did not make specific findings of fact on these matters beyond those contained in paragraph 27 of the Reasons and the parties were not agreed on these topics. Accordingly, I have not formed a view on them as my appellate role does not encompass fact-finding.


 

Recorders and district judges

110. The respondents accept that, pursuant to section 21 **CA 1971**, a recorder is a specific appointment and that there is no pre-condition that the appointee is already a judicial office holder. They also accept that the work undertaken by Mr Atherton when he sat as a recorder in the Crown Court was distinct from his work as a district judge in the county courts. Furthermore, Mr Robin Allen emphasises the phrase "part-time judges" in section 21.

111. Whilst these are matters of potential significance, I do not consider that they are conclusive in terms of Mr Atherton's status when he sat as a recorder, as Mr Robin Allen submits. Mr Andrew Allen relies upon his terms and conditions as a district judge. As the EJ noted at paragraph 28 of his Reasons, the most recent version of the terms and conditions (from 2009) required district judges to "devote 215 days in each year to judicial business". Mr Andrew Allen emphasises that this phrase is not limited to sitting in the county court. He also stresses that the terms and conditions contemplate a district judge sitting as a recorder; and provide that a district judge appointed as a recorder will be expected sit for a minimum of 15 days a year in that capacity and will not receive extra remuneration in addition to his/her salary as a district judge for doing so. I am told that similar provisions were contained in earlier versions of the district judge's terms and conditions in 2005 and 2007. The respondents also rely on Mr Masterson's undisputed evidence that sitting as a recorder will count towards a district judge's 215 days annual sitting commitment.

## Grounds 1A, 1B and 1C

112. Grounds 1A, 1B and 1C raise the central complaints in respect of the ET's finding that the claimants were part-time workers. After three initial observations, I will consider these sub-grounds in turn, but there is some significant overlap. For the reason I have explained at paragraph 97 above, I am currently focusing upon the EJ's application of the definition of a part-time worker in the **PTWR**.


 

Paid "wholly or in part by reference to the time he works"

113. There was no disagreement expressed by either party about the EJ's finding in paragraph 55 of his Reasons that the claimants were paid wholly or in part by reference to the time that they worked. However, as I have noted at paragraphs 54 - 55 above, there is an apparent illogicality in relation to how the EJ approached Issue 1. His reasoning appears to indicate that he found that this regulation 2(2) pre-condition was satisfied by referring to the terms and conditions of service that attached to the claimants' salaried roles (which required them to devote a certain number of days per year to "judicial business" or to the "business of the courts"). The EJ did not find that the claimants were paid wholly or partly by reference to the time they worked in respect of their alleged part-time work as section 9(1) judges or, in Mr Atherton's case, as a recorder, yet he then focussed on their alleged part-time roles when he came on to consider the remaining part of the regulation 2(2) test, without, it appears considering the implications of this apparent disconnect. In my judgement this reinforces the alleged error that the respondents identify at Ground 1A.

The scope of the tribunal's consideration under regulation 2(1) and (2)

114. The second component of regulation 2(2) requires the tribunal to determine whether the worker "is not identifiable as a full-time worker". In conducting this assessment, the tribunal is to "have 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". I do not consider that the wording of regulation 2(2) confines the tribunal to only having regard to the employer's custom and practice. If that were the intention, the regulation could have said so. To require tribunals to "have regard" to a matter, does not, of itself, mean that they should exclude consideration of other matters that bear on whether the worker is not identifiable as a full-time worker. In addition, there is force in Mr Robin Allen's point that requiring the employer's custom and practice to be decisive on this point would not accord with


 

the **PTWD** provisions. However, the employer's custom and practice is the only consideration that is expressly mentioned in the regulation and, on the face of it, it is a highly relevant factor, albeit in a context where the question is whether the worker is "identifiable" as a part-time worker, not whether they are "identified" as such by the employer.

115. Accordingly, I consider that the EJ was incorrect in saying at paragraph 43 of his Reasons that the effect of regulation 2(2) is that in determining whether the worker was not identifiable as a full-time worker, the tribunal can only take into account whether the worker was paid wholly or partly by reference to the time they worked and the employer's custom and practice. However, I do not consider that this in itself gave rise to a material error of law, as his reasoning over the paragraphs that followed show that the EJ did not in fact confine his consideration in that way.

The respondents' concession in respect of Mr Atherton

116. For completeness, I mention that I clarified the basis upon which it was conceded that Mr Atherton was a part-time worker when his salaried role as a district judge reduced to 90%, lest it undermined the respondents' position on their Ground 1 contentions. Mr Andrew Allen said that this concession was made on the basis that his district judge's salaried role was a part-time one from this point; and that it was not conceded that when Mr Atherton sat as a recorder during his 90% salaried time he was undertaking a second, distinct part-time role.

Ground 1A: The ET's focus on the periods of alleged part-time working

117. It is apparent from his reasoning that the EJ decided that he should focus upon the time when the claimants were alleged to be part-time workers and that he should answer the regulation 2(2) question "with specific reference to that time and that job" (paragraph 50, Reasons). In paragraph 54 of his Reasons the EJ concluded that the section 9(1) judges were not identifiable, nor identified by the respondents, "as full-time workers when acting as judges of the High Court". He then expressed


 

a similar conclusion in relation to Mr Atherton's work as a recorder, referring to section 21 **CA 1971** and to recorders being part-time judges of the Crown Court.

118. In my judgement the decision to focus upon the period of part-time working was erroneous. To do so pre-determined the conclusion that the EJ would arrive at in terms of whether the claimant was "not identifiable as a full-time worker". In short, he put the cart before the horse.

119. As I have earlier explained, the EJ decided in his paragraph 50 that he should answer the questions posed by regulations 2(1) and (2) by reference to the alleged part-time jobs undertaken by the claimants. As he began by homing in on the sitting up aspect of the claimants' work he, unsurprisingly, arrived at the conclusion that this was identifiable as distinct part-time work. His reasoning in this regard appears to me to be circular. As the EJ decided to focus upon the alleged part-time work of sitting up, it was virtually inevitable that he would find, as he did in paragraph 54, that when undertaking this work the claimants were not identifiable as full-time workers.

120. Similarly, this approach meant that the EJ failed to have regard to the employer's custom and practice in relation to the salaried roles in finding that the claimants and those employed under the same type of contracts were not identifiable as full-time workers. The narrow focus adopted by the EJ was particularly significant in a case of this nature, where the respondents' central contention was that the claimants' periods of sitting up came within and formed a part of their full-time salaried role. In my judgement, the tribunal could only decide whether the claimants had a single full-time employment (as the respondents contended) by analysing the respondents' custom and practice in respect of their salaried roles.

121. The EJ cited no authority in support of the approach that he took at paragraph 50. It does not appear to me to follow from the wording of regulation 2(1) and (2). The reason that the regulation directs the tribunal's attention towards the employer's custom and practice is for the purpose of assessing (when it is in issue), whether the worker is in fact identifiable as full-time or part-time. The EJ's approach pre-empted that question.


 

122. The only support that the EJ cited in paragraph 50 for his approach of focusing in upon the time when the worker did the alleged part-time job was his "industrial example" in paragraph 44. He commented that in order to decide whether the worker's evening job in the warehouse was part-time it was "obviously necessary" to focus upon the time when he did that job, rather than to look at how he filled the daytime when he worked as a check-out operator. However, his example involved two distinct jobs, undertaken at different times of the day and where there was no suggestion that the work was pursuant to one employment, so that the warehouse working was part of the terms of his work as a cashier. If the employer in this example had contended that this was the position, then it would have been necessary to consider the employer's custom and practice in relation to the cashier role in order to address the statutory test. During oral submissions, Mr Robin Allen accepted that the paragraph 44 example related to a materially different situation to the claimants' position, but he said that it did not play a particularly significant part in the EJ's reasoning. I disagree, given the prominence that the EJ accorded to it in his key paragraph 50.

123. As I have observed at paragraph 27 above, a part-time worker is defined in a negative way by reference to what they are not; a worker who is not identifiable as a full-time worker. Accordingly, where the point is in issue and it is said that the worker is in fact a full-time worker at the time when they are undertaking the work in question, the issue can only be resolved by considering that alleged full-time role, having regard to the employer's custom and practice in respect of it, as well as to the alleged part-time working. As the EJ recognised (paragraph 45, Reasons) and both parties accept, the claimants could not be both full-time and part-time workers during the same periods of time; if they were full-time workers when they were sitting-up then they failed on Issue 1.

124. The EJ's solution was to find that the claimants had two part-time roles: one when they were undertaking their 100% salaried roles as circuit judges or, in Mr Atherton's case as a district judge, and the other when they sat up (paragraph 45, Reasons). As I address in respect of Ground 1C below, this conclusion was reached without having regard to the respondents' custom and practice in relation


 

to workers employed under the same type of contract and (although it was acknowledged at paragraph 53), despite the claimants' own understanding that their salaried roles were full-time.

125. The EJ replicated the error in paragraph 52 where he discussed the position of a barrister who sat part-time as a recorder and continued to sit as a recorder once he was appointed to a salaried judicial role. The EJ's reasoning makes clear that he considered that what the worker did "outside the alleged part-time working hours" should not affect the question of their status. However, as I have explained, if the respondent's case is that the alleged part-time work is now done as part and parcel of a full-time salaried employment, it is incumbent on the tribunal to have regard to the salaried role in determining whether or not the person is identifiable as a full-time worker.

126. Mr Robin Allen submitted that the **PTWD** supported the EJ's approach of focusing upon the period of alleged part-time working. I have taken that contention into account; my reasoning is at paragraphs 150 – 159 below. In short, I do not consider that it does.

127. Accordingly, I consider that the EJ erred in law in focusing upon the periods of alleged part-time working in determining that the claimants were not identifiable as full-time workers during their periods of sitting up.

Ground 1B: The ET's core duties distinction

128. Paragraph 53 of the Reasons is of particular significance in terms of the distinction that the EJ drew between core duties and other duties. He reasoned that as the claimants did not spend 100% of their time on the "core" duties of their salaried roles: "It is therefore not accurate to describe the claimants as full-time circuit judges or a full-time district judge when they spend significant portions of their working time performing duties entirely separate from their 'core' duties." (emphasis added). He also relied upon this distinction in his paragraph 54, finding that their salary was in respect of their "core" duties.

129. There are two central problems with this approach. Firstly, the terms of appointment of a



 

circuit judge contemplate that the judge will not only serve in the Crown Court and the county courts but "carry out such other judicial functions as may be conferred"; and a district judge's siting days requirement is in respect of "judicial business" (paragraphs 106 and 111 above). When a worker carries out duties that are contemplated by their terms and conditions, it does not follow, simply because those duties are infrequent or peripheral or in some respects distinct to their central responsibilities, that they are no longer acting in that role and are instead working in a separate part-time role. Secondly, there is nothing in regulation 2 or in the authorities that supports a distinction being drawn between core and non-core duties for these purposes; still less so if the evidence indicates that the employer's custom and practice is to treat the various duties as components of a single employment.

130. There are many situations where workers are required to perform tasks which are ancillary to their main duties but are a part of their contractual role, including (but not limited to) temporarily performing some work that is routinely carried out by a higher paid employee. It would be a most surprising situation if this in itself led to the conclusion that the worker was in fact undertaking two (or more) part-time jobs rather than one full-time role.

131. In my judgement the EJ's approach confuses sitting in different jurisdictions with undertaking different jobs. There are many instances where judicial office holders sit up in other jurisdictions, and some where they sit down. Whilst regard must be had to the applicable terms and conditions and the custom and practice in each instance, on the face of it, the sheer fact that a salaried judge is undertaking work in another jurisdiction does not mean that they are a part-time worker in relation to both this and their salaried role.

132. I also note that some confusion is cast upon the sense in which the EJ understood a duty to be "core" given paragraph 86 of his Reasons. When considering justification, he referred to Mr Atherton occasionally sitting as a recorder in the county courts, as opposed to the Crown Court, characterising this as part of his "core duties". This suggests that the EJ considered the question of whether a duty


 

is "core" or not to depend upon how similar the work is to the central responsibilities of the salaried role, rather than on whether it involves sitting in a different jurisdiction to that of the salaried appointment (which appeared to be the sense in which "core duties" distinction was relied upon when he addressed Issue 1).

133. The EJ reaffirmed the distinction at paragraph 77 of his Reasons, when he said that he did not think it was "right to say that the work of a section 9 judge when acting as a judge of the High Court forms part of his/her salaried work". The "core" work distinction was one of the supporting reasons that he identified and I return to this point when I address Ground 3.

134. Mr Robin Allen suggests that because the EJ referred to a judge undertaking "sittings which are outside those terms and conditions" (of their salaried appointment), when he addressed justification at paragraph 87 of his Reasons, he must have concluded at an earlier stage that the sitting up work fell outside of the terms and conditions of the claimants' salaried roles. However, that is not something that he addressed under Issue 1 and it is not apparent how he has arrived at that position in light of the terms of appointment that I have referred to in paragraphs 106 and 111 above.

135. As I explain at paragraphs 150 - 159 below, I do not consider that the **PTWD** provides any support for this distinction.

136. Accordingly, I consider that the EJ erred in law in regarding the claimants' performance of non-core duties as meaning that they were not identifiable as full-time circuit judges or, in Mr Atherton's case, as a full-time district judge and/or in regarding the existence of such duties as indicating that they were undertaking distinct part-time work.

Ground 1C: The respondents' custom and practice

137. I have already referred to this in addressing Ground 1A. The EJ's reasoning at paragraphs 44 – 55 did not engage with the respondents' custom and practice in relation to workers employed under the same type of contract as the claimants, other than to briefly note the respondents' submissions at


 

paragraphs 46 and 48, before erroneously deciding that his focus should be on the alleged part-time work. At paragraph 53 the EJ referred to the claimants' perception that their salaried roles were full-time ones and at paragraph 54 to the employer's practice in relation to section 9(4) judges, but the lack of reference to or analysis of the respondents' practice beyond this is striking.

138. In my judgement the EJ failed to "have regard" to the custom and practice of the employer in considering whether the claimants were or were not identifiable as full-time workers, as required by regulations 2(1) and (2).

139. By way of example, the relevant custom and practice included the following:

(i) the terms and conditions of the claimants' respective appointments as circuit judges and district judge (paragraphs 106 and 111 above);

(ii) that sitting up days were treated as part of the annual sitting commitment of the salaried roles (paragraphs 106 and 111 above);

(iii) the respondents' undisputed evidence that the general policy was that judicial sittings falling within salaried times were remunerated at the rate applicable to that salaried office;

(iv) as regards the section 9(1) claimants, that this policy was, for example, applied to section 9(4) judges who already held salaried office (paragraph 108 above); and

(v) in relation to the section 9(1) judges, there was no clear demarcation between their circuit judge duties and their section 9(1) duties; for example, the undisputed evidence from Ms George was that she would sometimes switch between the two jurisdictions several times during a single court day. As the EJ said of the section 9(1) claimants at paragraph 86 of his Reasons when considering justification: "High Court work was a regular and intrinsic part of their routine".

140. For the avoidance of doubt, I do not suggest that those were the only aspects of the respondents' custom and practice to be taken into account. There were points that Mr Robin Allen



 

relied upon; for example the documentation from the JAC (described at paragraph 164(iii) below). However, I have highlighted these as examples of relevant considerations that were not taken into account before the EJ found that the claimants were part-time workers.

141. I appreciate the importance of reading a tribunal's decision as a whole and I note that some – although not all– of these aspects were mentioned elsewhere within the ET's Reasons. For example, the terms and conditions were referred to in paragraph 28 when the EJ set out his findings of fact. I also bear in mind that a judge need not expressly refer to all of the points that he or she has brought into account. However, what is significant for present purposes is that regulations 2(1) and (2) specifically direct the tribunal to have regard to the employer's custom and practice in relation to workers employed on the same contracts, yet the EJ did not analyse this body of material relating to the respondents' custom and practice in reaching his conclusions on Issue 1. More specifically, it is striking that the undisputed fact that the sitting up days were treated as counting towards the annual sitting commitments of the claimants' salaried roles is not referred to anywhere in the decision.

142. It appears that this approach was not simply oversight but rather that it stemmed from the error of law that I have already identified in relation to Ground 1A, which led the EJ to focus on the alleged part-time roles. However, the failure to have regard to the respondents' custom and practice in relation to workers employed under the same type of contract was a further error of law in itself.

143. As I explain at paragraphs 152 – 159 below, I consider that these matters are also of relevance to the way in which a part-time worker is defined in the **PTWD**.

Ground 1C: The ET's approach to the position of section 9(4) judges

144. I conclude that the EJ further erred in law in his approach to the respondents' treatment of section 9(4) judges, as shown by his paragraph 54. His reasoning was as follows. The section 9(4) judges were regarded by the respondents as part-time workers, yet when they acted as judges of the High Court there was no material distinction between their work and that done by the section 9(1)


 

judges, and accordingly: "There was therefore, in my judgment, no basis for the respondents' distinction between the latter as part-time workers and the former as not so" (emphasis added).

145. Firstly, this passage contains an explicit, or at least implicit, finding that the respondents' treated the section 9(4) judges as part-time workers, but the section 9(1) judges differently, that is to say, read in context, as full-time workers. That is the inquiry that this part of regulations 2(1) and (2) is directed at, with its emphasis on the employer's custom and practice. On the face of it, this in itself pointed towards the opposite answer to the one that the EJ arrived at.

146. Secondly, the EJ then took into account whether he considered that the employer's different treatment of section 9(4) judges and section 9(1) judges was well-founded. In commenting that there was "no basis" for this distinction, the EJ was saying that he could see no good basis for this distinction; I do not see how his choice of words can sensibly be read any other way. This approach wrongly introduced a value judgement into the first issue that the tribunal had to consider. At this stage the ET was not concerned with whether the treatment of the section 9(1) judges was fair or whether it was justified; the tribunal was simply concerned with whether or not they were part-time workers under the applicable definition. I have already accepted Mr Robin Allen's point that the employer's characterisation is not determinative of status (paragraph 107 above). However, I have also accepted that the employer's custom and practice is highly relevant, given the wording of regulations 2(1) and (2). In any event, when the tribunal is determining the claimants' status, there is no warrant for importing an implied requirement that the employer's practice in terms of whether it treats its workers as full-time or not, must also be just and fair, examined in light of the way that it treats other cohorts of its workers. The **PTWD** affords no support for such an approach either (paragraph 157 below).

## Ground 1D

147. I do not consider that there is anything in this sub-ground. The respondents contend that the



 

EJ erred in failing to engage with their argument that the terms of section 9(1) indicate that a circuit judge would not be able to undertake section 9(1) sittings in their non-salaried time.

148. However, the EJ did not disregard this contention. He expressly referred to it at paragraph 29 of his Reasons. He said that it was a moot point in light of the evidence and submissions he had heard. I do not see how the impression that he formed in that regard can be characterised as an error of law, still less when I have heard neither the evidence nor those submissions. Furthermore, he referred to Mr Atherton having sat in the Crown Court as a recorder during his non-salaried district judge time, which indicates that the evidence was not all one way on this point.

**Ground 1E**

149. Equally, there is no substance to Ground 1E, which alleges that the bulk of the Tribunal's reasoning focused solely on Mr Atherton, when his situation was materially different to that of the other claimants. I have already discussed the EJ's reasoning in some detail. It is clear that he considered the position of both the section 9(1) claimants and Mr Atherton. Whilst I have found that there were legal errors in his approach, I do not consider that this is a valid free-standing criticism.

**The effect of the PTWD**

150. As I foreshadowed at paragraph 97 above, having concluded that the points raised by Grounds 1A, 1B and 1C are well-founded in terms of the EJ's reasoning with regard to regulations 2(1) and (2) **PTWR**, I turn to consider whether his approach derives support from the **PTWD** and/or whether his determination on Issue 1 should in any event be upheld on the basis of claims made in reliance on the definition of a part-time worker in clause 3 **PTWD**. As I have concluded that the EJ made no error of law in relation to the contentions at Grounds 1D and 1E, I do not need to consider those points any further.

151. Mr Robin Allen submits that the wording of clause 3 indicates that the question of whether a worker is a part-time worker is not to be divorced from the identification of a comparable full-time


 

worker, since the test involves seeing whether their normal working hours are less than those of the comparator. In turn, he stresses that the ET found that High Court judges were appropriate comparators for the section 9(1) claimants and that it was conceded that a circuit judge was an appropriate comparator for Mr Atherton's work as a recorder. He says that given this and given that the hours of work as a section 9(1) judge or as a recorder were clearly less than those of their full-time comparators, the claimants were part-time workers for the purposes of the **PTWD**; and that, in turn, the **PTWR** must be interpreted to achieve a consistent result with this.

152. However, in my judgement, Mr Robin Allen's chain of reasoning omits an important step. As a first stage, clause 3 requires the identification of the employee's "normal hours of work" before a comparison is then drawn. Identifying an employee's normal hours of work involves having regard to the nature of their employment, their terms and conditions and, potentially, the employer's custom and practice.

153. On the respondents' case, the section 9(1) claimants' normal hours of work would be their 210 days per annum sitting commitment as a circuit judge; and similarly for Mr Atherton, his 215 days sitting commitment as a district judge. The EJ made no findings as to whether this was less than the normal hours of work of (respectively) a High Court judge and a circuit judge in Mr Atherton's case. Sir Brian Levenson's witness statement referred to the High Court judge annual sitting commitment as being 189 days. In any event, it is not surprising that there were no findings on that point, as it was not the way that the claimants put their case. They argued that the focus should be on the work they undertook when sitting up and that their "normal hours of work" for the purposes of clause 3 were only those that they undertook in their alleged part-time roles. However, as with the EJ's reasoning in respect of regulations 2(1) and (2) **PTWR**, taking that approach pre-empts the issue that the tribunal needs to resolve.

154. Mr Robin Allen submits that the correct approach is to identify the comparable full-time worker and then see if the claimant is a part-time worker, because they work fewer hours, in


 

comparison with them. However, if regard is only had to the hours when a claimant is said to work part-time, then in circumstances where the respondent contends that this work was in fact a component of a larger full-time role, the answer is pre-determined in the claimant's favour from the outset. If this were the correct approach, an employee could, for example, simply self-define the more complex part of their duties as a part-time job and compare themselves to full-time employees who undertook such duties more extensively and receive a higher salary. However, the reason why this approach would not succeed is because the employee in question would not be founding the claim on their "normal hours of work". Unless their normal hours of work are first identified by reference to the material I have outlined at paragraph 152 above, the comparison exercise becomes untethered from the actual jobs involved.

155. In so far as the claimants stress the objectives of the **PTWD**, its purpose lies in facilitating the development of part-time work and removing discrimination against part-time workers (paragraphs 20 – 21 above), it is not a broader charter for equal pay. The elements of the clause 3 definition have to be applied.

156. I accept that the **PTWR** should provide no less favourable rights for part-time workers than those contained in the **PTWD**. However, understood in this way, I consider that the terms of regulations 2(1) and (2) **PTWR** are not inconsistent with the approach contemplated by the **PTWD**; the **PTWR** makes the sequential stages more explicit but, at least for present purposes, there is no tension between the two. (For the avoidance of doubt, Mr Robin Allen did not contend that the **PTWD** required an adaption of the wording of regulations 2(1) and (2)).

157. Returning to the present case, I do not consider that the **PTWD** casts a different light upon the errors that I have found in the ET's reasoning. For the reasons I have just identified, it does not support the EJ's approach of focusing in on the alleged part-time work undertaken by the claimants and it underscores the need to have regard to the material that bears upon the worker's terms and conditions and the nature of their employment. Furthermore, the **PTWD** definition affords no support


 

for a core / non-core duties distinction to be applied in identifying the normal hours of work or for the introduction of a fairness stage at this part of the inquiry.

158. As regards Mr Robin Allen's contention that the **PTWD** requires whether a worker is part-time to be considered "together with" the question of whether there is a comparable full-time worker, I have explained why it is first necessary to determine the alleged part-time worker's normal hours of work before any meaningful comparison exercise can be undertaken.

159. For completeness I mention two other points. I do not accept Mr Robin Allen's supporting submission that the EJ accepted his contention that status and comparability should be considered together in paragraph 42 of his Reasons. I have already noted that there is a typographical error in this passage (see paragraph 47 above). Therein he referred to the fact that that the regulation 2(2) **PTWR** test defines a part-time worker as "one who is not identifiable as a full-time worker" and observed that in this sense the definition involved a comparison with a full-time worker. He was not, however, suggesting that Issue 1 and Issue 2 should be considered together, as is also plain from the course that he then took in his judgment. Mr Robin Allen also submits that in any event in this instance the claimants were correct in focusing upon their work when sitting up as their normal hours of work because "jurisdiction and title go together". This was a reference back to his earlier "jurisdiction is everything" submissions which I have not accepted at paragraphs 101 – 105 above.

**Conclusions, outcome and consequences**

160. It therefore follows that my conclusions in relation to Ground 1 are:

(i) Ground 1A: the EJ did err in law in focusing on the alleged part-time work rather than considering the totality of the claimants' work in circumstances where the respondents' case was that the "sitting up" was part of their full-time salaried role. This error infected the tribunal's consideration of both the section 9(1) claimants and Mr Atherton;



 

(ii) Ground 1B: the EJ did err in law in the distinction that he drew between "core" duties and other work. This error applied to both the section 9(1) claimants and to Mr Atherton;

(iii) Ground 1C: the EJ did err in law in failing to have regard to relevant considerations relating to the respondents' custom and practice. Whilst not every aspect of custom and practice is the same for both section 9(1) judges and recorders, the error infected the tribunal's consideration of both the section 9(1) claimants and Mr Atherton;

(iv) Ground 1C: additionally, the EJ erred in law in introducing a fairness or equity test into whether the worker was a part-time worker. From his reasoning in paragraph 54, this only appears to have been a material factor in his conclusion concerning the section 9(1) claimants.

(v) Grounds 1D and 1E: the EJ did not err in law in the respects alleged;

(vi) In so far as Ground 1C also contends that the ET erred in law in failing to provide adequate reasons, I have not approached that as a free-standing ground; and

(vii) As I explain when identifying why I have decided to remit this issue immediately below, I am not in a position to arrive at my own determination of the claimants' status. I have not decided that the ET's conclusion on Issue 1 were perverse.

161. I next have to consider whether I am in a position to re-determine the question of whether the claimants were part-time workers or whether I should remit this question, as I foreshadowed at paragraph 97 above.

162. As is very well established, I should remit unless there is only one conclusion that the ET could lawfully reach on Issue 1 and arriving at that conclusion does not involve the EAT in making findings of fact: **Jafri v Lincoln College** (2014) ICR 920.

163. Although the additional delay involved is highly undesirable all round, after careful



 

consideration I have concluded that remittance is the proper course in relation to each of the claimants, for the reasons that I list in the next paragraph. (As part of the process of making written submissions on consequential matters after seeing the judgment in draft, the parties will have the opportunity to make representations as to whether remittance should be to the same or to a different tribunal.)

164. The reasons why I have decided that remittance is the correct course are the combined effect of the following:

(i) Because of the errors that I have identified in relation to Grounds 1A and 1C, the EJ did not make relevant findings about the respondents' custom and practice in relation to workers employed by them under the same type of contracts as the claimants. It appears likely that this will involve conclusions of mixed fact and law, rather than simply the latter;

(ii) There may also be other matters of evidence that bear on the question of whether or not each of the claimants are "identifiable as a full-time worker". As I have indicated earlier, I do not consider that this inquiry is confined to the employer's custom and practice. Again because of the error I have accepted occurred in relation to Ground 1A, the focus of the ET's decision was upon the period of alleged part-time working;

(iii) Within these broader topics of mixed fact and law there are specific factual disputes that are currently unresolved. I will give one example. Both leading counsel addressed me on the arrangements regarding the selection of judges for the section 9(2CA) pool of section 9(1) judges. On the second day of the hearing Mr Robin Allen provided two JAC job description documents, one for a section 9(1) authorisation and the other for a section 9(4) appointment. I understand that these were before the ET, but they are not referred to in the Reasons. Mr Robin Allen emphasised their similarity of content in terms of the descriptions of the


 

roles and the prospects for subsequent appointment to the High Court bench. He also said that the language of the section 9(1) document supported the proposition that this was a separate post. He submitted that this material was relevant to an assessment of the respondents' practice and that it undermined some of the respondents' contentions in that regard. In reply Mr Andrew Allen disputed the significance of the documents, referring to passages in the witness statements of Sir Brian Leveson and Mr Masterson. He also pointed out that one of the two JAC documents was undated and that it was not clear when it had been prepared. These are not matters that I am able to resolve as part of the appeal;

(iv) Other than the two JAC documents I have mentioned, along with the pleadings and the witness statements, I do not have the 2,369 page bundle of documents or the 239 page supplementary bundle of documents that were before the ET; nor do I have notes of the evidence given by the witnesses. It appears from paragraph 3 of the ET's Reasons that there was substantial cross-examination of the witnesses (with time being short on the final day of the six-day hearing for closing submissions); and

(v) In light of the approach taken by the ET to the **PTWD**, no findings have been made about "the normal hours of work" of the claimants or those of a comparable full-time worker. Again, these appear to me to be mixed questions of fact and law.

165. Accordingly, I will allow the appeal in relation to Ground 1 and remit the questions identified at paragraphs 1 and 3 of the Generic List of Issues, namely:

(i) Are the claimant circuit judges (or were the claimant retired circuit judges) part-time workers within the meaning of the **PTWD** and/or the **PTWR** when undertaking work in the High Court pursuant to their authorisation under section 9(1) or section 9(4) **SCA 1981**;



 

(ii) Was the claimant retired district judge a part-time worker within the meaning of the **PTWD** and/or the **PTWR** when undertaking work as a recorder during his salaried district judge time (in the period before 1 November 2011 when it is agreed that he was a part-time worker on going down to 90%).

166. As the ET erred in law in determining that the claimants were part-time workers in the respects that I have indicated, it appears to me that the tribunal's conclusions on the subsequent issues cannot stand either. Self-evidently, if it is decided on remission that a claimant is not a part-time worker, then Issues 2, 3 and 4 simply do not arise in relation to that claim. Furthermore, the EJ's reasoning on those issues began from the conclusions he had reached on Issue 1, including the unduly narrow focus that he had taken to the claimants' work and to the evidence relating to custom and practice. Accordingly, his line of reasoning and conclusion on Issue 1 tainted his subsequent conclusions.

167. However, as the parties encouraged me to do so, I will in any event consider the other grounds of appeal on their merits, not least because it is important to identify for the benefit of the remitted hearing whether additional errors of law were made in relation to Issues 2, 3 and/or 4.

## Ground 2: Discussion and conclusions

168. As I explained earlier, comparability was only in issue in relation to the section 9(1) claimants and their chosen comparators, High Court judges. The respondents contend that the ET erred in finding that the section 9(1) claimants were engaged in broadly similar work to High Court judges. There is no perversity challenge brought either in respect of the ET's overall conclusion on this issue or in respect of any of the supporting factual findings that were made. Accordingly, in so far as I am now considering Ground 2 on a free-standing basis, I must proceed on the basis of the factual findings made by the EJ.

### Ground 2A



 

169. Firstly it is said that the ET erred in adopting an incorrect test that focused only on the similarities between the work of the section 9(1) judges and High Court judges, without considering adequately or at all the difference between the work that they performed.

170. I reject that proposition. As I have indicated at paragraph 56 above, the EJ identified the correct test, as explained by Baroness Hale in **Matthews** (paragraph 28 above). Furthermore, he discussed the differences at paragraphs 61 and 62, concluding at paragraph 63 that: "the differences between the work of full-time High Court judges and that of both categories of section 9 judges are not of such importance as to prevent their work from being regarded overall as 'broadly similar'".

171. Mr Andrew Allen also submits that the EJ "disregarded" **Moultrie** because he was not able to establish exact percentages of the similarities and the differences between the section 9(1) judges and their comparators. There is no merit in this complaint. The applicable approach was identified by the House of Lords in **Matthews**; **Moultrie** provides an illustration of the application of Baroness Hale's test, but it does not identify or give rise to a further or adapted test. Accordingly, if the ET applied the **Matthews** approach it applied the correct test. In any event, in the last few lines of his paragraph 61 the EJ does no more than note that on the evidence he has heard he is not able to apportion percentages to the differences and the similarities. He was not thereby suggesting that in consequence he was not going to apply the **Matthews** test.

172. Lastly, so far as the criticisms of the test that was applied are concerned, the respondents submit that the last sentence of paragraph 62 of the Reasons shows that the EJ erred in focusing only on the question of whether the claimants' section 9(1) work was "peripheral". I am clear that the EJ did not do this. As I have set out at paragraph 28 above, in paragraph 44 of **Matthews**, Baroness Hale observed that it was easy to imagine workplaces where the full-timers did the more important work and the part-timers were brought in to do the more peripheral tasks, and equally workplaces where both full-timers and part-timers spent much of their time on the core activity of the enterprise. She gave judging in the courts as an example. The EJ was referring to this, when he said that it would be


 

contrary to the evidence to suggest that the section 9 judges were "brought in to do 'the more peripheral tasks'". In light of his factual findings, this appears to me to be a legitimate observation. Moreover, this one sentence does not suggest that the EJ was substituting a criterion of whether the section 9(1) judges' work was or was not "peripheral" for the correct test which he had identified at paragraph 59 of his Reasons, repeated at the outset of his paragraph 62 and again in paragraph 63 when setting out his conclusion.

173. The respondents also say that although the EJ acknowledged that there were differences between the two roles as identified in Sir Brian Leveson's undisputed evidence, he failed to analyse them, or, to the extent that any assessment was made, to provide sufficient reasoning. Mr Andrew Allen submits that it was incumbent on the EJ to explain his conclusion by providing a list of both the similarities and the differences, showing the weight that he attached to each.

174. Whilst that would certainly be one way in which a tribunal could set out its reasoning and conclusion on the comparability issue, I do not consider that failing to take that approach amounts to an error of law. There is nothing in the earlier authorities that suggests this is required. I consider that the EJ's conclusion on this issue, although relatively compressed, was appropriately structured, adequately reasoned and compliant with the requirements identified in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA. I summarise the EJ's reasoning in the next paragraph. His reasoning enabled the parties to understand: the test that was applied, the evidence that was accepted, the particular differences that existed, why they were not considered to be decisive and the conclusion that the EJ reached on this issue. Whilst fuller reasoning may well have been desirable, the relevant passages do not disclose an error of law in this regard.

175. The EJ identified the test that he was to apply at paragraphs 59 - 60. He indicated that the work done by the section 9 judges was "of the highest importance" to the respondents' business (paragraph 61). He then found that a large part of the work done by the section 9 judges "is not distinguishable from the work done by the High Court judges", summarising why that was the case


 

(paragraph 61). Having addressed the similarities, the EJ then went on to consider the differences. In the remainder of paragraph 61 he described the "essentially twofold" differences identified by Sir Brian Leveson, indicating that he accepted this evidence. He then reminded himself that, in accordance with Baroness Hale's test, he should ask "whether any differences are of such importance as to prevent their work being regarded overall as 'the same or broadly similar'" (paragraph 62). The EJ then made the point that the two differences the respondents relied upon also applied to section 9(4) judges, but that had not been sufficient to prevent the respondents from valuing the latter's work as equal to that of High Court judges in terms of their daily rate of pay. He then asked himself whether there was any material distinction between the section 9(1) judges and section 9(4) judges for these purposes, concluding that there was not, in particular as the section 9(1) judges undertook additional functions such as boxwork, that was rarely asked of the section 9(4) judges (paragraph 62). In paragraph 63 he set out his conclusion that the differences were not of such importance as to prevent the work of the section 9(1) judges and High Court judges from being regarded overall as "broadly similar".

**Ground 2B**

176. I do not consider that the three specific criticisms raised in this sub-ground constitute material errors of law.

177. Paragraph 36(a) of the grounds of appeal complains that the EJ conducted a comparison exercise between the section 9(1) judges and the section 9(4) judges, rather than comparing section 9(1) judges with High Court judges. However, it is clear from the reasoning in paragraphs 62 – 64, which I have already summarised, that this is not what the EJ did.

178. Paragraph 36(c) of the grounds of appeal alleges that the position of the section 9(4) judges was irrelevant to Issue 2 and that in referring to their position the EJ wrongly introduced a fairness / equity element into the comparability test. I do not accept these propositions. Mr Andrew Allen's oral


 

submissions tended to treat the position of the section 9(4) judges as equally irrelevant to each of the issues before the ET. However, that is an over-simplification. The relevance or otherwise of this cohort of judges depended upon the issue that was under consideration and the reason why the EJ considered their position to be significant. I have already explained under Ground 1 that he erred in law in regarding what he saw as the lack of a good basis for the respondents' differences in their treatment of section 9(1) judges and section 9(4) judges, as relevant to whether the former were part-time workers. However, I can see no error of law in the chain of reasoning that I have described in relation to Ground 2; the EJ was entitled to regard section 9(4) judges and High Court judges being paid at the same *per diem* rate as material to the question of whether the differences between the work of section 9(1) judges (who did additional tasks to section 9(4) judges) and High Court judges were such as to mean that they were not engaged in "broadly similar work".

179. Paragraph 36(b) of the grounds advances two points. It is said that the EJ failed to have regard to the evidence of Sir Brian Leveson and Mr Masterson as to the reasons why section 9(4) judges were paid at the daily rate equivalent of High Court judges. In oral argument Mr Andrew Allen made particular reference to the "market rates" point (that the level of payment was in order to attract the right calibre of individuals from private practice). This point was referred to, albeit fairly briefly, by Mr Masterson at paragraph 62 of his witness statement. However, it is trite law that a tribunal does not have to refer to every point that has been taken into account and, equally, that it cannot be inferred simply from a tribunal's failure to mention a particular piece of evidence, that it was not considered. The position here is quite distinct from that which obtains in relation to Grounds 1A and 1C, where the EJ specifically indicated the narrow ambit of his focus. By contrast, there is nothing here to suggest that this evidence was not taken into account.

180. It is also said that the EJ erred in proceeding on the basis that all section 9(4) judges are paid at a *pro rata* equivalent rate to the salary of a High Court judge. Whilst this is the case for section 9(4) judges who do not hold a salaried appointment, the evidence of Mr Masterson (paragraph 62,


 

witness statement) was that where section 9(4) sittings occur within a salaried judge's time, then the pay applicable to the judge's salaried office applies. I understand that this was not disputed by the claimants. It is not referred to by the EJ. Furthermore, I agree that his reasoning indicates that he did not take this into account, since he says, for example, at paragraph 62 that "Deputy judges of the High Court appointed under section 9(4) are paid a daily rate equivalent *pro rata* to the salary of a High Court judge" without including the caveat that this does not apply to section 9(4) judges with a salaried appointment. This point is of greater significance in relation to Ground 3, as I come on to at paragraphs 191 – 192 below. However, I do not consider that failing to take this into account was a material error in relation to Issue 2. The EJ's point was that the work of section 9(4) judges (which was the same as the section 9(1) judges) was valued by the respondents as financially equivalent to High Court judges, thereby suggesting that the differences between their work were not so great as to mean that the work was not broadly similar. The force of this point does not depend upon every section 9(4) judge being paid at the High Court judge rate.

**Conclusions**

181. Accordingly, I do not consider that there is a free-standing basis for overturning the ET's conclusion on Issue 2. Nonetheless, as I have already explained at paragraph 166 above, the finding on Issue 2 cannot stand in light of the errors made in relation to Issue 1.

**Ground 3: Discussion and conclusions**

182. I approach Ground 3 on the basis that I indicated in paragraphs 166 – 167 above. This ground applies to all of the claimants. In order to see if free-standing errors were made, I have to assess the EJ's reasoning on the basis that he found that the claimants were part-time workers.

183. The respondents' case was that the less favourable treatment in terms of the claimants' remuneration was because their primary office was a salaried office to which they were required to



 

devote their working time and in which they were entitled to deploy him in accordance with the business needs of the courts.

**Ground 3A**

184. Ground 3A relates to conclusions that were drawn by the EJ in respect of the section 9(1) claimants.

185. Firstly, it contends that the remuneration of section 9(4) judges was irrelevant to the reason why the claimants were paid at a lower rate than comparator High Court judges.

186. I reject that proposition. I do not accept that the position of the section 9(4) judges was wholly irrelevant to the causation question. It is quite clear that it did not provide a decisive answer, for the reason that the EJ correctly identified in the second and third sentences of his paragraph 69. As the EJ went on to observe in that paragraph, it was only relevant in so far as it was capable of shedding light on the question raised by Issue 3, namely whether the less favourable treatment of the claimants was on the ground of their part-time status. Indeed, in their alternative argument, the respondents themselves rely on the treatment of the section 9(4) judges as supporting their position on the "reason why" question, as that cohort of judges included part-timers who were paid at a higher rate commensurate with High Court judges. Accordingly, I reject the first part of Ground 3A.

187. Secondly, this sub-ground asserts that the ET erred in introducing a fairness or equity approach to the question of whether the treatment was on the ground that the claimants were part-time workers.

188. I accept that there is force in this contention. The EJ's reasoning indicates that he considered that there was no good reason for the difference in the respondents' treatment of section 9(1) judges, on the one hand, and section 9(4) judges and/or High Court judges on the other, and that he regarded this as bearing on the causation question. In my judgement this was an error. At this stage the tribunal is simply concerned with the reason for the less favourable treatment, not whether it is a good reason


 

or a fair reason. If the less favourable treatment is found to be on the ground of the worker's part-time status, then the question of whether the employer can justify the same will arise at the next step of the inquiry. If the less favourable treatment is not on the ground of the part-time worker's status, then the fact that the tribunal believes the differential in treatment and/or the reason for it to be unfair is irrelevant. The perceived inadequacy of the ground advanced by the employer is only relevant if it calls into question the assertion that it was the genuine reason for the differential.

189. This error is apparent from the following. At paragraph 73 of his Reasons, the EJ found that the respondents' policy on the payment of section 9(1) judges "was based … on whether the section 9 judge did, or did not, simultaneously hold a salaried office". Although the EJ did not accept some of the explanations given by Mr Masterson (as identified at his paragraphs 70 – 72), it nonetheless appears from this passage in paragraph 73, that he accepted the respondents' contention that the section 9(1) judges were paid as they were because they held a salaried judicial office. After noting at paragraph 76 that it was the reason for the less favourable treatment that he had to identify, the EJ went on to conclude in paragraph 77 that if one asked the ground on which they were not paid at the High Court judges' rate: "it cannot, in my judgment, be a satisfactory answer to say, because the rest of their time they are paid a salary for doing other work which is different" (emphasis added). As I have already stressed, the exercise at this stage is to identify the reason for the treatment, not to evaluate whether the reason is a just, a good or a satisfactory one. Looked at in context, the EJ is saying that that the ground advanced was not "satisfactory" in the sense that it was not, in his view, a good enough reason to warrant the differential; he is not, for example, saying that it is unsatisfactory in the sense that he does not believe the respondents' evidence. When I asked Mr Robin Allen what the EJ meant in this passage, he said that he was using the word "satisfactory" with "an ironic raised eyebrow". This response in itself shows how difficult it is to get away from the proposition that the EJ was, wrongly, bringing a value judgement to bear at this stage.

190. That the EJ fell into this error is reinforced by two further passages in his reasoning. Firstly,


 

in the last sentence of his paragraph 78 he observed of the respondents' policy: "It cannot in any event be legitimate to have a policy which results in discrimination contrary to the Regulations". The EJ's task at this stage was not to evaluate whether the respondents' policy was "legitimate"; he was concerned with identifying whether less favourable treatment on the grounds of part-time status had occurred. The observation appears to be circular; it is necessary to consider causation and then, in turn, justification, in order to determine whether a policy has resulted in discrimination contrary to the **PTWR**. Secondly, in paragraph 79 he said that he could not find that the reason for the less favourable treatment of the claimants "is explained either by a distinction between their duties and those of their comparators, or by the fact of their being salaried when performing different work" (emphasis added). Read with the earlier passages that I have highlighted, this also suggests that the EJ considered that his resolution of Issue 3 involved him assessing the adequacy of the reason for the less favourable treatment, as opposed to simply identifying the reason itself.

191. Thirdly, Ground 3A alleges that the EJ failed to properly appreciate the position of section 9(4) judges, in that whilst they are mostly judges who do not hold a pre-existing salaried office, where they do so and their sittings are performed within that salaried time, they are paid in accordance with their salaried office, just like the section 9(1) claimants. I have already referred to the undisputed evidence of Mr Masterson on this point at paragraph 180 above. I also note that the EJ's findings in respect of Mr Atherton at his paragraph 16 appear to support this.

192. The EJ's reasoning, including paragraphs 69, 70 and 72, indicate that he did proceed on the basis that section 9(4) judges as a cohort were paid *per diem* on the basis of a High Court judge's salary. There is no reference to section 9(4) judges with a salaried appointment being paid on a different basis. Unlike the position that I discussed earlier in relation to Issue 2, I consider that this was a material error in respect of Issue 3. If the evidence showed an apparent distinction in the way that section 9(4) judges were remunerated, based on whether or not they held a salaried office and the sittings were within their salaried time, this was clearly a relevant consideration in terms of the


 

respondents' case that the reason for the less favourable treatment in the claimants' case was because they held a salaried office and the sittings were within their salaried time.

193. Lastly Ground 3A asserts that the ET's conclusion was perverse. I am not in a position to say that this was the case, given the absence of evidential material before me, as I have noted in relation to Issue 1.

**Ground 3B**

194. Ground 3B alleges a further four errors of law on the part of the EJ. They all relate to the contents of paragraph 77 of the Reasons. I accept that these contentions are also well founded. The first three led to or materially contributed to the conclusion that the EJ expressed at the beginning of paragraph 77, namely that he did not think Mr Andrew Allen was correct in saying that the work of a section 9(1) judge when sitting as a judge of the High Court formed part of his/her salaried work. The fourth point relates to the application of this conclusion to Mr Atherton.

195. The first error concerns the way that the EJ addressed section 9(5) **SCA 1981**. The respondents submit that he failed to have proper regard to the full meaning and effect of section 9(5) read with section 9(1) and section 9(6). I have already addressed this at paragraphs 101 – 105 and 107 above.

196. The second error concerns the proposition that sitting in the High Court pursuant to a section 9(1) authorisation was not part of a circuit judge's "core" work. I have already explained why this was a flawed approach at paragraphs 128 – 136 above.

197. The third error concerns the EJ's reference to the compulsory nature of section 9(1) sittings. He said that authorised judges who were requested to sit in this capacity "must comply". I do not agree with the respondents' suggestion that in saying this the EJ must have overlooked the fact that the claimants voluntarily applied to be section 9(1) judges; there is no basis for inferring that this was the case. However, I do accept their second point, namely that it is not apparent from the EJ's reasoning why this is a factor that tells against the proposition that a section 9(1) judge's sittings in


 

the High Court are a part of their salaried work. On the face of it, a power to direct a circuit judge to sit in his or her section 9(1) capacity appears to point in the opposite direction. Whilst this is a less significant point than the first two errors that I have identified, it further reinforces the legally flawed nature of the conclusion expressed at the outset of paragraph 77.

198. The fourth point made by the respondents is that no specific reasoning is provided in respect of Mr Atherton. It is right to say that the EJ's line of reasoning in paragraphs 69 – 73 and 76 - 77 is heavily focused on the position of the section 9(1) claimants. The only reference of potential significance to Mr Atherton before paragraph 77 comes in paragraph 74, where the EJ refers to the response he received to his request for an explanation of the respondent's policy. Towards the end of paragraph 77 the EJ says that: "the same reasoning applies by analogy to Mr Atherton". However, much of his preceding discussion in that paragraph relates to the provisions of section 9 **SCA 1981**, which do not apply to Mr Atherton. Accordingly, the absence of reasoning specific to Mr Atherton's position does amount to a further error of law in my judgement.

**Ground 3C**

199. In terms of the way that this is expressed in the grounds of appeal, there is some overlap with points that I have already addressed in relation to Grounds 3A and 3B. This leaves the discrete point which is made at paragraphs 45 – 47 of the grounds of appeal. The contention here is that the ET erred in concluding towards the end of his paragraph 77 that: "if the claimants sat full-time in the High Court or Crown Court respectively, they would obviously be paid at the higher rate".

200. Mr Andrew Allen submits that the only evidence before the tribunal on this point was that section 9(1) judges would not sit in the High Court to that extent, but that if, hypothetically, they were to do so, they would still be paid in accordance with their substantive salary as a circuit judge. He says that this is confirmed by paragraph 70 of the Reasons where the EJ said: "Mr Masterson was asked to consider the hypothetical possibility … that a section 9(1) judge might spend 100% of his/her


 

time doing High Court work. Despite the rationale above, he said that in such circumstances the policy would be unchanged: only the substantive salary would be paid".

201. Mr Robin Allen does not suggest that there was additional evidence given on this topic, nor does he suggest a different interpretation of this part of paragraph 77; rather, he says that the EJ was entitled to reject Mr Masterson's "fanciful" evidence in relation to this.

202. Whilst a tribunal may, of course, reject the evidence of a witness, there is no explanation along those lines here and the phrasing "they would obviously be paid at the relevant higher rate" (emphasis added), does not sit easily with a situation where the only relevant evidence was to the opposite effect. Moreover, the EJ appears to have regarded this point as being of particular significance. Immediately after he has expressed this, he sets out his conclusion that: "The reason why they are not so paid is because they do so part-time not full-time" (emphasis added). Read in context, "so paid" is a reference back to the preceding sentence; to the rate at which, on his finding, the claimants would be paid if they were to sit 100% of their time in the court where they sit up.

203. I do not go so far as to conclude that his challenged finding was perverse. However, in light of the importance that the EJ accorded to this and the fact that the only relevant evidence he heard supported the opposite conclusion, I do consider that it was incumbent upon him to identify, albeit briefly, why he had arrived at this finding. As he did not do so, there was a failure to give adequate reasons.

## Conclusions

204. Accordingly, I find that the EJ's conclusion that the less favourable treatment of the claimants was on the ground that they were part-time workers was flawed by the following errors of law:

(i) The respondents' case that the claimants' level of remuneration was attributable to the pay attached to their salaried judicial office was rejected in part because this was not a good or satisfactory reason for the less favourable treatment of the section 9(1) claimants. This


 

involved a misdirection and/or taking into account an irrelevant consideration; the only question for the tribunal under Issue 3 was to identify the ground for the less favourable treatment, not to consider the fairness or adequacy of the respondents' treatment of the claimants in this regard;

(ii) The EJ failed to have regard to a relevant consideration, namely that where section 9(4) judges simultaneously hold a salaried office and their sittings are performed within salaried time, they are paid in accordance with their salaried office, as the section 9(1) claimants were;

(iii) In attaching the emphasis that he did to section 9(5) **SCA 1981**, he failed to have regard to the meaning and effect of section 9(1) and section 9(6) **SCA 1981**;

(iv) He relied upon a flawed distinction between the claimants' "core" and "non-core" work (as identified earlier in respect of Ground 1B); and

(v) The EJ failed to give adequate reasons in the respects identified at paragraphs 197, 198 and 199 - 203 above, including in relation to the position of Mr Atherton.

205. Accordingly, I would in any event have allowed the appeal in relation to Ground 3 and remitted Issue 3 (paragraph 8 of the Generic List of Issues) to the tribunal in respect of all four claimants.

## Ground 4: Discussion and conclusions

206. The EJ's reasoning in relation to justification is heavily bound up with his earlier reasoning on Issue 1. When considering the respondents' first aim (the fair and flexible deployment of judges) he made reference to the claimants' "core" duties (Reasons, paragraph 86). I have already identified his error of law in that regard when I considered Ground 1B. When he turned to the respondents' second aim (the fair allocation of resources), the EJ referred to the instances of sitting up as being "outside" the "terms and conditions" of the claimants' respective salaried appointments. The basis


 

for this conclusion is not explained, in particular how it has been arrived at in circumstances where the terms and conditions of the claimants' salaried offices, required that they devote their sitting days to "the business of the courts" or to "judicial business" (paragraphs 106 and 111 above). However, it appears to be linked to the errors of law that I have identified in relation to Grounds 1A, 1B and 1C concerning the conclusion that the section 9(1) authorisations and the recorder role were separate part-time appointments.

207. I have concluded that there are also two free-standing errors of law in the tribunal's reasoning regarding the respondents' second aim. The first of these only concerns the section 9(1) claimants; the second relates to all of the claimants.

208. Before identifying those errors, I mention for completeness that I do not accept the respondents' contention that in relation to the first of their aims, the EJ erred in failing to address their case on the conflicts of interest that could arise if salaried judges were paid differently depending on the type of work that they did. The EJ had already found at paragraph 24 that appropriate checks could be put in place in this regard. Whilst the EJ could have been fuller on that point, I do not consider that there was an error of law in terms of the adequacy of his reasons; the evaluative conclusion that he set out in that paragraph met the point that the respondents had raised. The respondents do not suggest that this conclusion was perverse.

**Administrative difficulties**

209. The EJ dismissed the respondents' reliance upon administrative difficulties in relation to rates of pay for the section 9(1) claimants as this was not "explicitly one of the three matters relied upon by the respondents" and "on that basis" (emphasis added) he could not find that it was a legitimate aim nor that the payment of base salary was a reasonably necessary means of solving it (Reasons, paragraph 85). This reasoning indicates a misunderstanding of the respondents' case. Administrative difficulties were not raised as a fourth aim, additional to the three pleaded aims, but rather in support


 

of the second aim (the fair allocation of resources).

210. This is apparent from paragraph 16(b) of Mr Masterson's witness statement, where he said:

> "As to the fair allocation of resources, it is important that judges are paid consistently with their salary grade and their terms and conditions of appointment, in relation to their salaried sittings. If judges were paid at different rates depending on where they sit, as opposed to by reference to their salaried terms, this could lead to difficulties. … The Respondents' policy enables it to manage its resources in a way that creates fairness and consistency, but also which enables it to maximise the available judicial resources in an efficient way. There can be no doubt that if the Respondents did not operate the policy in the way they do, then there would be significant financial consequences, not only in terms of additional fees payable, but also in relation to administration and management costs, due to the complexity of some claims arising from short periods (see paragraph 17(g) below)."

211. It is agreed that there is a typographical error in the words in parentheses and that the intended cross reference was to paragraph 18(g) of Mr Masterson's statement. There he explained that section 9(1) authorisations could be used very flexibly in practice, particularly in relation to work carried out on circuit; and that such flexibility was particularly important in relation to Family Court work. He continued:

> "…Much family work will be dealt with on the Circuits, whereby the judges with s.9(1) authorisation are likely to be doing lists that require their jurisdiction to be used flexibly. I understand that a judge doing s.9(1) work may only be doing so for a part of their day or for a particular purpose when this arises, as opposed to the whole day. If different rates of pay were to be applied each and every time this occurred, which in practice would be extremely difficult, if not impossible to predict from a planning perspective, then this would lead to difficulties and complications in terms of the administration of judicial pay."

212. The EJ recognised in his paragraph 85 that this evidence was explored in cross-examination at the hearing. Administrative difficulties had not been referred to explicitly in the respondents' response to the grounds of claim, but I do not consider that this was reason in itself to disregard the point. The respondents' pleading on justification simply averred that the treatment of the claimants was objectively justified as a proportionate means of pursuing the three legitimate aims that I have referred to earlier. The basis for this was not detailed in the pleading. It was subsequently fleshed out in the respondents' witness evidence, without objection being taken by the claimants. Accordingly, there was no logical reason for the EJ to treat this aspect of the evidence in a different way to the other evidence that was relied upon by the respondents in support of their justification defence. The reason why he did so stemmed from his misunderstanding that administrative difficulties were being advanced as a fourth, distinct legitimate aim. That this was not the case is further borne out by the


 

agreed List of Generic Issues and the way that Mr Masterson explicitly related this aspect to the fair allocation of resources aim in his witness evidence.

213. Accordingly, the EJ failed to engage with this aspect of the respondents' case, dismissing it on a misconceived basis in his paragraph 85.

214. Mr Robin Allen argues that even if the EJ misunderstood the position in paragraph 85 (which he does not concede) the administrative difficulties point was in any event disposed of for justification purposes by the ET's finding of fact in the last sentence of his paragraph 24 that: "appropriate systems could be devised to determine how much of a judge's time was spent on county court and how much on section 9 work". However, I do not consider that this finding in itself meets the points that were being raised by Mr Masterson in relation to the "fair allocation of resources" aim. His point was not that it was impossible to design such a system; it was that doing so would increase administration and management costs and planning projections would be difficult particularly in relation to family work, where a circuit judge may switch between section 9(1) work and county court work several times a day. The EJ did not address these points. It is also of some note that the EJ himself did not regard his finding at paragraph 24 as dispositive of this part of the respondents' case on justification; rather, he did not address these relevant matters because of his mistaken understanding that they were raised in support of a fourth legitimate aim that had not been pleaded.

**Saving cost**

215. The EJ observed in relation to the second aim (at his paragraph 86) that less favourable treatment of part-time workers "cannot be justified simply on the basis of saving cost". Mr Robin Allen submits that the EJ was thereby indicating that the respondents had failed to show the kind of precise, concrete factors that the caselaw indicated was required to establish justification (paragraph 32 above). However, that is not what the EJ said. Moreover, there does not appear to be any reason for him to point out that the less favourable treatment that he had identified could not be justified


 

"simply on the basis of saving cost" unless this was how he characterised the respondents' position. This impression is supported, rather than undermined, by the sentence that followed, where the EJ said that he had no evidence as to the level of costs that was relied upon by the respondents.

216. Applying the approach explained by Underhill LJ in **Heskett** (paragraph 33 above), I do not consider that this was an accurate characterisation of the respondents' second aim. The EJ himself had described the aim as the fair allocation of resources (rather than solely the saving of costs) and he had earlier found it to be a legitimate aim at paragraph 87 of his Reasons.

217. Furthermore, the material parts of Mr Masterson's witness statement identified a number of considerations related to the second aim which indicated that it was not one of solely avoiding increased costs. By way of example, they included: salaried judges would not wish to be paid less when they sat down in an inferior jurisdiction to their salaried role; the current policy enabled the respondents to achieve consistency and maximise available judicial resources in an efficient way; increased administration and management costs could lead to less use of section 9(1) judges in favour of meeting the demands of the High Court in different ways; and the current arrangements assisted flexibility in judges moving easily from siting in one capacity to another during the course of a day. For the avoidance of doubt, I am not evaluating the merit or otherwise of these contentions at this stage; I am simply deciding that the EJ erred in law in dismissing the second aim in whole or in part on the basis that the respondents were impermissibly seeking to justify the differential treatment on the basis of saving cost. In terms of the impact of this error, I note that after making his point about saving costs, the EJ did not consider the substance of the justification case on this aim, instead moving on to consider the third limb of the justification defence.

## Conclusions

218. Accordingly, I find that the ET's conclusion that the respondents had failed to justify the less favourable treatment of the claimants was infected by the two free-standing errors of law that I have


 

identified at paragraphs 209 - 217 above in relation to the second aim, as well as, more generally, by the errors in reasoning that stemmed from the flawed approach taken to Issue 1 (paragraph 206 above). In consequence of these errors, the tribunal failed to make material findings of fact in relation to the matters relied upon by the respondents.

## Overall summary of conclusions and outcome

219. For the reasons that I have identified at paragraphs 112 – 146 and 150 - 159 above and summarised at paragraph 160, I allow the appeal in relation to Ground 1, namely the ET's finding that the claimants were part-time workers in their "sitting up" capacity. In short, the ET: (i) focused upon the alleged part-time work rather than considering the totality of the claimants' work in circumstances where the respondents' case was that the sitting up was part of their full-time salaried office; (ii) drew an unwarranted distinction between the claimants' "core" duties and their other duties for this purpose; and (iii) failed to have regard to relevant considerations regarding the respondents' custom and practice. Although the ET based its decision upon the **PTWR**, the **PTWD** does not alter the position in this regard (paragraphs 150 – 159).

220. I have decided that the appropriate course is for me to remit the case, given, in particular, the outstanding areas of fact-finding in relation to the question of the claimants' status (paragraphs 161 – 165 above).

221. As I have overturned the tribunals' findings that the claimants were part-time workers, it also follows that the ET's conclusions on comparability, causation and justification cannot stand as they were all predicated on the tribunal's decision in respect of the claimants' status (paragraph 166 above).

222. In addition I have identified further errors of law in relation to Ground 3 and Ground 4, concerning, respectively, the ET's findings that the claimants were less favourably treated on the


 

ground of their part-time status and that the respondents had failed to objectively justify that treatment (paragraphs 187 – 205 and 206 – 218 above).

223. Accordingly, the appeal is allowed and the claims are remitted to the ET for re-determination of the disputed issues identified on the parties' agreed List of Generic Issues (save for those that applied to Mr Field). For the avoidance of doubt, this is paragraphs 1, 3, 4, 8 and 9 of that document. I have set out paragraphs 1 and 3 at paragraph 165 above. The other relevant paragraphs are as follows:

> "4. For the purposes of the **PTWR** and/or **PTWD** are High Court Judges valid comparators to Circuit Judges acting up as High Court Judges … pursuant to their authorisation under s9(1) or appointment under s9(4) of the **SCA**?
>
> 8. Was the less favourable treatment on the ground of their part-time status?
>
> 9. Was such less favourable treatment objectively justified on objective grounds consistently with the **PTWR** and the **PTWD**? The Respondent relies on the aims of:
>
> (i) Fair and flexible deployment of judges to Courts and Tribunals whose office holders may be paid at rates which are different (higher or lower) from theirs;
>
> (ii) Fair allocation of resources; and
>
> (iii) Reflecting the difference in hierarchy and the differences in full-time roles as between different judicial roles."

224. After a draft of this judgment was circulated to counsel for typographical corrections, the parties indicated that they were agreed that upon remission the matter should be heard by a differently constituted Employment Tribunal.