



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Miller & Others

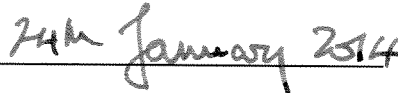
**Respondent:** Ministry Of Justice

## CERTIFICATE OF CORRECTION Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Reasons sent to the parties on **2 January 2014**, is corrected as set out in ***bold italics*** type at paragraph 7.

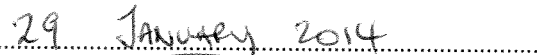
  
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Employment Judge **Macmillan**

  
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Date

SENT TO THE PARTIES ON

  
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FOR THE TRIBUNAL OFFICE

**Important note to parties:**

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.



# EMPLOYMENT TRIBUNALS

Between

Claimant

Respondent

Mr R Miler and others

The Ministry of Justice  
(formerly the Department  
of Constitutional Affairs)

## Preliminary Hearing

Held at: London Central

On: Monday 2<sup>nd</sup> December to  
Thursday 5<sup>th</sup> December,  
Monday 9<sup>th</sup> December to  
Wednesday 11<sup>th</sup> December  
and Monday 16<sup>th</sup> December.  
Reserved Judgment Tuesday  
17<sup>th</sup> December to Friday 20<sup>th</sup>  
and Monday 23<sup>rd</sup> December  
2013

**BEFORE** Employment Judge Macmillan

### REPRESENTATIVES

For the Browne Jacobson and Beers claimants:

Mr Robin Allen QC  
Ms Rachel Crasnow

For the Leigh Day claimants:

Mr Andrew Short QC  
Mr Saul Margo

For Ms Kyrie James:

Mr Ian Rogers<sup>1</sup>

For the respondent:

Mr John Cavanagh QC  
Mr Charles Bourne  
Ms R Kamm

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<sup>1</sup> On the 11<sup>th</sup> and 16<sup>th</sup> December only

## **RESERVED JUDGMENT**

1. For the purposes of bringing a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 in respect of denial of access to the judicial pension scheme, time runs from the ending of each fee paid appointment about which complaint is made, irrespective of whether the claimant then transfers into a salaried appointment or has other fee paid appointments which continue [paras 15 – 26].
2. For the purposes of bringing a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 in respect of a monetary claim, time runs at the latest from the ending of each fee paid appointment about which complaint is made, irrespective of whether the claimant then transfers into a salaried appointment or has other fee paid appointments which continue [paras 27 & 28].
3. Where the sole reason for a pension claim being out of time is that the claimant has delayed commencing proceedings because of the Moratorium issued by the respondent in April 2013 it would be just and equitable to extend time [para 58].
4. There are no other generic grounds which make it just and equitable to extend time [paras 46 – 57].
5. It is just and equitable to extend time in the cases of Peter Robins (case number 2201157/2013) and Kathleen Miller (case number 2204300/2011) for reasons peculiar to their individual circumstances [paras 59 – 61].
6. The correct daily divisor for Deputy Masters and Deputy Costs Judges is 210 and for Deputy District Judges is 215 [pars 66 -68].
7. A fee paid judge who has not left fee paid office is entitled to holiday pay only if the following conditions are satisfied:
  - 7.1 their terms and conditions of appointment make no reference to the fact that the daily sitting fee includes holiday pay (howsoever expressed) and
  - 7.2 they have given notice under regulation 15(1) of the Working Time Regulations 1998 and no counter-notice has been received and
  - 7.3 a claim was presented to the tribunal within 3 months of the last date on which holiday pay should have been paid in respect of leave taken following a notice given under regulation 15(1) [paras 83 -102].
8. By consent a fee paid judge may claim compensation under regulation 14 of the Working Time Regulations in respect of holiday pay accrued but untaken upon the termination of their fee paid appointment.
9. The payment of less than a full days fee to a fee paid judge for attending a days training is less favourable treatment in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 which has not been objectively justified [paras 112 – 114].

10. The non-payment of sick pay to a fee paid judge who is unable to sit because of illness or injury is less favourable treatment in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 which has not been objectively justified in the following circumstances only:

10.1 where the sitting in question has been pre-booked and would not have been cancelled by the MoJ in circumstances which would not have entitled the judge to a fee;

10.2 where the judge's total number of sittings in the year is less than the minimum guaranteed by his terms and conditions of appointment [paras 121 - 124]

11. Deputy District Judges and fee paid judges of the Immigration and Asylum Chamber are not less favourably treated than their salaried comparators over the payment of fees for decision writing [paras 136 and 137].

12. Fee paid judges of the Social Entitlement Chamber are less favourably treated than their salaried comparators over the payment of fees for writing statements of reasons, which treatment has not been objectively justified [paras 138 - 140].

13. Fee paid judges who satisfy the eligibility conditions for London weighting with regard to their principle place of work, are treated less favourably than their full time salaried comparators, which treatment has not been objectively justified [paras 145 - 148].

14. Ms James' complaints in respect of compassionate leave, cancellation fees, provision of special aids and equipment and the cost of establishing a home office are not well founded and are dismissed [paras 149-159].

15. The complaint of Christopher Ash (case number 2204183/2010) in relation to the actuarial reduction of his pension is dismissed on withdrawal.

16. By consent it is declared that a pro-rated benefit will be payable to a fee paid Judge who establishes an entitlement to a pension and whose state of health was such that he or she met (or would have met had the medical certificate required by section 2(3)(b) of the Judicial Pensions and Retirement Act 1993 been obtained) the requirements for ill-health retirement and that entitlement to such benefits commenced when he or she met, or would have met, those requirements.

17. By consent it is declared that fee paid judges in the Employment Tribunal and the First-tier Tribunal (Social Entitlement Chamber) and their predecessors were entitled under the PTWR from 7 April 2000<sup>2</sup> (and continuing until 1 April 2014 in the case of the Social Entitlement Judges) to a daily sitting fee calculated as 1/220<sup>th</sup> of the salary of a full-time salaried Judge in their jurisdiction at the material time. Errors of calculation in the sums paid to the lead claimants (Ian Soulsby – case number 2204242/2011 - and Martin Block Block – case number 2204018/2013) therefore fall to be corrected; and in Mr Block's case the daily fee is to be corrected for the future

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<sup>2</sup> This is the date agreed by the parties but the PTWR did not come into effect until 1 July 2000

to 1/220<sup>th</sup> of the salary of a fulltime salaried judge in the First-tier Tribunal (Social Entitlement Chamber).

## **REASONS**

### **A. INTRODUCTION**

1. This is the third in the series of preliminary hearings concerning the terms and conditions of fee paid judicial office holders which began with Mr O'Brien (case number 2202623/05) and continued with Dr Moultrie and others (2201158/2012). With one exception, the claim relating to holiday pay, the claims are brought under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) (PTWR). The hearings have so far concentrated on questions concerning the calculation of the pension entitlement of fee paid judges following the judgment of the Supreme Court in *O'Brien v. Ministry of Justice* [2013] UKSC 6 handed down on the 6<sup>th</sup> February 2013, and whether the work of fee paid medical members of certain tribunals was the same as or broadly similar to their salaried colleagues. This hearing has addressed three new topics: a wide range of issues concerning various elements of the remuneration of salaried judicial office holders which are not replicated in, or are said to be less favourable in, the terms and conditions of fee paid judges; the all-important question of from when time runs for the purpose of presenting a claim and the basis on which it might be just and equitable to extend time on a generic basis for any claims commenced after the time limit had expired; and the daily divisor, resolved (subject to appeal) in my judgment in O'Brien (at paragraphs 60 to 74) in respect of recorders, is revisited in respect of Deputy District Judges and Deputy Costs Judges. Similar points in respect of Deputy High Court Judges and Deputy Bankruptcy Registrars were adjourned to be dealt with on another occasion if necessary. One test issue relating to the actuarial reduction of the pension of a salaried judge who retires before reaching their 65<sup>th</sup> birthday (lead claimant Mr Ash) was withdrawn and that part of Mr Ash's claim is dismissed by consent. Two issues, claims relating to payment of the daily fee at a rate less than the agreed appropriate divisor of 1/220 and the eligibility of fee paid judges to the same benefits as salaried judges in the event of premature retirement on health grounds, were resolved by agreement between the parties.

2. For the respondents I heard evidence from ten witnesses and received an unchallenged statement from an 11<sup>th</sup>, Judge Robert Martin the President of the Social Entitlement Chamber. For the claimants I heard evidence from 16 witnesses and received unchallenged witness statements from two others, Mr Christopher Ash and Ms Kathleen Miller. Ms Miller's statement was supplemented by an agreed declaration. I attach as Schedule 1 to these reasons a list of the witnesses and the test issues to which their evidence was directed. Over the weekend before closing oral submissions I read over 300 pages of written submissions plus associated authorities and documents. Whilst I am grateful to all of the legal teams for their industry and compliment them on the excellence of their arguments, in the interests of brevity I do not propose to do more than sketch out the principal points raised for and against a proposition.

3. For ease of understanding I will refer (at least in the main) in these reasons to the test issues rather than the claimants whose cases have been selected as lead cases for those issues, not least because there are few cases in which clear cut distinctions can be made, judges whose careers have been chosen as exemplars of one issue often being eligible to be exemplars of other issues. I attach as Schedule 2 to these reasons the outcome for each of the lead claimants when my holdings on the test issues are applied to their claims (in most cases no mention is made of entitlement to access to the pension scheme as that has already been established by *O'Brien*). The remedy issues arising out of the lead claims where they have succeeded are left to the parties to resolve by agreement or in default of agreement will be determined at remedy hearings in the future. Again in the interest of simplicity I will refer to the respondent throughout as the Ministry of Justice rather than the name under which it was then known when certain decisions were taken and I will refer to judicial offices by their current title except where that is obviously inappropriate, for example when a claimant retired from a particular judicial office before the current tribunal structure came into existence. In all cases references to current roles are to be read as incorporating predecessor roles.

## **B. THE OUT OF TIME POINTS**

### **When time begins to run**

#### **i. Issues and the law**

4. It has always been the intention of the respondent to take out of time points and I reject any suggestion that it is somehow improper or Orwellian for them to do so. Regulation 8 of the PTWR provides, so far as material, as follows:

*“(1) ... a worker may present a complaint to an employment tribunal that their employer has infringed a right conferred on him by regulation 5...*

*(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months .... beginning with the date of the less favourable treatment or detriment to which the complaint relates, or where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.*

*(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.*

*(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2) –*

*(a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;*

*(b) ...*

*(c) ... a deliberate failure to act contrary to regulation 5 ... shall be treated as done when it was decided upon.*

(5) *In the absence of evidence establishing the contrary, a person shall be taken for the purposes of paragraph (4)(c) to decide not to act –*  
(a) *when he does an act inconsistent with doing the failed act; ...*

(7) *Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable –*  
(a) *[a declaration of the rights of the parties]*  
(b) *[order compensation]*  
(c) *[make recommendations]*

5. Regulation 5 provides that a part-time worker has the right not to be treated less favourably than a comparable full time worker. The meaning of comparable full time worker has been discussed in previous decisions in this series of cases and nothing further needs to be said about it.

6. The test issues on time limits addressed four different scenarios:

6.1 where a claimant had held a fee paid office about which complaint is made but relinquished it on obtaining a salaried position more than three months before commencing proceedings (transfer cases)

6.2 the same scenario but after retiring from the salaried office the claimant commenced a further period of fee paid appointment

6.3 where a claimant held one (or more) fee paid office but retired from it (or them) whilst continuing to hold another judicial office on a fee paid basis, the proceedings being brought while only the latter office is still held and more than three months after ceasing to hold the other office (or offices) (portfolio cases). (I think Mr Allan QC divides this class into two – where the first appointment ends and the second begins and where the two overlap for at least some period of time. I see no need to make that distinction).

6.4 where a claimant has a salaried appointment but simultaneously also holds a fee paid role in another jurisdiction.

7. Two points are agreed. Time begins to run from the date on which a judge retires from all judicial office: no claim lies where a judge retired prior to the date on which the ***PTWD required the United Kingdom to bring the necessary laws, regulations and administrative provisions into effect (April 7th 2000)*** irrespective of my holding on the generic just and equitable issue.

## ii. The respondent's submissions

8. Mr Cavanagh QC submits that the point has been decided by the Court of Appeal in ***O'Brien*** ([2009] ICR 593, [2009] IRLR 294) and that I am bound by that finding. He relies on paragraph 17 of the judgment of Maurice Kay LJ with whom the two other Lord Justices agreed:

*“The decision of the employment tribunal to the effect that the application was made out of time was explained in this passage*

*‘His complaint relates to the denial of access as a part-time worker during his period of appointment as a recorder. The complaint therefore relates to that period of time when he says he was eligible to*

*and should have been allowed access to the pension scheme as a part-time judge. The failure to pay pension on 30 June 2005 or on any later date is simply a consequence of that decision to exclude him from access to the pension scheme. The act of discrimination complained of, denial of access to the scheme while a recorder, must be distinguished from the consequences of that act, a failure to pay him pension. The letter of 15 July 2005 does not in itself constitute a discriminatory act, or at least not one complained of in the ET1. Even if the letter was a discriminatory act, it would not in itself give rise to the right to a declaratory judgment of entitlement to access to the judicial pension scheme.'*

*Although in the tribunal, the appeal tribunal and in this court, the claimant has contended for a later date for when time began to run, it is clear to me that the analysis of the tribunal and the appeal tribunal was correct on this point."*

9. Mr Cavanagh submits that this makes it clear that the less favourable treatment comes to an end on retirement rather than arises on retirement and he points out that this part of the Court of Appeal's judgment was not the subject of an appeal to the Supreme Court. He submits that paragraph 17 is wholly consistent with reg 8(2) PTWR and with a body of European jurisprudence stretching back to 1987 which held that pensions are deferred pay and that the right to a pension occurs gradually throughout the employee's working life. He further submits that this argument is wholly consistent with common sense as otherwise a claim brought before a worker retired would have to be struck out on the grounds that no less favourable treatment had yet occurred.

10. He rejects the submission made by Mr Allan that the well-known case of **Barclays Bank v. Kapur** [1991] ICR 208 HL has any relevance, first because it was dealing with a differently worded limitation provision, that in the Race Relations Act 1976, and secondly, but more importantly, that in **Kapur** the less favourable treatment carried on until the claimants retired whereas in these cases it ended when a salaried appointment was taken.

11. So far as the so-called 'portfolio cases' are concerned, that is where a judge has held more than one fee paid office over time (see paragraph 6.3 above), he submits that it clearly cannot be the case that the two roles can be aggregated so that if the judge retires from role A many months before retiring from role B time does not run in respect of role A until his final retirement from role B. They are two different jobs with different terms and conditions both of which had to be applied for separately. He drew an analogy with local government workers who might hold two quite different part time roles, for example as a cleaner in one school and a mid-day supervisor in another and submitted that in **Preston v. Wolverhampton Healthcare NHS Trust (No. 1)** [1997] ICR 899 the Court of Appeal held that for the purposes of the limitation provisions in the Equal Pay Act 1970 those two roles could not be merged as they were held under separate contracts, time running in respect of each contract when it ended. This ruling was approved in **Slack and others v. Cumbria County Council** [2009] IRLR 463 CA.

### iii The claimants' submissions

12. Mr Allan submits that the time limit for bringing a claim cannot begin any earlier than the date on which a claimant's full time comparator would have retired from all salaried judicial office. That is because until that date the comparator has no entitlement to a pension and it is only upon her becoming so entitled that there is less favourable treatment of the claimant. In particular, there is no question of a pension becoming payable should the salaried judge move from one pensionable office (for example as an employment judge) to a different office (e.g. circuit judge). This demonstrates that until retirement there is no entitlement to a pension. The Judicial Pensions and Retirement Act 1993 permits the payment of pension only on retirement from judicial office, not from 'a' judicial office and requires the judge's pension to be calculated on their aggregated service in judicial office, meaning that the judge who changes roles has her total service counted for pension purposes, not just her service in the latest role. The European cases relied upon by Mr Cavanagh are simply not in point as they do not deal with time limit issues at all.

13. The judgment in *O'Brien* must be looked at in context. The issues currently before this tribunal simply did not arise for consideration, in particular the *Barclays Bank v. Kapur* point. There were only three competing contentions for the Court of Appeal to decide between: the date on which Mr O'Brien retired from his only judicial office, that of recorder; one month later when if he had been a salaried judge his first pension payment would have been received; and the 15<sup>th</sup> July 2005 being the date of a letter from the respondent confirming that he would not be paid a pension.

14. Mr Allan submits that there could not be a clearer case of an authority helping the claimants and not the respondent than *Kapur*. In that case the bank operated a policy which denied Asian employees who had served with its subsidiaries and associated companies in East Africa and who had emigrated to the UK upon the Africanisation of their former posts and continued to serve with the bank in the UK, the right to aggregate their service in East Africa with their UK service for pension purposes. White employees who had joined the bank at around the same time had had all of their service with different banks credited for pension purposes. This was a rule or policy which had an ongoing discriminatory effect not a single discriminatory act from which consequences continued to flow.

#### iv. Conclusions

15. Mr Cavanagh by implication and Mr Allan expressly, contend that the same considerations apply to the pension claims as to the general terms and conditions claims which relate to the non-payment (or alleged underpayment) of fees on the happening of certain events. In my view different considerations arise, at least potentially and I will therefore deal with them separately.

#### - pension claims

16. I reject Mr Cavanagh's contention that the point about when time starts to run was decided in respect of all cases by *O'Brien* in the Court of Appeal and that I am bound by that decision. None of the issues before me were before the court which, as Mr Allan points out, had only three alternatives to choose between. Given those alternatives, its decision was almost inevitable. Nothing turns on the fact that there was no further appeal on the point as the claim was held to be in time, the primary

time limit being extended on the just and equitable principle (PTWR reg 8(3)). That having been said, **O'Brien** is clearly binding on me when the facts are the same.

17. I also reject Mr Allan's submission that the moment from which time runs is the date of retirement of the claimant's hypothetical comparator (that date presumably being the date of the claimant's own retirement) as until that date there is no less favourable treatment. If that were the case, Mr Cavanagh's submission that any claim brought prior to retirement would be premature as no cause of action would have accrued, must be right, an outcome that Mr Allan would no doubt seek to avoid. There would also be seemingly insuperable problems of jurisdiction in the transfer cases as at the moment when the cause of action is said to accrue the claimants would no longer be part-time workers (not a requisite for bringing a claim under PTWR reg 8) who would be complaining about something which was happening to them in their capacity as a full time worker – the payment of a smaller pension than their 'comparator' - which would take them outside the ambit of regulation 5. I also do not accept that the way the judicial pension scheme treats the service of a salaried judge when calculating pension entitlement casts any light on how the limitation provisions in the PTWR should be interpreted.

18. In **Barclays Bank v. Kapur** [1991] ICR 208 HL the sole point before the House of Lords was whether the claims had been brought in time. The claimants had moved to the UK on various dates in the early 1970's when they were permitted to join the bank on condition that their service in East Africa did not count for pension purposes. The claims were not presented until October 1987. The bank contended that the decision not to allow the claimants to benefit from their East African service was a deliberate omission within the meaning of section 68(7)(c) of the Race Relations Act 1976 causing time to run from that date. The claimants contended that the relevant provision was section 68(7)(b).

19. The material parts of section 68 provided (omitting later amendments) as follows:

*“(1) An industrial tribunal shall not consider a complaint under section 54 unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done...”*

*(7) For the purposes of this section –*  
*(a) when the inclusion of any term in a contract renders the making of the contract an unlawful act, that act shall be treated as extending throughout the duration of the contract; and*  
*(b) any act extending over a period shall be treated as done at the end of that period; and*  
*(c) a deliberate omission shall be treated as done when the person in question decided upon it...*

20. The House of Lords upheld the claimants' contentions and in doing so approved the judgement of the EAT in **Calder v. James Findlay Corporation Ltd.** (Note) [1989] ICR 157:

*“By constituting a scheme under the rules of which a female could not obtain the benefit of the mortgage subsidy, in our judgment the employers were discriminating against the applicant in the way they afforded her access to the scheme. It follows, in our judgment, that **so long as the applicant remained in the employment of these employers** there was a continuing discrimination against her. .... The rule of the scheme constituted a discriminatory act extending over the period of her employment and is therefore to be treated as having been done at the end of her employment.”*  
[emphasis added]

21. However it is important to understand that in reaching its conclusion the House of Lords was faced with only two options, subsections (7)(b) and (c). Subsection (7)(a) was not available to the claimants in **Kapur** because they had entered into the unfavourable contracts several years prior to the commencement of the Race Relations Act. Nonetheless, the following extract from the speech of Lord Griffiths (with which Lords Bridge of Harwich, Templeman, Ackner and Lowry agreed) is instructive: (at 212 H to 213 D):

*“It seems to me to be a very artificial way of looking at the facts of these cases to say that they constituted ‘deliberate omissions.’ The complaint here is that Barclays did not employ the applicants on as favourable terms as their European comparators. Whenever terms of employment are less favourable it is possible to dress up the complaint as a deliberate omission by saying that the employer ‘deliberately omitted’ to include the more favourable term in the contract. But that ‘deliberate omission’ was not intended to cover such a situation is, I think, made clear by the wording of section 68(7)(a) .....*

*... let us suppose that after the Act was in force a coloured man was employed under a contract which gave him a pension of one-eightieth of salary for each year of service and his white comparator’s contract gave him a pension of one-sixtieth of salary for each year of service. The inclusion of the term as to a pension being less favourable on racial grounds would render the making of the contract unlawful and that act would be treated as extending throughout the duration of the contract.”*

22. I do not accept Mr Cavanagh’s first submission that the time limits in question in **Kapur** and in these proceedings are materially different. While regulation 8(2) PTWR refers to a series of similar acts or failures and section 68(7)(b) to any act extending over a period, the established canons of statutory interpretation require the singular ‘act’ to be interpreted as the plural ‘acts’. Although the wording of regulation 8(4)(a) and section 68(7)(a) differ in that the former appears to expressly contemplate that the defect in the contract can be remedied thus causing time to run whereas the latter does not, the same must be true by implication of the latter provision. If the offending clause were removed the unlawful contract would no longer subsist having been replaced by a lawful one, again causing time to run. In consequence the provisions are for practical purposes identical.

23. However, I also do not accept Mr Allan’s submission that **Kapur** is unequivocally in the claimants’ favour. Although Mr Allan has not expressly said so I am assuming that he relies on **Kapur** principally if not exclusively in those cases

falling within paragraph 6.1 above namely where the claimant is a salaried judge by the time proceedings are commenced but the claim is brought in respect of earlier fee paid office. If he relies on *Kapur* in the so called portfolio cases the outcome must be the same as in the transfer cases. In my judgment *Kapur* does not answer the question posed in the so called transfer cases; it begs it. It begs the question because Mr Allan's submission assumes that *Kapur* applies where an employment relationship continues but the offending contract is superseded by a later 'compliant' contract. That is exactly the issue in the transfer cases. It also ignores the fact that the limitation provision in the Race Relations Act dealing with unlawful contracts was not in issue in *Kapur*.

24. For Mr Allen's submission to succeed I would have to be satisfied that regulation 8(4)(a) PTWR was subject to regulation 8(2) such that even after a term in the contract had ceased to be less favourable, time still did not begin to run if it could be shown that the series of acts complained of somehow lived on independently of the existence of the offending contract. But regulation 8(4) is clearly not subject to regulation 8(2), quite the reverse. It defines how time is to be calculated for the purposes of that regulation in certain circumstances. Where that circumstance is the existence of a less favourable term in a contract, time runs from the date on which it ceases to be less favourable. Regulation 8(2) could therefore be said to be subject to regulation 8(4).

25. I therefore reach the same conclusion as the tribunal in *O'Brien*, namely that the act of discrimination complained of, denial of access to the scheme while a fee paid judge, must be distinguished from the consequences of that act, the failure to pay a pension reflecting fee paid service, a passage expressly approved by the Court of Appeal in *O'Brien*. *Barclays Bank v. Kapur*, in my judgment, far from being a trump card is in fact irrelevant. In a simple transfer case time therefore runs from the date on which the fee paid office about which complaint is made, ended.

26. If that is true of the simple transfer cases it must, in my judgment be true of the so called portfolio cases, that is those cases where at some point in their career a fee paid judge has held other fee paid offices which they no longer hold at the time the claim was presented. Time runs in those cases from the date on which each office was relinquished. The variants of the simple transfer case, where the salaried judge returns to fee paid office on retirement from the salaried post and where the fee paid judge continues to hold a fee paid office in addition to their salaried office, produce the same result although for different reasons. In the former case Mr Allen has failed to explain how, if the first period of fee paid service is out of time, the second period somehow resurrects the corpse. He has failed to explain it because no explanation is available. In the latter case the answer lies in regulations 5(1) and 8(4)(a). Any term in the parallel fee paid 'contract' cannot be less favourable in the sense of the pension it fails to generate as the salaried terms and conditions are generating the maximum pension entitlement possible. Alternatively, even if technically the terms of the fee paid contract are less favourable, for the same reason no remedy would be available under regulation 8(7) as all remedies are discretionary and both a declaration and a recommendation would be entirely pointless. The only exception to this might be a part-time salaried judge who in addition to (but not as part of) her salaried sitting commitment sat fee paid in another

jurisdiction and drew a fee for those sittings. There being no lead case which has those facts I am unable to reach a definitive conclusion on it.

**- terms and conditions claims**

27. Having concluded that for pension claims time runs from the ending of the appointment in question, it must follow that for exactly the same reasons, time runs from the same date for terms and conditions claims (I use the phrase 'terms and conditions claims' to encompass all claims in these proceedings other than those of exclusion from the judicial pension scheme). Those arguments which were said to be available in connection with the pension claims to show that time began to run from a later date are simply not available in terms and conditions claims or to any extent that they might be, they fail for the same reasons.

28. However, in respect of some terms and conditions claims the respondent contends for an earlier date from which time runs and I will deal with those submissions when considering the different claims which have been brought later in these reasons.

**Just and equitable extension of time**

**i. The issues**

29. I am invited by the parties to say whether and if so to what extent, certain so called generic factors can be taken into account in determining whether it is just and equitable to extend time for bringing claims which have not met the three month time limit beginning with the end of the fee paid appointment in question. This is a difficult area as it is common ground that it is for an individual applicant to satisfy a tribunal that on the facts of his or her particular case it would be just and equitable to extend time (*Robertson v. Bexley Community Centre* [2003] IRLR 434 CA). The idea of generic grounds does not sit happily with that concept. The difficulty is compounded by the fact that the points relied on are not truly generic as no claimant who gave evidence to explain why they personally had not brought their claim in time identified all of the reasons relied on by Mr Short QC and Mr Allen. Moreover, in at least one respect, that of the length of the delay, the periods in question cover a very wide range from 6 weeks to 17 years. Nonetheless, I have felt it possible to give the requested guidance.

30. It is common ground that there is no presumption in favour of granting or refusing an extension. The discretion is at large and falls to be exercised in all the circumstances of the case. Whether a claimant can displace the statutory time limit on this basis is a question of fact and judgment for the tribunal (*Chief Constable of Lincolnshire Police v. Caxton* [2009] EWCA Civ 1298). A 'wholly understandable misapprehension of the law' must have been a matter which Parliament intended the tribunal to take into account and the tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980 (*British Coal Corporation v. Keeble* [1997] IRLR 336 EAT).

31. The claimants rely on *DPP v. Marshall* [1998] ICR 518 EAT which held that the discretion 'may include a consideration of the date from which the complainant could reasonably have become aware of her right to present a worthwhile claim.'

Whilst Mr Cavanagh does not deny that **Marshall** is in point, he does deny that it has the significance contended for by the claimants.

32. I am specifically asked to comment on the efficacy of the so called Moratorium issued by the Ministry of Justice in April 2013 following an initiative between the Lord Chief Justice and the Lord Chancellor which announced that the respondent would not take out of time points against any claimant who chose not to issue a pension claim provided that their claim would have been in time on the 1<sup>st</sup> March 2013. The announcement was made in the wake of the judgment of the Supreme Court in **O'Brien** in February which was (correctly) anticipated to trigger a flood of claims. The purpose of the Moratorium was to prevent to some extent both the tribunal and the MoJ being swamped with new claims. I am also asked to consider the claims of two claimants, Mr Peter Robins and Ms Kathleen Miller, on an individual basis if I am against the claimants' generally on the question of generic grounds.

ii. **The claimant's submissions**

33. Mr Short and Mr Allen both made submissions on this point and I trust I may be forgiven for not attributing a specific submission to specific counsel: suffice it to say that Mr Allen adopted Mr Short's submissions whilst adding some cogent ones of his own. In particular he made much of the fact that this was truly test case litigation and that the Moratorium and earlier correspondence which he and Ms Crasnow had had with the Court of Appeal over the issue of whether leave to appeal to the Court from the EAT should be granted, made that quite clear. In consequence it was 'ridiculous' to suggest that the flood of claims which the Moratorium was expressly trying to prevent should have occurred at an earlier date as any claim presented would have been stayed behind **O'Brien** and none would be any further forward than they now are. From the moment it was accepted by the Court of Appeal that **O'Brien** was a test case on whether regulation 17 PTWR (which stated that the Regulations did not apply to the holders of fee paid judicial office) was compatible with the UK's obligations under the Part-time Workers Directive (97/81/EC) (PTWD) there was no point in bringing a claim.

34. The other generic factors relied on include the following (each was developed at length but I do not propose to do more than identify the factors, nor do I propose to consider the evidence of individual claimants as these are generic points. Suffice it to say that the points listed in this and the next paragraphs had some support in the evidence where such support was required):

(a) liability is not in issue at least for pensions so every single time barred claim is a windfall for the MoJ

(b) the MoJ is both law maker and employer. Despite its unique obligation properly to transpose the PTWD, it purported to give statutory authority to the unlawful unequal treatment in regulation 17 PTWR

(c) the MoJ resisted claims and sought to uphold regulation 17

(d) it would be particularly inappropriate for a serving judge to bring unmeritorious claims against the MoJ

(e) claims appeared hopeless following the Court of Appeals decision in 2008 and the decision in **Christie v. Department of Constitutional Affairs** [2007] ICR 1553 EAT in 2007 and remained speculative until the final judgment of the Supreme Court in February 2013. Applying **DPP v. Marshall** all claims issued reasonably promptly after that date should have the time limit extended

(f) there is no prejudice and a fair trial is still possible: the burden remains on the claimants to prove the extent of their losses and no pension calculations would have been done before now even if claims had been brought earlier

(g) the extent of the delay is pertinent and there is no material difference between a delay of 6 weeks, 6 months or 6 years given that claims would have been stayed in any event

(h) unequal treatment of the same fee paid service of judges whose circumstances are identical save that one remained fee paid and one took up salaried appointment, would be unjust and inequitable.

35. The factors raised by one or more of the claimants were based around:

(a) the claimant's knowledge of the **O'Brien** litigation and the fact that they were not specialist employment lawyers

(b) the belief that the claim would fail

(c) the belief that it was not necessary to bring a claim because the MoJ could be expected to act across the board to right the wrongs for which it was uniquely responsible

(d) the belief that it was not necessary to bring a claim because, all things being equal, the claimant would accrue maximum pensionable service before retirement in any event

(e) the belief that time would start to run from the date of retirement

(f) the belief that it was inappropriate to issue proceedings without the advice of the MoJ and that there was no point in seeking such advice.

36. This last point needs some development. It is based on a clause in the Judicial Conduct section of the terms and conditions of appointment of all judicial office holders. In some the clause provides merely that: 'Office holder must notify the Lord Chancellor if they are involved or likely to get involved in any court proceedings.' In others a longer paragraph includes the following:

*"As regards proceedings in a purely private capacity, the Lord Chancellor is concerned that the normal legal rights of a [judge] as a private citizen should not be unduly prejudiced. But a [judge] may think it appropriate to seek advice from [the identified individual differs depending on the court or tribunal] before himself initiating any such proceedings."*

37. The financial prejudice which the respondent would suffer as a result of the loss of an accrued limitation defence upon the exercise of the discretion under section 33 of the Limitation Act 1980 is not a relevant consideration in deciding whether the discretion should be exercised (**Cain v. Francis** [2008] EWCA Civ 1451).

### iii. The respondent's submissions

38. Mr Cavanagh submitted that much of the claimants' case on this point seems to amount to special pleading because they are judges and the MoJ, the department for which they 'worked', was responsible for the offending regulation and as the Ministry of Justice must not act unjustly. This was not a case in which any of the material facts had been concealed or where any of the claimants did not know or could not have known with a little thought and enquiry, all the material facts at all material times. None took legal advice to see whether they might have a claim until

shortly before issuing proceedings. A considerable number of claims had been brought before the decision of the Supreme Court in **O'Brien** in February 2013, in particular 180 claims in 2011 and 465 in 2012 suggesting that at least those judge claimants were unaffected by the matters now preyed in aid. Prior to that however, there had only been a total of 37 claims including Mr O'Brien's own.

39. Mr O'Brien's case had received a great deal of publicity from time to time. It was reported in the law reports from the Court of Appeal decision in 2008 onwards and from that time at least it was a topic of conversation among judges. There was evidence to this effect from several of the witnesses. By the time it reached the Supreme Court in 2010 the Council of Immigration Judges had formally intervened and probably no later than the second half of 2008 they and the Council of Employment Judges had obtained what appeared to be favourable opinions from different leading counsel. Mr O'Brien himself had been in touch with all practicing barristers through the columns of 'Counsel' magazine in November 2006 and thereafter made several follow up reports to those who had supported him financially. There was an article in the New Law Journal in August 2010 following the Supreme Court's decision to refer the question of worker status and the validity of regulation 17 PTWR to the Court of Justice of the European Union (CJEU). Only two lead claimants, Mr Peter Wain and Mr Robins, claim not to have been aware of the O'Brien litigation until very shortly before they commenced proceedings in April 2011 and February 2013 respectively. Both had by that time retired, Mr Wain nearly 6 years earlier. No other lead claimant suggested that they had become aware of the proceedings any later than at around the time of the date of the reference to the CJEU in late July 2010 and several accepted that they had known of them from their inception.

40. The length of the delay in individual cases is important. In **Keeble** one claimant whose claim was 12 years out of time did not have her time extended even though other claimants apparently in the same position did. In **Foster v. South Glamorgan Health Authority** [1988] ICR 526 EAT it was said that the line had to be drawn somewhere. Most lead claimants are between 4 and 10 years out of time while one, Mr Fox, is 17 years out of time.

41. Every one of the claimants is an experienced lawyer which places them in a much better position than the ordinary litigant. To say that they were not experienced *employment* lawyers is a hopeless point – most litigants aren't lawyers at all. There is no reason why the application of the time limit provisions to claims brought by judges should be any different to their application to claims brought by lay people. It was clear from no later than the Court of Appeal decision in 2008 when time ran from and that the MoJ were taking the time limit point against Mr O'Brien.

42. A lack of belief that the claim will succeed is not a valid reason for not commencing proceedings. By July 2010 when the Supreme Court made the reference to the CJEU, it must have been clear that the chances of success were improving and the Advocate-General had given a favourable opinion which was published in November 2011. Moreover in **Percival-Price and others v. Department of Economic Development and others** [2000] IRLR 380 NICA in a claim brought by salaried judges of the Industrial Tribunals and Fair Employment Tribunals in Northern Ireland under the Equal Pay Act (Northern Ireland), the

Northern Ireland Court of Appeal had held that they were workers who were in employment within the meaning of European Community law and that a provision in the Act which excluded persons holding statutory office could be disapplied as being inconsistent with Article 119 of the Treaty of Rome.

43. There is no principle in law that a potential claimant does not have to bring a claim in time if they are aware of a test case on the same issue. In any event, **O'Brien** was never a test case on anything other than the worker and regulation 17 points and any objective justification and the claim related only to pensions and training days. It was also specific to recorders. Significant numbers of claims were in fact presented by Browne-Jacobson on behalf of clients before **O'Brien** was finally decided by the Supreme Court.

44. So far as the question of impropriety is concerned, most claimants who take the point did in the end present claims while still serving as judges, some doing so before the final decision of the Supreme Court. It is the most egregious form of special pleading for judges. Any claimant still in employment may be concerned about annoying or alienating their employer but judges are in fact in a stronger position as there was no realistic possibility that the Lord Chief Justice or Lord Chancellor was going to victimise a judge because they were joining in litigation to assert a right on a pure point of law.

45. On the issue of prejudice, there is no requirement for a respondent to show some specific and unusual prejudice. Prejudice is suffered because if an extension is granted the respondent has to face a liability it would otherwise not have to face (**Department for Constitutional Affairs v. Jones** [2007] EWCA Civ 894. The claimant must show some exceptional reason why the time limit should be extended (**Robertson v. Bexley**).

#### iv. Conclusions

46. My starting point must be **Robertson v. Bexley Community Centre** which was a complaint under the Race Relations Act 1976 which an industrial tribunal had found to be out of time and had refused to exercise its discretion to extend time under the same just and equitable principle that applies to claims under the PTWR. In restoring the decision of the tribunal on an appeal from the Employment Appeal Tribunal (EAT), Auld LJ, who gave the judgment of the court, said this:

*"24. The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition it is to be found in Daniel v. Homerton Hospital Trust (unreported, 9 July 1999, CA) in the judgment of Gibson LJ at p. 3 where he said:*

*'The discretion of the tribunal ... is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong'*

25. *It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless*

*the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”*

47. In **Chief Constable of Lincolnshire Police v. Caston** [2009] EWCA Civ 1298 at para 25 Sedley LJ explained this approach:

*“... there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields ... policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in **Robertson** that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them.”*

48. In the earlier case of **British Coal Corporation v. Keeble** [1997] IRLR 336 EAT (which was not referred to in the judgments in either **Robertson** or **Caston**) it was held that the discretion conferred by the corresponding provision in the Sex Discrimination Act 1975 was as wide as that conferred by section 33 of the Limitation Act in respect of which a mistake of law or inaccurate advice given by a lawyer as to the state of the law has been taken into account in exercising the discretion to disapply the limitation period. If the only reason for a long delay is a wholly understandable misapprehension of the law, that must be a matter which Parliament intended the tribunal to take into account.

49. These cases are not comparable with **DPP v. Marshall**. In that case, as Mr Cavanagh graphically described it, the decision in **P v. S** (Case C-13/94) [1996] ICR 795 ECJ which alerted Ms Marshall to the fact that she might have a case, came ‘out of left field’ in other words it took everyone completely by surprise. It did so for two reasons. It was an entirely novel attempt to construe the Sex Discrimination Act 1975 so as to permit a claim to be brought alleging discrimination on the grounds of gender reassignment and the reference to the ECJ had been made by an industrial tribunal in Truro. The differences between **Marshall** and these proceedings are therefore two-fold: in **Marshall** the ground of complaint was entirely novel; in these proceedings the ground of complaint was well recognised but subject to a blocking provision which needed to be disapplied, a very similar provision having been disapplied in **Percival-Price**. In **Marshall** there would have been no or almost no publicity prior to the judgment of the ECJ itself (with the possible exception of the Advocate-Generals opinion); these proceedings were well publicised and much discussed from the time of the Court of Appeal judgment in 2008.

50. The claimants in these proceedings are all considerably more sophisticated and knowledgeable about the law than the average litigant. The fact that the majority are not employment lawyers is neither here nor there. All of the facts necessary for them to bring a claim will have been known to them from a relatively short time after their appointment, namely that as fee paid judges they were excluded from the judicial pension scheme whereas their salaried counterparts were not and that in certain other respects the terms and conditions of their salaried counterparts also seemed more favourable. None took advice to see whether they might have a claim and all must have been alive to the fact that if they did have a

claim a limitation provision would apply to it, that being the invariable rule with regard to civil proceedings in this country. As Mr Cavanagh has pointed out, had they cared to research the topic there was ample material available, not just about the O'Brien litigation but on the subject of discrimination against part-time workers generally, Ms Kamm having produced a list of 23 articles or papers in the legal press on the subject since 2000.

51. All the lead claimants, apart from Mr Robins and Mr Wain, had become aware of the O'Brien litigation, albeit in some cases perhaps only vaguely, some years prior to the commencement of proceedings, most at around the time of the judgment of the Court of Appeal although at least two were aware of it from the outset. I find it difficult to accept that any Employment Judge or Immigration Judge in post in mid to late 2008 could not have been well aware of the litigation and most certainly should have been aware of it, as their professional bodies were both independently taking leading counsel's opinion and by mid 2010 the latter had formally intervened in the proceedings. The evidence from several of the lead claimants suggests that it was a topic of conversation among judges at least from time to time. A large proportion of the claimants in these proceedings in my judgment did know of the proceedings from around the time of the Court of Appeal judgment and almost all if not all of those who did not should reasonably have been aware of them given the publicity which they received.

52. This is also not a case like *Keeble*. No-one had been given mistaken advice about the law. From the outset Mr O'Brien had obtained the opinion of distinguished leading counsel to the effect that he had a good case but would probably have to go to Europe to establish it. Although I have not been shown the opinions obtained by the Council of Immigration Judges and the Council of Employment Judges there can be little doubt that in the former case it was to the like effect (they would scarcely have intervened in the proceedings had it been otherwise) and I have no doubt that if Brian Napier QC had been advising the Employment Judges that the claim would fail that would have been a ground relied upon by those judges in support of their application to extend time in these proceedings.

53. I am not persuaded that the clauses in the various terms and conditions of appointment of fee paid judges which I have set out at paragraph 36 above have any real connection with the delay in commencing proceedings. On the balance of probabilities, on the evidence which I heard I am satisfied that if the lead claimants were aware of the existence of those terms at all at the material time, it was only vaguely in the back of their minds. In any event the clauses impose no kind of prohibition against the bringing of proceedings or imply any kind of threat. Mr Jones-Evans' belief that the clause required him to obtain permission to bring proceedings is plainly and unarguably both wrong and unreasonable: the clause is quite incapable of being so construed. I can accept that many judges might have felt uncomfortable at the notion that they should commence proceedings against their 'employer' but Mr Cavanagh is plainly right that in that respect they were in no different position from that of any litigant bring a claim under the PTWR while still employed and almost certainly had less to fear by way of unfortunate consequences.

54. I do not accept the suggestion that there would be no need to bring a claim because if the matter were finally resolved against them the MoJ would put things

right for everyone and I do not understand how such a view could reasonably have been held, at least with regard to the past. Had the MoJ given any such indication that would have been a very powerful reason for extending time, but there is no claim that they did so. Indeed, rather perversely there is a complaint that the MoJ was acting in a way unbecoming a Ministry of Justice by digging its heels in and fighting its corner and taking out of time points against Mr O'Brien. While the judgment of the Supreme Court would, if favourable, compel the MoJ to put matters right for the future it imposed no obligation on them to do so for the past if claims were time barred.

55. I equally do not accept the point about test cases. Mr Cavanagh's submission is plainly right. There is no magic about test cases which obviates the need for others with similar claims to present their claims timeously in order to safeguard their positions and I find it difficult to accept that experienced and knowledgeable lawyers, whatever their field of practice, could have believed otherwise. Had they had any doubts in the matter they should have taken legal advice but none did. Mr Cavanagh is also right that the respondent does not have to show specific prejudice. Faced with two apparently conflicting authorities of the Court of Appeal (I note that *DCA v. Jones* does not seem to have been drawn to the attention of the Court in *Cain v. Francis* despite having been reported before the latter appeal was heard) had it been necessary to do so in order to decide this point I would have followed the former as it dealt with the application of the same principle albeit in the Disability Discrimination Act rather than the related principle in the Limitation Act.

56. I have come to the conclusion that whatever post hoc rationalisation has taken place, the most likely explanation for the delay is that given by Mr Peter Howarth 'I don't back losers.' It is no coincidence that as Mr O'Brien's chances of success seemed to improve the number of judges willing to overcome such scruples as they might have had about commencing proceedings, increased. The analogy to a horse race raised by Mr Howarth is apposite. It seems that we have a large crowd of onlookers knowing that if the outsider wins they will benefit greatly but, doubting his chances of success, they wait until he unexpectedly pips the favourite at the post only to object when the bookmaker refuses to accept bets on the entirely understandable grounds that the race is over!

57. In my judgment, Mr Cavanagh is right. Much of this is special pleading on the grounds that the claimants are judges and the respondent is the MoJ. In an ordinary case the claimants' position on these generic points would be hopeless: all relevant facts were known throughout; no-one was given incorrect legal advice about their prospects of success; the issues were clear and well defined from the outset but none of the claimants who are out of time sought their own legal advice until too late; in general terms the fact of the *O'Brien* litigation and its progress were known to most judges to a greater or lesser extent at least from 2008; the chances of success may have appeared slight at first but that is a risk attached to almost all litigation of this nature and by the date of reference to the CJEU in July 2010 things were looking up. The typical period of delay is measured in years rather than months. The test case point has no substance. No special rules attach to claims in test cases and it is surprising that any judge should take the view that they do or even might. The fact that these claimants all are or were judges does not improve their position, if

anything it makes it worse on account of their greater understanding (sometimes only in general terms of course) of the law and legal process. The position of the Employment Judges and Immigration Judges who collectively sought and obtained what appears to have been favourable legal advice probably in 2008 is particularly problematic. In short there are no generic grounds on which I could find that it is just and equitable to extend time even though each claimant affected by this decision will suffer the prejudice of losing what would otherwise have been a valuable claim.

58. There is one very limited exception. Where the sole reason for a pension claim being presented out of time is that the claimant has relied on the Moratorium issued by the respondent in April 2013, which entails the claim being in time as of 1<sup>st</sup> March 2013, it would be just and equitable to extend time. It is important to note that the Moratorium only applies to pension claims.

59. I am asked to consider two individual cases on the basis that special circumstances apply to them. The first is that of Peter Robins a Deputy District Judge (civil). Two features are unique to his case, at least among the lead case claimants. The first is that his claim is only 6 weeks out of time. The second is that he was unaware of the *O'Brien* litigation until he read an article in the Law Society's Gazette in February 2013 which was presumably prompted by the final judgment of the Supreme Court. He had retired on the 15<sup>th</sup> October 2012 so his claim was already out of time when he read it. He immediately researched the case on the internet and contacted Messrs Browne Jacobson who issued his claim on the 26<sup>th</sup> February. Mr Cavanagh submits that the time limit should not be extended in Mr Robins' case because he accepted that throughout his career as a fee paid judge he had known that he was treated less favourably than a salaried District Judge but took no steps to ascertain whether he might have a remedy. The fact that he was not an employment lawyer is irrelevant because he could have obtained specialist advice from others.

60. In my judgment it would be just and equitable to extend time in Mr Robins' case. There is no suggestion that he is not being entirely truthful when he says that he had no knowledge of this litigation until about the 13<sup>th</sup> February 2013 when he read the article in the Law Society's Gazette. The areas of law in which he practised make it understandable why he might not have been aware of either the litigation or the issues behind it prior to that. Having made the discovery he acted with great diligence and speed. Moreover his claim is out of time by only 6 weeks. I suspect this combination of factors will be extremely rare.

61. In the case of Ms Kate Miller, Mr Cavanagh has accepted that the description that she gives in her witness statement of her serious health problems is accurate. She suffered a stroke in September 2010 which resulted in expressive dysphasia a condition affecting her ability to communicate. She resigned her appointment as a fee paid judge of the Social Entitlement Chamber on health grounds on the 18<sup>th</sup> April 2011 having encountered further serious health issues. It was not until about August of that year that she 'was able to take an interest in matters other than staying alive'. She contacted Browne Jacobson at the end of that month and her claim form was presented on the 31<sup>st</sup> October 2011. Mr Cavanagh agrees that it would be just and equitable to extend time in her case because of her severe health problems.

## C. THE DAILY DIVISOR

### i. The issues

62. I dealt with this issue at length at paragraphs 60 to 74 of my reasons for the judgment in *O'Brien* dated 19<sup>th</sup> August 2013. Mr Allen submits that my decision in relation to the divisor for recorders effectively decides the point in relation to all other categories of fee paid judge as the reasoning is of universal application and it is an abuse of process for the respondent now to seek a different ruling for different categories of judge. He relies on *Ashmore v. British Coal Corporation* [1990] ICR 465 CA. and expressly reserves the right of the claimants to apply for costs on this point if it is pursued.

63. Following the *O'Brien* preliminary hearing the claimants were asked to specify the daily divisor for which they contended in respect of each category of judge and the respondent was asked to indicate whether it took the same point or different points in defending those contentions. The area of dispute turned out to be relatively narrow as the claimants accepted that 220 was the correct divisor for all tribunal judges. The only categories of fee paid judge where a different divisor was contended for were Deputy High Court Judges, Deputy Bankruptcy Registrars, Deputy Masters and Deputy Costs Judges where the correct divisor is said to be 210 and Deputy District Judges where the correct divisor is said to be 215. A dispute arose between the parties very shortly before the hearing was due to commence over whether Deputy High Court Judges and Deputy Bankruptcy Registrars were covered by the case management order for these proceedings and if they were not, whether permission should be given for them to be added. The outcome was that they were not added and submissions and evidence in respect of them were adjourned to another day should that prove necessary. I expressed the preliminary view that it should not be necessary as I had understood my solution to the question in *O'Brien* to be applicable to all jurisdictions but that it was open to Mr Cavanagh to persuade me that that was not the case.

64. The start and finish point of the claimants' case is that the instruments of appointment of the salaried comparator for the Deputy Master and Deputy Costs Judge shows that their commitment to the court is 210 days per annum and that of the salaried comparator for the Deputy District Judge is 215 days per annum. Applying my ruling in *O'Brien* the outcome of this issue is therefore self-evident.

65. Mr Cavanagh rejected Mr Allen's criticisms and submitted that it was open to the respondent to call evidence showing that the picture was different in respect of different classes of judge. I therefore heard evidence from a number of witnesses. Unsurprisingly I heard, and accept, that some salaried judges in each of the categories work considerably in excess of their commitment to the court as measured by their instruments of appointment, most notably in the evenings and weekends. But equally unsurprisingly I heard evidence, which I also accept, that some do not or do not do so to any great extent.

### ii. Conclusions

66. It would be quite impossible for me to say, based on the evidence which I heard, that the typical salaried judge in any of the jurisdictions in question typically works any identifiable number of days in excess of the stipulated figure, not least

because much of the evidence that they do so to excess came from judges whose positions and additional responsibilities were by no means typical. But even if I could have done so, it would have been beside the point.

67. In my judgment in *O'Brien*, I made it clear that the statistical approach to the question of establishing the correct divisor for which Mr Allen had contended was wrong in principle, not least because of its uncertainty both as to outcome and as to the nature of the statistics themselves. Mr Cavanagh's approach invites me to hold, in effect, that what was sauce for the claimant goose is not sauce for the respondent gander. His approach is equally impermissible. I explained why in *O'Brien*. Given the atypical nature of both the claimants and their comparators working relationships with the respondent, and the consequential anomaly (in the context of the comparison which the PTWR requires me to make) of comparing a salaried person without a contract of employment with a part-time worker paid by a fee, the amount of which is fixed in advance irrespective of the actual number of hours worked in what might be called the reference period (one day or one session), a stable mechanism for making the comparison required by the Regulations had to be found. I held that the correct approach was to determine the extent of the salaried comparators 'commitment to the court'. For the avoidance of any doubt, that is not, as Mr Cavanagh put it in his opening skeleton argument for this hearing, the number of sitting days per year, nor is it, as he put it in his closing skeleton in politely rejecting the criticism I had levelled at his opening submission, the judge's 'judicial work at court.' It is all 'judicial business' as defined in the instrument of appointment which includes training days, conferences or seminars arranged by or under the sponsorship of the Judicial College and attendance at certain meetings.

68. In the absence of compelling evidence that the number of days of judicial business given in the instrument of appointment as the extent of the judge's commitment to the court has been superseded in practice so that as a matter of fact and law the instrument had been amended, the terms of the instrument can, in my judgment, be the only measure of that commitment. It is simply not enough to call evidence that many judges work more days, perhaps that even all judges in the jurisdiction do. What would be required would be something of the order of a letter or other indisputable communication from the MoJ or the Senior President of tribunals or other judicial head of division, to the effect that for the future the instrument of appointment's definition of the commitment is replaced by some other defined figure which would of course involve the reduction in the amount of annual leave the judges were entitled to. I note in particular that in the case of District Judges that any 'sitting' in excess of 215 days in year one can be offset against a judge's sitting commitment in year two. For Costs Judges and Masters any 'sittings' over 210 in a year up to a maximum of 10 for each of three years can be utilised as additional leave in the fourth year. For it to be the case that the extent of the judge's commitment to the court in their instrument of appointment had changed, such arrangements with regard to carrying forward sitting days and additional leave would also have to be superseded.

69. My holding in respect of this issue in *O'Brien* appeared to me at the time to be of universal application. Having heard further submissions and evidence I am satisfied that it is. Therefore the correct daily divisor for Deputy Masters and Deputy Costs Judges is 210 days and for Deputy District Judges is 215 days.

## D. TERMS AND CONDITIONS CLAIMS

### Holiday pay

#### i. The issues

70. These claims (apart from one, that of Ms Baker whose claim under regulation 14 is conceded in principle) are entirely without merit. They were originally brought (largely by Leigh Day represented claimants) as claims under the PTWR and the Working Time Regulations 1998 (SI 1998/1833) (WTR) but are no longer pursued under the former, no doubt because they could not succeed. They could not succeed because there is no dispute that all claimants have been able to take such holiday as they may be entitled to and, although Mr Short could not bring himself in closing submissions to admit that all have been paid holiday pay, accepting only that 'the amounts which fee paid judges are paid is by way of a divisor which takes account of non-sitting days for judges' there is no doubt that (except for the rare case where a judge's appointment comes to an end during a leave year before she has had the chance to take all her accumulated holiday) all have been paid full holiday pay. The case is therefore pursued on the most technical of grounds (now also under Part II of the Employment Rights Act 1996 to take advantage of the more favourable time limits relating to a series of deductions which continues across more than one leave year) which, as Mr Short explains more than once in his closing skeleton argument, is the MoJ's failure to make the fact that it was paying rolled up holiday pay transparent and comprehensible by setting it out clearly.

71. There are two live issues: whether, notwithstanding those technical failures by the MoJ, they are still permitted to set off under regulation 16(5) the rolled up holiday pay against a judge's entitlement to holiday pay when taking leave, their right to do so not being in doubt provided certain conditions are met, and whether regulation 15 of the WTR requires notice to be given before entitlement to statutory holiday pay arises and if so whether it has been complied with. With regard to the former, at paragraph 105 of his closing skeleton Mr Short accepted that if the rolled up holiday pay can be set off against a judge's entitlement 'it will not be suggested that there is any further entitlement to holiday pay' which can only amount to a concession that holiday pay has, in fact been paid in full even if not paid in a manner which complied with the WTR.

#### i. The facts

72 In fact, as Mr Bourne, who led for the respondent on this issue, submits, rather more than the statutory entitlement has been paid. While the statutory entitlement (ignoring transitional provisions for part years each time the rate changed) was 4 weeks per annum for leave years beginning before 1<sup>st</sup> October 2007, 4.8 weeks for leave years between that date and before 1<sup>st</sup> April 2009, and 5.6 weeks for leave years beginning after that date, the way in which the Senior Salaries Review Body (SSRB) arrived at its conclusion that the appropriate divisor for fee paid judges was 1/220<sup>th</sup> of a salaried judge's pay effectively gives the fee paid judge 41 days or 8.2 weeks holiday pay per annum. Mr Short does not challenge that assessment. There would therefore be not merely double recovery if this claim was to succeed but more than treble recovery for leave years beginning before 1<sup>st</sup> October 2007.

73. The other facts are also largely undisputed. The SSRB reports do not make it clear that the daily fee includes holiday pay nor do they specifically state that in arriving at the daily fee the holiday entitlement of salaried judges has been taken into account, although that can be the only explanation for the figure of 1/220<sup>th</sup> given that there are 365 days in a year of which only 104 are weekends. Most but not all memoranda of terms and conditions attached to instruments of appointment make no reference to the fact that the daily fee includes holiday pay but some do, including Fee-paid Immigration Judges 2005 edition, Recorders 2011 edition and Deputy District Judges 2005 edition. They also explain the basis for the assertion albeit in different terms. I have almost certainly not seen every edition of such terms and conditions and it may well be that there are others which also include similar information. It would however be unfortunate if this issue turned on what a particular edition of the terms and conditions said as that could have the wholly undesirable consequence of some judges in a jurisdiction being entitled to holiday pay and some not, depending on which edition of the terms and conditions they had been appointed under.

74. No edition of the terms and conditions requires a fee paid judge to notify their home court or tribunal of their intention to take leave. I reject Mr Short's contention that the clause in the Tribunals Service terms of 2010 requiring fee paid judges to *'indicate sufficiently far in advance the dates on which, because of other official commitments or their holidays, they do not expect to be available to sit'* created such an obligation. The only requirement is to notify the fact of unavailability, not the reason for it. I also reject Mr Short's contention that the absence of an express requirement to notify is a relevant agreement for the purposes of regulation 15(5) WTR thus excluding any requirement for notice that there might otherwise be under regulation 15(1). A failure to say anything about a subject clearly cannot amount to an agreement about that subject one way or the other. Mr Tomlinson, one of the lead claimants did not give notice. I do not accept Mr Short's submission that the other lead claimant, Ms Baker did. Her evidence was that she only notified her home court of her unavailability if it clashed with a pre-booked holiday and she was not required to give the reason for being unavailable.

75. Fee paid judges are, by the nature of their appointments, casual workers. They therefore take their holidays at times when they do not sit, convenient to themselves and may well not let anyone at their home court or tribunal know. They owe no obligation to the MoJ beyond meeting any minimum sitting commitment required of them, usually not more than 30 days a year. No judge has been deterred from taking leave by the fact that they had not been told that their daily fee included holiday pay.

#### **ii. The respondent's submissions**

76. Mr Bourne submits that notwithstanding the respondent's failure to comply with the strict letter of the WTR they can set off the holiday pay rolled up in the daily fee against a judge's holiday entitlement. If I am against him on that point he submits that none of the claimants did sufficient by way of giving the notice required by regulation 15 WTR to become entitled to the payment of statutory holiday pay. He urges me to adopt a purposive interpretation of the Regulations and the authorities and that I should not allow double recovery unless I have no option. What matters is whether an employer is demonstrably and genuinely paying holiday

pay, not whether the worker is aware that that it the case. What has to be avoided is a situation where the employer makes it up as he goes along making unverifiable, unilateral, claims that holiday pay is being paid. In these cases the system of payment was based on the SSRB report, a public document, the effect of which was readily identifiable.

77. Fee paid judges are atypical when it comes to holiday pay and many of the policy considerations which underpin the judgment of the ECJ in **Robinson-Steele v. RD Retail Services Ltd** (Cases C-131 and 257/04) [2002] ICR 932 simply do not apply to them, in particular the health and safety issues and the worry that if rolled up holiday pay is paid it will be used for weekly subsistence leaving the worker unable to take holiday. The policy behind the Working Time Directive (93/104/EC) when considered in the light of these cases did not mean that the need for transparency and comprehensibility had to be applied in a technical way. He accepted that where the terms and conditions are silent about holiday pay the point was less clear cut in the respondent's favour.

78. On the question of notice, which he described as his fall-back position, he submitted that if the claimants are applying the letter of the WTR against the respondent it was only fair for the letter of it to be applied against them in the matter of notice. He relied in particular on Article 7 of the Directive and paragraphs 23 and 26 to 30 of the judgment **Fraser v. Southwest London St George's Mental Health Trust** [2012] ICR 403.

79. The time limit for bringing a holiday pay claim does not run from the end of the contract but from the time of last non-compliance with the WTR, that is when the last period of leave for which no directly referable payment was made, was taken. The failure of any claimant to notify the respondent that annual leave is being taken means that they cannot show that a claim is in time nor can any 'loss' attributable to that period of leave be quantified.

### iii. The claimants' submissions

80. Mr Short's closing skeleton argument on this issue runs to 24 pages and 91 paragraphs. I therefore summarise only the main points.

81. The payment of rolled up holiday pay, that is where the worker's pay is said to include an element of holiday pay, does not satisfy the requirements of the Directive or the WTR (**Robinson-Steele**). Whilst rolled up holiday pay may be off-set against the obligation to pay holiday pay when the holiday is taken in certain circumstances, those circumstances do not exist in these cases. Regulation 16(5) WTR is the starting point as it permits payments of contractual holiday pay to be set off against the statutory liability. Several cases, notably **Gridquest Ltd v. Blackburn** [2002] ICR 1206 CA, **Robinson-Steele**, **Marshall's Clay Products v. Caulfield** [2004] ICR 436 EAT and **Lyddon v. Englefield Brickwork Ltd** [2006] IRLR 198 EAT all make it clear that there is no contractual holiday pay capable of being set off against the statutory obligation where there is no agreement that holiday pay was included in the weekly pay. In particular it is not open to an employer simply to announce that holiday pay is included. The uncontradicted evidence of the lead claimant Mr Tomlinson was that he did not know that the daily fee included an element of holiday pay. Mr Short relies in particular on the categorisation of contracts concerning

holiday pay identified in **Marshall's Clay** and submits that the terms and conditions given to fee paid judges fall into two of the categories which were said to be not compliant with regulation 16(5) namely contracts which are silent in relation to holiday pay and contracts where the rates are said to include holiday pay but there is no indication or specification of the amount. The fact that some terms and conditions simply make reference to holiday pay being included in the sitting fee therefore does not resolve the problem.

82. The notice requirement in regulation 15(1) is clearly not mandatory as it merely says that a worker 'may' give notice. Moreover it is clear from the authorities that the giving of notice is not a prerequisite for the taking of leave (**NHS Leeds v. Larner** [2011] ICR 895 EAT; [2012] ICR 1389 CA). He dismisses 'what was left' of **Fraser** after the Court of Appeal's judgment in **Larner** as being obiter, distinguishable and *per incuriam* as **Larner** was not referred to. The requirement to give notice is an 'opt in' arrangement and the requirement is excluded in these cases because the MoJ are just not interested in when fee paid judges are going away. Any suggestion that failure to give notice would produce a chaotic situation is wrong for that reason.

83. In the alternative, the notification to a judge of the days on which they are required to sit amounts to notice (albeit negatively) under regulation 15(2) by the MoJ that they could take leave on any other day.

#### iv. Conclusions

##### - set off

84. The preamble to the Working Time Directive makes it clear that it is a health and safety measure introduced under Article 137 of the Treaty establishing the European Community which, as recital (2) of the Directive sets out, permits the introduction of measures "with a view to improving the working environment to protect workers' health and safety". The Directive also imposes a maximum limit on working hours and makes adequate rest breaks compulsory. Some may therefore see it as rather unattractive that fee paid judges, who may work for the MoJ for no more than 30 days a year and who have indisputably already been paid as holiday pay up to double their entitlement under the WTR, should seek to further enrich themselves at the public expense because of purely technical failings by the MoJ in the way it drafted terms and conditions at a time when neither they nor the judges had any notion that the Directive or the Regulations might apply. Nonetheless, as Mr Bourne conceded, if the MoJ has failed to comply with its obligations under the WTR and the Directive, the claims must succeed.

85. Regulation 16(5) provides so far as material:

*"Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of the period..."*

86. The obligation on the MoJ if they are to be able to set off the rolled up holiday pay included in the daily fee against their statutory liability, emerges from **Gridquest** and **Marshall's Clay**. Remuneration in respect of leave is not contractual for this purpose if there is no agreement to that effect. Therefore contracts which are silent

on the question of holiday pay cannot fall within regulation 16(5) and in consequence set off is not permitted (**Marshall's Clay Products Ltd v. Caulfield**). The reasons are obvious and obviously correct: to prevent employers unilaterally asserting after the employment relationship has begun that the weekly wage includes holiday pay which would render the policy considerations which underpinned **Robinson-Steele** ineffective. In consequence, in all cases where a fee paid judge's terms and conditions make no reference to holiday pay there is no right of set off.

87. The terms and conditions which Mr Jones-Evans received (he is not a lead claimant on this issue) which appear to be the 2004 terms and conditions for Deputy District Judges, includes the following in paragraph 26 'Fees':

*"The daily fee is calculated by dividing the salary for the equivalent full time office by 220. The divisor of 220 is used on the basis that full-time office-holders are required to sit for 220 days per annum, being a full year, less weekends, 30 days annual leave and 11 days of public and privilege holidays. The effect of this divisor is that a pro-rata payment for annual leave and public and privilege holidays is built into the daily fee."*

88. The terms and conditions for recorders, 2011 edition say something similar at paragraph 40:

*"In accordance with the recommendation of the Senior Salaries Review Body (SSRB) fees are calculated by dividing the salary for the equivalent full-time office by 220. The effect of this divisor is that a pro rata allowance for annual leave and public and privilege holidays is built into the daily fee".*

89. In **Marshall's Clay** the EAT drew a distinction between 'contracts where the rates are said to include holiday pay, but there is no indication or specification of the amount' (category 3 cases) and 'contracts providing for a basic wage or rate topped up by a specific sum or percentage in respect of holiday pay' (category 4). Category 3 cases were held not to be examples of contractual remuneration paid to a worker in respect of a period of leave and therefore no set off was permissible, while category 4 cases did permit set off. In my judgment Mr Jones-Evans' terms and conditions undoubtedly fall within category 4. Even though not expressed in terms of a basic wage which is topped up by a specific percentage they do the exact equivalent in this atypical situation by explaining in detail the calculation formula and how it encompasses holiday pay. No one reading them (or at least no-one possessing the level of intellectual sophistication required to be a District Judge) could be in any doubt how it worked.

90. In **Lyddon v. Englefield Brickwork Ltd** [2008] IRLR 198 EAT Mr Lyddon had been told on commencing work for the respondent that his weekly pay included holiday pay but no further explanation was given. His weekly pay packets showed basic and holiday pay as separate amounts. The EAT rejected the claimant's contention that there could be no set off unless at the outset not merely the fact that holiday pay was included in the weekly wage but also the amount or a formula for calculating it were spelled out. The only proper inference to draw from the facts was that the amount of holiday pay was specified in the contract. This was because there was a system in place, contained in a computer programme, for determining

the sum referable to holiday pay which could readily have been explained to Mr Lyddon before he started work had he asked. Having referred to the judgment of the EAT in **Smith v. A J Morrisroes & Sons Ltd** [2005] IRLR 72 and the guidance which it provided as to the best way of evidencing that there was a mutual agreement for holidays representing a true addition to the contractual rate of pay for time worked, the EAT said at paragraph 30:

*“... we do not accept that the tribunal was in error in failing to follow the guidelines in **Smith**. It is important to emphasise that the principles there set out are only guidance. The fundamental question is whether there is a consensual agreement identifying a specific sum properly attributable to periods of holiday. We are satisfied that the requirement was met in this case. ... It is obviously desirable that the sum, or a formula for calculating it, should be identified in writing in advance of the worker starting work. But [**Smith**] does not purport to lay down an exhaustive set of criteria which have to be satisfied before the tribunal can properly reach the conclusion that there is a clear and transparent contractual term.”*

91. It is clear from **Robinson-Steele** and **Gridquest** that the mischief which the restrictive interpretations of the set off provisions are designed to prevent is the unilateral and artificial claim by an employer that rolled up holiday pay is being paid. There is therefore no mischief if the fact that rolled up holiday pay is being paid is stated in advance provided that claim can be backed up by evidence showing both that that it is the case and how it is achieved. What matters, borrowing a phrase from **Lyddon**, is that it should be clear and transparent. It must follow that the words in paragraph 40 of the 2011 edition of the terms and conditions for recorders also permit set off. They in fact put the recorder in a rather better position than Mr Lyddon as they not only tell him that holiday pay is included but sketch out the mechanism. The fact that there is no mention of the holiday pay element in the recorder's pay slips does not, in my judgment, defeat this conclusion. In **Lyddon** the importance of the payslips was in demonstrating that there was a system in place and in consequence that the requisite contractual term existed. In these cases the formula for payment which was established by the SSRB in a public document serves the same purpose. I accept Mr Bourne's submission that a purposive interpretation is required. The claimants are all sophisticated and intelligent people and the formula used by the SSRB permits of only one interpretation, namely that an element of holiday pay considerably in excess of the statutory requirement, is built into the fee. If, as Mr Lyddon was said to have been able to do, a newly appointed recorder was in any doubt as to the matter of holiday pay, an enquiry would have demonstrated the existence of a clear and transparent contractual term in the form of the 1/220 divisor and the reasoning which produced it.

92. In my judgment, the same answer would apply for the same reasons to any terms and conditions which went no further than stating that holiday pay was included in the daily fee. The underlying contractual term remains clear and transparent as a simple enquiry would have demonstrated.

- **notice**

93. Article 7.1 of the Directive provides:

*“Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least 4 weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.”*

94. Regulation 15 of the WTR provides so far as material:

*“(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).*

*(2) A worker’s employer may require the worker –*  
*(a) to take leave to which the worker is entitled under regulation 13 or regulation 13A; or*  
*(b) not to take such leave,*  
*on particular days, by giving notice to the worker in accordance with paragraph (3).*

*(3) A notice under paragraph (1) or (2) –*  
*(a) may relate to all or part of the leave to which a worker is entitled in a leave year;*  
*(b) shall specify the days on which leave is or (as the case may be) is not to be taken ...*  
*(c) and shall be given to the employer or, as the case may be, the worker before the relevant date.*

*(4) The relevant date, for the purposes of paragraph (3), is the date –*  
*(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and*  
*(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.”*

95. Regulation 16 which provides for payment in respect of annual leave is supported by regulation 30 ‘Remedies’. They provide, again so far as material:

*“16(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week’s pay in respect of each week of leave.*

*30(1) A worker may present a complaint to an employment tribunal that his employer –*  
*(a) ...*  
*(b) has failed to pay him the whole or any part of any amount due to him under regulation ... 16(1).*

*(4) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with*

*regulation ... 16(1) it shall order the employer to pay to the worker the amount which it finds to be due to him."*

96. The natural reading of these provisions is that the right to take leave in respect of which the employer is obliged to pay holiday pay is dependent upon the service of a notice under regulation 15(1). But Mr Short submits that that is not the case. He points to the absence of the word 'only' in regulation 15(1) and submits that that demonstrates that the giving of notice is not compulsory. Absent authority to the contrary, in my judgment the submission is unsustainable, not least because the word 'only' is also missing from regulation 15(2) where the requirement to give notice is clearly obligatory simply in order to make the provision work. The regime as a whole creates consequences for an employer in default. Is it seriously to be said that an employer is to be in default if his employee simply fails to turn up for work for a whole week and on return demands payment on the grounds that he has been on a previously unannounced holiday for which the employer then refuses to pay? That is the obvious consequence of Mr Short's submission. He responds that that cannot happen in these cases because of the nature of the working relationship, but that is wholly beside the point. The Regulations cannot be interpreted in different ways for different industries. There is the further difficulty that elements of regulation 15(3) are clearly mandatory including the length of the notice to be given. It is nonsense to suggest, again absent authority to the contrary, that there can be mandatory provisions with regard to the content and length of a discretionary notice. It would seem, if Mr Short is right, that if no notice is given by the worker that is fine but not if a notice is given which doesn't comply with regulation 15(3).

97. The authority to the contrary is said to be **NHS Leeds v. Larner**. But that case was dealing with wholly different circumstances. The claimant had been too ill to take leave during the whole of a leave year and had made no request to do so. She was dismissed on capability grounds during the following leave year without having returned to work. Her claim for holiday pay in respect of the untaken leave during the year prior to her dismissal was upheld notwithstanding the lack of notice. It is clear from the reasoning of Bean J at first instance that the decision was necessary to comply with the ruling of the European Court in **Pereda v. Madrid Movilidad SA** [2009] IRLR 959 ECJ which had held that the Directive did not preclude, as a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave, including even the loss of that right at the end of a leave year or of a carry-over period, provided that the worker has actually had the opportunity to exercise that right. It was therefore held that the right to paid annual leave was not extinguished at the end of a reference period where the worker was on sick leave for the whole or part of the leave year and had not actually had the opportunity to exercise the right.

98. In my judgment **Larner** does not help Mr Short at all. Rather, it is in the nature of the exception which proves the rule. An exception to the normal requirement to give notice had to be made to accommodate the extreme circumstances of the case and the requirement under EU law that the right to annual leave should not be lost because the worker was too ill to take it during a reference period.

99. In my judgment the natural reading of regulation 15(1), particularly in the context of the holiday pay regime as a whole, is the correct one. Notice which accords with regulation 15(3) must be given before entitlement to paid holiday is triggered unless the worker is too ill to take the leave during the reference period. If the requirement in regulation 15(1) was simply optional and therefore not a requirement at all, the whole system would break down.

100. Mr Short's alternative position, that the MoJ give a 'negative' notice under regulation 15(2) each time they book a fee paid judge to sit, is equally untenable. One does not give notice by saying nothing. Moreover, regulation 15(3) deals with the giving of notice to take leave on particular days: it clearly does not cover an unstated and therefore merely implied, invitation to take leave on any number of unspecified days within what may be an extended period during which the fee paid judge is not required to sit.

**- time limits**

101. It is common ground that a claim to unpaid holiday pay can be brought under Part II of the Employment Rights Act 1996. The time limit is in section 23:

*"(2) Subject to subsection (4) an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –*

- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made*
- (b) ...*

*(3) Where a complaint is brought under this section in respect of –*

- (a) a series of deductions ...*
- (b)*

*the references in subsection (2) to the deduction ... are to the last deduction ... in the series...*

*(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

102. By virtue of section 13(3) a failure to pay wages (which includes holiday pay) on the occasion when they are due is a deduction for the purposes of section 23 made on that occasion.

103. Time therefore runs from the date on which holiday pay should have been paid in respect of leave taken following a notice given under regulation 15(1) WTR.

**Training days**

**i. The issues**

104. I start from the premise that it is now not seriously disputed that to pay two judges who attend the same training course different amounts is less favourable treatment of the one who is paid less. If it is, it ought not to be and I shall waste no time dealing with the point. Any contention that the collateral benefits which the fee paid judge is said to receive from the training which his salaried counterpart does not somehow prevents the payment of a lower rate of pay to the former from being less favourable treatment, is misconceived. The real issue here is whether that treatment can be objectively justified. The dispute concerns the half day fee paid to fee paid judges who attend training courses while their full time comparators on the same course still receive a normal days pay. There is a further contention by Mr Cavanagh that time started to run for the purpose of bringing a claim when significant changes were made to the fees regime for training

**i. The facts**

105. Prior to 2009 each tribunal had set its own rules with regard to the payment of fees for attendance at training. Some paid a full days fee, some paid 50% of the fee and some paid a small, flat rate amount. Recorders and Deputy District Judges received 50% of the daily fee. During 2008 through to early 2009 there was a series of discussions aimed at harmonising terms and conditions for tribunal judges including training fees following the advent of the First Tier Tribunal created under the Tribunals, Courts and Enforcement Act 2007. Training leads from all the major jurisdictions who were members of the Tribunals Joint Training Group chaired by Professor Jeremy Cooper participated in the discussions and made recommendations. The decision was to recommend a percentage of the daily sitting fee rather than a flat fee and that the correct percentage was 50%. The view that 50% was the correct proportion was, according to Professor Cooper, very strongly held by all of the training leads he spoke to.

106. Professor Cooper said that the idea of 50% appealed philosophically, not just on grounds of cost. Contemporary documents show that a rate of 40% would have been cost neutral, presumably on the basis that it would represent an increase for some and a decrease for others. The increase to 50% was said to cost an additional £300,000. The philosophical appeal lay in what were perceived as the collateral benefits to be derived from the training for fee paid judges. Specifically these were said to be that the training carried CPD points for which the judge would otherwise have to pay and he or she would also have to give up remunerative practice time to obtain and that the judicial training would be of benefit to the judge in their private practice, even if the training was specifically judicial rather than subject based as the skills were readily transferrable. He cited fact finding, questioning skills, understanding and dealing with vulnerable people and unrepresented litigants and assessing credibility as examples of what he had in mind. The possibility of paying a full fee was discussed but quickly rejected because of those additional benefits.

107. Attendance at some judicial training events is compulsory for fee paid judges in the sense that you either can't sit at all or can't progress if you do not attend. Failure to attend any course which is not strictly compulsory without good reason is likely to lead to 'words of advice' from one's regional judge and if persisted in, the threat of non-renewal of appointment. The training is designed to make fee paid judges fit to undertake their roles. They receive the same training as salaried judges with some very limited exceptions, for example in the employment tribunals only

salaries judges receive mediation training. No research has been done to establish how many fee paid judges require CPD points and Professor Cooper could not even hazard an educated guess. They would not be required by those who have retired from private practice or who are academics or who have already obtained their full quota of points for the year. No research has been done to establish how many fee paid judges practice in the areas in which they sit. In employment and more recently in immigration the percentage is likely to be high, possibly very high. In Social Entitlement it is likely to be low, possibly very low. It is nothing more than an assertion that training purely judicial skills has any tangible collateral benefits for practitioners. Whilst the cost of obtaining CPD points can be quite high and can involve giving up the whole or part of a working day, they can also be obtained free of charge, at evening events such as seminars put on by a set of chambers or by delivering lectures to one's own clients on aspects of the law, double points being thereby obtained. Paying a lower fee to judges for attending training significantly predated the introduction of CPD points for both solicitors and barristers.

## ii. The law

108. The law on objective justification is not in dispute. In **O'Brien** the Supreme Court adopted the guidance given by the CJEU at paragraphs 64 to 66 of its judgment on the reference (at [2012] ICR 955) and by Advocate General Kokott in her Opinion at paragraph 62. It found the opinion of the Advocate General rather more 'expansive':

*"The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary."*

109. At paragraph 64 of its judgment the CJEU put it this way: "...the concept 'objective grounds' ... requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose..."

110. Observing that the MoJ had not until the late stages of the O'Brien litigation articulated a justification for excluding fee paid judges from the judicial pension scheme, the Supreme Court said this at paragraph 48 of its judgment (Baroness Hale):

*"However, in this as in any other human rights context, this court is likely to treat with greater respect a justification for a policy which was carefully thought through by reference to the relevant principles when it was adopted... In particular... it is difficult for the ministry to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at that time."*

111. It is well established that cost has only a limited role to play in justification. At paragraph 66 of its judgment in **O'Brien** the CJEU said that it must be recalled that budgetary considerations cannot justify discrimination. At paragraph 67 of her

judgment Baroness Hale said that “*Sound management of the public finances may be a legitimate aim, but that is very different from deliberately discriminating against part-time workers in order to save money*”

112. In **Jorgensen** (C-226/98) [2000] IRLR 726 ECJ the second question for the court was whether considerations relating to budgetary stringency, savings or medical practice planning may be regarded as objective considerations such as to justify a measure which adversely affects a larger number of women than men. The court answered the question at paragraph 42 of its judgment:

*“The answer to the second question must therefore be that budgetary considerations cannot in themselves justify discrimination on grounds of sex. However, measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people’s access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end.”*

### iii. Conclusions

113. During closing submissions I asked Mr Cavanagh what need the payment of half a days fee to fee paid judges met. He replied that it was the efficient management of the judicial system and he pointed to **Jorgensen**. That misunderstands **Jorgensen**. The efficient management of a system is not by itself a need, particularly if it is a euphemism for saving money. The efficient management of a system that results in a discriminatory outcome may be justifiable if it meets a legitimate objective of social policy, is appropriate to obtain that objective and is necessary to that end. The requirement for a need – a legitimate objective of social policy – remains. What that legitimate objective is in the case of training fees therefore remains unexplained. By itself that is sufficient to dispose of the point in the claimants favour.

114. However, the claim of objective justification falls at the other fences as well. I am not satisfied that this is anything more than a ‘felt fair’ basis for managing the training budget. There is no evidence to support any of the assertions made about the extent or value of the collateral benefits contended for, some of which are in any event questionable and no evidence to inform the choice made appears to have been gathered either at the time the choice was made or subsequently. The criteria, if that is what they are, are therefore somewhat less than objective and transparent: they are not much better than guess work.

115. I am also against the respondents on the time limit point. The changes to the payment regime which were made in 2008/09 cannot start time running in respect of earlier years. All that has changed is that the extent of the less favourable treatment may be different if the fee paid for attending training has changed or that a ‘justification’ for continuing to pay the old fee is now said to be in place.

## Sick pay

### i. The issues

116. A salaried court judge is entitled to continue to receive full salary during periods of sickness absence so long as there remains a reasonable prospect of him

or her returning to work. Although for salaried tribunal judges the rule is different – six months full pay followed by six months on half pay, subject to a maximum of 12 months sick leave in any period of 4 years – the rule which applies to court judges is extended to tribunal judges as an extra-statutory concession. Fee paid judges are entitled only to statutory sick pay if they meet the qualifying criteria.

**ii. The respondent's submissions**

117. Mr Cavanagh submits that it is a moot point as to whether what is in issue here is if there has been less favourable treatment or if any less favourable treatment can be justified. He makes a limited concession of less favourable treatment although I have to say that I am not entirely clear what it is. In his closing skeleton argument he accepted that there is less favourable treatment 'in a case where the judge's days off sick cannot be made up in the course of the year', presumably the calendar year if that is the period during which judge's sitting days are counted for the purpose of ensuring everyone gets their minimum entitlement and does not exceed the permitted maximum. But he went on to say (para 107) that 'whether or not there is less favourable treatment in a particular case will depend on the length of the sickness absence, whether or not the fee-paid judge was entitled to further sitting days in the relevant period, and whether or not they were able to make up the missed days in practice.' The reference to entitlement I take to be a reference to those terms and conditions which guarantee a minimum number of sitting days per annum. In closing submissions he said that the respondent recognised that its position was stronger for short term periods of sickness than longer term but that I must bear in mind the nature of the fee paid arrangement. This is consistent with his written skeleton only if I take the recognition of weakness to be a reference to the ability of the judge to make up the lost days and that is how I believe it was intended. The concession therefore appears to be that a judge is less favourably treated in the matter of sick pay if they have to cancel a sitting day which has already been booked through illness, unless they are able to make up that day later in the year, or illness prevents them from achieving the minimum number of sitting days guaranteed by their terms of appointment.

**iii. The claimant's submissions**

118. Mr Allan and Mr Rogers contend that in addition to days booked which are lost through sickness, sick pay should be payable to compensate a judge who through illness is prevented from achieving their normal number of sitting days. The question of whether a judge does or does not have the opportunity to make up for a day lost through illness later in the calendar year is irrelevant: the day in question has gone and the opportunity to earn a fee for that day goes with it.

**iv. The facts**

119. There are few relevant facts. Some terms and conditions guarantee a fee paid judge a minimum number of sitting days in a year: some do not. Although all impose an expectation on the judge as to the number of days he will sit, no sittings beyond the minimum are guaranteed. Even where over a period of years a judge has consistently sat for a certain number of days a year, no kind of obligation arises from that either way: the MoJ could not complain if the judge decided he was no longer prepared to sit more than the minimum and the judge could not complain if the work suddenly dried up. That is the nature of the beast. Evidence of precisely that was given by several Immigration Judges who after several years of being

encouraged to sit as much as they were able to suddenly found that a budgetary cap on sittings had been set. In the employment tribunals there is concern that the advent of fees will seriously depress the work available for fee paid judges to do.

120. The 'nature of the beast' requires a little expansion. Fee paid judges are causal workers, on a 'bank' as it were, with, effectively, zero hours contracts except for those whose contracts guarantee them a minimum number of sitting days. They are a resource for their resident or regional judge to call upon in times of need. They cannot, for example, bring a claim under Part II of the Employment Rights Act 1996 complaining of unauthorised deduction from wages if they get no sittings in a year (unless of course they have a guaranteed minimum in their terms) or fewer sittings than they have habitually had in the past. There is no subterfuge here: everyone understands the situation on taking up office or if they do not, they have only themselves to blame.

121. None of the respondent's witnesses were able to tell me why the sick pay arrangement for salaried judges had not been extended to fee paid judges. The short answer is that no thought had been given to the question.

#### **v. Conclusion**

122. If there is less favourable treatment it cannot be justified. As none of the witnesses were able to explain to me why sick pay is not extended to fee paid judges it inexorably follows that the respondent cannot establish the need which the policy is designed to meet and so cannot establish objective justification (see paragraph 107 to 111 above).

123. Mr Cavanagh's submission that a judge who loses a sitting day through illness suffers no less favourable treatment if they are able to 'make up' for the loss of that day by sitting later in the year is misconceived, for two reasons. The day on which the judge was due to sit but for illness does not come round again. Her salaried counterpart who is also sick on that day receives his salary for *that* day, she receives nothing for *that* day. And how is it to be determined whether any particular day's sitting later in the year is a sitting that would have been undertaken in any event or is only being undertaken as a replacement for the lost day? Given the nature of the working relationship between the fee paid judge and the MoJ no answer to that question is possible.

124. The respondent's concession if I have understood it correctly, subject to that qualification, is therefore right: there is less favourable treatment of a fee paid judge who loses a days pre-booked sitting through illness or who is unable to sit because of illness for the minimum number of days guaranteed by their terms and conditions if they are not paid sick pay. Obviously the MoJ is entitled to proof of inability to sit through illness, equally so for historical claims, but it is a moot point, about which I have heard no argument, whether that proof can be any greater than that demanded of a salaried judge absent for the same number of days of sickness. Although the point was not raised by either side it seems to me that a further qualification must be added given the nature of the arrangement between the fee paid judge and the MoJ namely that the sitting in question would not have been cancelled by the respondent in circumstances in which the judge would not have been entitled to the payment of a fee.

125. I do not accept that there is any further less favourable treatment in the matter of sick pay. This is because there is no equivalent in a fee paid judge's terms and conditions to the concept of a salaried judge's continuing commitment to the court. To put it another way, there is no mutuality of obligation beyond those dates when a sitting is guaranteed or pre-booked (in the latter case subject to the respondent's right to cancel). In consequence there is no less favourable treatment if a fee paid judge is unable to offer him or herself to sit for a health related reason and does not in consequence receive sick pay. I appreciate that this appears to place those judges who have to notify their availability to a listing team before being allocated sittings at a disadvantage when compared with those judges who are simply allocated sittings based on historical availability, but that is an administrative anomaly which it is for the MoJ to resolve.

### **Writing up fees**

#### **i. The issues**

126. A salaried judge writing up a judgment during the working day is paid his or her normal salary. In some jurisdictions fee paid judges are not paid a full days fee for writing up judgments. Claims by employment judges have been withdrawn, presumably because they are now paid a full days fee for decision writing, which leaves claims by judges from the First-tier Tribunal Social Entitlement and Immigration and Asylum Chambers and by Deputy District Judges. As the facts are different in each case I will deal with them separately.

#### **ii. Deputy District Judges**

127. The terms and conditions of salaried District Judges expressly contemplate that that they may be required to write up judgements in their own time. The terms and conditions of fee paid Deputy District Judges are silent on the point. The evidence concerning the nature of the work which Deputy District Judges do is largely not in dispute. They tend to do the shorter and simpler cases and it is very rare indeed for them to have to reserve judgment. Mr Tomlinson, a lead claimant on this issue, thought it might happen once every 18 months or 2 years. Mr Robins thought he had reserved judgment perhaps only 3 or 4 times in a decade, evidence with which Mr Fox agreed. A Deputy District Judge can request payment of a discretionary fee in those very rare cases where it is necessary to write up a complex judgment.

128. For those reasons, less favourable treatment is denied and the same reasons are relied upon as objective justification. Additionally Mr Cavanagh submits that the point is *de minimis* – too trifling for the tribunal to trouble itself with.

#### **iii. First-tier Tribunal (Immigration and Asylum)**

129. The dispute concerns the payment of fees for single judge hearings. I have heard no evidence concerning the fees for panel hearings. The current arrangements were negotiated by the Council of Immigration Judges on behalf of their members with the then Chief Adjudicator (the President of the tribunal) and the administration in 2002 and have remained in place ever since. The arrangements reflected a then new working pattern known as 1+1 which had been the subject of two pilot studies before being rolled out nationally. It followed recommendations made by Messrs Price-Waterhouse-Cooper and has been subsequently endorsed in

a report by a High Court Judge, Sir Thayne Forbes. The pattern anticipates that over a two day period one day is spent sitting hearing a number of cases and the next writing up the judgments from those cases. The agreement between the Council of Immigration Judges and the administration was renewed in 2005. The issue in these claims is that whereas a salaried judge receives two days pay for the 1+1 sitting pattern, the fee paid judge receives only 1 and 6/7<sup>th</sup> daily fees.

130. The rationale behind the difference is said to be that the fee is as accurate a reflection as possible of the time taken to write up judgments and that salaried judges will be expected to utilise the remaining one-seventh of the writing up day on other judicial business. This rationale depends upon three assumptions: that the working day is 7 hours long; that fee paid judges always write up at home and that salaried judges always write up in their chambers at the tribunal. The first two assumptions appear to be sound, the third less so. A fee paid immigration judge can claim an additional fee for each judgment which they type up personally or which is typed up at their expense, the fee being £15, £35 or £45 depending on the type of case.

131. The issue here is whether there is less favourable treatment of fee paid judges. For that to be the case I would have to be satisfied that the rationale underlying the agreement was mistaken in that the composite fee did not represent an as accurate picture as possible, albeit rough and ready, of the length of time which it took both salaried and fee paid judges to dispose of a days list both sitting and decision writing and that the true position was that it took two full days of seven hours or that it was not generally the case that salaried judges devoted the remaining hour of the second day to other judicial business.

132. Ms Kyrie James is both the only lead claimant and only claimant witness on this point. Her evidence on it was absolutely minimal, running to two short paragraphs in her witness statement which were supplemented by a single question. She merely asserts that the writing up day for all fee paid immigration judges is a full day and that she personally always does more than 1+1. There is no suggestion, let alone evidence, that the Council of Immigration Judges is seeking to renegotiate the agreement they last made in 2005, a point I put to Ms James specifically and no other fee paid Immigration and Asylum judge has been called to support her assertions.. Mr Rogers' lengthy submissions on this point are therefore based almost entirely on surmise, plus his interpretation of the Forbes report and conclusions which he believes can be drawn from the answers given in cross examination by Judge Michael Clements the current Chamber President. It may well be the case that Ms James personally takes more than a day to write her judgments as she types them all, a slower way of producing a document than dictating it for others to type - she is of course paid extra for typing them - and because from the number of occasions when she has been prevented from sitting by her Resident Judge because judgments were outstanding, she seems to be generally slow in producing them. I have heard no direct evidence about how long the typical salaried Immigration Judge spends judgment writing or what they do with the rest of their day when they have finished. However, there can be no doubt that, unlike the fee paid judge, once they have finished decision writing they are under a continuing commitment to the court.

133. Current statistics show that the 1+1 pattern does not hold good in practice when it comes to the sitting day as 46% of hearings finish by 2.00 pm and a further 18% by 3.00 pm. That would suggest some leeway in the first day of the 1+1 pattern for decision writing.

**iv. Social Entitlement Chamber  
- the facts**

134. Prior to 2011 no fee was payable to a fee paid judge in this jurisdiction for writing decisions (known as statements of reasons). Since then a payment described as discretionary may be paid in two circumstances: where in the assessment of the Chamber President a statement of reasons is exceptionally complex (the Judicial Finance Guidance defines 7 circumstances which might make a statement exceptionally complex); multiple statements, that is where more than one statement of reasons is requested by parties in cases heard on the same day. In the former case the usual fee would be the daily fee but could be more at the discretion of the Chamber President. In the latter case the fee is 1/3<sup>rd</sup> of the daily fee for the second and each subsequent statement of reasons produced (in this case although still described as discretionary the payment appears to be made automatically). The complaint concerns only the fee for writing multiple statements.

135. Salaried judges are expected to produce statements of reasons in their own time at weekends and in the evenings when the need arises which, according to Judge Robert Martin the Chamber President, it regularly does. It does not seem to be disputed that salaried judges are more likely to deal with the more complex and lengthy hearings and in consequence more likely to be asked to produce more complex and lengthy statements of reasons.

136. The evidence suggests that a fee paid judge is asked to produce a written statement of reasons in about 1 case out of every 10 but it seems to be a matter of pure chance whether a fee can be claimed for doing so (in the absence of exceptional complexity). A fee paid judge might sit on four days in the same week and be asked to produce 4 statements of reasons in consequence. If that request relates to 4 cases heard on the same day the judge will get a full days session fee (3 x 1/3) but if the request relates to cases heard on 4 different days no fee is payable even though exactly the same amount of time will be spent writing up the statements of reasons. Based on Judge Martin's evidence summarised in the next paragraph, writing all 4 statements would (on average) require 1 1/3 sitting days.

137. In his unchallenged evidence Judge Martin said that in 2007 in preparation for a submission to the SSRB a survey was taken of 50 chairmen of the then Social Security and Child Support Tribunal which suggested that the average time for producing a statement of reasons was just under 2 hours 20 minutes, or one third of the sitting day. A further submission was made to the SSRB in 2009 which recorded that judges had reported that writing a statement of reason takes on average 3 hours. The SSRB recommended that "*Chamber Presidents should have discretion to authorise payment for additional time where essential preparation and writing-up exceed what can reasonably be achieved in one day.*" [Recommendation 10]. Judge Martin proposed to the Tribunal Service that the fee for writing up a standard statement of reasons should be the equivalent of one third of the daily fee. Paragraph 22 of his statement concludes: "The Tribunals Service accepted my

recommendation” which suggests that he also recommended the current pattern of payment for multiple statement writing, although he does not expressly say so. If it was his recommendation he does not explain why he made it and I have heard no other evidence to explain why it was adopted in preference to a straight one third of the daily fee per statement of reasons.

**- claimants’ submissions**

138. Mr Short submitted in his closing skeleton argument that the evidence produced by Judge Martin shows that in the period April to September 2013 there were 20,060 requests for statements of reasons which resulted in only 2,536 multiple statement payments to fee paid judges. Making a series of working assumptions based on the ratio of fee paid to salaried judges in the Chamber and their respective sitting rates, he estimated that only 15% of statements written by fee paid judges in this period resulted in the payment of a fee. In final oral submissions Mr Cavanagh did not challenge that estimate.

139. Mr Short submitted that the system is arbitrary and leaves both the fact and level of payment entirely to chance. It is incapable of justification in the absence of evidence showing just how much statement writing salaried judges do in their own time as in consequence the MoJ cannot show that the system is a proportionate means of achieving whatever legitimate aim is said to lie behind it. The policy appears to have been adopted and maintained without any proper assessment of its operation in practice.

**- respondent’s submissions**

140. At a broad brush policy level fee paid judges are treated the same as salaried judges given that the former are not paid for writing up some statements of reasons and the latter have to write some up in their own time. Without paying each judge by the hour (which would in any event reward inefficiency rather than efficiency) it is not possible to have a system that ensures each judge is reimbursed in exactly the correct amount for each statement of reasons and any system designed to achieve that would be an administrative nightmare. The same submissions are made in support of the contention that any less favourable treatment is objectively justified.

141. Claims in respect of the period of time before the introduction of the 2011 system of payments are out of time because time runs with the ending of the old system whereby fee paid judges were not paid at all for decision writing.

**v. conclusions**

**- Deputy District Judges**

142. Given the extreme infrequency of the need to write up decisions in their own time, the existence of a discretionary fee for so doing and the frequency with which salaried District Judges have to write up decisions in their own time, I am not satisfied that the failure to pay an automatic fee to Deputy District Judges for decision writing amounts to less favourable treatment for the purposes of the PTWR.

**- Immigration and Asylum Judges**

143. For the reasons given in paragraph 126 above it is simply not open to me on the evidence to find less favourable treatment of fee paid Immigration and Asylum Judges in the way the composite fee for the 1+1 sitting pattern is calculated. I am not

even able to say the Ms James personally is less favourably treated given that she types her own decisions and is paid extra for so doing and there is evidence to suggest that she is rather slow at producing decisions in any event.

**- Social Entitlement Judges**

144. In the absence of any evidence as to the amount of time which salaried judges spend on decision writing outside of normal sitting time and given the unchallenged suggestion that as many as 85% of statements of reasons produced by fee paid judges do not attract a fee, less favourable treatment is established.

145. The contention that this less favourable treatment is objectively justified must fail in the absence of any evidence of the need which it is designed to address. It appears to have been no more than an attempt to rectify a previous system of even greater unfavourable treatment which has succeeded only in slightly reducing the extent of the discrimination. But given the lack of evidence concerning salaried judge's use of own time for this purpose and the entirely arbitrary and 'luck based' nature of the system which appears to result in very few fees for statement writing being paid to fee paid judges, the objective justification argument would also have failed the proportionality or appropriateness test not to mention the necessity test.

146. The introduction of the new system did not cause time to run in respect of the failure to pay fees for statement writing prior to 2011 as the less favourable treatment continued, albeit somewhat reduced.

**London weighting**

**i. The issues**

147. London weighting is something of an historical anomaly. It was introduced in 1979 to supplement the salaries of judicial office holders in salary grade 7 whose principal court was within an 18 mile radius of the statue of King Charles I at Charing Cross. It is in two parts, a London pay lead and a London Allowance. In 1992 the rates for both were set at £2,000 where they have remained. The payments are taxable and pensionable. They are not paid to fee paid judges who sit in the capital.

**ii. The facts**

148. Eligibility for payment is determined by the location of the salaried office holder's principal place of work. The definition of principal place of work for this purpose is the same as for determining entitlement to travel expenses. A court is a principal place of work if the judge sits for 40% or more of the number of days on which he or she sits during a year at that court. A judge may thus have one, two or no principal courts on this basis. If the judge does not sit at any court for 40% of their sitting days in a year, the court at which she sits which is nearest to her home is her principal place of work. The payment of London weighting is therefore entirely unconnected to where the judge lives.

149. The only discussion about London weighting in recent times between the respondent and the SSRB has been about whether it is still appropriate to pay it now that grade 7 salaries exceed £100,000 per annum. There has been no discussion about whether or not it would be appropriate to extend it to fee paid judges. No-one was able to tell me whether the matters advanced in justification of the fact that it is

not paid to fee paid judges were considered in 1979 when London weighting was introduced or indeed on any subsequent occasion. There was also some confusion about the reason for paying London weighting to salaried judges: was it because of the higher cost of housing in London or the greater cost of travel to or within the capital, or both? As Mr Gray candidly admitted in evidence, it would be entirely a matter of chance whether the travel expenses paid to a particular fee paid judge equalled the London weighting.

### iii. The respondent's submissions

150. Mr Cavanagh contends that the non-payment of London weighting to fee paid judges is objectively justified by the fact that salaried judges are not paid travel expenses to their principal place of work whereas fee paid judges are, albeit subject to income tax. The travel expenses are not, of course, pensionable. The same facts show that there is no less favourable treatment when all things are taken in the round.

### iv. Conclusions

151. It is only exceptionally that an employer is permitted to offset the benefits of one payment against a shortfall in another part of a worker's remuneration package for the purpose of showing no less favourable treatment. In **Matthews and others v. Kent and Medway Towns Fire Authority** [2004] ICR 365 HL Baroness Hale said [para 49]:

*"I would not wish to rule out the possibility that, in certain cases, a less favourable term might be so well balanced by a more favourable one that it could not be said that the part-timers were treated less favourably overall."*

152. That is clearly not the case here – or at least not on the evidence before me. There is no connection whatever on that evidence between the two terms, although I accept that Baroness Hale does not say that the terms need to be connected. But if a randomly chosen more favourable term is to be offset against a less favourable term, evidence must be adduced to show that the more and less favourable terms are so well balanced that overall there is no less favourable treatment. But not only is there no such evidence, the evidence of Mr Gray strongly suggests that none could be produced because, as he says, it is entirely a matter of chance if a fee paid judge's travel expenses equal the lost London weighting, and even if they do they are not pensionable. The lead claimant Mr Tomlinson does not even claim travel expenses to his principal court for the simple reason that the journey is so short that they aren't worth claiming. There is therefore, less favourable treatment of fee paid judges who sit in London who are not paid London weighting.

153. The less favourable treatment cannot be justified in the absence of any knowledge as to why London weighting is not paid to fee paid judges. It seems to me that such knowledge is essential if the need which the policy is said to address is to be identified. But given that the rules with regard to payment of travel expenses are exactly the same for judges based in London as they are for judges based elsewhere in the country, it is extremely difficult to see how the existence of those travel rules could be said to justify in even the loosest sense of that word, a payment which is only made to salaried judges in London.

154. It follows that a fee paid judge who satisfies the eligibility conditions for London weighting with regard to their principle place of work, is treated less favourably than their full time salaried comparator in the matter of London weighting which treatment cannot be objectively justified.

### **Compassionate leave**

155. Ms James' claim in respect of compassionate leave must fail on the facts. At the time she took a period of compassionate leave she was a very newly appointed fee paid Immigration and Asylum Judge, so newly appointed in fact that she was not yet eligible to sit. Before she would have been eligible to sit she was required to undertake a short period of monitoring by cum shadowing of an experienced judge. Her evidence was that so great was the intake of new fee paid judges at that time they were all finding it difficult to make the necessary arrangements for that to happen. The fact that she did not manage to do her first sittings until early May, having been appointed in January and having had the family bereavement at the end of February, was attributable to that rather than the bereavement.

156. I venture some observations on this question generally. While it is true that the terms and conditions of salaried judges contemplate the possibility of compassionate leave up to a maximum of 7 days in certain limited circumstances and those of fee paid judges do not, salaried judges do not have the right to compassionate leave. It is at the discretion of the senior judicial officer usually in practice a regional or resident judge with the confirmation of the Chamber President or equivalent. It therefore seems to me that every case will be fact specific with the need for the claimant to show (at the very least) that a salaried judge has or would have been given compassionate leave in the same circumstances. I say 'at the very least' because it is very likely that, except in obvious cases like the death of a spouse or child, there will be similar cases where leave has been refused as well as cases where it has been granted or where different periods of leave have been granted by different senior judicial officers. It also seems to me that, in parallel with sick pay claims, entitlement to paid compassionate leave would be limited in the case of fee paid judges to the loss of pre-booked sittings or if the compassionate leave meant that the guaranteed minimum number of sittings under the judge's terms and conditions would not be met.

### **Cancellation fees**

157. Ms James complains that when a salaried judge is 'cancelled' they still receive their full days salary whereas if she is cancelled she receives nothing. While there is a scheme for the payment of cancellation fees to fee paid judges in certain limited circumstances, a payment will only be made if there is evidence of financial loss other than the loss of the sitting fee. This would require the judge to show, in essence, that they had given up another opportunity to earn money in order to sit which they could not reinstate because of the short notice of the cancellation. Ms James can never benefit from that scheme because she has no other source of income beside her sitting fees.

158. This claim must also fail on its facts because the basic premise – that salaried judges are 'cancelled' - appears to be false. The evidence is that a salaried judge is

never idle in the event of their list collapsing in advance of the hearing. Either a fee paid judge will be stood down to give the salaried judge cases to hear or there will be box work (duty post work) to do or decisions to write or fair up or case papers to read. So while the fee paid judge who has been cancelled is free to do as they please with their day, the salaried judge still has to fulfil their continuing commitment to the court in some way.

### **Special aids and equipment**

159. Ms James also complains that, following a road traffic accident in October 2007 in which she sustained whiplash injuries and because a little later of the onset of arthritis in her hands, she was forced to purchase a laptop computer and a dictation soft wear package with blue tooth capacity to enable her to dictate decisions at home whilst walking rather than sitting for long periods and type rather than write notes of evidence during hearings. She puts the combined cost together with the cost of upgrading her soft wear and ensuring her home computer was 'sync'd' with the laptop she used in court, at around £2,000. She complains that she has not been reimbursed by the respondent.

160. This claim must also fail on its facts. Ms James has never applied to the respondent for reimbursement and this is one area where the MoJ does have a policy which applies equally to fee paid and salaried judges. The current Memorandum on conditions of appointment and terms of service for fee paid judicial office holders provides:

*"13.1 A range of reasonable adjustments to working practices, travelling arrangements and equipment may be available for office holders who have or acquire an impairment or long-term medical condition amounting to a disability. ... No judicial office-holder will be asked to fund reasonable adjustments from his or her personal resources."*

161. That provision is aimed of course at judicial office holders who are disabled for the purposes of the Equality Act 2010, previously the Disability Discrimination Act 1995. If Ms James fulfils the definition of a disabled person in those Acts and if she had applied for reimbursement of the cost of purchasing the special aids, there is no evidence to suggest that she would not have been reimbursed. However, she has not claimed that she is a disabled person but she has adduced no evidence, indeed has not even asserted, that the respondent would have reimbursed a non-disabled salaried judge who had purchased similar items for similar reasons. The claim therefore has none of the basic elements necessary for it to succeed.

### **Cost of establishing a home office**

162. This is also a claim by Ms James. No other claimant brings a similar claim as far as I know. It arises in this way. As a fee paid Immigration and Asylum Judge she is required to write up decisions at home because no chambers are provided for her at a hearing centre. Her comparator salaried judge has chambers in which they can write up decisions and therefore does not need, although he or she may choose to establish, an office at home or to incur the cost of equipping it. Ms James said that

in order to write up her judgments at home she requires an office, a computer, printer, ink cartridges, stationary and access to the judicial intranet.

163. The less favourable treatment complained of is the provision of chambers at hearing centres to salaried judges but not fee paid judges as there is no suggestion that the respondent provides any financial assistance for salaried judges who have offices at home or who merely work at home. It is of course part of Mr Rogers' case on the writing up fee that salaried judges often do their writing up at home just like Ms James and if Ms James requires certain equipment at home to enable her to write her judgments and a space to do it in, so presumably must they. But clearly like is not being compared with like over the matter of chambers accommodation. A salaried judge is likely to be at the court in which their chambers are located either every working day or very frequently. A fee paid judge may well sit at several different hearing centres and may not sit very frequently at any particular one. It is, as Mr Cavanagh has remarked in connection with several other claims, a moot point whether this goes to the question of no less favourable treatment or objective justification but the answer comes out the same either way. In my judgment the primary answer is that there is no less favourable treatment simply because like is not being compared with like, but if that is the wrong analysis then I am satisfied that the non-provision of chambers for fee paid judges is objectively justified: a proportionate response to the need for sound management of financial resources for the provision of judicial services.

164. There is also a major problem with causation when it comes to any detriment which Ms James claims to have suffered. Can it seriously be claimed by Ms James that but for the fact that she is a fee paid Immigration and Asylum Judge she would not have had a computer and a printer? Possibly, but hers would have been a very unusual modern household without a computer, and in her case given her other commitments (e.g. for the Welsh Assembly) and interests, also a printer. And if she had a computer and a printer already or would have acquired one even if she had not been a fee paid judge, she would have needed somewhere to put them; so to what additional expense has she been put, what additional space has had to be provided, through her being a fee paid judge? There may be some additional cost of consumables such as paper and printer ink but Judge Michael Clements said in evidence that judges are encouraged to email their judgments to the hearing centres. In any event, the additional fee for typing her own judgments presumably includes an element to cover the cost of consumables.

165. Most fee paid judges receive tax relief annually for providing a 'home office' in which to do their work which relief would largely if not entirely offset any extra cost involved. It is interesting to note that Ms James was originally advised, presumably by her accountant, that she could not make such a claim and that now she has been advised otherwise HMRC are querying the amount she is claiming or are at least being difficult about her claim generally. This is surprising given that the Council of Immigration Judges has agreed with the Revenue a block allowance for fee paid and salaried judges who maintain an office at home.

166. The claim therefore fails because there is no less favourable treatment: salaried judges do not receive any financial assistance from the respondent to establish an office at home; there is no less favourable treatment of the claimant

because salaried judges are provided with chambers at a hearing centre in which to do judgment writing but fee paid judges are not as the circumstances and therefore the needs of the two groups are different; and I am not satisfied on the evidence that detriment has been demonstrated.

  
.....  
Employment Judge

Date: 30 December 2013

JUDGMENT SENT TO THE PARTIES ON  
.....2 January 2014

AND ENTERED IN THE REGISTER

  
.....  
FOR SECRETARY OF THE TRIBUNALS

**SCHEDULE 1**

**Witnesses for the claimants**

Andrew Wilson	Salaried Immigration and Asylum Judge
Michael Tomlinson	Deputy District Judge
Jacqueline Baker	Fee paid judge in the Social Entitlement and Immigration and Asylum Chambers
Jeremy Gibb	Salaried Immigration and Asylum Judge
Merfyn Jones-Evans	Salaried District Judge
Kyrie James	Fee paid Immigration and Asylum Judge
Martin Block	Fee paid judge Social Entitlement Chamber
Charles Fox	Recorder and Deputy District Judge
Peter Haworth	Salaried Master/Costs Judge
Jean Ritchie QC	Retired recorder
Ian Soulsby	Fee paid Employment Judge
John Sprack	Retired salaried Employment Judge, now fee paid
Peter Wain	Retired District Judge (Magistrates Courts)
Peter Robins	Retired fee paid District Judge
Dermod O'Brien	Retired recorder
Christopher Smyth	Retired salaried judge, Social Entitlement Chamber
Christopher Ash	(statement taken as read) Retired salaried Employment Judge
Kathleen Miller	(statement taken as read) fee paid judge Social Entitlement Chamber

**Witnesses for the respondent**

Prof. Jeremy Cooper	Director of Tribunal Training, Judicial College
Peter Hurst	Senior Costs Judge

Dr James Murrell	Projects Manager, Judicial HR
Margaret Langley	District Judge
Shirley Ann Hales	Head of Judicial Pay and Pensions Branch and Judicial Pensions Administrator, MoJ
Ian Gray	Deputy Director, Judicial Reward and Pension Reform
Clive Toomer	Retired salaried Employment Judge
Terry Frankpit	Financial Assurance Manager, Finance and Governance Directorate HMCTS
Emma Arbuthnot	Deputy Senior District Judge (Chief Magistrate)
Michael Clements	President, Immigration and Asylum Chamber
Robert Martin	(statement taken as read) President, Social Entitlement Chamber

## **SCHEDULE 2**

### **Browne Jacobson and Beers represented claimants**

- Peter Howarth (2200879/2012) The claimant's claim is dismissed. It was presented after the time limit had expired and it is not just and equitable to extend time
- Charles Fox (2201150/20120) (1) The claims in respect of the claimant's service in the Social Security Appeals Tribunal is dismissed. It is out of time and it is not just and equitable to extend time.  
(2) The claims in respect of the claimants service as a Deputy District Judge and as a recorder, namely that he was excluded from the judicial pension scheme and was less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000,, are well founded.
- Jean Ritchie (2202528/2013) The claimant's claim is dismissed. It was presented after the time limit had expired and it is not just and equitable to extend time.

Christopher Smyth (2202478/2012)

The claimant's claim is dismissed (save to the extent that it includes a claim in respect of his fee paid service as a judge of the SEC after 31 May 2012) . It was presented after the time limit had expired and it is not just and equitable to extend time

John Sprack (2202193/2012)

(1) The claimant's claim is dismissed save to the extent that it includes a claim in respect of his service as a fee paid employment judge after 1 February 2004 . It was presented after the time limit had expired and it is not just and equitable to extend time

(2) The complaints in respect of the claimant's service as a fee paid Employment Judge after 1 February 2004, namely that he was excluded from the judicial pension scheme and was less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, are well founded.

Peter Wain (3201327/2011)

(1) The claimant's claim is dismissed save to the extent that it includes a claim in respect of his service as a Deputy District Judge after 1 February 2011. It was presented after the time limit had expired and it is not just and equitable to extend time

(2) The complaints in respect of the claimant's service as a fee paid Deputy District Judge after 1 February 2011, namely that he was excluded from the judicial pension scheme and was less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, are well founded.

Peter Robins (2201157/2013)

(1) The claimant's claim is in time, it being just and equitable to extend the primary time limit to 26 February 2013

(2) The complaints that he was excluded from the judicial pension scheme and was less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, are well founded.

- Andrew Wilson (2204330/2012) The claimant's claim is dismissed. It was presented after the time limit had expired and it is not just and equitable to extend time
- Ian Soulsby (2204242/2011) (1) The claimant's complaint that he has been less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, is well founded  
(2) By consent, it is declared that the claimant is entitled under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 from 7 April 2000 to a daily sitting fee calculated as 1/220<sup>th</sup> of the salary of a full-time salaried Employment Judge at the material time.  
(3) The claimant's complaint that he has been less favourably treated in the matter of sick pay is well founded in principle subject to the claimant providing evidence that he either cancelled pre-booked sittings because of illness or was unable to sit the minimum number of days guaranteed by his terms and conditions of appointment in any year because of illness.
- Kathleen Miller (2204300/2011)<sup>3</sup> (1) The claimant's claim is in time, it being just and equitable to extend the primary time limit to 31 October 2011  
(2) The claimant's complaint under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 in respect of exclusion from the benefits of an ill-health retirement pension is well founded in principle, subject to the claimant establishing that she satisfied the eligibility requirements under the Judicial Pensions and Retirement Act 1993 on the 18 April 2011  
(3) The claimant's complaint that she was less favourably treated in the matter of the fee for attending training sessions is well founded.
- Martin Block (2204018/2013) (1) The claimant's complaint that he was less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, is well founded.  
(2) By consent it is declared that the claimant is entitled under the Part-time Workers (Prevention of

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<sup>3</sup> Although Ms Miller's witness statement deals with the issues of sick pay her claim form does not include a claim in relation to it

Less Favourable Treatment) Regulations 2000, from 7 April 2000 and continuing until 1 April 2014 to a daily sitting fee calculated as 1/220<sup>th</sup> of the salary of a full-time salaried Social Entitlement Judge at the material time.

- Christopher Ash (2204183/2010)
- (1) The claimant's complaint in respect of his service as a fee paid Employment Judge after 1 June 2008, namely that he was less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, is well founded.
  - (2) To the extent that the claimant's claim includes any complaints that the way he was remunerated as a fee paid Employment Judge prior to becoming salaried on 10 February 1992, they are dismissed on the grounds that (a) they pre-date the coming into force of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and (b) they are out of time
  - (3) By consent, it is declared that the claimant is entitled under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 from 1 June 2008 to a daily sitting fee calculated as 1/220<sup>th</sup> of the salary of a full-time salaried Employment Judge at the material time.
  - (4) The complaints in respect of the actuarial reduction of his pension are dismissed on withdrawal by the claimant.

Dermod O'Brien (2202623/2005) The claimant's complaint under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 that he was less favourably treated in the matter of the fee for attending training sessions, is well founded.

### **Leigh Day represented claimants**

Jacqueline Baker (2204708/2013)

- (1) The claimant's complaint that the respondent is in breach of the Working Time Regulations 1998 in failing to pay holiday pay during her fee paid judicial appointments is not well founded
- (2) The claimant's complaint that the respondent is in breach of regulation 14(1) of the Working Time Regulations 1998 in failing to pay holiday pay upon the termination of her fee paid judicial appointments is well founded in principle subject to

the claimant establishing that at the date of termination she had accrued a greater entitlement to holiday pay than she had received

(3) The claimant's complaint that she has been less favourably treated in the matter of the payment of a fee for decision writing in her capacity as a fee paid Immigration and Asylum Judge is not well founded

(3) The claimant's complaint that she has been less favourably treated under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 in the matter of a fee for writing statements of reasons in her capacity as a fee paid judge of the Social Entitlement Chamber is well founded

(4) By consent it is declared that the claimant is entitled under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, from 7 April 2000 and continuing until 1 April 2014 to a daily sitting fee calculated as 1/220<sup>th</sup> of the salary of a full-time salaried Social Entitlement Judge at the material time.

(5) The claimant's complaint that she was less favourably treated in the matter of the fee for attending training sessions is well founded.

Jeremy Gibb (2202174/2013)

The claimant's claim is dismissed. It was presented after the time limit had expired and it is not just and equitable to extend time.

Merfyn Jones-Evans(2202193/2013)

The claimant's claim is dismissed. It was presented after the time limit had expired and it is not just and equitable to extend time

Michael Tomlinson (2202213/2013)

(1) It is declared that the claimant is entitled under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, from 7 April 2000 and continuing to a daily sitting fee calculated as 1/215<sup>th</sup> of the salary of a full-time salaried District Judge at the material time

(2) The claimant's complaint that he was less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, is well founded.

(3) The claimant's complaint that he was less favourably treated in the matter of non-payment of London weighting is well founded.

(4) The claimant's complaint that he has been less favourably treated in the matter of a fee for writing decisions is not well founded

(5) The claimant's complaint that the respondent is in breach of the Working Time Regulations 1998 in failing to pay holiday pay during his fee paid judicial appointment is not well founded

### **Underhills represented claimants**

Kyrie James (2201155/2012)

(1) The claimant's complaints in respect of compassionate leave, special aids and equipment, the cost of establishing a home office, and cancellation fees are not well founded

(2) The claimant's complaint that she has been less favourably treated in the matter of a fee for writing decisions is not well founded

(3) The claimant's complaint that she was less favourably treated in the matter of the fee for attending training sessions in breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, is well founded.

(4) The claimant's complaint that she was less favourably treated in the matter of non-payment of London weighting is well founded

(5) The claimant's complaint that she has been less favourably treated in the matter of sick pay is well founded in principle subject to the claimant providing evidence that she either cancelled pre-booked sittings because of illness or was unable to sit the minimum number of days guaranteed by her terms and conditions of appointment in any year because of illness.

(6) The claimant's complaint that the respondent is in breach of the Working Time Regulations 1998 in failing to pay holiday pay during her fee paid judicial appointment is not well founded