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EMPLOYMENT TRIBUNALS

Claimants		***Respondents***
Mr T Clayson & Others	**AND**	1. Ministry of Justice 2. Lord Chancellor

Heard at: London Central **On**: 3-7 July 2023

Before: Employment Judge S J Williams (Sitting alone)

Representation

For the Claimants: Ms R Crasnow KC
For the Respondents: Mr A Allen KC and Mr A Line, of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the respondents did not treat the claimants less favourably than comparable full-time workers on the ground that the claimants were part-time workers. Accordingly, these claims are dismissed.

REASONS

Introduction

1. The three claimants in this case are representative of a larger group, all of whom are circuit judges or retired circuit judges appointed on or after 31 March 1995 and who, before that date, held the part-time office of recorder or assistant recorder. The claimants contend that by virtue of their part-time status they have been, and will in future be, treated less favourably by the respondents in respect of their pension rights than their comparators, who are full-time circuit judges appointed to that office when the claimants were appointed assistant recorders.

2. When a new judicial pension scheme was introduced by the Judicial Pensions and Retirement Act 1993 (JUPRA) with effect from 31 March 1995, the comparator circuit judges were given a right to elect to join that new scheme or to remain in their existing scheme under the Judicial Pensions Act 1981 (JPA). The

first, second and third claimant contend that they were treated less favourably than their comparators because, when they were appointed circuit judges in 2004, 2006 and 2007 respectively, they were compulsorily enrolled in the JUPRA scheme and not permitted a right of election to remain on JPA-equivalent terms. They bring their claims pursuant to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) and the Part-Time Workers Directive 97/81/EC (PTWD).

3. Ms Crasnow adduced the evidence of the three claimants. Mr Allen adduced the evidence of Paul Darby, Head of Core Judicial Pensions Policy in the Judicial and Legal Services Policy Directorate of the first respondent. All witnesses gave evidence from prepared witness statements. The tribunal was provided with a bundle containing 903 pages and a bundle of authorities. Both counsel presented written closing submissions on which they elaborated orally. The parties were agreed that this case might be heard before an employment judge sitting alone.

The facts

4. The offices which the claimants have at various times held were created by the Courts Act 1971. By section 16, circuit judges are appointed 'to serve in the Crown and county courts and to carry out such other judicial functions as may be conferred on them ...' By section 24, assistant recorders were, although they no longer are, appointed to facilitate the disposal of business in the Crown or county court. By section 27, recorders are appointed 'to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them ...'

5. Timothy Clayson was appointed an assistant recorder in 1992, a recorder in 1996 and a circuit judge in 2004 on his second application. Mr Clayson said that his claim related principally to his service as a full-time circuit judge. After three months in Manchester, Mr Clayson sat in Bolton where he became the Honorary Recorder of Bolton. He was one of nine circuit judges appointed to hear serious cases and appeals arising in the British sovereign bases in Cyprus, exercising very broad jurisdictions in civil, crime and family work. Mr Clayson accepted that he had the benefit of certain intangible benefits – in the nature of insurance benefits – under JUPRA whilst he was in service; however, the option to elect was at the heart of the case.

6. Andrew Woolman was appointed an assistant recorder in 1992, a recorder in 1997 and a circuit judge in 2006 on his second application. He sat exclusively in crime in Preston Crown Court.

7. David Griffith-Jones was appointed an assistant recorder in 1992, a recorder in 1997 and a circuit judge in 2007 on his second application. Latterly, Mr Griffith-Jones was resident judge in Maidstone and became the Honorary Recorder of Maidstone. He also sat in the Court of Appeal Criminal Division.

8. The background against which these claims arise concerns the arrangements which existed in the 1990s and early 2000s for the payment of

retirement pensions to judicial office-holders. Prior to 31 March 1995 the scheme for the payment of pensions to salaried circuit judges was governed by s. 5 of the JPA. With effect from 31 March 1995 ('the appointed day' pursuant to s. 31(2) of JUPRA), the JPA scheme was closed to new members and replaced by the scheme governed by JUPRA. Schedule 1 to the Act specified the offices which may be qualifying judicial offices, and included circuit judges. Circuit judges already in post before the appointed day were permitted to remain members of the JPA scheme or to elect, at any time up to retirement, to transfer to the JUPRA scheme. It is not disputed that the respondents were entitled to close the JPA pension scheme and introduce the JUPRA pension scheme when they did.

9. In the 1990s and early 2000s there was no pension scheme for fee-paid judicial office-holders. The office of recorder was not one of the offices specified in Schedule 1 to JUPRA. Regulation 17 of the PTWR specifically excluded them from the ambit of those regulations. As a consequence of a series of judgments in the Supreme Court (SC) and the Court of Justice of the European Union (CJEU) ('the *O'Brien* litigation'), the position changed. By amendments made in 2015, and further amendments made in 2022, JUPRA provides for a scheme to be established for the payment of pensions and other benefits to or on respect of fee-paid judges, and that such scheme may provide for payments in relation to a fee-paid judge's service before the scheme is established: JUPRA s 18A (1) and (2). The present scheme is contained in the Judicial Pensions (Fee-Paid Judges) Regulations 2017, as amended by the Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2023 (FPJPS).

10. In respect of their part-time service in the 1990s and early 2000s, the claimants acknowledge that formulae have been devised by the respondents which enable them to receive, on a *pro rata* basis, pension benefits which mirror as far as possible the benefits payable to a relevant salaried judge under the JPA. Thus, in respect of their part-time service the claimants now enjoy the benefit of JPA-equivalent pension terms, about which there is no dispute before this tribunal. Detailed calculations have not been completed in all cases and some interim payments have been made. To that extent, the pre-existing discrimination against the claimants as part-time judicial office-holders has been retrospectively remedied.

11. On 31 March 1995, the appointed day for the commencement of JUPRA, existing JPA members, such as the claimants' full-time comparators, were not compulsorily enrolled into JUPRA but retained their JPA rights (in the absence of any election). By the retrospective effect of the arrangements described above, the claimants also continued, after the appointed day, to have the benefit of JPA-equivalent terms reflecting the whole of their part-time service.

12. On the date of their full-time appointments in 2004, 2006 and 2007 respectively, the claimants were compulsorily enrolled into JUPRA, that is to say, with no right of election to remain on JPA terms. This was pursuant to s.1 of JUPRA, relevant extracts of which are set out below.

13. The office of assistant recorder no longer exists, and in this case no material distinction was drawn between assistant recorders and recorders No

further distinction will be made between them in this judgment, and the term 'recorder' will be used to include both. The respondent did not consider that a move from assistant recorder to recorder was of any significance; it did not amount to a material change of office since the work of both was comparable to the work of a circuit judge.

14. A central question in this case is whether, on appointment to the office of circuit judge, a recorder ceases to hold the office of recorder and 'is appointed to some other qualifying judicial office': s.1 of JUPRA, which is set out below. For that reason, all three claimants gave extensive evidence about the similarities and differences between the offices of recorder and circuit judge, drawing on both their personal experience and their wider knowledge of the circuit bench.

15. In their applications to be a circuit judge the claimants drew on their experience as recorders, as well as other relevant experience including, for example, in Mr Clayson's case, being a judge appointed to assist the UN in Kosovo in 2000, and, in Mr Griffith-Jones's case, having been an arbitrator. Mr Clayson said that a recorder could not in reality have held the office of Honorary Recorder of Bolton, nor taken on the role he had in Cyprus. Many of the features the claimants described were subject to occasional exceptions, but the following general picture emerged.

16. The legislative basis for the appointment of recorders and circuit judges is different. The claimants' appointments as recorders were very informal and they could not recall the details of the process. By contrast, their appointments as circuit judges followed a competency-based application process and interview. None of the claimants was successful at his first attempt. It was agreed that an applicant for the office of circuit judge does not have to have been a recorder – though it is rare for a successful applicant not to have been – and that being a recorder is no guarantee of a successful application.

17. Circuit judges receive a separate letter of appointment and there is a separate swearing-in ceremony; they also wear different robes. Only a circuit judge could be a resident judge, and Mr Griffith-Jones thought that legislation precluded a recorder from sitting in the Court of Appeal, as he did. There are numerous categories of serious criminal cases which are rarely if ever tried by recorders. These include serious sex cases, murder and attempt murder, terrorism, prison riot; recorders very rarely have specialist 'tickets' for these cases. Pre-trial preparation hearings in criminal cases are also heard by circuit judges. Because of their limited availability, recorders do not usually undertake long cases and cannot be resident judges.

18. Save for very rare circumstances, a circuit judge is a permanent appointment and he or she cannot be removed. Unlike a recorder, a circuit judge has to leave private practice and accept restrictions on future professional and political activities. Circuit judges generally have a base court where they have their own private room, whereas a recorder generally goes to sit wherever the circuit administration asks. A circuit judge may be asked to do work outside ordinary court hours, though that is infrequent. Recorders are rarely involved in the training or mentoring of other judges. Recorders are not generally paid

preparation time; a paid reading day is a rarity. A recorder is paid, *pro rata temporis*, the same as a circuit judge and sits ordinarily about thirty days per year, though this has varied over time.

19. I was referred also to the witness statement of Clement Goldstone given in the case of *Dodds and Ors v Ministry of Justice and Ors.* Mr Goldstone is an extremely experienced criminal judge who was a recorder before being appointed to the circuit bench. He summarised both the similarity and the distinction between the two offices at his paragraphs 16 and 19 thus,

> 'Where a recorder sits in the Crown Court, their role in that hearing in no way differs from the role a circuit judge would perform in that hearing. The distinction is the type of cases that are generally allocated to each type of judge ... [a recorder's] work will in all probability be confined to sentences, trials and appeals from the Magistrates' Court.'

20. In contrast to the position of recorders, there are now also salaried part-time circuit judges (though there were none at the time these claimants were recorders). These are circuit judges who are contracted to work a portion of full-time hours, such as fifty, or eighty percent. They are in all respects appointed to the office of circuit judge and, save for their reduced hours and any consequential restriction on their availability, perform the same functions as any other circuit judge.

21. The claimants were not unanimous on the question of the comparability of the two roles. Mr Clayson did not accept that a circuit judge and a recorder were not the same. Mr Woolman and Mr Griffith-Jones did not maintain that the two were the same, preferring to say that they were 'comparable'. The appointment of a recorder to be a circuit judge was, according to Mr Griffith-Jones, 'not merely an upgrade'. Ms Crasnow argues, however, that it was not even an upgrade: it was merely a case of a part-time circuit judge becoming full-time.

22. The fact that the former JPA scheme was commonly known as the 'fifteen-year scheme' and the replacement JUPRA scheme the 'twenty-year scheme' might suggest that the former was more generous. However, whether the JPA scheme or the JUPRA scheme is more beneficial in an individual case depends on the particular circumstances of the judicial office-holder, including length of service, age at retirement and reason for retirement. In this case, the respondents have not disputed the claimants' contention that in their particular circumstances the benefits they receive, or will receive, under the JUPRA scheme are less generous than those they would have received under the JPA, if they had been permitted to have pension benefits reflecting their service as circuit judges calculated under that scheme.

23. Under JUPRA the compulsory retirement age was set at 70, rather than 72 under The Courts Act 1971. When certain judges challenged this as less favourable treatment, the Lord Chancellor wrote on 28 May 2020, 'I confirm that both the Ministry of Justice and I accept that your statutory retirement age of 70 as set out in JUPRA 1993 is discriminatory on grounds of your part-time worker

status as fee-paid judges prior to 31 March 1995'. Consequently, the judges' appointments were extended beyond 70.

24. The respondents' policy in 1993 was to bring judicial office-holders into what Mr Darby called a 'modernised, unified scheme' scheme as soon as practicable whilst permitting those who had contractual rights under the previous JPA scheme to retain those rights if they wished. The means of putting that policy into effect was s. 1 of JUPRA, effective from 31 March 1995 and affecting at that time only salaried office-holders. Consequent on the *O'Brien* litigation, it was necessary to design – retrospectively – a scheme which provided fee-paid judges such as the claimants also with pension benefits no less favourable than their comparable full-time colleagues. The means of achieving that end was the FPJPS.

25. Following the judgment of the CJEU in *O'Brien v Ministry of Justice* [No. 2] concerning pre-7 April 2000 fee-paid judicial service, the respondents published their proposals to amend the FPJPS and engaged in a period of consultation from 24 June to 18 September 2000 aimed primarily at judges with pre-7 April 2000 fee-paid service. Mr Clayson responded to the consultation with a very short email dated 8 September in which he expressed support for the submissions by HHJ Platt of the same date. Judge Platt also engaged in correspondence with the respondents in January 2021 which was considered by the respondents notwithstanding that the consultation had closed. The matters raised touch on the interpretation to be given to s.1 of JUPRA, which is considered below.

The law

26. JUPRA 1993 provides:

1 Persons to whom this Part applies.

(1) This Part applies-

(a) to any person who first holds qualifying judicial office on or after the appointed day;

(b) to any person-

(i) who, immediately before the appointed day, was holding any qualifying judicial office, service in which was, in his case, subject to a judicial pension scheme; and

(ii) who, on or after that day, ceases to hold that office and is appointed to some other qualifying judicial office, service in which would (apart from this Act) have been subject, in his case, to some other judicial pension scheme;

(2) Any person-

(a) who holds qualifying judicial office on the appointed day, and

(b) who held such office at any time before that day, shall be entitled, in such circumstances as may be prescribed and subject to subsection (5) below, to make an election for this Part to apply to him, if it would not otherwise do so.

The appointed day for the purposes of section 1 was 31 March 1995.

27. The Framework Agreement on Part-Time Work annexed to Council Directive 97/81/EC provides:

Clause 3: Definitions

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 ...

Clause 4: Principle 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.

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

2 Meaning of full-time worker, part-time worker and comparable full-time worker

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

(a) both workers are –

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

5. Less favourable treatment of part-time workers

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

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

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

29. For the purposes of a claim under the PTWD or PTWR it has been conclusively decided that the work of a recorder is comparable to that of a circuit judge. In *O'Brien v Ministry of* Justice [2012] ICR 955, the CJEU said, 'the crucial factor is that they perform essentially the same activity.' The question of comparability is discussed further below.

The parties' positions in summary

30. Ms Crasnow contended that the claimants were, throughout their service, treated less favourably by the respondents than their comparator circuit judges appointed before 31 March 1995, by being denied the right to elect to have their pensions reflecting their full-time service calculated on JPA rather than JUPRA terms. The less favourable treatment commenced when the claimants were part-time workers and their comparators full-time, and carried on throughout their judicial carers, crystallising upon their retirement.

31. Ms Crasnow argued also that on the highest authority (the SC and CJEU in *O'Brien*) it had been decided that the work of a recorder and that of a circuit judge were comparable for the purposes of a claim under PTWR and PTWD. That comparability must be carried over into the interpretation of s.1(1)(b)(ii) of JUPRA which, accordingly, must be read in such a way that the office of circuit judge was not 'some other qualifying judicial office' vis-à-vis the office of recorder. If an interpretation of the domestic statute led to a contrary conclusion, which would result in the claims failing, then the section must be disapplied in order not to perpetuate the discrimination prohibited by *O'Brien*. The claimants were entitled to rely on the PTWD as having direct effect against the respondents, an emanation of the state.

32. Ms Crasnow summarised the claimants' position in her closing submissions, 'Recorders and circuit judges are definitively comparable offices for the purposes of the PTWD and the PTWD' (paragraph 33 of her closing submissions), and '*O'Brien* establishes conclusively that the two offices are not different such that the position of CJ is 'some other' office. Rather the office of CJ is the full-time equivalent of the office of recorder' (paragraph 50).

33. Mr Allen made a number of points in response. The comparability of recorders and circuit judges for the purposes of claims under the PTWR and PTWD was not to be read across to the interpretation of s.1 of JUPRA because that question was not before the SC or CJEU. On appointment as a circuit judge,

a recorder ceased to hold the office of recorder and was appointed to 'some other qualifying judicial office', service in which was, or would have been, subject to 'some other judicial pension scheme'. Accordingly, the claimants were correctly enrolled in the JUPRA pension scheme.

34. Mr Allen further argued that the treatment complained of, namely the denial of a right of election, arose only when the claimants were no longer part-time workers and was, in any case, not on the ground that they were, or had been, part-time workers. Further, the comparator circuit judge relied upon would also have been compulsorily enrolled in the JUPRA scheme if, like the claimants, he or she had ceased to hold that office and been appointed to some other qualifying judicial office subject to some other judicial pension scheme. Accordingly, there was no less favourable treatment of the claimants than their comparators on the ground of part-time worker status. In the alternative, the respondents' treatment of the claimants was objectively justified.

Discussion and conclusions

Two further questions

35. The parties provided the tribunal with an agreed list of issues including matters on which they were agreed and those which are to be decided. It is important at the outset to keep clearly in mind the exact nature of the claimants' complaint. On appointment as circuit judges, the claimants were compulsorily enrolled in the JUPRA scheme. At the time of their appointment, that happened because they were treated as 'first holding qualifying judicial office on or after the appointed day': JUPRA s.1(1)(a). Now that it has been accepted, retrospectively, that the claimants must be treated as having held the qualifying judicial office of recorder before the appointed day, and that that office was, retrospectively, subject to a judicial pension scheme, it is s.1(1)(b) which, on the respondents' argument, causes Part 1 of JUPRA to apply to the claimants. It is the respondents' failure to give the claimants, on their appointment as circuit judges, a right of election between pension schemes, similar to that granted to their comparators by s.1(2) of JUPRA, of which the claimants now complain. The effects of that failure subsisted until the claimants' retirement and beyond.

36. By s.1(1)(b), JUPRA will apply to an office-holder who ceases to hold one 'qualifying judicial office' subject to a judicial pension scheme and is appointed to another which is subject to some other judicial pension scheme. Thus, at the outset of the hearing, counsel jointly said that, in addition to the agreed list of issues, JUPRA section 1(1)(b)(ii) raised two further important questions which this tribunal needed to address: firstly, whether, on their appointment as circuit judges, the claimant recorders were 'appointed to some other qualifying judicial office'; and secondly, whether service in that other office 'would (apart from [that] Act) have been subject ... to some other judicial pension scheme.'

37. A recorder appointed under section 21 of the Courts Act 1971 (as amended) undoubtedly holds an office,' per Lord Walker in *O'Brien v Ministry of Justice* [2010] UKSC 34, at paragraph 27. But at the time material to this case the office of recorder was not specified in Schedule 1 to JUPRA as a qualifying

judicial office. Thus, in 1993 recorders had no entitlement to a judicial pension on retirement, and the questions posed in the previous paragraph did not arise. Retrospectively, however, that discrimination has been remedied, and recorders now have the benefit of a pension scheme comparable to circuit judges. In order not to perpetuate the discrimination which was ruled unlawful in the *O'Brien* litigation, it is therefore necessary to read JUPRA s.1(1)(b) and Schedule 1 such that 'qualifying judicial office' includes the office of recorder, and to assume that that office was at all material times, and not merely retrospectively, subject to a judicial pension scheme.

38. The first of the two questions requires me to construe the meaning of 'some other qualifying judicial office' in relation to recorders and circuit judges. In order to answer the second, I am invited to step into the world of hypothesis. Assuming that the JPA had, from the outset, been compliant with the respondents' duty not to treat part-time workers less favourably, and that it had accordingly included a pension scheme for recorders, would the draftsman have achieved that aim (a) by giving the benefit of the same judicial pension scheme to recorders as well as to circuit judges, or (b) by drafting a separate judicial pension scheme for recorders, which would therefore have been 'some other judicial pension scheme', as contemplated by JUPRA s. 1(1)(b)(ii)?

39. The first question: is the office of circuit judge 'some other qualifying judicial office' vis-à-vis the office of recorder. On the one hand, the CJEU has decided that 'they perform essentially the same activity', and Ms Crasnow argues that that must mean they cannot be 'some other' office vis-à-vis each other. On the other hand, I heard a wealth of evidence from the claimants themselves concerning the differences between the two offices, and that they each made one unsuccessful attempt before being appointed circuit judges (other recorders, though not claimants in this case, do not succeed at all). Two of the claimants preferred to say the offices were comparable rather than the same. Mr Allen says that the fact that two offices are comparable for the purposes of the PTWR and the PTWD does not mean that they are the same office, rather than 'some other qualifying judicial office' for the purposes of s.1 of JUPRA.

40. In *O'Brien,* the CJEU was considering, at paragraph 61, the criteria for defining 'comparable full-time worker' and noted the definition in clause 3.2 of the framework agreement: 'a full-time worker … who is engaged in the same or a similar work/occupation …' The court went on to say, '[it] must be held that those criteria are based on the content of the activity of the persons concerned.' The court continued, at paragraph 62, '[t]herefore, it cannot be argued that full-time judges and recorders are not in a comparable situation because they have different careers, as the latter retain the opportunity to practise as barristers. The crucial factor is that they perform essentially the same activity.'

41. The court was there rejecting the argument that the different careers of circuit judges and recorders meant that they were not 'comparable full-time workers.' The court was acknowledging that there are differences between the careers of recorders and full-time judges, but saying that those differences were irrelevant to a consideration of 'the content of the activity', that is to say the work of the two.

42. For the purposes of interpreting s.1 of JUPRA, it is not the comparability of the work done by them which is in issue; that has been conclusively decided. The question for this tribunal is a different one: is the appointment of a recorder to be a circuit judge an appointment 'to some other qualifying judicial office' or is it, as Ms Crasnow puts it, simply a case of a part-timer going full time? That question, Mr Allen says, was not before the SC or CJEU for consideration.

43. Ms Crasnow rightly pointed out that the claimants do not have to establish that the two offices are the *same*, though, as she herself found, it is difficult to avoid the terms 'same' and 'different' when discussing this question. It seems to me that the contrast between 'other' and 'different', and 'not other' and 'same', are distinctions with vanishingly small semantic differences, if any at all in this context. If an office is not 'some other office' then it may be thought that, for the purposes in question, it is regarded as the same office. Ms Crasnow (paragraph 55 of her closing submissions) says that it is only in the timing of their payment and in their hours of work that they differ. That summation, however, does not do justice to the evidence of the claimants themselves concerning the numerous differences between the two offices, albeit that those differences were not considered by the SC/CJEU to be relevant to the decision whether the work of the two – 'the content of the activity' – was essentially the same.

44. Mr Woolman and Mr Griffith-Jones were, in my view, right to draw back from saying that the two offices were the same, and to prefer the word comparable. Their evidence on the point, which I prefer to that of Mr Clayson, is inconsistent, in my view, with the proposition that a move from one to the other is no more than a part-timer going full-time. When they applied to be circuit judges, the claimants were doing much more than applying to change their working hours; they were applying for a wholly different professional life. The evidence of all three, which I have set out above (paragraphs 17ff) and do not repeat here, amply demonstrates the many differences. If it were simply a question of a part-timer going full-time, one might wonder how, on a competency-based exercise, each could have failed at the first attempt. If they had been asked at the time whether they were applying to continue in their existing office, or to be appointed to 'some other' office, the answer is in my judgment obvious. If the office of recorder had been included in JUPRA, I have no doubt that it would have had a separate entry in Schedule 1 from that of circuit judge, reflecting the fact that the two are not the same office and have different statutory origins. I did not derive any assistance on this question from the fact that the respondents acknowledge that there is no distinction to be drawn in the context of this case between assistant recorders and recorders. The similarity between the two compelled that concession. The position of recorders vis-à-vis circuit judges is entirely different, and the distinction between them of a wholly different order.

45. Ms Crasnow's submission (paragraph 50 of her closing submissions) that 'the finding in *O'Brien* establishes conclusively that ... the office of CJ is the full-time equivalent of the office of recorder ... and has determined these posts are substantively the same' also pushes her argument beyond what the CJEU decided. What the CJEU decided is not that the two offices are the same, but that the two 'perform essentially the same activity,' that is to say their work is

essentially the same, notwithstanding that they have 'different careers'. Mr Allen is right to say that the question posed by s.1 of JUPRA was not before the CJEU.

46. Based on a reading of the statute, and on the evidence of the claimants, I therefore find that when the claimant recorders were appointed circuit judges, they ceased to hold the office of recorder and were appointed to 'some other qualifying judicial office' within the meaning of s.1(1)(b)(ii) of JUPRA.

47. The second question: if the JPA had included a pension scheme for recorders, would service as a recorder have been subject to the same scheme as that for circuit judges, or to 'some other judicial pension scheme'. Whilst tribunals do sometimes have to speculate about future events (when assessing future loss, for example), this tribunal has never before been asked to make a finding of fact about how someone, a putative draftsman, would have approached a problem which would have arisen only if, over forty years ago, it had been appreciated that it was necessary to design a pension scheme not only for salaried but also for fee-paid judicial office-holders. The tribunal therefore approaches this hypothetical question with more than usual caution.

48. The only direct evidence on this point came from Mr Darby who thought that it would have been impracticable for both salaried and fee-paid office-holders to be catered for in the same scheme. His reasons related to the very different benefit mechanisms for salaried and fee-paid judges. Unlike the former, the latter often hold more than one judicial appointment, sometimes with different rates of remuneration; fee-paid judges' reckonable service has to be derived from typical sitting days of salaried judges; there has to be a process of pro rating; and fee-paid judges may partially retire, that is from some but not all of their appointments. Mr Darby derived some support from the fact that FPJPS, when introduced, was set up as a scheme separate from the JUPRA scheme. In cross-examination he said that, in aggregate, the complications were such that you would inevitably have needed a separate pension scheme for part-time office-holders, and even if such a scheme had been included in the JPA, it would have been a separate part of the Act.

49. There is before me also correspondence between the respondents and HH Judge Platt who, as Mr Clayson acknowledged, is highly knowledgeable on questions of judicial pensions, though Mr Clayson did not agree with Judge Platt on all points. Mr Allen sought to place some reliance on Judge Platt's statement in his paper of January 2021 that '[f]or technical reasons it is practically impossible simply to amend the section 5 scheme to include part-time fee-paid recorders.' Ms Crasnow, for her part, sought to distinguish the question of amendment of the existing JPA scheme from the question whether it could have been drafted *ab initio* to include fee-paid office-holders. I found it unsatisfactory to have Judge Platt's meaning dissected and interpreted at second hand in this way without having heard what he might have said about either of these, or any other matters. I therefore thought it inappropriate to place reliance on his correspondence with the respondents. The claimants were not in a position to assist the tribunal on this question.

50. Mr Darby was necessarily also speculating, but from a position of considerable expertise. At a number of points Ms Crasnow criticised Mr Darby's evidence as self-serving. If there was any implication in that criticism that Mr Darby did not honestly believe what he was saying, then such criticism was in my view unfair, the more so as the claimants adduced no evidence themselves on the point. I found Mr Darby to be a witness who weighed his answers carefully and who was willing to concede the validity of points put to him.

51. The question is not whether one scheme *could* have accommodated both recorders and circuit judges, but what solution would the putative draftsman probably have favoured. For the reasons given by Mr Darby, whose expertise in this matter deserves respect, I find that, on the assumptions set out above, there would in 1981 most probably have been two separate pension schemes, one for salaried circuit judges and one for fee-paid judicial office-holders such as recorders. I turn now to consider the issues identified in advance by the parties.

Part-time worker status

52. The parties record that it is agreed that the claimants, in their former capacity as assistant recorders and/or recorders, were part-time workers for the purposes of regulation 2(2) of the PTWR. Further, the respondents aver that when the claimants were appointed as circuit judges, or senior circuit judges, they ceased to be part-time workers for the purposes of regulation 2(2) of the PTWR. Whilst not recorded as agreed, that latter point was not the subject of any argument, and I have no difficulty in so finding.

The comparator

53. The parties record that, for the purposes of regulation 2(4)(a)(ii) and 5(1) of the PTWR, it is agreed that the offices of recorder and/or assistant recorder are comparable to the office of circuit judge and/or senior circuit judge. That proposition has been conclusively established by the Supreme Court and the CJEU in the *O'Brien* litigation because 'they perform essentially the same activity'. The respondents' agreement extends only as far as saying that the two are broadly similar. I have dealt above with the dispute between the parties about how far the comparability of the two offices properly extends.

54. Further, the respondents argue that the claimants' comparator is not apt. Circuit judges appointed before 31 March 1995 had the right, as long as they remained circuit judges, to retain their benefits under the JPA scheme. Likewise, recorders appointed before 31 March 1995 had the right (retrospectively granted) to retain their JPA-equivalent benefits under FPJPS for as long as they remained recorders. The event which triggers the compulsory transfer, of both the claimants and their comparator, into JUPRA is appointment to 'some other qualifying judicial office'. Thus, if, after 31 March 1995, a sitting circuit judge were appointed, for example, to the High Court bench, he or she would be transferred into the JUPRA scheme; and similarly, if a recorder were appointed to be a circuit judge, as the claimants were. It is therefore necessary, the respondents argue, to build into the comparator the fact of appointment 'to some other qualifying judicial office' in order to ensure that like is being compared with like.

55. Thus, the answer to the first question posed by s.1 of JUPRA, discussed above (see paragraph 40ff) is relevant to the question of the comparator also. It follows, in my judgment, from my finding that the claimants, in 2004, 2006 and 2007 respectively, ceased to hold the office of recorder and were appointed to 'some other qualifying judicial office' that it would be necessary, to ensure that like is compared with like, that the claimants' comparator also be similarly appointed. A comparator circuit judge who was similarly appointed after 31 March 1995 to 'some other qualifying judicial office' would have been treated in the same way the claimants were.

56. The respondents also argue that the claimants can no longer rely on their pleaded comparison from the date of their appointment as full-time circuit judges. This point is dealt with below.

Less favourable treatment

57. The parties pose the question: were the claimants treated less favourably than their comparators by being transferred from their JPA-equivalent pension terms to JUPRA pension terms upon their appointment as circuit judges? It will be recalled that the claimants were appointed circuit judges in 2004, 2006 and 2007 respectively; those are therefore the points in time at which the less favourable treatment is said to have occurred. The essence of the complaint was repeatedly said to be the compulsory transfer with no right to elect to stay on JPA-equivalent terms. The respondents say that the claimants were treated in the same way as their comparator would have been treated in like circumstances, that is to say, if there had been an appointment to 'some other qualifying judicial office' which was, or would have been, subject to some other judicial pension scheme.

58. A further point raised by the respondents in the list of issues (at paragraph 10(b)), namely that there was no less favourable treatment because JUPRA offers advantages compared with the JPA scheme, was not seriously argued. It was the acknowledged position that, depending on a judge's personal circumstances, either scheme might prove more beneficial.

59. Up to the point when the claimants were appointed as circuit judges, the full-time comparators (after 31 March 1995) had a right to retain their JPA pension terms and not to be forcibly enrolled in the JUPRA scheme. Likewise, up to that point, the part-time claimants had – retrospectively given – the benefit of JPA-equivalent pension terms, and were also not forcibly enrolled in the JUPRA scheme. Accordingly, I am unable to find that there was less favourable treatment of the claimants than their comparators before the point at which the claimants were appointed as circuit judges.

60. As noted above, the respondents say that once the claimants were appointed circuit judges they became full-time workers, and no longer entitled to claim under the PTWR/PTWD. It was at that point that the less favourable treatment/detriment, if any, was suffered. Ms Crasnow argues that the less favourable treatment commenced when the claimants were part-time workers

and continued to the point of retirement when the detriment was experienced. Relying on *Miller v MoJ* [2019] UKSC 60, she says there is no requirement that a judge be a part-time worker at the point of retirement.

61. In cases such as that of Mr O'Brien, the claimant was less favourably treated throughout his period of part-time service: every time he was paid for a sitting he should also, like his comparator, have earned credit towards his pension. *Miller* establishes that a claim in respect of such past less favourable treatment may be made at any time up to retirement, when the detriment occurs, subject to the time limit for making a tribunal complaint.

62. In the case of the present claimants, however, I can find no less favourable treatment of them during their period of part-time service; their comparators were on JPA terms and they were on JPA-equivalent terms. On their appointment as full-time circuit judges, the claimants were forcibly enrolled in the JUPRA scheme. From that point the claimants can say, correctly, that they did not have a right of election between JPA and JUPRA pension terms, which their comparator circuit judges who were appointed before 31.3.1995 did have. To that extent they have suffered less favourable treatment.

63. For the reason I have set out above, their case differs from the facts in cases such as *O'Brien* and *Miller*. As full-time workers, who suffered disparate treatment compared with other full-time workers, the claimants are not entitled to claim in respect of that treatment under the PTWR/PTWD. The reason for that disparate treatment is dealt with below.

Detriment

64. On the assumption – not challenged in this case – that JPA terms would have been more advantageous to these claimants, their disparate treatment crystallised in the form of less advantageous pension terms at the point when they retired, or will retire. It is not disputed that such less advantageous terms amount to a detriment.

Reason for the less favourable treatment

65. Was the reason for any less favourable treatment 'on the ground of' part-time worker status for the purposes of regulation 5(2)(a) of the PTWR? The omission, in regulation 5(2)(a) of the PTWR, of the word 'solely' which appears in Clause 4(1) of the Framework Agreement is of no significance in this case, and is more favourable to the claimants. It must be shown that the treatment complained of is 'on the ground' that they were part-time workers, but not that that was the only cause. Part-time status must be the 'effective and predominant cause' of the less favourable treatment: *Sharma v Manchester City Council* [2008] ICR 623 and *Carl v University of Sheffield* [2009] ICR 616.

66. By regulation 8(6) of the PTWR, it is for the respondent to identify the ground for the less favourable treatment or detriment. The respondents say there were two effective and predominant causes: firstly, appointment as circuit judges, and secondly, the date of appointment on/after 31 March 1995. The point is

encapsulated in Ms Crasnow's formulation (paragraph 1 of her closing submissions):

> 'The claimants are circuit judges or retired circuit judges who were appointed to that office on or after 31 March 1995 but who were previously appointed as recorders before that date. These claimants have been and stand in future to be treated less favourably by the MoJ in respect of their pension rights than circuit judges who were appointed to that office before 31 March 1995.'

The statements in the paragraph above are all factually true. The paragraph impliedly poses the question: if the claimants had not been previously appointed as recorders before 31 March 1995, would they have been treated the same or differently? Was their part-time service simply a surrounding historical circumstance, or was it the 'effective and predominant cause' of their treatment?

67. In *Engel v Ministry of Justice* [2017] ICR 277, HHJ Richardson, at paragraph 18, adopted the formulation put forward by counsel for the respondent: '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:'

68. It is instructive to consider the hypothetical scenarios advanced by Mr Allen. It is not, of course, suggested that they are directly comparable to the claimants' circumstances in all respects; indeed, that is the point of them. Ms Crasnow's criticisms of this exercise are not apt (paragraph 131 of her closing submissions). When seeking to identify the 'effective and predominant' cause for treatment (*Carl,* paragraphs 24-42), it is a legitimate analytical tool to isolate, or eliminate, the disputed cause(s) and then ask whether the treatment would have been the same or different.

- If the claimants had not been appointed circuit judges, and had continued as part-time recorders until retirement, they would, with the benefit of FPJPS, have remained on JPA-equivalent terms, with no less favourable treatment of them than their full-time comparators. It is when they ceased to be part-time workers, on appointment as circuit judges, that the treatment occurred of which they now complain.

- A circuit judge appointed before 31 March 1995 (the position of the claimants' comparators), whether previously part-time or not, would not have been required to leave the JPA scheme. This indicates that not merely the fact of appointment, but also the date of appointment to circuit judge was an effective cause of the claimants' less favourable treatment. This is acknowledged by Ms Crasnow (see paragraph 66 above).

- A circuit judge appointed when the claimants were so appointed, but who had never been part-time, would have been treated exactly as the claimants were. This also indicates that the date of appointment as circuit judge was an effective cause of their treatment.

- A circuit judge appointed when the claimants were so appointed, with previous part-time service as a recorder commencing after 31 March 1995, would also have been treated exactly as the claimants were. This also indicates that the claimants' case depends not only on their having part-time service, but on their having been appointed part-time before rather than after 31 March 1995.

69. If the claimants' case is well founded then, taken to its extreme, it would involve a finding that a recorder first appointed on 30 March 1995, and subsequently appointed a circuit judge, would be entitled to make a like claim, whereas an otherwise identical recorder first appointed on 31 March 1995 would not. Whilst a part-time worker is not an appropriate comparator for another part-time worker for the purposes of a claim under the PTWR, it is nevertheless instructive, for the purposes of exploring the reason for particular treatment, to consider what explains the different treatment of two part-time workers, appointed one day apart? In the absence of some cogent explanation, one would expect the two to be treated the same. The explanation for the difference is that on 30 March 1995 the JPA scheme closed to new members, and anyone appointed after that date – full-time or part-time (retrospectively) – was enrolled in the JUPRA scheme. From the above analysis, it follows, in my judgment, that the effective and predominant cause of the claimants' less favourable treatment was their appointment as circuit judges after 30 March 1995, and not their part-time status, whether before or after that date.

70. On their appointment as circuit judges, the difference in treatment between the claimants and the circuit judge they rely on as a comparator was no longer a difference between a part-time and a full-time worker, but between two full-time circuit judges, according to the date of their respective appointments. That the claimants are unhappy about this difference is understandable, but it is in the nature of an injustice, or grievance, of the kind referred to by HHJ Richardson in *Engel*, and did not result from their previous part-time status. The question of the claimants' retirement age being reduced from 72 to 70 seems to me to fall into the same category as the claim in this case: it was a consequence of Part 1 of JUPRA applying to them. If it had been for decision by me, I would have decided it in the same way as this claim. Mr Darby was not cross-examined on this point, though he was in post at the time, and I therefore do not know why the respondents took a different view in 2020.

71. In the light of the conclusions I have reached above about the extent of the comparability of the two offices in question, and about the probability of their being subject to separate pension schemes, it does not seem to me that s.1(1)(b)(ii) of JUPRA is in conflict with the authority of the CJEU in *O'Brien*. It is therefore not necessary to consider whether the PTWD requires the section to be disregarded.

Objective justification

72. Was any less favourable treatment found to have been occasioned justified on objective grounds? In the absence of a finding of less favourable treatment on the ground of part-time worker status, strictly speaking the question

of justification does not arise. However, in deference to the arguments advanced, and in the event that I am wrong in my earlier analysis, I deal with them here on the assumption that otherwise unlawful less favourable treatment had been established.

73. In *Ministry of Justice v O'Brien* [2013] ICR, the SC, referring to the judgment of the CJEU in the same case, summarised at paragraph 45 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.'

74. In their grounds of resistance, the respondents rely on four aims to justify any less favourable treatment:

(a) consistent treatment of judicial office-holders, fee-paid and salaried;

(b) ensuring that the approach taken towards pension entitlement for the fee-paid judiciary is reasonably compatible with the existing legislative framework applicable to the salaried judiciary, including as this relates to transfers between schemes;

(c) efficient use of resources;

(d) avoidance of other forms of discrimination, in particular based on the protected characteristic of age.

Consistent treatment of judicial office-holders

75. Concerning consistent treatment of judicial office-holders, Mr Darby said that if these claimants are successful 'the logical consequence will be that they will be treated more favourably, rather than equivalent to, salaried circuit judges in similar situations who had not previously been fee-paid judges prior to 31.3.1995.' There may be some force in that point. What the claimants argue for is, in effect, a cut-off at 31 March 1995, such that anyone appointed before that date – whether full- or part-time – would enjoy the right to elect which scheme to belong to pursuant to s.1(2) of JUPRA. That might have been the result of a successful claim by these claimants. To remedy the inconsistency complained of by the claimants, in the way they seek, would replace it with the inconsistency highlighted by Mr Darby. Designing a new pension scheme, while permitting those with acquired rights to retain them, inevitably builds into the scheme some, albeit temporary and limited, element of inconsistency of treatment between those who have, and those who do not have, acquired rights. The respondents decided to incorporate that degree of inconsistency into the JUPRA scheme. I accept that the pursuit of consistency, to the extent possible, is a legitimate aim, but, given the inevitability of some inconsistency, I cannot find in it anything which would have justified otherwise unlawful treatment of the claimants, had I found that there was such.

Ensuring that the approach taken towards pension entitlement for the fee-paid judiciary is reasonably compatible with the existing legislative framework

applicable to the salaried judiciary, including as this relates to transfers between schemes;

76. I find it difficult to distinguish sensibly between ensuring consistent treatment of fee-paid and salaried office-holders, and on the other hand ensuring compatibility with the existing legislative framework applicable to both. Aims (a) and (b) seem to me to come to very much the same thing. If I had found otherwise unlawful treatment, I would not have held that it was justified by this aim.

Efficient use of resources

77. Mr Darby said in evidence that there was no budgetary pressure which would have justified otherwise unlawful treatment of the claimants. The respondents' aim throughout was to treat the claimants no less favourably that their comparators. Mr Allen abandoned this ground.

Avoidance of other forms of discrimination, in particular based on the protected characteristic of age.

78. The question of other possible forms of discrimination was not elaborated by Mr Darby with any specificity. He speculated that circuit judges appointed after 31 March 1995 might conceivably make age discrimination claims, on the assumption that they might be in a younger age group than the claimants. Mr Allen said that the respondents were wary of potential age discrimination allegations after *McCloud.* This argument was hypothetical in the extreme, especially since the group identified by Mr Darby is already treated less favourably under JUPRA by being deprived of the right of election given to their colleagues appointed before 31 March 1995. Whilst I do not doubt that the avoidance of discrimination is a legitimate aim, the respondents did not come close to establishing that, in order to avoid possible age discrimination against one group, it would be reasonably necessary to treat another group less favourably on the ground of their part-time worker status.

79. The respondents' case on justification was not made out. The claimants' own case was based on seeking consistent treatment with their comparators. The respondents did not explain why the tribunal should find it justifiable to depart from that aspect of consistency in pursuit of some other form of consistency, which was in any case not elaborated. If I had found less favourable treatment on grounds of part-time worker status, I would have found nothing in Mr Darby's evidence or Mr Allen's submissions to persuade me that such treatment was justified on objective grounds.

Summary

80. I find:

(1) For the purposes of s.1(1)(b)(ii) of JUPRA, the office of circuit judge is 'some other qualifying judicial office' vis-à-vis the office of recorder, notwithstanding that, for the purposes of the PTWR and the PTWD, their

work is comparable. The CJEU in *O'Brien* was considering only the latter, and not the former, question.

(2) When the claimants were appointed circuit judges, they ceased to hold the office of recorder and were appointed to some other qualifying judicial office, service in which would (apart from JUPRA) have been subject to some other judicial pension scheme.

(3) In order to ensure that like is compared with like, the claimants' comparator also would have to cease to hold their current qualifying office and be appointed to some other qualifying judicial office. Such a comparator would have been treated as the claimants were treated. The comparator relied on by the claimants is to that extent not apt.

(4) When the claimants suffered the less favourable treatment complained of, they were full-time workers and are therefore not entitled to complain of that treatment under the PTWR/PTWD.

(5) The effective and predominant cause of the claimants' less favourable treatment was their appointment as circuit judges after 30 March 1995, and not their part-time worker status.

(6) If there had been unlawful less favourable treatment of the claimants by the respondents, the respondents have failed to justify such treatment on objective grounds.

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Employment Judge Williams

Dated: ……31 August 2023……..……..

Judgment and Reasons sent to the parties on:

……31 August 2023.....

…….....
For the Tribunal Office