Neutral Citation Number: [2024] EAT 99

Case No: EA-2023-001220-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 June 2024

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

(1) HIS HONOUR TIMOTHY CLAYSON

(2) HIS HONOUR ANDREW WOOLMAN

(3) HIS HONOUR DAVID GRIFFITH-JONES

Appellants
(Claimants below)

- and –

(1) MINISTRY OF JUSTICE

(2) LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE

Respondents
(Respondents below)

- -
- -

Ms Rachel Crasnow KC and Ms Tamar Burton (instructed by Leigh Day) appeared for the Appellants
Mr Andrew Allen KC and Mr Alexander Line (instructed by Government Legal Department) appeared for the Respondents

Hearing date: 15 and 16 May 2024

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JUDGMENT

SUMMARY

Part-timers; discrimination; judges' pensions

The claimants were circuit judges appointed after 31 March 1995 (the "appointed day" under the Judicial Pensions and Retirement Act 1993 (**JUPRA**)). They were former fee-paid part-time recorders (appointed as such before 31 March 1995) who on their appointment as circuit judges were compulsorily enrolled in the JUPRA pension scheme and denied access to the (for them) more favourable Judicial Pensions Act 1981 (**JPA**) pension scheme.

Their comparators were circuit judges appointed before 31 March 1995, who under JUPRA were allowed to remain on JPA scheme terms after that date, unlike the claimants. The claimants had already been granted a pension on JPA terms in relation to their sittings as recorders, following the *O'Brien* litigation (*O'Brien v. Ministry of Justice (Nos. 1 and 2)* [2012] ICR 995; [2013] ICR 499; [2017] ICR 1101; [2019] ICR 505).

The tribunal had been entitled to decide that the offices of recorder and circuit judge were different, although circuit judges and recorders performed essentially the same activities in their judicial work. The tribunal was not bound by the reasoning of the Court of Justice of the European Union in *O'Brien v. Ministry of Justice* [2012] ICR 995 to decide that the offices of circuit judge and recorder were one and the same. The tribunal had not erred in its consideration of the then domestic legislation.

The tribunal had been entitled to decide that the effective and predominant cause of the claimants being denied access to JPA scheme terms after being appointed as circuit judges, while their comparators (appointed as salaried circuit judges before 31 March 1995) were allowed to remain on JPA scheme terms on the enactment of JUPRA, was not that the claimants had served part-time as recorders, both before and after 31 March 1995; but rather, that the claimants were part of a group of judges appointed after 31 March 1995 to a different qualifying judicial office for pension purposes.

THE HONOURABLE MR JUSTICE KERR:

Introduction

1. The appellant circuit judges (**the claimants**) appeal against the reserved decision of Employment Judge Stuart Williams dated and sent to the parties on 31 August 2023 (after a five day hearing in early July 2023) that the respondents below and in this appeal (**the respondents**) "did not treat the claimants less favourably than comparable full-time workers on the ground that the claimants were part-time workers"; and dismissing their claims. In practice this also renders untenable, subject to this and any further appeal, the claims of other circuit judge claimants in the same position as these claimants. By an order made on 4 December 2023, all three grounds of appeal were permitted by His Honour Judge Shanks to proceed to a full hearing.

2. A useful summary of the claims is found in the opening paragraphs of the judgment below. I will use the same abbreviations:

> **"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. More precisely, the comparator judges are defined in the grounds of challenge attached to the ET1 form used below, at paragraph 6:

> **"… each Claimant is entitled to a pension on a basis *pro rata temporis* to a full-time Circuit Judge or Senior Circuit Judge (FTCJ) who commenced service on or before the date that the Claimant commenced part-time service and retired after the Claimant commenced full-time service …."**

4. The first ground asserts errors of law in comparing the position of the claimants with that of the comparators, circuit judges with a different judicial office holding history and better pension rights. The second ground is that the judge "wrongly concluded that the less favourable treatment arose and concluded when the Claimants transferred from Recorder to Circuit Judge and therefore they were not-time workers when the less favourable treatment occurred". The third ground is that the judge erred when addressing the reason for the less favourable treatment; he should have found

that the reason "arose from their part-time status." The quotes are from the written grounds of appeal.

5. The respondents asserted in their answer that they rely on the reasons given by the judge below and "additional reasons set out below". The additional reasons are not sharply differentiated from the judge's reasons. The respondents do not cross-appeal and do not say the judge erred in any way. The respondents' answer defends the decision below, with added observations about the factual context and the contentions of the parties in their pleadings and before the judge. The same approach is found in the respondents' skeleton argument.

The Facts

6. The relevant facts, as found by the tribunal and told in chronological order, include changes in the law relating to judicial office holding and judicial pensions. The Courts Act 1971 created the Crown Court to replace the old courts of assize and quarter sessions. Circuit judges, recorders and (then but no longer) assistant recorders were appointed to sit in the new Crown Court and perform such other judicial functions as may be conferred on them (see in particular, as originally enacted, sections 3, 4, 16, 21 and 24). Circuit judges normally sit in the Crown Court and County Court. Some also sit in the High Court and Court of Appeal Criminal Division.

7. In 1981, the JPA was enacted. It provided, as the name suggests, for a judicial pension scheme (**the JPA scheme**). All that need be said about the JPA scheme here is that it is common ground, and was below, that the terms of a judicial pension under the JPA, or "JPA equivalent terms", are likely to be (though always depending on an individual's personal and financial circumstances as at retirement) more favourable for these claimants and others than those of a pension under the JUPRA. There was at that time (and for decades thereafter) no pension scheme for fee-paid judicial office holders such as recorders or assistant recorders.

8. At some point before July 1992, the comparator circuit judges were appointed as circuit judges. Those were full-time salaried appointments. The comparator judges may or may not previously have held part-time fee-paid judicial positions; it does not matter. On appointment, they became eligible to join, and did join, the JPA scheme. Then in July and August 1992, the three claimants were appointed as assistant recorders. Later they become recorders[1]. On appointment, they entered no pension scheme, for there was not then one for part-time fee-paid judges.

9. The judge made findings comparing the work done by the claimants while they were recorders with the work done by the comparator circuit judges. It was not disputed that the work done by the

[1] Nothing turns on the distinction between a recorder and an assistant recorder. Like the tribunal below, I will use the term "recorder" to include an assistant recorder.

claimants and their comparators was comparable for the purpose of a claim under the PTWD or the PTWR. The Court of Justice had decided in *O'Brien v. Ministry of Justice* [2012] ICR 995 (***O'Brien (1)***) at [62] that "they perform essentially the same activity". Both do classic judicial work, conducting trials and applying the law. The judge in this case noted career differences between recorders and circuit judges, but not ones that permitted anyone to go behind the Court of Justice's proposition that fee-paid recorders and full-time salaried judges perform essentially the same activity.

10. The judge noted that circuit judges can hold appointments such as were held by the claimants, not in practice open to recorders: as resident judge or Honorary Recorder of a city; as a judge at a British sovereign base in Cyprus; or appointed to assist the UN mission in Kosovo. Circuit judges, but not recorders, may sit in the Court of Appeal Criminal Division. They wear different robes. The appointment process is more formal for circuit judges than for recorders. Circuit judges have strong protection against removal from office but, on the other hand, must abjure private practice for ever, unlike recorders. Circuit judges tend to try heavy cases such as homicide and serious sexual offence cases. Recorders are more flexible and itinerant, responding to the short term needs of the circuit.

11. The judge found that these differences supported the conclusion that recorders who subsequently become circuit judges are appointed to a different judicial office. He rejected the submission of the claimants that the judicial office remained the same and that a recorder becoming a circuit judge was a part-time judge becoming a full-time judge in the same office. The significance of that point arose from the passing of the JUPRA and its implementation from 31 March 1995, to which I will come in a moment.

12. Before doing so, I record that the claimants' part-time service as recorders (up to and beyond 31 March 1995) has retrospectively become pensionable service on "JPA equivalent" terms. While they had no pension entitlement when they performed that service, the judge explained at paragraph 10 of his decision that (pursuant to later legislation some of which I shall mention):

> **"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."**

13. With effect from 31 March 1995, the JUPRA entered into force. It has since been amended significantly. It contained no provision for recorders, serving as judges part-time, to be entitled to a pension. It applied to, among others, a person who "first holds qualifying judicial office on or after the appointed day" (section 1(1)(a)). The "appointed day" was 31 March 1995. Such a person would

be entitled to a pension under the JUPRA scheme. A "qualifying judicial office" was one of those set out in Schedule 1 to the JUPRA, held on a salaried basis (section 1(6)).

14. The list of salaried qualifying judicial offices in Schedule 1 included full-time judges of all sorts and has been amended to add judges whose offices have been created since (e.g. Supreme Court justices and district judges in the magistrates' court). It included circuit judges. It did not include recorders, who did not serve on a salaried basis. The right to a JUPRA pension also applied to any person who on or after 31 March 1995 "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" (section 1(1)(b)(ii)).

15. The judge correctly described the effect of the JUPRA for circuit judges such as the comparator judges in this case, at paragraph 8:

> **"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."**

16. The right of those serving as salaried circuit judges as at 31 March 1995 to opt into the JUPRA scheme - or, more importantly, not to do so - was the product of section 1(2) of the JUPRA: a person who holds "qualifying judicial office on the appointed day" and "held such office … before that day" may "make an election for this Part to apply to him, if it would not otherwise do so". Absent such an election, that person would not receive a pension under the JUPRA scheme. The comparator circuit judges in this case did not elect for the JUPRA to apply to them. Their pension rights continued to accrue under the JPA scheme in respect of their service both before and after 31 March 1995.

17. The judge decided, as I have said, that the office of recorder and that of circuit judge were two different offices. Each office was separately created under the Courts Act 1971. The career differences already mentioned impelled the conclusion that a recorder appointed as a circuit judge on or after 31 March 1995 "ceases to hold that office [i.e. the office of recorder] and is appointed to some other qualifying judicial office [that of circuit judge]", within the JUPRA, section 1(1)(b)(ii).

18. The judge rejected the submission that the reasoning of the Court of Justice in *O'Brien (1)* required him to find that the office of a recorder was the same as that of a circuit judge. The activities performed were essentially the same, but that did not mean the judicial office was the same. He concluded (at paragraph 44) that, if the office of recorder had been included in Schedule 1 to the JUPRA, it would had a separate entry in the Schedule to that of circuit judge.

19. At the invitation of the parties, the judge went on to consider and decide a further, hypothetical issue, which he identified in paragraph 38 of his judgment thus:

> **"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)?"**

20. That question arose because of the concluding words of JUPRA section 1(1)(b)(ii). Was the office of circuit judge to which the claimants were later appointed an office "service in which would (apart from this Act) have been subject, in his case, to some other judicial pension scheme"? That depended on whether the respondents would, before 31 March 1995, have included recorders in the same pension scheme as circuit judges (i.e. the JPA scheme) or made provision for recorders to join a separate and different pension scheme (not the JPA scheme).

21. The judge addressed this question at paragraphs 47 to 51. He noted that it was unusual for a tribunal to be asked to consider what would have happened over 40 years ago on the basis of a counterfactual scenario, i.e. on the footing that the respondents had then been compliant with their obligations and had made pension provision for part-time fee-paid judicial office holders. He had the benefit of evidence on the issue from Mr Paul Darby, Head of Core Judicial Pensions Policy in the Judicial and Legal Services Policy Directorate of the first respondent.

22. He accepted Mr Darby's evidence that it would have been impracticable for salaried and fee-paid office holders to be in the same pension scheme. The benefit mechanisms would be very different. Fee-paid judges often hold more than one appointment, with different rates of remuneration. Reckonable service for fee-paid judges would have to be derived from full-time service of salaried judges, with pro rating. Fee-paid judges may partially retire, i.e. from some but not all their appointments. The more recent fee-paid judges' pension scheme (**the FPJPS**) had been set up as a scheme separate from the JUPRA scheme.

23. The judge also had a January 2021 paper from His Honour Judge Platt, an expert on judicial pensions, which included the observation that "[f]or technical reasons it is practically impossible simply to amend the section 5 [JUPRA] scheme to include part-time fee-paid recorders". However, the judge did not place weight on Judge Platt's correspondence with the respondents about judicial pensions because Judge Platt was not in attendance to answer questions. Basing himself of Mr Darby's evidence and expertise, the judge found at paragraph 51 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."**

24. Those were the judge's findings arising from the advent of the JUPRA and the new regime that took effect from 31 March 1995. According to those findings, if there had been a pension scheme for part-time judicial office holders when these claimants were appointed as recorders, they would have been enrolled into a pension scheme but not the JPA scheme.

25. The claimants were fee-paid recorders as at 31 March 1995 and seamlessly continued serving as such after that date, perhaps paying little attention to the judicial pension changes which had no relevance to them. They had no pension scheme and were accruing no pension rights from their fee-paid service. But, as I have already explained, that part-time service as recorders, up to and beyond 31 March 1995, has retrospectively become pensionable service on "JPA equivalent" terms.

26. On 15 December 1997 the PTWD, the first legislative measure to prevent discrimination against workers on the ground of part-time working, was adopted by the Council of the European Union to give effect to a "framework agreement" on part-time working, annexed to the PTWD. The PTWD imposed a deadline of 20 January 2000 for transposition of its provisions into the domestic law of the member states of the European Union, apart from the United Kingdom. A further directive, Directive 98/23/EC, extended the scope of the PTWD to the United Kingdom, with a deadline of 7 April 2000 for implementation of its provisions in our domestic law.

27. The United Kingdom missed that deadline by nearly three months, enacting the PTWR which took effect from 1 July 2000. I will return to the provisions of the PTWR when considering the parties' submissions. Broadly, it conferred the right in domestic law not to be discriminated against on the ground of part-time working. The explanatory note to the PTWR stated, among other things:

> **"The Regulations give part-time workers the right in principle not to be treated less favourably than full-time workers of the same employer who work under the same type of employment contract. ….**
>
> **The rights apply where the less favourable treatment is on the ground that the worker is part-time and is not justified on objective grounds."**

28. The PTWR appeared at first sight to be of no interest or assistance to persons in the claimants' position because regulation 17, headed "[h]olders of judicial offices", provided:

> **"These Regulations do not apply to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis."**

29. Then in, respectively, 2004, 2006 and 2007 the claimants left private practice for good and were appointed as full-time, salaried circuit judges. According to the finding of the judge (at paragraph 46), "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 section 1(1)(b)(ii) of JUPRA". But since they had not, unlike the comparator circuit judges, held a "qualifying judicial office" as at 31 March 1995, they had to join the JUPRA scheme and could not

elect to join the JPA scheme, of which they had never been members.

30. I need not set out in detail the litigious history which secured pension rights for part-time fee-paid judges. A major milestone was the decision of the Court of Justice in March 2012 in *O'Brien (1)*. The court held (on a reference from the Supreme Court) that a member state could not exclude judges from the protection of the PTWD and the framework agreement; that part-time judges performed essentially the same activities as full-time judges; and that, for the purpose of access to a retirement pension scheme, the framework agreement precluded national laws which established a distinction between full-time and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment was objectively justified.

31. In February 2013 the Supreme Court, on Mr O'Brien's resumed appeal ([2013] ICR 499), accepted that he was a "worker" entitled to the protection of the PTWD and the PTWR; that regulation 17 of the PTWR did not assist the (then) Department of Constitutional Affairs (the predecessor of the first respondent to this appeal); and that the Department's defence of objective justification failed. The JUPRA was then amended by the Pension Schemes Act 2015 to add (with effect from 3 March 2015) section 18A empowering the appropriate minister by regulations to "establish a scheme for the payment of pensions and other benefits to or in respect of fee-paid judges" (section 18A(1)).

32. On 31 March 2017, the Lord Chancellor made the Judicial Pensions (Fee-Paid Judges) Regulations 2017, making pension provision for fee-paid judges but only in respect of service during the period from 7 April 2000 (the deadline for transposing the PTWD) and 31 March 2015. Then (omitting unnecessary detail) in July 2017, in *Ministry of Justice v. O'Brien* [2017] ICR 1101 (***O'Brien (2)***), the Supreme Court referred to the Court of Justice the question whether the PTWD and the Framework Agreement:

> **"require that periods of service prior to the deadline for transposing the Directive should be taken into account when calculating the amount of the retirement pension of a part-time worker, if they would be taken into account when calculating the pension of a comparable full-time worker?"**

33. The Court of Justice then gave its judgment, on 7 November 2018 ([2019] ICR 505), answering the question asked by the Supreme Court, at [38]:

> **"… the answer to the question posed is that Directive 97/81 must be interpreted as meaning that, in a case such as that at issue in the main proceedings, periods of service prior to the deadline for transposing that Directive must be taken into account for the purpose of calculating the retirement pension entitlement."**

34. That led to the making of pension provision under the FPJPS in respect of these claimants' periods of part-time service as recorders, going back to the start of their appointments as recorders in July and August 1992. That provision was on "JPA equivalent" terms and as already explained, covered the whole of their period of service as fee-paid recorders, up to the dates (in 2004, 2006 and

2007) of their respective appointments as circuit judges.

35. The claimants retired from their positions as full-time circuit judges, respectively on 30 November 2018 (the first claimant), 31 January 2020 (the second claimant) and 19 April 2022 (the third claimant). All three continued to sit in retirement thereafter in fee-paid judicial roles. The pensions they receive in respect of their full-time service as circuit judges are on JUPRA scheme terms, not JPA scheme terms. For present purposes, it is not disputed (and was not disputed below) that the terms of the JUPRA scheme are less advantageous for the claimants than the JPA scheme terms would be. Their applications to the tribunal below were presented on 30 June 2022.

The Tribunal's Decision

36. I have already recorded above the judge's findings that the offices of recorder and circuit judge are not the same as each other; and that if there had been a pension scheme for fee-paid judges in the 1990s and early 2000s, it would have been a different scheme from the scheme for full-time salaried judges. The judge made the following further findings and decisions. He accepted that the claimants were part-time workers while serving as recorders, but not once they were appointed as circuit judges. He accepted that recorders and circuit judges perform essentially the same activities and that the two roles are broadly similar.

37. He accepted the respondents' argument that to compare like with like, the comparator judges must be taken to be appointed to "some other qualifying judicial office" after 31 March 1995; for example, to the High Court bench. That would lead to the comparator judges losing the right to remain in the JPA scheme and would mean they, like the claimants on their appointment as circuit judges, would be compulsorily enrolled into the JUPRA scheme. There would therefore, the judge accepted, be no difference in treatment as between claimants and comparators.

38. The judge also accepted that there was no less favourable treatment of the claimants while they were part-time fee-paid judges, i.e. recorders. Their pension rights, like those of the comparator judges, were (as retrospectively granted) on JPA equivalent terms. He accepted that the claimants were less favourably treated than the comparator judges once the claimants became full-time circuit judges; but that was a comparison between two groups of full-time workers, not between part-time and full-time workers. He rejected the submission made in reliance on *Miller v. Ministry of Justice* [2020] ICR 1143, SC, that the less favourable treatment of the claimant started when they were part-time workers and continued after they become full-time workers and up to the point of retirement.

39. As for causation, the judge went on to consider what was the "effective and predominant cause" of the less favourable treatment of the claimants. He noted that by regulation 8(6) of the

PTWR, the respondents bore the burden of identifying the ground of the less favourable treatment or detriment. The respondents were submitting that there were two such causes: the appointment of the claimants as circuit judges; and the timing of their appointments, being after 31 March 1995. From the claimants' arguments, the tribunal derived the implicit question: whether the claimants would have been treated differently had they not been appointed as recorders before 31 March 1995.

40. Was the claimants' part-time service "simply a surrounding historical circumstance" or was it the "effective and predominant cause" of their treatment, the judge asked himself (paragraph 66). He noted at paragraph 67 that the purpose of the PTWR was not to do justice as between different groups of workers but to redress the favourable treatment of part-time workers, provided the reason for their treatment was their part-time status, and not otherwise (*Engel v. Ministry of Justice* [2017] ICR 277, per HHJ Richardson at [18]). At paragraphs 68 and 69, the judge then considered hypothetical scenarios for the purpose of testing the causation issue.

41. First, had the claimants continued as recorders and not accepted a full-time appointment they would (with their retrospective rights under the FPJPS on JPA equivalent terms) have been treated in the same way as the comparator judges. The difference in treatment only started when they ceased to be part-timers. Second, a circuit judge appointed as such before 31 March 1995 would not have been required to leave the JPA scheme, whether or not that judge had previously served as a part-timer. Thus, the date of appointment as a full-time circuit judge, rather than the fact of the appointment, appeared to be causative of the claimants' treatment.

42. Third, a circuit judge appointed as such on the dates when the claimants were so appointed, but who had never been part-time, would have been treated in the same way as the claimants; suggesting, again, that the date of appointment rather than the fact of having been part-time in the past was causative of the claimants' treatment. Fourth, the same would be the case if a circuit judge were appointed to that role on the same dates as the claimants were and had previously served part-time after 31 March 1995.

43. On considering that reasoning and analysis, the judge decided at paragraph 69 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." And at paragraph 70, the judge observed:

> **"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."**

Issues, Reasoning and Conclusions

44. The respondents accept, as they did below, that within regulation 2(4) of the PTWR, a circuit judge is a "comparable full-time worker in relation to a part-time worker" who is a recorder, in line with the Court of Justice's decision in *O'Brien (1)*. Both are "engaged in the same or broadly similar work having regard …. to whether they have a similar level of qualification, skills and experience" (regulation 2(4)(a)(i)). But that comparability is only conceded, as regulation 2(4) provides, "at the time when the treatment that is alleged to be less favourable to the part-time worker takes place…."

45. Regulation 5 of the PTRW provides in part:

> **(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.**

46. The essence of the respondents' case, and of the judge's decision, is that the less favourable treatment ended when the claimants became circuit judges; that the discrimination up to that point has been retrospectively remedied; and that after becoming circuit judges, the claimants were treated to the same pension terms as any other circuit judge appointed on or after 31 March 1995. A circuit judge appointed before that date is not a valid comparator: his or her pension terms are not those available to circuit judges appointed when the claimants were appointed.

47. The essence of the claimants' case is that the discrimination endured throughout their service and up to retirement when they started to receive their pensions which are less favourable than those of the claimants' valid comparators, namely circuit judges appointed at the time, or before, the claimants became recorders. The claimants did not have to be part-time workers when they brought their claims. Nor did they have to be part-time workers during their service as circuit judges when their pension rights were accruing on a less favourable basis than those of their comparators.

Grounds of Appeal

First ground: errors of law in comparing claimants and comparators

48. The submissions of Ms Rachel Crasnow KC were developed in written and oral argument and may be summarised as follows. First, she says the judge erred in law by holding that the office of recorder was different from that of circuit judge and therefore that appointment as a circuit judge was to "some other qualifying judicial office" triggering compulsory enrolment in the JUPRA. The judge

should have avoided that conclusion, applying the *Marleasing* principle (see *Marleasing SA v La Comercial Internacional de Alimentación SA* (1992) 1 CMLR 305, ECJ) and equating the "office" with the activities performed, which were established in *O'Brien (1)* as essentially the same.

49. Second, the claimants say the judge was wrong to apply a construction of the JUPRA that was never in fact applied to the claimants. He should not have undertaken the speculative hypothetical exercise of deciding what would have been the application of the JUPRA to the claimants, on their appointment as circuit judges. He allowed domestic legislation from an earlier era to take precedence over the PTWR, enacted to give effect to the PTWD; and to remove the claimants' protection under the PTWR. Further, even if that exercise were permissible, he should have found that recorders *would* have been placed in the same pension scheme as circuit judges.

50. The judge should have followed the approach of the Supreme Court in *Miller v. Ministry of Defence* [2020] ICR 1143, at [31]-[32] in construing the PTWR, taking account of the artificial context in which judicial pensions fall to be considered, without any contract of employment and with many judges holding more than one appointment amounting to "qualifying judicial office". The judge should not have focussed on transfer from one judicial office to another when considering the issue of less favourable treatment.

51. Ms Crasnow submitted that the judge wrongly failed to follow Lord Carnwath JSCs approach in *Miller*, where the issue was when time starts to run for limitation purposes. He should have held that the less favourable treatment crystallises on retirement, which leads to payment of less favourable pension benefits thereafter. He should have interpreted the JUPRA provisions in accordance with the spirit and purpose of the PTWD and the PTWR, either by reading down section 1 of the JUPRA or, if that were not possible, by disapplying it under the doctrine of direct effect; just as regulation 17 had to be disapplied to secure Mr O'Brien's rights under the PTWD.

52. Third, Ms Crasnow submitted that by adopting his restrictive interpretation of "qualifying judicial office", the judge introduced an additional and insurmountable hurdle for the claimants, namely that their comparators must have transferred from one judicial office to another, on the footing that the claimants had done so when becoming circuit judges after serving as recorders. That again, Ms Crasnow argued, was contrary to the reasoning in *O'Brien (1)* and *Miller* that the activities, and therefore by parity of reasoning the office, of recorder and circuit judge were one and the same.

53. Finally, the claimants submitted, the judge erred in law by taking into account irrelevant considerations, namely the career differences he identified between recorders and circuit judges. Those differences – leaving private practice for ever, wearing different robes, having access to higher

level appointments, and so forth – were relevant only to the nature of the judicial office viewed through the prism of the outdated domestic law. They should have been rejected as irrelevant when considering the scope of the protection against discrimination conferred by the PTWR.

Second ground: deciding that claimants were not part-time workers when treated less favourably

54. In the second ground of appeal the claimants say the judge wrongly concluded that the less favourable treatment arose and concluded when the claimants transferred from recorder to circuit judge and therefore were not part-time workers when the less favourable treatment occurred. The claimants again say *Miller* is authority that the wrong crystallises at the point of retirement; hence the decision that time starts to run afresh from that point; see Lord Carnwath JSC's observations at [34] and [35], drawing on earlier case law. A part-time judge may complain, he said:

> **"both during his period of service, that his terms of office did not include provision for a future pension; and, at the point of retirement, that there has been a failure at that point to make a pension available ([34])."**

And where such a complaint is made:

> **"'the point of unequal treatment occurs at the time that the pension falls to be paid'" ([35], citing Lord Kerr JSC's judgment in *Innospec Ltd v. Walker* [2017] ICR 1077, at [56]).**

55. While the discrimination suffered as recorders has been remedied, that does not mean there was no further less favourable treatment, Ms Crasnow submitted. The denial of JPA terms in respect of service as circuit judges directly affected the claimants' pension provision on retirement. The judge had wrongly compartmentalised the claimants' periods of service, rather than examining the whole of their service, aggregating the periods up to (and after) retirement. By the judge's logic, the *Miller* claimants' claims should have been held out of time.

First and second grounds: reasoning and conclusions

56. The first and second grounds of appeal are closely linked and I will take them together. Both challenge the reasoning of the judge that the "less favourable treatment" of the claimants ceased when they became full-time workers. But I agree with the respondents that the judge's reasoning is sound and his conclusion correct. It is crucial to understand that the claim is made in circumstances where the claimants' pension rights as part-time recorders, i.e. arising from their remunerated sittings as recorders, have already been vindicated.

57. As the respondents point out, the claimants accepted before the judge that they could not rely on any actionable less favourable treatment in relation to their recorder sittings. The claimants were, indeed, less favourably treated than circuit judges while they were sitting as recorders. The effects of that wrong did, as the claimants rightly say, reverberate and persist up to the point of retirement.

While working part-time as recorders, they should have been accruing pension rights but were not, at the time. On retirement, they were entitled to a pension and were not going to receive one until the *O'Brien* and *Miller* litigation changed that.

58. It must, therefore, be accepted that the claimants were not treated less favourably than circuit judges while sitting as recorders, in any way except that which has already been remedied. The remedy of being invited into the FPJPS did not include any "top-up" element arising from considerations such as those advanced by the claimants in this claim. It is, nonetheless, accepted as a full and complete remedy for the wrong of having been denied access to a pension scheme while serving as recorders. It follows that the less favourable treatment of the claimants started when they were recorders.

59. Next, I accept the respondents' submission that there is a temporal element to the definition of comparability in regulation 2(4) of the PTWR. The full-time worker is comparable to the part-timer if they are engaged in the same or broadly similar work (which the Court of Justice decided in *O'Brien (1)* was the case as between circuit judges and recorders); but only if that is the case "at the time when the treatment that is alleged to be less favourable to the part-time worker takes place".

60. So, the tribunal must consider the treatment of the part-time claimant and full-time comparator at the time when the alleged differential treatment occurs. The claimant must therefore be a part-timer at the time the comparison is made, though he or she need not be at the later time at which the claim is brought. The treatment of the claimants complained of here was less favourable while they were recorders, but once they ceased to be such, I accept the respondents' submission that they were no longer part-timers and therefore could not compare themselves with other full-time judges.

61. When the claimants became circuit judges, they were given the pension rights available to other circuit judges appointed on or after 31 March 1995. The treatment of which they complain is the same as the treatment of some other circuit judges, but different from that of other circuit judges; depending on when they were appointed and whether they changed office.

62. The fact that the effects of the wrong previously done (and since remedied) continued up to retirement does not mean that the treatment of the victim was less favourable throughout the period of service up to retirement. A person can be treated less favourably vis-à-vis a comparator for part of their overall service period, but not all of it; and may end up with a worse pension as a result. The fact that the effects of earlier less favourable treatment continue up to retirement (and beyond) does not mean the treatment was the same throughout the office holder's service.

63. I do not accept Ms Crasnow's submission that the judge was bound by the *Marleasing*

principle to interpret the domestic legislation in a manner that enabled the claimants to gain access to JPA scheme terms, merely because circuit judges appointed before 31 March 1995 and not changing office after that date retained access to JPA scheme terms. Other circuit judges did not, namely those appointed after 31 March 1995 and those who changed office after that date. The claimants would be getting better treatment than that cohort of less fortunate circuit judges.

64. I come back to the point that the wrong done to the claimants while they were recorders has been remedied. To submit that they should, in addition, have access to JPA scheme terms because a different cohort of the more fortunate circuit judges have that benefit, is tantamount to a complaint that the *O'Brien* remedy of joining the FPJPS is incomplete and insufficient. That is not a contention open to the claimants, nor one that was advanced in this appeal or below.

65. Once it is appreciated that the *O'Brien* remedy is full and complete redress for that wrong, it is inevitable that in a fresh claim such as this, the court must consider the domestic legislation as part of the exercise of testing whether any further actionable less favourable treatment occurred, beyond that which has already been compensated. I reject the proposition that the tribunal was bound by *O'Brien (1)* to ignore the differences between judicial offices separately created under the Courts Act 1971. The denial of access to JPA scheme terms to some circuit judges but not others was inescapably bound up with the content of the domestic legislation at the time.

66. Nor was the judge wrong to consider the hypothetical question whether the claimants would have been included in the JPA or put in a different pension scheme, had the respondents complied with what later became their obligations under the PTWD and the PTWR. The claimants rightly did not object at the time to the judge hearing the evidence of Mr Darby. Artificial though it was to introduce retrospection and a hypothetical exercise into the tribunal's findings, the judge had to test the proposition the claimants were advancing, that there was less favourable treatment of the claimants over and above that which had already been remedied.

67. In my judgment, a comparator circuit judge appointed before 31 March 1995 is not a valid comparator because the claimants were only appointed as circuit judges after that date, by which time the terms of appointment relating to pension had changed. The treatment of circuit judges appointed after 31 March 1995 was unfavourable because the pension terms were worse than they had been; but they were the same terms for all circuit judges appointed after that date. To express the same point from a different perspective, a comparison with circuit judges appointed before 31 March 1995 was valid in the claimants' *O'Brien* claim and was the territory of that claim, which has succeeded.

Third ground: error in deciding less favourable treatment not caused by part-time status

68. The judge had to decide what the cause of the less favourable treatment was; by regulation 5(2)(a), the wrong is committed only if "the treatment is on the ground that the worker is a part-time worker". The claimants submit that, while he correctly articulated the appropriate test of causation as the "effective and predominant cause" (e.g. at paragraph 65), he did not apply that test and, had he done so, he must inevitably have found that it was the claimants' part-time working. The claimants denied that this was a disguised perversity challenge, as the respondents suggested.

69. Specifically, the claimants reproach the judge with omitting to refer to "the inappropriateness of the 'but for' test" (to quote from Ms Crasnow's skeleton argument). He then applied a "but for" test, despite professing not to do so; in that he used the JUPRA appointed day, 31 March 1995, as what Ms Crasnow called a "causative binary". Ms Crasnow submitted that the judge asked himself the wrong question, namely "why were the claimants treated as they were?" whereas he should have asked himself "what is the reason for less favourable treatment at the point of retirement?"

70. She submitted that asking the latter question yields only one possible answer: the reason is part-time working. The provisions of the JUPRA and the pension differences flowing from the holding of office before or after the appointed day were merely part of the context and background and, properly analysed, not the effective and predominant cause of the less favourable treatment. The judge was distracted by the examples discussed in paragraphs 68 and 69 into elevating those factors to the level of an effective cause of the treatment.

Third ground: reasoning and conclusions

71. I do not accept the claimants' submissions. I think there are two principal difficulties with them. First, I would be very slow to conclude that the judge directed himself correctly as to the test of causation, in agreement with both parties' formulation of that test; and then applied a different test. That is unlikely and I do not think it is what happened here. Secondly, it was for the judge to determine what the "effective and predominant" cause or causes were and I can find no flaw in his consideration of that factual issue, which led him to a conclusion that was open to him.

72. The judge was entitled to conclude that the effective and predominant causes of the claimants' treatment were the fact of and the timing of their appointment as circuit judges; and not their prior part-time service as recorders. He was fully entitled to use as an "analytical tool" (as he put it) the scenarios posited by the respondents and considered at paragraphs 68 and 69 of his reasons. I agree with the respondents that the third ground of appeal amounts in substance to a perversity challenge which does not come near to reaching the threshold for such a challenge to succeed.

Conclusion and Disposal

73. For those reasons, I do not think the reasoning of the judge was flawed. The claimants' sense of grievance is understandable but I think the judge was right to decide that the treatment they received in respect of their pension entitlement was, other than the discrimination that has already been remedied, not caused by their part-time working as recorders before becoming circuit judges. It may be that the real complaint here is that the remedy in the claimants' *O'Brien* claim was less than full and should have included access to JPA scheme terms for ex-recorders made circuit judges after 31 March 1995.

74. But that is not the basis of the complaint in this case. The discrimination here is said to be separate and distinct from the discrimination found in *O'Brien*, since remedied. I do not think it is. The claimants were part of a group of circuit judges whose misfortune was that their pensions were less favourable than those of their predecessors. That group included circuit judges who had never been recorders prior to 31 March 1995 and probably a few who had never been recorders at all. The grounds of appeal are, in my judgment, not well founded and I must and do dismiss the appeal.