Neutral Citation Number: [2026] EAT 25

Case No: EA-2024-SCO-000078-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 29 January 2026

Before:

THE HONOURABLE LORD FAIRLEY, PRESIDENT

Between:

THE ADVOCATE GENERAL FOR SCOTLAND (REPRESENTING THE MINISTRY OF DEFENCE)

Appellant

and

MR CHARLES MILROY

Respondent

- -
- -

Brian Napier K.C. (instructed by **Morton Fraser MacRoberts LLP**) for the Appellant
Mr Adam Ohringer, of Counsel, (instructed by **Amicus Law LLP**) for the Respondent

Hearing dates: 18 and 19 December 2025

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JUDGMENT

SUMMARY

Part-time workers; army reservists; worker status; less favourable treatment; causation.

The claimant was an officer in the Army Reserves (formally known as the Territorial Army). Following his retirement from military service in 2019, he presented a claim form to the Employment Tribunal in which he made complaints under the **Part Time Workers (Prevention of Less Favourable Treatment) Regulations, 2000** ("**PTWR**") and relative **Council Directive 97/81/EC** of 15 December 1997 ("**PTWD**"). He complained that, as a part-time reservist, (a) his military service prior to 1 April 2015 was disregarded for pension purposes and he was thereby treated less favourably than full-time regular members of the Army; and (b) his daily rate of pay was not equivalent *pro rata* to that paid to regulars. The Employment Tribunal concluded that the complaints succeeded on their merits.

The appellant submitted that the Tribunal's conclusion that the claimant's relationship with the appellant was not "substantially different" from that of a "worker" under national law was plainly wrong and disclosed errors of law in the Tribunal's approach. It further challenged the Tribunal's conclusions (a) that the daily rate of pay received by him as a reservist amounted to "less favourable treatment" than a full-time comparator; and (b) that the daily rate of pay received by him and the disregarding of his service prior to 1 April 2015 for pension purposes were, in each case, "on the ground" that he was a part-time worker.

Held:

(1) the Tribunal had carefully evaluated all aspects of the relationship between the claimant and the appellant. Its conclusion that he was a "worker" for the purposes of the **PTWD** and **PTWR** disclosed no error of law and was not plainly wrong;

(2) The Tribunal's conclusion that the daily rate of pay received by the claimant was less favourable than the rate paid to regulars was open to it on the evidence; and

(3) The Tribunal's conclusions that both the rate of pay and the disregarding of the claimant's service prior to 1 April 2015 were each solely "on the ground of" his part-time status as a reservist were neither perverse nor wrong in law.

The appeal was, therefore, refused.

The Honourable Lord Fairley, President:

Introduction

1. This is an appeal by the Advocate General for Scotland, representing the Ministry of Defence, from a Judgment of an Employment Tribunal at Glasgow dated 6 August 2024. The respondent to the appeal is Mr Charles Milroy. I will refer to him, as the Tribunal did, as "the claimant".

2. The appellant was represented in the appeal by Mr Brian Napier K.C., and the claimant by Mr Ohringer, Barrister, both of whom appeared below.

Overview

3. The claimant served in the Army Reserves (formally known as the Territorial Army) from 9 May 1982 to 1 November 2019. He received a commission as an officer in June 1983, and was promoted to the rank of Major in 1990. Between February 2007 and July 2008, he served as a Staff Officer in Iraq.

4. The claimant's civilian role was as a Chartered Civil Engineer with Scottish Water. He retired from that role in 2010. Prior to his retirement from Scottish Water, he served as a reservist for an average of 46 days per year. Following his retirement, that figure increased to 150 days per year (ET § 13).

5. Following his retirement from military service in 2019, the claimant presented a claim form (ET1) to the Employment Tribunal in which he made complaints that, as a part-time reservist, (a) his military service prior to 1 April 2015 was disregarded for pension purposes and he was thereby treated less favourably than full-time regular members of the Army ("regulars"); and (b) his daily rate of pay was not equivalent *pro rata* to that of regulars. Each of these complaints was made under the **Part Time Workers (Prevention of Less Favourable**

Treatment) Regulations, 2000 ("**PTWR**") and the relative **Council Directive 97/81/EC** of 15 December 1997 ("**PTWD**").

6. A hearing on liability took place before a full tribunal chaired by Employment Judge Ian McPherson between 17 and 24 April 2023. Unfortunately, the panel was unable to reach a decision before the Judge's retirement in March 2024. Parties therefore agreed that Employment Judge Eccles, Vice-President of the Scottish Employment Tribunals, should listen to an audio recording of the hearing and consider an agreed note of evidence prepared by the parties. Thereafter, Judge Eccles deliberated with the original lay members of the panel, and a reserved Judgment and Reasons was sent to the Parties on 6 August 2024.

7. The Judgment of the Tribunal was that the complaints succeeded on their merits. This appeal relates to three particular aspects of the Tribunal's conclusions that:

(a) the claimant was a "worker" for the purposes of the **PTWD** and **PTWR**;
(b) the daily rate of pay received by him as a reservist amounted to "less favourable treatment" than a full-time comparator; and
(c) the rate of pay received by him and the exclusion of his service prior to 1 April 2015 for pension purposes were, in each case, "on the ground" that he was a part-time worker.

Relevant law

Origins of the PTWR

8. The **PTWR** were enacted to comply with the United Kingdom's obligations under the **PTWD**. The purpose of the **PTWD** was to give effect to the principle of equal treatment in relation to part-time workers by adopting the Framework Agreement on Part-Time Work.

The Framework Agreement ("FA")

9. The purpose of the FA (Clause 1) is:

> (a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;
>
> (b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers.

It applies (Clause 2) to:

> "part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State."

Member States may, however,:

> "…after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice… for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis."

10. The central principle of the FA is in clause 4 which states *inter alia*:

> **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.
> 2. Where appropriate, the principle of *pro rata temporis* shall apply.
> 3. The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice.

The PTWD

11. The stated purpose of the **PTWD** was to implement the FA. Terms used in the FA but not specifically defined were left to Member States to define in accordance with national law and practice (**PTWD**, recital 16).

The PTWR

12. The United Kingdom's obligations under the **PTWD** were implemented by the **PTWR** with effect from 1 July 2000. The **PTWR** contains no definition of what amounts to an "employment relationship". Regulation 2, however, contains definitions of "full-time" and "part-time" in the context of worker status.

13. Regulation 5 contains the domestic prohibition on unjustified less favourable treatment of part-time workers. It states:

> **Less favourable treatment of part-time workers**
>
> **5.**—(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.
>
> (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

14. Regulation 13 relates specifically to the Armed Forces. So far as material to this appeal, it states:

> **Armed forces**
>
> **13.**—(1) These Regulations, shall have effect in relation—
>
> (a) subject to paragraphs (2) and (3) and apart from regulation 7(1), to service as a member of the armed forces, and
>
> (b) to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.
>
> (2) These Regulations shall not have effect in relation to service as a member of the reserve forces in so far as that service consists in undertaking training obligations—

> (a) under section 38, 40 or 41 of the Reserve Forces Act 1980
>
> (b) under section 22 of the Reserve Forces Act 1996
>
> (c) pursuant to regulations made under section 4 of the Reserve Forces Act 1996,
>
> or consists in undertaking voluntary training or duties under section 27 of the Reserve Forces Act 1996.

15. Section 6(3) of the **European Union (Withdrawal) Act 2018** provides that retained EU law must be construed in accordance with EU legal principles and case law as at 31 January 2020. The **PTWR** must, therefore, be read and applied consistently with the **PTWD** on that date (**Ministry of Justice v O'Brien** [2013] ICR 499, UKSC).

Ministry of Justice v. O'Brien

16. In **O'Brien**, the Supreme Court considered whether or not a fee-paid judicial office holder was a "worker" for the purposes of the **PTWD** and **PTWR**. Following a reference to the Court of Justice of the European Union ("ECJ"), certain key principles were clarified.

17. The term "worker" is not an autonomous EU law concept for the purposes of the FA or the **PTWD**. It follows that neither instrument seeks to bring about a complete harmonisation of the definition of "worker" across all member states. Rather, they establish a general framework for eliminating discrimination against part-time workers (**O'Brien** [2012] ICR 955 per the Advocate General, at para. 22; and the ECJ at paras. 30 and 31). It is for national law to determine whether a person in part-time work is in "an employment relationship" such that they have the status of "worker". That is recognised as a "discretion" given to member states in implementing the FA and **PTWD** (**O'Brien** [2012] ICR 955 per the Advocate General at paras 22, 53 and 71; the ECJ at para 34; and [2013] ICR 499 per the UKSC at para 29).

18. The discretion is not, however, absolute. Its broadest limits are determined by reference to EU law (**O'Brien** – Advocate General – paras 22 and 38). In particular, the discretion is qualified by the need to respect the effectiveness of the FA / **PTWD** and general principles of

EU law (**O'Brien** – ECJ – paras 34 to 38). At least three consequences flow from that. First, the exclusion of a category of persons from the protection afforded by the FA and the **PTWD** may be permitted only if "the nature of the employment relationship is substantially different" from that between employers and their employees who are regarded as "workers" under national law (**O'Brien** – Advocate General, para 43; ECJ, para 51; UKSC, para 30). Secondly, in considering the issue of "substantial difference", it is necessary for the national court to consider all relevant aspects of the relationship. That exercise requires an examination both of similarities and differences in comparison to those who are regarded as "workers" under national law (**O'Brien** – Advocate General, paras 44 and 52). Ultimately, what is important is "the nature of the employment relationship" viewed as a whole (**O'Brien** – Advocate General – para 46). Thirdly, there are certain principles that a national court *must* take into account in its examination of that question. One of those is that "purely formal grounds" cannot justify the exclusion of a category of persons (**O'Brien** – Advocate General – para 45). Another is that the spirit and purpose of the FA is that the term "worker" is used principally to draw a distinction from a self-employed person (**O'Brien** – Advocate General – para 48; ECJ – para 44).

The agreed list of issues before the Tribunal

19. The hearing before the Employment Tribunal was conducted on the basis of an agreed list of issues. The issues that are relevant to this appeal were:

> 1. Does the Claimant come within the scope of the Part Time Workers Directive (Council Directive 97/81 EC), or is his service as a member of the reserve forces "substantially different from that between employers and their employees falling, according to national law, under the category of workers" (the test propounded by the Court of Justice of the European Union in *O'Brien v. Ministry of Justice* [2012] EUCJC C-393:10 at para. 43) such as to exclude him from the scope of the Directive?

2. Does the Claimant's service as a member of the reserve forces come within the scope of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (read in light of the Directive / FA if applicable):

    (a) Having regard to the terms of Reg 13…

7. Was the claimant treated less favourably than his comparator regular officer (applying the principle of *pro rata temporis*) in that:

    (a) His rate of pay for a day's work was the annual rate of pay divided by 365.25 and not some smaller divisor; [and]

    (b) His retirement pension does not take account [of] his service prior to 1 April 2015…

9. … was the less favorable treatment "on the ground that" he was a part time worker? (reg 5(2)(a)

The Tribunal's Reasons

Worker status – Issues 1 and 2

20. It is common ground in this appeal that, if the claimant was a "worker" at all, he was a part-time worker. The disputed issue is worker status.

21. The Tribunal examined the nature of the whole relationship between the claimant and the Army in detail. It considered and made findings of fact about the period and frequency of his service (ET§ 13); the legal basis for his appointment as a reservist and as a commissioned officer (ET§ 14); the disciplinary rules to which he was subject (ET§ 15 to 18); his duties (ET§ 19 to 24); his pay arrangements (ET§ 25 to 30); and his pension arrangements (ET§ 31 to 35). It noted that very few material facts were in dispute (ET§ 37).

22. From 1982, the claimant received monthly pay statements showing gross pay based on days worked during the month and deductions for income tax and national insurance. Annually, the claimant received a P60 statement from the respondent and, when discharged, a P45. The claimant was paid an allowance for home to duty travel and other incidental expenses at the

same rates as his regular counterparts. The claimant was required to submit monthly attendance registers or sign a unit attendance register for the appellant to record his attendance, length of attendance and type of travel allowance claimed. He was provided with an employee number.

23. The Tribunal recorded that some of the appellant's witnesses sought to emphasise the voluntary nature of a reservist's role in comparison to full-time regulars. At ET§ 38, however, it commented that:

> "Despite careful scrutiny of their evidence…the Tribunal was unable to identify any aspect of the work undertaken by a reservist that was materially different from that of a regular."

It noted that there was a "lack of persuasive evidence" from the appellant as to the basis on which the work of reservists was said to differ from that of regulars (ET§ 39).

24. The Tribunal gave accurate self-directions on the law reflecting the principles set out in **O'Brien** (ET§ 44 to 47). Its reasoning on the issue of worker status was then set out at ET§ 49 to 52 in the following terms:

> 49. Having regard to the facts of the present case, the Tribunal was not persuaded that the nature of the claimant's service as a reservist with the respondent was substantially different from that of a worker under national law….
>
> 50. The Tribunal found that to be a reservist the claimant was required to attend training and when holding Officer rank to undertake Officer duties for the respondent. A reservist can undertake voluntary training, but this is in addition to required training to retain their commission. While it was apparent that there is a reluctance on the part of the respondent to sanction reservists who fail to attend training without leave or good reason, to retain their commission reservists are obliged to attend training on a regular basis. Failure to do so could result in discharge from service and this would normally be the case after a year's absence from training. When the claimant signed up for training, he had no control over when or where it would take place. Payment of the bounty, prospects of promotion and ultimately whether he would retain his commission were dependent on regular attendance at training of 27 days each year including attendance at camp. When training or undertaking Officer duties, reservists are subject to the direction and control of their Commanding Officer. They arrange training in terms of their Commanding Officer's Training Directive. Reservists

are subject to service law while training and undertaking Officer duties and are required to comply with the "service test" at all times in terms of which their actions or behaviour must not adversely impact or be likely to impact on the efficiency or operational effectiveness of the Army. As a reservist the claimant did not work for himself in a self- employed capacity or when at work in a manner that suited him, as opposed to the respondent.

51. The claimant did not dispute that his obligations as a reservist were "*different to that of civilian employment*." The Tribunal did not accept however the respondent's submission that the unique nature of the service required from members of the armed forces, including the level of discipline demanded and exclusion from certain employment rights, precludes a finding that reservists come within the meaning of workers. Similarly, the Tribunal did not accept that the legislative provisions in place to provide a reservist with additional protection in their civilian employment made the employment relationship between a reservist and the respondent substantially different from that of employer and worker under domestic law.

52. As referred to by [senior counsel for the respondent], the relationship between the Crown and a member of the armed forces is non-contractual. [Senior counsel] referred the Tribunal to the case of **Newell v Ministry of Defence** in which Elias J stated that it is a very firmly established principle that officers of the army do not have any contractual relationship with the Crown. A reservist is however subject to service law under the Armed Forces Act 2006 (and predecessor provisions) which confers powers and sets out procedures to enforce the duty of members of the armed forces to obey lawful commands. Reservists are required to attend training to retain their commission. When training they are subject to the command and control structure of service law. They are paid for attending training and for undertaking Officer duties. They can be subject to administrative discharge if they fail to undertake required training. The characteristics of the work of a reservist differs from that of a self-employed person. They are not carrying out a business on their own account and the level of control over their work by the respondent is inconsistent with the freedom of a self - employed person to decide when and how they carry out work. Applying a purposive approach to domestic law and the test in **O'Brien,** the Tribunal was satisfied that in all the circumstances the nature of the relationship between reservists and the respondent is not so substantially different from that between employers and their employees falling, according to national law, under the category of workers as to exclude reservists from the scope of the PTWD. The Tribunal was persuaded that in all the circumstances, reservists are in an employment relationship within the meaning of clause 2.1 of the framework agreement and that they can therefore be treated as workers for the purposes of the PTWD."

Pension entitlement

25. The Tribunal found that, prior to 1 April 2015, only periods of mobilisation were pensionable for part time reservists. In respect of such periods, the pension options available to a mobilised reservist included payment of contributions to maintain their civilian pension scheme and payment of contributions to the state pension scheme. From 1997 to 2005 reservists on mobilisation and who took up full time service were allowed to join a scheme for full time reservists (FTRS 97) and, from 6 April 2005, the Reserve Forces Pension Scheme (RFPS 05). The pension arrangements under the schemes for regulars and reservists differed in certain respects including age on receipt of payment and method by which pension entitlement is calculated, and were less favourable overall for reservists.

26. The Armed Forces Pensions Scheme 1975 ("AFPS 75") and its successor, the AFPS 05 (from 6 April 2005), were open only to regulars. They were designed for regulars serving on a full-time basis who "*make the services their career*." A regular was required to serve for two years to qualify for a pension under the schemes. Based on their average annual service and total years' service, the majority of reservists would not have qualified for a pension under either scheme. Based on his total service, however, the claimant would have qualified for a pension under AFPS 75 / AFPS 05 had he been allowed access to those schemes.

27. Exclusion of reservists from AFPS 75 and AFPS 05 prior to 2015 was explained by the appellant on the ground of cost. Before use of computers became more widespread, the cost of pension administration was higher. It was not until 2015 that pension administration moved to the same computer system as is used for pay, leave and expenses. With that change, pension administration costs were reduced. AFPS 15 was introduced in April 2015. It is open to both regulars and reservists.

Basic pay

28. Regulars can be required to attend for duty on any day of the year. They are paid an annual salary. During most of a regular's time in service, they will be required to attend for duty on no more than five days a week or an equivalent number of days over a calendar year. They are entitled to annual leave. Regulars who apply for part-time working are paid on a *pro rata* basis based on a five-day working week. Any regular who agrees to work the equivalent of a four-day week is paid 80% of their annual salary.

29. A reservist is paid for the days they attend for duty. Reservists are paid a daily rate for each 24-hour period or for at least 8 hours for a single day. The claimant's daily rate of pay as a reservist was calculated by applying a divisor of 365.25 to his regular counterpart's annual salary.

30. Reservists also earn an annual tax-free payment, referred to as a bounty, when they complete their annual training requirement, normally of 27 days, and obtain their certificate of efficiency. The annual bounty increases each year (up to a maximum of 5 years) in recognition of a reservist's level of commitment.

31. In addition to their basic pay, members of the armed forces receive a payment known as the "X Factor". It is paid in recognition of the special conditions of service experienced by members of the armed forces when compared to civilians. It accounts *inter alia* for a range of potential disadvantages in army life such as turbulence, the impact on family life and a partner's career, danger, separation, hours of work, stress, loss of leave, lack of autonomy and lack of certain individual and collective rights. It is expressed as a percentage of basic pay. The rate of the X-Factor is 14.5% for regulars, and 5% for reservists. What are referred to as "spikes"' in activity such as lengthy separation from family, or significantly increased exposure to danger, are additionally compensated through specific allowances paid to regulars such as Longer Separation Allowance and Operational Allowance.

32. The Tribunal considered the rate of pay issue between ET§ 77 and 83:

> 77. …It is not in dispute that a reservist's daily rate of pay is calculated by dividing the annual salary of a regular of the same rank by 365.25. The claimant submits that by using a divisor of 365.25 the respondent is failing to take account of the time when a regular is not working such as at weekends (104 days) and annual leave (38 days). A reservist's daily rate of pay, submits the claimant, should be calculated using a divisor that takes account of the above non-working time, for example 261 or 223. The claimant relies on the treatment of part-time regulars to highlight the above discrepancy on the basis that part time regulars are paid on a *pro rata* basis of a five-day working week – a regular who works four days per week is therefore paid 80% of a full-time equivalent salary…
>
> 79. The respondent sought to argue that as regulars are "*on call to work*" every day of the year, a divisor of 365.25 makes sense and is fair. It is not less favourable treatment under the PTWR. Reservists are paid, according to the respondent, for the days that they are available for work.
>
> 80. Eamonn Moyles for the respondent described how a reservist is paid the daily rate for working at least 8 hours in any 24-hour period. He argued that in annual terms they were therefore only required to work a third of the year to earn the equivalent of a regular's salary. For this to be a valid comparison, it must be the case that a regular is working 24 hours a day, 365 days a year.
>
> 81. From the evidence before it, the Tribunal was not persuaded that by being on call regulars work 24 hours' a day, 365 days a year. It was not being suggested by the respondent that this was in fact the case. The respondent argued that given a regular can, in theory, be required to attend for duty at any time, the Tribunal should treat them as working. Regulars were referred to as being available for duty every day if required, unlike reservists who are able to choose when they wish to serve. The Tribunal was not persuaded from the evidence before it that it could make such a finding. It was clear that regulars have days when they do not work, perhaps not always at weekends when reservists are often also working, but for periods including annual leave. It was not being suggested by either party that a member of the armed forces will always have regular periods away from work, for example when on active duty. The Tribunal did not find however that the reality of army life involved being on call in the sense of working or for that matter being expected to work 365 days a year without leave. While in principle they could be called to duty on any day of the year, it did not follow that this resulted in any regular having to work 365 days a year. There would still for example be periods of annual leave in any such year. When a reservist undertakes [additional duties commitments] on specific days, they are required to attend on those days and continue to be paid at the

rate of 365.25 of a regular's pay at the same rank. The argument that by applying a lower divisor would result in reservists being paid more than regulars – as argued by Mr Moyes – relies on acceptance of the respondent's position that by being on call to duty at all times, regulars are in fact working every day of the year. From the evidence before it, the Tribunal was unable to accept this submission as justifying the use of a divisor of 365.25 to calculate a reservist's pay.

82. Different levels of X Factor for regulars and reservists did not persuade the Tribunal that a regular should be treated as working 365 days a year and that the daily rate of pay of a reservist is therefore correctly calculated by using a divisor of 365.25 of a regular's annual salary. The X Factor recognises and compensates regulars for the disadvantages that can arise from having to be available to work 365 days including the impact on leave, turbulence and hours of work. As described by Major General Graham, the X Factor was an increment to his salary "*recognising the unique 24/7 call that the Army had over me*". The fact that the X Factor is lower for reservists is not challenged as being less favourable treatment. The X Factor enhances the pay of a regular, in part at least, to compensate them for the potential impact on their private and family life.

83. The Tribunal was persuaded that in all the circumstances, by calculating the claimant's daily rate of pay using a divisor of 365.25 of a regular's annual salary and not a smaller divisor to reflect periods when a regular is not working amounted to the claimant being treated less favourably than his comparator regular (applying the principle of *pro rata temporis*).

Causation

30. Finally, at ET§ 94 to 96 the Tribunal considered the evidence and submissions on the issue of causation:

94. In this case the claimant was excluded from the AFPS 75 because as a reservist he worked part time. The AFPS 75 and successor schemes were only designed for regulars who worked full time. They were not intended for reservists. When the claimant sought access to the AFPS 75 scheme it was considered unsuitable and too expensive to administer because as a reservist he worked part time. The fact that reservists who took up full time service were provided with a separate scheme such as the FTRS 97 (albeit less favourable than the AFPS 75)…was relied on by the respondent to argue that exclusion from the AFPS 75 was nothing to do with the claimant's part time status. The Tribunal did not accept that the existence of a separate scheme for reservists who were no longer working part time demonstrated a reason other than part time status for

> exclusion from the AFPS 75. Access to a pension scheme such as the FTRS 97 was available to reservists because they had been part-time. Being part time was why they had been denied access to the AFPS 75.
>
> 95. …the Tribunal was persuaded that the claimant's exclusion from the AFPS 75 was because of his part time status and not for some other reason or number of different reasons. The Tribunal concluded that in all the circumstances the less favourable treatment of the claimant as a reservist of not having access to the AFPS 75 and successor schemes for regulars only was on the ground that he was a part- time worker.
>
> 96. The respondent did not advance a reason for use of the divisor of 365.25 to calculate a reservist's daily rate of pay other than because a regular should be treated as working 365 days a year unlike a reservist who works on days of their choosing. The Tribunal did not agree that regulars should be treated as working 365 days for the reasons given above. There was no persuasive evidence before the Tribunal of any other reason for the differential in pay apart from the part-time status of reservists and in all the circumstances, the Tribunal concluded that use of a divisor of 365.25 to calculate the daily rate of pay for the claimant as a reservist was on the ground that he was a part- time worker.

Summary of submissions in the appeal

Appellant – Ground 1 – worker status

31. Senior counsel for the appellant submitted that, although the issue of worker status was ultimately one of law, it was dependent upon the Tribunal's findings of fact, and was therefore one where the decision of the Tribunal, as the primary fact-finder, was due considerable respect (*cf* in a different context **Ravat v. Halliburton Manufacturing and Services Limited** [2012] ICR 389 at para. 35 *per* Lord Hope). Applying that standard of review, the Tribunal's conclusion that the relationship between the Army and reservists was not "substantially different" to that between employers and "workers" under national law was "clearly wrong".

32. The Tribunal had been entitled to conclude that there was no close analogy between the position of a reservist and that of a self-employed person. That of itself, however, did not finally resolve the issue of worker status (**O'Brien** [2012] ICR 955 ECJ at paras 43-47). The key question was whether the exclusion from the scope of the **PTWR** in terms of regulation 13(2)

PTWR was "arbitrary". That question fell to be answered by looking at the relationship as a whole and comparing it to employer / worker relationships under domestic law.

33. The absence of a contract between the parties, though not decisive, was important. The essence of the relationship of military service in the British Army is that it is a self-contained regime based upon statute and prerogative powers. Other important features of the relationship under domestic law are: the exclusion from (or special treatment of) members of the armed forces in domestic employment law (especially in the **Employment Rights Act, 1996**, the **Working Time Regulations, 1998**, and the **Employment Relations Act, 1999**); the various legislative provisions protecting reservists from suffering detriment in their principal employment on account of their military service (for example, the **Reserve Forces (Safeguard of Employment) Act, 1985**); the exclusion of members of the armed forces from collective bargaining rights and the right to engage in strike action (**Trade Union and Labour Relations (Consolidation) Act, 1992**, section 296(1)(c)); the applicability of military law (in particular the **Reserve Land Forces Regulations, 2016**) to reservists; the unique disciplinary regime applicable to the armed forces (**Armed Forces Act, 2006**), and the severity of penalties (including criminal penalties) for disobedience.

34. It was accepted by the appellant that the Tribunal had taken all of those factors cumulatively into account and had referred to them in its Reasons. The appellant nevertheless submitted that, having done so, the Tribunal had erred in failing to conclude that the relationship between a reservist and the Army was "substantially different" to that between employers and workers under national law. Such a conclusion was also said to be inconsistent with the Tribunal's own finding (at ET§ 62) that:

> "…the employment relationship of members of the armed forces with the Army differs significantly from that of most workers with their employer."

35. The Tribunal had also, it was submitted, erred in law in the three specific respects:

a) in giving any weight to the claimant's submission that EU concepts of worker status were relevant to the issue of the **O'Brien** "substantial difference" test under national law (ET§ 48);
b) in adopting a "purposive approach" to the application of the **O'Brien** test (ET§ 52); and
c) in reversing the burden of proof by stating (at ET§ 49) that it was "not persuaded" that the nature of the claimant's service as a reservist was substantially different from that of a worker under national law.

Claimant – Ground 1 – worker status

36. Counsel for the claimant submitted that the Tribunal had carefully evaluated all of the facts and had reached a conclusion that was open to it on the evidence. Its conclusion that there was no substantial difference between the relationship between reservists and the appellant in comparison to those recognised as workers / employers under national law disclosed no error of law. Whilst the sources and nature of the duties and obligations of reservists were clearly different from those arising in civilian employment, exactly the same could be said of fee-paid judges. The **O'Brien** test was a practical and functional one. An important question was whether the individual was in a relationship of subordination and dependence or, alternatively, was working for himself. Exclusion of members of the armed forces from certain statutory rights was not determinative. On a fair reading of its Reasons, read as a whole, the Tribunal had not placed any burden of proof on the appellant.

Appellant – Ground 2 – worker status and the PTWR

37. Within the Notice of Appeal for which permission to appeal was given, this ground was entirely based upon the related (and undisputed) propositions that: (i) if reservists did not meet the definition of "worker" for the purposes of the **PTWD**, their inclusion within the protections of the **PTWR** arose solely from regulation 13(1); and therefore (ii) the exclusion of reservists

by virtue of regulation 13(2) could not then be affected by the **PTWD**, but would simply be a legitimate exercise of domestic legislative sovereignty.

38. In a skeleton argument lodged shortly before the full hearing of the appeal, however, the appellant sought to add a new and different argument that, even if the claimant was a "worker", for the purposes of the **PTWD**, regulation 13(2) **PTWR** was not unlawful because its practical effect was not to exclude *all* reservists as a class, even if it had that practical effect in the claimant's case. The basis of this new argument was that the regulation 13(2) exclusions only apply to certain defined types of activity, but did not exclude a "category" of workers. It was acknowledged by senior counsel that this was not an argument that had been advanced before the Employment Tribunal. I also noted that this point did not feature anywhere in the Notice of Appeal, and no application had ever been made by the appellant in terms of section 8.13 of the EAT Practice Direction of 2024 to advance it as a new point.

39. Having heard submissions, and applying the principles described in **Secretary of State for Health and another v. Rance** [2007] IRLR 665, I refused to exercise my discretion to allow this new point to be raised for the first time in this appeal. I gave that decision, with oral reasons, on the second day of the appeal hearing. In summary, it was clear that if this issue had been raised below, the agreed list of issues and consequent factual inquiry would have been materially different. That inquiry would have included, for example, evidence about the working patterns of reservists as a class, and consideration of whether the agreed *de facto* exclusion of the claimant by regulation 13(2) (ET§ 55) was in some way different to other members of that class. Before the Employment Tribunal, the sole focus in the list of issues was upon the claimant. Matters plainly proceeded, on both sides, upon the hypothesis that he was representative of the class of reservists of which he formed part. There was no suggestion by the appellant before the Employment Tribunal that the position of the claimant was unusual. If this new argument had been allowed to be raised for the first time on appeal, that factual issue

would inevitably have required to be remitted to be investigated on its facts. In terms of **Rance**, that was very powerful reason not to exercise a discretion to allow the new argument to be advanced for the first time on appeal.

40. The effect of that ruling was to limit ground 2 to the terms set out in the Notice of Appeal. The consequence of that was that ground 2 became wholly dependent upon ground 1.

Claimant – Ground 2 – worker status and the PTWR

41. The claimant did not dispute the proposition that, if he was not a "worker" for the purposes of the **PTWD**, there was no basis on which to challenge his exclusion from the **PTWR** under regulation 13(2). In line with his response to ground 1, however, he maintained that he *was* a worker for the purposes of the **PTWD** and was thus entitled not to be excluded on arbitrary grounds from the protections of the national legislation (**O'Brien**). The Tribunal was, therefore, correct to conclude that his *de facto* exclusion from the **PTWR** by regulation 13(2) was impermissible.

Appellant – Ground 3 – unfavourable treatment – daily rate of pay

42. The annual salary of the regular comparator covered the periods when he attended for work and periods when he was not attending for work but was on-call and could be required to attend for work. Regulars can be called to attend for work on any day of the year, including periods when they were not required to attend for work – e.g. when taking holiday. A regular can (subject to a few exceptions) be required to work at any time over a 24-hour period and can be deployed anywhere in the world. In short, the regular is paid for providing a service which the reservist is not required to provide. The pay for the reservist is calculated by reference to the days when they attend for work and receive work attendance pay. Because the reservist is not subject to being on-call, they receive pay only for the days (or proportion of days) when they attend for work.

43. What constitutes "work" is a decision for the Army to make. It has decided that the work of a regular is spread over 365 days. Regulars provide that service to which the respondent attaches value. The respondent is entitled to pay as it sees fit for the facility of having regulars available to serve on a 365-day basis. It is entitled to hold that view and to structure the regular's pay accordingly. There is no suggestion that in so doing it is participating in a sham or acting in bad faith. Nothing in either the **PTWR** nor the **PTWD** gives any basis for challenging the view of the Army that being 'on-call' is work, nor for challenging the salary that is paid for such service. Contrary to what the Tribunal found at ET§ 81, regulars do work 24 hours a day, 365 days a year. Reservists, by contrast, do not.

Claimant – Ground 3 – unfavourable treatment – daily rate of pay

44. This ground was an impermissible attempt to re-try fact. The Tribunal had been entitled to conclude that regulars did not, in fact, work on every day of the year, and that their availability for service was not the same as "work". The X Factor payment was made in addition to basic pay at a rate that compensated regulars for the inconvenience of having to be available for duty even when they were not actually working (ET§ 62 and 82). The Tribunal was entitled to conclude that basic pay was for work rather than mere on-call availability to work.

Appellant –Ground 4 – causation

45. The reason for the calculation of the daily pay was that regulars undertake on-call duties. The claimant did not. Even if the claimant's part-time status was a cause for the pay rate, it was not the sole cause (per **McMenemy v. Capita Business Services Ltd** [2007] IRLR 400).

46. The finding that the claimant was excluded from AFPS 75 solely because he was a reservist and worked part time was not supported by the evidence. Administrative cost was also a very significant factor. The evidence suggested that the AFPS 75 scheme had been designed specifically for those who made service their career. Full-time reservists were also excluded from AFPS 75. The exclusion of reservists was for a reason that was separate from their part-time status. Even if part-time status was *an* effective cause of exclusion, it was not *the sole* cause per **McMenemy**.

Claimant – Ground 4 – causation

47. The claimant relied upon the reasoning of the Tribunal that the exclusion of reservists from the AFPS 75 pension scheme and its successor AFPS 05 had the practical effect of excluding part-time members of the armed forces from the more favourable pension provisions available to regular members of the Army. The motivation for that decision was irrelevant and did not affect the issue of the "ground" on which the exclusion was implemented. The Tribunal had correctly regarded itself as being bound by **McMenemy** and had been entitled to reach the factual conclusion that the claimant had been treated less favourably solely "on the ground of" his part-time status.

Analysis and decision

Preliminary point

48. Because of the way in which this appeal was ultimately presented on behalf of the appellant, it is necessary to make some preliminary observations about the respective functions of the grounds of appeal and the skeleton argument in EAT procedure.

49. As section 3.8 of the EAT's Practice Direction makes clear, the grounds of appeal are very important. They form the basis on which the appeal is sifted under rule 3 of the EAT rules.

If the proposed appeal, or any part of it, is allowed to proceed to a full hearing, the grounds also provide notice to the respondent, as well as to the judge or panel hearing the appeal, of the specific points that have been permitted to be argued.

50. The headline point of each ground of appeal should be followed by a brief explanation of the error of law that is sufficient to enable the particular error of law that is being asserted to be understood (Practice Direction, section 3.8.3). An appellant cannot "reserve a right" to amend, alter or add to grounds of appeal. Any application for permission to amend grounds must be made in accordance with the procedure for amendment set out at section 8.2 of the Practice Direction.

51. The purpose of the skeleton argument is to focus the particular points of law raised in the appeal (Practice Direction, section 11.6). The skeleton is not, however, a vehicle through which new or different arguments may be introduced without amendment of the Notice of Appeal / grounds of appeal. Regrettably, and as noted in the analysis below, this important point was overlooked at times in the skeleton argument and oral submissions that were ultimately relied upon by the appellant in the course of this appeal.

Ground 1

52. When the Supreme Court in **O'Brien** applied the ECJ's Judgment, it did so by examining the "spirit and purpose" of the FA and, in particular, its requirement that a distinction must be drawn by the national court between the category of "worker" in terms of state law, and those who are self-employed ([2013] ICR 499, at paras. 37 to 42). Within the court's analysis of whether or not fee-paid Recorders were "workers", the distinction between workers on the one hand and self-employed persons on the other was important (see, for example, [2013] ICR 499 at paras. 37, 39 and 41).

53. I accept, as a generality, the appellant's submission that a conclusion that a person is not self-employed does not inevitably lead to a conclusion that they must be a "worker".

Rejection of self-employed status is an important, but not decisive, factor. It is still necessary, to look at the nature of the relationship, viewed as a whole.

54. In this case, it is clear from ET§ 49 to 52 that the Tribunal adopted precisely that analytical approach. The appellant does not suggest that the Tribunal took into account any irrelevant factor or left out of account any relevant one. Rather, the suggestion made by the appellant is simply that the conclusion reached by the Tribunal on the facts found by it was obviously wrong.

55. To have any prospect of success, however, that argument would have required a comprehensive analysis by the appellant of all of the areas of similarity and difference identified by the Tribunal. That, however, is not how this appeal was presented. Instead, the appellant has narrowed its focus to certain specific aspects of the relationship that are said by the appellant to be different from those of workers under national law. The highlighted differences are said, in combination, to lead inevitably to a conclusion of "substantial difference" from worker status due to what was said to be the unusual or unique nature of Army service. On careful examination, however, that submission is strikingly similar to the approach relied upon, ultimately without success, by the Ministry of Justice in **O'Brien** in relation to the alleged uniqueness of the judicial role of fee-paid Recorders. In this appeal, the appellant's focus upon areas of alleged difference also led to it largely ignoring the many areas of similarity found by the Tribunal between reservists and workers according to national law.

56. Plainly, in comparison to workers generally there are some differences under national law in the particular employment rights given to members of the armed forces and, on occasion, in the way in which rights are conferred. The Tribunal recognised the relationship "differed significantly" (ET§ 62). Applying the **O'Brien** test of "substantial difference", however, requires a more comprehensive analysis of all relevant aspects of the nature of the relationship, viewed as a whole.

57. The Tribunal's conclusion that the relationship between the claimant and the Army was not one of self-employment is not challenged in this appeal. The Tribunal also plainly considered the nature of the relationship in the round. The aspects of similarity to worker status referred to by the Tribunal in its findings of fact and at ET§ 50 to 52 (including conditions as to pay, training requirements, direction and control by the appellant, discipline and the characteristics of the work undertaken) were all important. The Tribunal's ultimate conclusion, as a specialist tribunal, was that there was no substantial difference between the nature of the claimant's relationship with the Army on the one hand and that between an employer and a worker on the other is not obviously wrong.

58. Turning to the three further specific criticisms advanced on behalf of the appellant, I do not accept that the Tribunal erred in law in placing any weight upon the claimant's submission that EU concepts of worker status were relevant to the issue of the **O'Brien** "substantial difference" test under national law. I note that the ground of appeal for which permission was given, and which is set out in detail over two pages of the Notice of Appeal, does not mention this point at all. That being so, I do not consider that it is open to the appellant to seek to advance it without applying to amend the Notice of Appeal, which it did not do.

59. In any event, the point is misconceived. The passage of the Tribunal's reasons founded upon by the appellant in support of it (ET§ 48) is simply a narration of a submission made on behalf of the claimant. When the Reasons of the Tribunal are read as a whole, it is perfectly clear that it correctly understood and applied **O'Brien**. Within the immediately following paragraph of its Reasons (ET§ 49), for example, the Tribunal referred in terms to the substantial difference test being one that fell to be determined under national law.

60. I also reject the submission that the Tribunal erred in referring (at ET§ 52) to the need for a "purposive approach". Again, this point was raised for the first time in the appellant's skeleton argument. It does not feature anywhere in the Notice of Appeal for which permission

was given, and no application was made to amend the grounds to include it. Again it is, in any event, wrong. A purposive approach by the national court to the "substantial difference" test is precisely what the ECJ and the UKSC had in mind when they referred to the need for national courts, in applying that test, to respect the "spirit and purpose" of the FA (see **O'Brien** – Advocate General at paragraph 48; ECJ at para. 44 and UKSC at para 30).

61. Faced with that difficulty, Senior Counsel for the appellant appeared to retreat from paragraph 9 of his skeleton argument and submitted instead that the Tribunal's use (at ET§ 52) of the word "and" in its reference to having applied "a purposive approach to domestic law *and* the test in **O'Brien**" (emphasis added) demonstrated that it had gone further than having regard merely to the sprit and purpose of the FA. Again, that narrower argument does not feature in the Notice of Appeal. It is not even part of the appellant's skeleton argument. Again, it is misconceived. As has been stressed many times, Tribunal judgments should not be picked over with a fine-toothed comb as if they are conveyancing documents in the hope of identifying some minor infelicity of expression that can then be developed into an alleged error of law. This is particularly so where – as here – the submission involves focussing upon a single word, which can be used either conjunctively or disjunctively, and seeking to attribute to it a meaning that it plainly does not bear when the reasons are read as a whole.

62. Finally, I reject the submission that the Tribunal incorrectly inverted the burden of proof at ET§ 49 when it said that it "was not persuaded" that the nature of the claimant's service as a reservist was substantially different from that of a worker under national law. It is quite clear from the Reasons when they are read as a whole, in particular, from the way that the Tribunal expressed itself at ET§ 52 and ET§ 57, that it did not so err. At ET§ 52 is said:

> "The Tribunal was persuaded that in all the circumstances, reservists are in an employment relationship within the meaning of clause 2.1 of the framework agreement…"

and at ET§ 57:

> "The Tribunal was persuaded that in all the circumstances regulation 13(2) of the PTWR is incompatible with the FA and PTWD and should therefore…be disapplied when determining the claimant's rights as a reservist."

On any fair reading of the impugned passage at ET§ 49, it was simply an expression of the Tribunal's rejection of the appellant's arguments to the contrary effect.

63. For these reasons, I have concluded that there is no merit in ground 1.

Ground 2

64. Ground 2, as expressed in the Notice of Appeal, is wholly dependent upon ground 1. It also, therefore, fails because the Tribunal made no error of law in finding that the claimant was a "worker" for the purposes of the **PTWD**. As in **O'Brien**, regulation 13(2) must be applied subject to the **PTWD**.

Ground 3

65. It was common ground that regulars are permanently on call, in the sense that they are expected to be available to be called upon to work at any time. The factual issue that the Tribunal had to consider was whether that aspect of the working relationship between regulars and the Army was remunerated through basic salary.

66. The appellant submitted that it was. It seems, however, to have produced little evidence of that beyond mere assertion. The Tribunal rejected that assertion noting, amongst other matters, the evidence of the appellant's own witness, Major General Graham, that the additional X Factor payment was an increment to his basic salary as a regular officer "*recognising the unique 24/7 call that the Army had over me*". The Tribunal concluded that part of the X Factor payment to regulars was consideration for the disadvantage of having to be available to work

at any time, including the impact on leave, as well as turbulence and hours of work. That conclusion was plainly open to it on the evidence.

67. It further noted that regulars do, in fact, have days when they are not actually called upon to work. These include weekends and periods of annual leave. It expressly declined to make a finding of fact that regulars were "on duty" every day. As a cross-check to that factual conclusion, it noted that part-time regulars who work an agreed 4 days per week are paid 80% of the basic salary of a regular. That was a relevant adminicle of evidence which tended to support and confirm the conclusion that the basic pay of regulars envisages a 5-day working week, and does not include an "on call" supplement.

68. Having regard to these aspects of the evidence, the Tribunal concluded that reservists were, in consequence, paid comparatively less for a day of work than their full-time comparators. On the facts found by the Tribunal, that conclusion was inevitable. I agree with the submission for the claimant that this ground is, in effect, an attempt to overturn clear and well-reasoned findings of fact that the Tribunal was entitled to make on the evidence.

69. Ground 3 also, therefore, fails.

Ground 4

70. The Tribunal's finding that the AFPS 75 scheme was "designed only for regulars" (ET§ 102) is not challenged in this appeal, nor is the conclusion that the pension arrangements made available to reservists prior to 2015 were less favourable than those available to regulars. As the Tribunal noted, the claimant's status as a part-time worker was the only reason why he and other reservists were denied access to AFPS 75 (ET§ 94) and its successor scheme, AFPS 05. Contrary to the submission made on behalf of the appellant, the mere fact that the appellant's underlying motive for excluding part-time reservists from those schemes was to save administrative cost is entirely consistent with a conclusion that the sole reason for selection for

exclusion was their part-time status. That conclusion was open to the Tribunal on the evidence. Logically, the fact that a sub-class of full-time reservists may also have been excluded does not undermine the correctness of that conclusion.

71. On the issue of the daily rate of pay, the Tribunal's finding that regulars were not remunerated through basic salary for being "on call" led inevitably to the conclusion that the reason for the less favourable treatment of the reservists was their part-time status.

72. Ground 4 also, therefore, fails.

Conclusion and disposal

73. The Tribunal did not err in law in any of the respects identified in the Notice of Appeal. The appeal is, therefore, refused.