EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Dr PA Moultrie & Others

Respondent: Ministry of Justice

PRELIMINARY HEARING

HELD AT: London Central

ON: 30 September, 1 – 3 October and 4 and 5 November 2013: reserved judgment 6 - 9 November 2013

HEARD BY EMPLOYMENT JUDGE Macmillan

Representation:
For the Claimant: Ms R Crasnow of counsel

For the Respondent: Mr C Bourne of counsel
Ms R Kamm of counsel

RESERVED JUDGMENT

The claimants work is not the same as or broadly similar to that of their comparators and the claims therefore fail and are dismissed.

REASONS

Introduction

1. This is the first of a series of preliminary hearings under r. 53(1)(b) in claims brought by fee paid judicial office holders in the wake of a successful claim by Mr D P O'Brien, a retired recorder, complaining that his exclusion from the judicial pension scheme was unlawful in that it breached the

provisions of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR). A brief history of that litigation and a summary of the relevant law and the applicable pension schemes are contained in my judgment on a range of preliminary issues which fell to be decided prior to the determination of the remedy to which Mr O'Brien was entitled, dated the 19th August 2013. As explained in that judgment it was intended to be read as the first chapter of an informal book, the remaining chapters of which would be the judgments in the other preliminary hearings, collectively referred to as Miller and others, which would have to be held to determine a further range of issues which affected the holders of different fee paid judicial offices in other jurisdictions. That history and that summary are therefore to be read as part of this judgment.

2. This hearing was intended to examine whether fee paid non-legal members of various tribunals were entitled to a pension equivalent to the judicial pension, the issues, it being conceded by the respondent that all were workers for the purposes of the PTWR, being whether they were engaged on work which was the same as or broadly similar to the work on which their named comparators were engaged and if so whether their exclusion from the existing judicial pension scheme could be objectively justified. However, at the start of the hearing on the 30th of September it was agreed that there were simply too many different roles to be compared with the roles of too many different comparators for the exercise to be completed within the allotted four days. Accordingly, all of the claims were postponed save for those of fee paid medical members (FPMM)[1] in three tribunals, namely Dr Terry Reilly a fee paid medical member of the First-tier Tribunal assigned to the Social Entitlement Chamber, who sits on the Social Security and Child Support Tribunal (SSCS), Dr Jonathan Cripps a fee paid medial member of the First-tier Tribunal assigned to the Health, Education and Social Care Chamber who sits on the Mental Health Tribunal (MHT) and, since earlier this year, also in SSCS, and Dr Patricia Moultrie who sits in SSCS and also as a fee paid medical member of the First-tier Tribunal assigned to the War Pensions and Armed Forces Compensation Chamber (WPAFCC).

3. A fourth claim brought by Ms Helen Barget who sits as a specialist member – that is a lay member with relevant expertise but who is not a medical member – of the MHT was withdrawn but the withdrawal did not affect the related cases stayed behind her lead claim. The fact that the three remaining claims have required 5 days of evidence and a day for closing submissions demonstrates the factual complexity of the deceptively simple task of comparing the work of a number of different judicial roles. The postponed cases have been divided into two groups (valuer members and valuer chairs in one group and all other lay member roles in the other) which have each been allocated a week for their disposal.

4. I have heard evidence from the three lead claimants and on their behalf from Dr Jane Rakowski a Regional Medical Member in SSCS and Dr Linda

[1] In the interests of succinctness I trust I may be forgiven for adopting a rather large number of acronyms throughout these reasons

Stanton a FPMM in SSCS. For the respondent I heard evidence from Ms Sarah Gane, Director of Operations at the Judicial Appointments Commission (JAC); Mr Michael Watson, Cluster Manager for London Central Tribunals; Mr Kevin Sadler, Director of Civil, Family and Tribunals at HM Courts and Tribunals Service; Judge Mark Hinchcliffe, Deputy Chamber President, Health, Education and Social Care Chamber; Dr Joan Rutherford, the Chief Medical Member for the MHT which sits within that chamber; Dr Jayne Raynor the Chief Medical Member for SSCS; Judge Clare Horrocks, Principal Judge of the WPAFCC; and Judge Robert Martin Chamber President of the Social Entitlement Chamber.

The preliminary issues

5. The comparators chosen by the claimants are as follows: for Drs Reilly and Moultrie - Dr Rakowski a full time salaried medical member known as a Regional Medical Member (RMM) in SSCS who was appointed to the role on the 1st November 2011, the role having been created in August 2011, and Dr Raynor the Chief Medical Member (CMM) of SSCS who was appointed on the 26th January 2004 when the role was first created. In addition to Drs Rakowski and Raynor, Dr Cripps compares himself with Dr Rutherford the Chief Medical Member of the Mental Health Tribunal who was appointed in August 2010 when that role was first created.

6. Mr Bourne concedes that cross jurisdictional comparisons may be made and in the case of Dr Moultrie in WPAFCC this is inevitable as there are no full time salaried medical members in that jurisdiction. One issue which arises if I accept that a claimant was engaged on broadly similar work with a comparator is the date from which the consequent entitlement to a pension arises. Ms Crasnow wishes to submit, by way of an extrapolation of the EU law future effects principle (see the preliminary hearing judgment in O'Brien paras 17 to 29), that the entitlement may be backdated to a date prior to the creation of the comparator office. It has been agreed that if this point falls for determination (which it does not unless at least one of the claimants succeeds) it will be dealt with at a subsequent preliminary hearing when time allows. Although each of the claimants has also made a claim in respect of the payment of a half-day fee for attendance at a full day of training, that issue will not be dealt with in these proceedings but as one of the issues in the main Miller and others hearing scheduled to begin on the 2nd of December.

7. This preliminary hearing is therefore solely about the entitlement of fee paid medical members in the three jurisdictions to a pension equivalent to the pension of their comparators. The claim of each of the three claimants is a lead case for the purposes of r. 36 of the Employment Tribunals Rules of Procedure 2013 and in consequence my decision in respect of them binds all related cases stayed behind them, subject to r. 36(3). It is therefore an unnecessary complication to an already complex task where a lead claimant's role differs from that of the role of the typical claimant whose case is stayed behind theirs. Dr Moultrie's case is perhaps an extreme example as she appears to have carved out for herself a unique role in the WPAFCC chamber. In her case I therefore have a double exercise to perform as it is

accepted by Mr Bourne that even if she fails as a lead claimant, in which function, subject to Ms Crasnow's contentions which I summarise in the next paragraph, I may only take into consideration those parts of her role which reflect the role of a typical FPMM in either of the two jurisdictions in which she sits, she may succeed in her personal claim because of those extra functions.

8. To further complicate matters, Ms Crasnow takes as a subsidiary group of claimants (a sub-set of the all the FPMM claimants as she puts it) those FPMMs who undertake tasks additional to the primary task of sitting on and deciding appeals. These tasks include but are not limited to, involvement in training, appraisal and recruitment. This group includes, but again is not limited to, the Regional Medical Appraisers in SSCS. Her primary submission is that the whole cadre of FPMMs are engaged on the same or broadly similar work as their comparators based solely on their primary task of sitting. If I am against her on that submission, she submits that they nonetheless succeed because I must add on to that primary task the fact that at least many – all those with more than minimal experience of sitting – are equipped to do those additional tasks which, the respondent says, sets the RMMs and the CMMs apart. It is only if I am against her on that secondary position as well that Ms Crasnow submits that the subset of those who actually do one or some of those tasks falls to be considered as she submits that they can succeed even if the main cadre cannot.

The law

9. I need to say rather more about the law and in particular my task in this preliminary hearing. It is not controversial and Ms Crasnow and Mr Bourne rely on the same passages from the same authorities. I was also invited by Ms Crasnow to read the decision of the London South employment tribunal in *Matthews and others v. Kent & Medway Town (sic) Fire Authority and others* (the copy she provided me with is undated) following a hearing in November 2007 and January 2008 on referral back from the House of Lords to consider whether the work of retained fire fighters was the same or broadly similar to that of their fulltime counterparts. I have not done so (other than to read paras 64 and 65 to which she drew particular attention in her skeleton argument) because I do not believe it would be helpful. I say this for two reasons: being a judgment at first instance it is at best of persuasive authority, but much more importantly it deals with a fact specific issue in a way which was no doubt appropriate to the comparison to be made in that case but which is unlikely to be of assistance to me in a quite different scenario involving entirely different job roles when the questions at issue are in consequence likely themselves to be quite different. It would be at best illustrative of the approach to be adopted.

10. The starting point must be the PTWR. So far as material (and additionally to those provisions which I quoted in the earlier judgment, particularly reg. 5(1)) they provide:

"2(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place –

(a) both worker are –

(i) employed by the same employer under the same type of contract, and

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

(b) ...

5(2) The right conferred by paragraph 5(1) applies only if –

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

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

11. The meaning of broadly similar work was considered by the House of Lords in *Matthews and others v. Kent and Medway Towns Fire Authority and others* [2006] UKHL 8, [2006] ICR 365. Two lengthy passages from the speeches of Lord Hope and Baroness Hale at paragraphs 14 and 15 and 43 and 44 respectively are relied upon.

"14. The wording of regulation 2(4)(a)(ii) identifies the matters that must be inquired into. One must look at the work that both the full-time worker and the part-time worker are engaged in. One must then ask oneself whether it is the same work or, if not, whether it is broadly similar. To answer these questions one must look at the whole of the work that these kinds of workers are each engaged in. Nothing that forms part of their work should be left out of account in the assessment. Regard must also be had to the question whether they have a similar level of qualification, skills and experience when judging whether work which at first sight appears to be the same or broadly similar does indeed satisfy this test. But this question must be directed to the whole of the work that the two kinds of worker are actually engaged in, not to some other work for which they may be qualified but does not form part of that work.

15. It is important to appreciate that it is the work on which the workers are actually engaged at the time that is the subject matter of the comparison. So the question whether they have a similar level of qualification, skills and experience is relevant only in so far as it bears on that exercise. An examination of these characteristics may help to show that they are each contributing something different to work that appears to be the same or broadly similar, with the result that their situations are not truly comparable. But the fact that they may fit them to do other work that they are not yet engaged in, in the event of promotion for example, would not be relevant.

43..... The sole question for the Tribunal at this stage of the inquiry is whether the work on which the full-time and part-time workers are

engaged is 'the same or broadly similar'. I do not accept the applicants' argument, put at its highest, that this involves looking at the similarities and ignoring any differences. The work which they do must be looked at as a whole, taking into account both similarities and differences. But the question is not whether it is different but whether it is the same or broadly similar. That question has also to be approached in the context of the Regulations which are inviting a comparison between two types of workers whose work will almost inevitably be different to some extent.

44. In making that assessment, the extent to which the work that they do is exactly the same must be of great importance. ***If a large component of their work is exactly the same, the question is whether any differences are of such importance as to prevent their work being regarded overall as 'the same or broadly similar'.*** *It is easy to imagine workplaces where both full- and part-timers do the same work, but the full-timers have extra activities with which to fill their time. This should not prevent their work being regarded as the same or broadly similar overall.* ***Also of great importance in this assessment is the importance of the same work which they do to the work of the enterprise as a whole.*** *It is easy to imagine workplaces where the full-timers do the more important work and the part-timers are brought in to do the more peripheral tasks: the fact that they both do some of the same work would not mean that their work was the same or broadly similar.* ***It is equally easy to imagine workplaces where the full-timers and part-timers spend much of their time on the core activity of the enterprise: judging in the courts or complaints-handling in an ombudsman's office spring to mind. The fact that the full-timers do some extra tasks would not prevent their work being the same or broadly similar.*** *In other words, in answering that question particular weight should be given to the extent to which their work is in fact the same and to the importance of that work to the enterprise as a whole. Otherwise one runs the risk of giving too much weight to differences which are the almost inevitable result of one worker working full-time and another working less than full-time."*
[emphasis added]

12. Mr Bourne submits that it follows from those extracts that the relevant factors in determining whether the work of the claimant and a comparator is the same or broadly similar will include the following: the extent to which the claimant's work is exactly the same as the comparator's work, taking into account the whole of their work and looking at both the similarities and the differences; whether the differences are qualitative, and the relative importance of the work; whether people in the claimant's role and people in the comparator's role have similar levels of qualification, skill and experience (focusing on how this is relevant to the differences between their work); whether the similarities between the roles are more important that the differences. I agree and I do not understand Ms Crasnow to disagree. She in turn relies in particular as being the key to the task before me on the three

passages which I have emphasised in paragraph 44 of the speech of Baroness Hale. Again, I agree.

The facts

i. the three jurisdictions

13. To some, albeit limited, extent the nature of the FPMM's role is shaped by the size of the jurisdiction in which they sit. WPAFC is tiny by comparison with the both SSCS and MHT. It hears between 2,000 and 3,000 appeals annually, and has only two full time salaried judges. The evidence about the number of medical members came from Judge Horrocks the Principal Judge and Mr Watson. According to Judge Horrocks there are 60 members in total of whom until the most recent recruitment round, only 15 were medical members which will become 22 by the end of the financial year allowing for new recruits and retirements. However according to Mr Watson there are 35 medical members. This discrepancy was not picked up during the hearing and I am unable to resolve it. On either account the number of FPMMs is small. Dr Moultrie and two other FPMMs undertake the appraisal of the medical members but, owing to her limited availability, apart from appraising one of her fellow appraisers, Dr Moultrie has done none. The other two appraisers have done 6 or 7 so far between them. FPMMs also become involved in recruitment competitions at the JAC, for the latest competition three (which did not include Dr Moultrie) were on the sift panel and one plus Dr Moultrie sat on the interviewing panel. Five established FPMMs will each mentor two of the new recruits. FPMMs may be asked to participate in the delivery of training and may be consulted by the President in relation to medical matters within their speciality. I will deal with Dr Moultrie's personal role in training below. There are no salaried medical members in WPAFC.

14. The MHT is the largest jurisdiction within the Social Care Chamber. It has around 900 fee paid judicial office holders of whom 364 are FPMMs all of whom are consultant psychiatrists. About 10 to 15 of them may be involved in providing training, but this is a shifting population whose make up is determined by the nature of the courses being run and who has volunteered. There is a training committee which consists largely of fee paid office holders (FPMMs, specialist lay members and judges). Seven FPMMs are ticketed as appraisers (I note that Judge Hinchcliffe gave a much vaguer figure of 'maybe 50' which may well have included non-medical member appraisers. The figure of 7 comes from the evidence of Dr Rutherford and it is the figure which Ms Crasnow has adopted for her skeleton argument). After each recruitment exercise, up to a dozen FPMMs act as mentors to groups of about 4 new recruits. The population of appraisers and mentors which is drawn from the more experienced FPMMs tends to be more stable than the population of trainers. In MHT any appraiser can appraise any office holder so a FPMM may appraise a fee paid judge for example. There is only one salaried medical member, namely Dr Rutherford the CMM.

15. The Social Entitlement Chamber is the biggest within the First-tier Tribunal. It comprises three jurisdictions of which the largest is SSCS, which has 1,076 FPMMs amongst whom are 33 Regional Medical Appraisers

(RMAs) who are appointed by their Regional Tribunal Judge following expressions of interest to conduct appraisals within their regions. A further 25 RMAs are likely to be appointed to cope with the ever increasing number of FPMMs who require appraising. Judge Martin described the role of the RMA as a deployment rather than an appointment with no additional terms and conditions attached to it other than the discreet fee paid for conducting an appraisal. RMAs have a much greater tendency than other FPMMs to become involved in other activities such as interviewing at recruitment exercises with 6 of them being involved in both the 2012 and 2013 competitions. RMAs are recognised as having a wider commitment to tribunal work than the typical FPMM. Around 30 FPMMs have acted as facilitators at training events and a small number (5 in 2012 and 7 in 2013) in recruitment exercises. Both roles are diminishing since the advent of the RMMs. There is a salaried full-time CMM and 7 (one per region) salaried RMM of whom three are less than full time, one being 90% full time equivalent and two are 80%. It has not been suggested by either Ms Crasnow or Mr Bourne that they should not be regarded as appropriate comparators for this purpose.

ii. similarities between the roles

16. All fee paid medical members and their comparators sit in a judicial capacity determining appeals as part of a tribunal. There are likely to be differences in the detail of what they do and how they do it because of the different natures of the jurisdictions in which they sit, but none signify for this purpose. The job description of the RMM which was drawn up prior to any appointments being made to the role includes the following as the first of their four main duties:

> *"Sitting as a medically qualified panel member, including sitting on complex cases. Please refer to the fee-paid medical member job description annexed for the main activities of a medical panel member"*

17. Two points need to be made. The first is not merely the cross reference to but the effective incorporation into the job description of the RMM of the role of the FPMM. The second is that there is no evidence that either a formal or an informal system exists for directing complex cases towards RMMs. For practical purposes therefore in purely qualitative terms, the system's expectations of RMMs and FPMMs when it comes to sitting are to all intents and purposes identical. Dr Rutherford's job description has similar wording but most of the time she sits on exactly the same sort of cases as the FPMMs. The same is not quite so true when it comes to the SSCS, but I am satisfied that the extent to which Dr Rayner might be called upon to sit on a particular case because she is the CMM is counterbalanced by the need from time to time to call upon a FPMM to sit on a certain type of case because of their personal clinical expertise in a particular area. With the CMMs as well therefore, the sitting role of the claimants and their comparators is the same.

18. The quantitative comparison is more difficult. It seems clear from the figures which I have quoted in the preceding section of these reasons that the typical FPMM in SSCS sits for 100% of their time as does their typical counterpart in MHT, discounting in both cases as being statistically

insignificant, attendance at training days. (I will consider those with other responsibilities later). The picture in WPAFCC is less clear given the inconsistencies in the evidence and the higher proportion of the total who seem to be involved in additional activities. I have not been told whether, apart from Dr Moultrie, any FPMM has more than one additional role but unless what motivates the members in WPAFCC to take on additional responsibilities is very different from what motivates their counterparts in SSCS it is likely that at least some of them will have more than one additional role. Nonetheless it remains the case that any additional responsibility is purely voluntary and even if no FPMM other than Dr Moultrie has more than one additional area of responsibility, on Judge Horrock's lower figure for total FPMMs the ratio of FPMMs who only sit as opposed to those who sit and have an extra responsibility is still about 2:1. In reality the ratio is likely to be slightly greater. (I have had to ignore involvement in training as I have been given no indication of the numbers involved but involvement is very likely to be of an ad hoc or transient nature as with MHT). It can still therefore be said that the typical FPMM in WPAFC sits for 100% of their time.

19. The evidence for the sitting commitment of RMMs requires some sifting. Dr Rakowski was quite adamant in her evidence that she sat for 3 days one week and 4 the next and used the great majority of the remainder of her week to read in for her sittings. She quoted colleagues across the country whose patterns were similar or even more orientated towards sitting. She played down the other parts of her role as being things which the reality of the ever increasing case load and the demands of her Regional Tribunal Judge for her to sit did not permit. The sitting pattern which she describes equates to 70% of her time spent sitting with virtually the whole of the remainder spent preparing to sit. I have no doubt that Dr Rakowski was doing her best to be as accurate as possible with her evidence but it is clear that she is mistaken. Statistics produced by Judge Martin from the source which the tribunal uses to provide data to Ministers and to Parliament shows that in the 12 month period July 2012 to June 2013 she sat for only 46.2% of her time. I think Mr Bourne must be right when he suggests that her evidence is of a typical week which she has extrapolated to all weeks and the error comes because she has forgotten to factor in the effect of atypical weeks such as the 3 weeks she devoted to a recent recruitment exercise. The same statistics show that on average the 7 RMMs spent 48.6% of their time sitting. If sitting and 'Chambers days' are added together they account for 85.6% of the total time of the RMM.

20. A measure of caution is necessary here as I accept that the statistics are but a rough and ready measure of the activity of any judicial office holder and record only the dominant purpose of their day. A very small adjustment is necessary because some 30 days of sitting in other jurisdictions is included which for the purposes of this comparison should be excluded, but more importantly there is no capacity within the statistics for measuring anything other than 'sittings', 'chambers', 'training', 'appraisal' and 'meetings'. In particular there is no capacity for recording the content of a day in chambers. For the same reason that I cannot accept Dr Rakowski's evidence that she spends 70% of her working time sitting, I cannot accept that she spends the

whole of every day recorded as 'chambers' on reading in for sittings. It follows that I do not accept that (in round figures) 85% of an RMMs time is spent on sitting and sitting related activities and 15% on other activities. On the balance of probabilities I am satisfied that the former must be lower and the latter higher but perhaps by no great margin. And I accept Mr Bourne's caution that I should not get too hung up on numbers: all I am concerned to do is to get a broad understanding of the time a typical RMM spends on that part of her role which is identical to that of the FPMM which I do not think the statistics do entirely accurately.

21. The picture is clearer when it comes to the CMMs. Statistics produced by the respondent show that in the period 1 April 2012 to 31 March 2013 Dr Rayner sat only 83 half day sessions, about one day each working week, and even less in the preceding 12 months. She said in evidence that in the first 9 months of this year she has sat for 43 days but whether that was 43 full days or 43 sessions, a session being a half day, or a mixture was not explored. Ms Crasnow submits that I should treat these statistics with caution as I have heard no evidence about them and I should instead accept that Dr Rayner has much the same sitting pattern as Dr Rutherford who, she claims, sits for 60% of her time, that figure being 'not controversial.' The figure is controversial as Mr Bourne does not accept it although he accepts that Dr Rutherford sits for something fairly close to that proportion of her time. I have in fact heard some although very limited evidence about the statistics on which the respondent relies for Dr Rayner's sittings, namely that they come from the same source, the GAPS2 database, as the statistics produced by Judge Martin which Ms Crasnow invites me to prefer. That being so I see no reason to treat them any differently. I am satisfied that Dr Rayner sits for about 20% of a typical working week. The figure may be slightly higher than that if one discounts (as I think one must) her extra curricula activities which consist of sitting on the Gender Recognition Panel and being an Honorary Associate Professor at Nottingham University which involves an unspecified amount of teaching time. They must be discounted because neither are attributable to her holding the post of CMM. I accept her evidence that she spends little office time on preparation, doing it, as a FPMM would do, in her own time or in marginal time such as when travelling or between sittings.

22. The source of the statistical evidence for Dr Rutherford's sitting statistics is not explained but I see no reason to doubt that it is accurate enough for me to make working assumptions sufficiently reliable for the purposes of the comparison which the PTWR requires. For the period 1 April 2102 to 31 March 2013 Dr Rutherford sat for 87 days which, as Mr Bourne submits, translates to about 40% of her typical working week. The MHT jurisdiction differs from SSCS in one material respect which is that the medical member of the tribunal is required to carry out a preliminary examination of the appellant in most cases about half of which have to be done on a day prior to the hearing. Dr Rutherford gave her evidence ex tempore and at short notice. She said that she estimated that her working week was split 60/40 between sitting and management and she included the preliminary examinations in the 60%. There is therefore some evidence to support Ms Crasnow's contention that Dr Rutherford's commitment to sitting amounts to

60% of her time. However, Dr Rutherford also gave evidence about the length of time which a preliminary examination can take and she said up to 5 hours including travelling time. So, even the longest examination takes rather less than a full working day. It seems very likely therefore that Dr Rutherford's commitment to sitting is somewhat less than 60% but on the evidence before me I can do no better than estimate it at between 50 and 60%. This chimes with Judge Hinchcliffe's view that she probably sits for 50% of her time.

iii. Dr Raynor

23. I now turn to the question of what each comparator or comparator group does with their time when they are not sitting. It is important to make the general point, given the third and final sentences of para 44 of Baroness Hale's speech in *Matthews,* that these additional tasks are not in any sense attributable to the fact that the comparator's are full time and the claimants are not. There is no element of Parkinson's law at work here. If there had been, one might have expected to find that the three RMMs who are less than 100% full time would have rather higher sitting percentages than their full time colleagues, but in fact the two RMMs with the lowest proportion of their time devoted to sitting related activities are both less than full time. The additional duties are very much a deliberately designed element of the comparator roles, all three of which are JAC appointments.

24. Dr Raynor was appointed as a FPMM of the Social Security Tribunal in 1995 and became the first CMM of the SSCS on the 26th January 2004. She also sits as a member of the Gender Recognition Panel but as this is a personal appointment unrelated to her role as CMM, I discount her involvement with that jurisdiction for the purposes of the statutory comparison. I accept her evidence and that of Judge Martin about the nature and content of her role. Judge Martin described her principal remit when she was appointed in 2004 as being to design, deliver and oversee an appraisal scheme and system of training for FPMMs of SSCS. She retains a strategic role in the former and a major strategic and operational role in the latter, her diary for this year showing that she has devoted an equal number of days to training as to sitting. Her most important other task is recruitment. In addition she writes articles for the Judicial Information Bulletin, liaises with external groups, the two most important aspects of which are as joint chair with Judge Martin of the Tribunals Medical Advisory Group, a cross jurisdictional group set up at the request of the Senior President, and her regular quarterly meetings with the Department of Work and Pensions. I will deal in detail only with her three principal non-sitting tasks.

25. Appraisal. Since introducing the appraisal system Dr Raynor has recently redrafted all medical member appraisal documents in line with General Medical Council changes to Good Medical Practice. She is consulted by the President on matters relating to appraisal. When the first Regional Medical Appraisers were appointed she personally appraised them all. She no longer routinely appraises FPMMs herself as she acts in a quasi appellate capacity should a dispute arise between an appraiser and an appraisee. She reads all appraisal self-assessment forms and all final appraisal reports both

to quality assure the standard of appraising and reporting and to identify training needs.

26. Training. Dr Raynor describes this as an enormous part of her role, having spent 'the majority of' the previous 12 months either recruiting or devising and delivering the training for new FPMMs. During that year some 260 new FPMMs were appointed and since she was appointed over 400 new FPMMs have been recruited and trained. Dr Raynor devises and writes all training material herself, although it is envisaged that a task soon to be delegated to the RMMs is the writing of some of their own training material (I return to this point when I look at the role of the RMM). In many cases, particularly with induction training, she delivers the training herself as well. Her training remit extends beyond the medical members and she is involved with the training of all SSCS members through her involvement with the National Judicial Training Committee. She personally trained the first 6 RMMs to be appointed, the 7th, who was appointed about a year later, being trained by her Regional Tribunal Judge and until the appointment of the RMMs she interviewed and trained all RMAs.

27. Recruitment. Here too Dr Raynor has a strategic involvement as she attends joint planning meetings with the JAC for all competitions involving the recruitment of medical members to SSCS for which she also writes all the material. She is involved with the whole recruitment process from initial advertisement through to final moderation.

iv. Dr Rutherford

28. According to Judge Martin it was the exemplary work of Dr Raynor in SSCS which led to the appointment of a CMM for the MHT. I accept the evidence of Judge Hinchcliffe. the Deputy Chamber President with responsibility for MHT, who, like Dr Rutherford gave evidence ex tempore and at short notice, and Dr Rutherford herself, about the nature and content of her role. Dr Rutherford's evidence focussed on a job description which she herself had drawn up earlier this year and which Judge Hinchcliffe said he recognised as a reasonable description of the role as it currently is, rather than the initial job description for the role which, according to Judge Hinchcliffe, has certainly developed over time in the light of experience. This included the need to provide a revalidation appraisal system for all FPMMs in the jurisdiction who had retired from clinical practice but who still wished to retain a licence to practice based on their work within the tribunal, Dr Rutherford having to be accredited and appointed as the Suitable Person (a statutory term) for the purposes of this appraisal system. As at August 2013 she was the Suitable Person for 52 such members although in that capacity she does not personally appraise them. She is also the Suitable Person for Dr Raynor's revalidation.

29. As with Dr Raynor's post, the post of CMM in MHT is regarded as essentially a judicial one rather than a managerial one, but nonetheless at interview Judge Hinchcliffe was looking for leadership and management skills as well as judicial skills. He wanted to delegate the judicial leadership and management role which he had hitherto had for the medical members which

he described as generally pastoral but involving the investigation of complaints and other disciplinary issues. The role of CMM has become more autonomous and, like Dr Raynor, one which Dr Rutherford is in the process of making her own. She is a member of the Judicial Management Team of the MHT which comprises Judge Hinchcliffe, the Principle Judge and Dr Rutherford. It is described as very informal and flexible, meeting roughly every 6 weeks. She is also a member of the Chamber Jurisdictional Board which is more formal, is chaired by the Chamber President and includes the senior civil servants: it meets about 4 times a year.

30. The list of Dr Rutherford's duties when she was first appointed were equivalent to those of Dr Raynor. They have broadly continued to be so although given the very considerable difference between the sizes of the two jurisdictions and the fact that Dr Rutherford sits roughly 2½ time more than Dr Raynor, and the fact that there are no RMMs in MHT, the extent and frequency which she performs the component tasks within the role must be different. For example she appears to be less involved in training than Dr Raynor, making no claim to be the sole author of training material and describing herself only as lead or co-trainer for a variety of training events. She is also a member of the Tribunal National Training Committee. She has additional duties which arise from the nature of the jurisdiction but which sit firmly within the leadership and management aspect of the role. These include dealing with complaints against medical members from hospitals in which patients are detained and liaising with those hospitals when members have concerns about the safety of a patient or themselves (virtually all MHT hearings take place in hospitals). She also retains tasks that Dr Raynor has now delegated, most notably dealing with medical members' queries, appraising and mentoring.

31. The differences between Dr Rutherford's role and Dr Raynor's are therefore ones of degree, reflecting the requirements of their respective jurisdictions and the fact that she has had much less time to shape the role, rather than ones of substance and in consequence it is not necessary for me to say any more about Dr Rutherford's personal role.

v. The Regional Medical Members

32. This is a very new role, no RMM having yet been in post for more than 2 years. I put a proposition to Judge Martin about the role which he accepted. Based on the statistics which he had produced about 85% of what the RMMs do (sitting) is also done by FPMMs; of the remaining 15% a good proportion is work which the great majority of FPMMs are capable of doing but which in practice only a tiny minority do (very largely training, appraisal, and recruitment); the balance, tasks delegated to them collectively by the CMM, are tasks which the FPMMs cannot do. I asked him what proportion of the whole he thought the delegated tasks amounted to and he thought it would be 5% or less. When this was translated into one day a month he thought it sounded about right. Ms Crasnow challenged that figure as being too high but in doing so she seemed to assume that the only delegated task was dealing with queries from medical members. In my judgment it is too low, although possibly not by much. Involvement in recruitment exercises is not a task

which the RMMs job description specifies as being part of their remit (see para 35 below). It must therefore be a delegated task from the CMM. Dr Rakowski told me that this year she had spent 3 weeks plus one day on a recruitment exercise. On the assumption that she has 8 weeks leave per annum (she had 40 days in the year in question) by itself that involvement with recruitment was more than 7% of her working year. (I bear in mind of course that 2013 was a particularly large recruitment exercise and she is only one of 7 RMMs all of whose workloads differ somewhat, but given the nature of her evidence the point is an important one – impressions are unreliable guides to what a person actually spends time doing).

33. Because the role is so new, it is still evolving and there is a danger that if I were to find that the role and the role of the FPMM were comparable on the basis of a snapshot taken today, that may not be the case in a year or two. The problem area is primarily that of delegation. Ms Crasnow submits, in my judgment correctly, that I must not take into account things which are purely aspirational and *Matthews* (per Lord Hope) tells me that I must not take into account things which RMMs might be fitted for by virtue of their personal skills, qualifications and experience but which they do not actually do as part of their job. I do take into account the fact that RMMs will imminently take on a new role mentoring newly appointed FPMMs with supportive visits as this is designed into the latest recruitment round. The question of RMMs writing their own training material is more problematic as according to the evidence of Dr Raynor it is currently only envisaged that they will do so although Judge Martin says that it has begun to emerge. But it is clearly a requirement of their job description that they do so and therefore hardly seems to qualify as 'aspirational'. I can, I think, legitimately and possibly most helpfully, approach the problem in this way: by recognising that there is a component of the work load of the RMM which FPMMs do not do, which consists of tasks delegated by the CMM and the Chamber President, the precise content and temporal scope of the component being subject to some fluctuation, but neither being insignificant in terms of time or importance.

34. There is a parallel problem in the areas in which tasks which the RMMs are required to perform are also undertaken on a voluntary basis (they are paid but no FPMM is required to undertake them) by a very small number of FPMMs, many but not all of whom are Regional Medical Appraisers as the RMAs by virtue of the kind of people they are, rather than by dint of the role itself, are more likely that the average FPMM to want to involve themselves in other areas such as training and recruitment. Prior to the advent of RMMs it was only to this group of FPMMs that the CMM and the Regional Tribunal Judges could turn for assistance in these areas, but since the appointment of the RMMs there is a very real sense in which the RMAs and the other FPMMs involved in these areas play a supporting role behind the RMMs and it is the extent of that supporting role which is likely to vary over time. Some statistics with regard to appraisals which Ms Crasnow relies upon but which in my judgment paint a rather different picture from the one for which she contends, explain the point. In the period 1 April 2012 to 31 March 2013, 93 appraisals being 34.3% of the total were carried out by RMMs while the balance, 178 (65.7%) were carried out by the RMAs. This, Ms Crasnow submits, show that

RMAs continue to carry out the bulk of the appraisals. As a group, yes but as individuals, no. If one adds into the equation that at the material time there were 7 RMMs and 35 RMAs (the figures are not precise because of the late appointment of the RMM for Wales and the south-west, but they are precise enough to make the point) each RMM carried out about 13 appraisals whereas each RMA only carried out about 5.

35. The job description of the RMM from which I have already quoted the obligation to sit, also contains 3 other main duties:

> *"- Appraising the performance of medical members in the Region, identifying training and development needs.*
> *- Participating in judicial training, including the development and delivery of training material.*
> *- Providing support to the Chief Medical Member."*

In addition there is the subsidiary duty, which was left intentionally open, of:

> *"- Carrying out such other duties as the Chamber President and Regional Judges may require".*

Judge Martin described both aspects of the main duties – sitting and undertaking activities that would previously have fallen to the CMM – as being equally important.

36. The history behind the business case for the appointment of the RMMs reflects two principle strands. The first is the problem which had been experienced in recruiting sufficient FPMMs, an exercise in 2009 to fill 202 vacancies had secured only 66 appointments and a year later, despite an increase in the sitting fee after 20 sittings had been achieved, only 67% of the vacancies were filled and the willingness of FPMMs to sit once appointed was described by Judge Martin in evidence as 'variable and volatile'. It was therefore felt that a small number of salaried appointments (Judge Martin had hoped for more than the finally agreed figure of 7) would go some way to alleviating this problem as salaried medical members offered a stable and predictable sitting resource. The second was the need to relieve Dr Raynor of some of her workload, it being Judge Martin's view as her line manager that she needed to delegate some of her activities.

37. In addition to sittings and routine appraisals which I have already dealt with, the RMMs are about to take on a new role in relation to the large intake – some 257 - of new FPMMs this year. This will take the form of shared sessions in which the RMM is likely to sit on the first case in the list while the new FPMM observes with the roles being reversed for the second case after which the RMM gives immediate feedback. Thereafter the two alternate on cases in the list during the day. If the FPMM appears to be struggling the RMM will give advice and guidance and may arrange a second shared session. Given the numbers involved this is a very substantial burden on the RMMs with each having to do between 30 and 40 such sessions. As the

appraisal scheme has been modified to include this new model it seems likely to be the pattern for the future.

38. So far as recruitment is concerned, in the two exercises which have taken place since the advent of RMMs, those of 2012 and 2013, the figures show the evolving nature of the involvement of RMMs on the one hand and FPMMs on the other. In 2012 six RMMs spent 26 days interviewing while 4 RMAs spent 22 days and an FPMM 5 days. In 2013 6 RMMs spent 45 days interviewing and 5 RMAs spent 36 days while 7 FPMMs each spent only 2 days. There is an obvious logistical advantage in this as it takes far less administrative effort to deploy one salaried medical member than several FPMMs who have no obligation to participate. The RMMs were responsible for organising FPMMs to sit on the interviewing panels which were held across the regions.

39. So far as training is concerned, since the creation of the post of RMM the reliance on RMAs and FPMMs to act as facilitators has reduced but in addition, RMMs have begun to take up training roles not previously done by RMAs or FPMMs, for example an RMM has co-presented a lecture at induction training and all RMMs co-facilitated small groups of salaried judges at their 2013 annual conference which all RMMs attend with time set aside for their own training needs. RMMs cover local training events which would previously have been attended by the CMM.

40. There are a variety of other tasks which the RMMs undertake either delegated from the CMM or the Chamber President or which Judge Martin envisages as arising naturally from their role. His analysis was not challenged by Ms Crasnow. The CMM has delegated to them the task of fielding enquiries from medical members, usually about tribunal related matters and Judge Martin anticipates that this role will develop as FPMMs 'become used to their helpfulness' as he put it. He also sees it as opening the possibility of RMMs developing a pastoral relationship with the FPMMs, providing practical guidance and support. With this goes the expectation that they will always demonstrate good practice, becoming the exemplar for a FPMM whose performance needs to be improved. Some RMMs have been asked to write articles for the Judicial Information Bulletin. An RMM was asked by the President to attend a meeting with the newly appointed Independent Reviewer of the Work Capability Assessment, something which the CMM would previously have done. Regional Tribunal Judges use RMMs for advice on a range of issues concerning medical members and they also tend to be consulted by District Judges (the level of salaried judge below the Regional Judge).

41. Although they have no formal leadership or management responsibility, RMMs are expected to lead by example. An example of how this works in practice concerns a new benefit – the Personal Independence Payment. The RMMs were the only medical members to be among the first group of the tribunal's judiciary to be trained in the new benefit and they will sit on the first wave of appeals concerning it, subsequently cascading their experiences and lessons learned to the FPMMs. They are also expected to look for patterns of

error in, for example, poor quality medical evidence submitted by ATOS on behalf of the DWP, analyse causes and recommend remedial action. This was the subject of a meeting in March of this year which all of the RMMs attended. Judge Martin has also been able to draw upon RMMs to provide feedback to the DWP on standards of departmental decision making.

42. Some final points. RMMs are not regarded as the CMMs deputies within a region and are not line managed by her, their line manager being the Regional Tribunal Judge. Their salary is not a straight multiple of the daily fee of the FPMM. FPMMs receive two different daily rates, a lower rate for the first 20 sittings in a year and a higher rate for sittings above that number or if a medical examination is required which, as I understand it, is very unusual except in industrial injuries appeals. The RMMs salary is a multiple of the FPMMs higher rate, a rate designed to incentivise them to sit more frequently.

First conclusions

43. I will turn first to Ms Crasnow's primary and first subsidiary contentions, namely that the FPMMs of the three jurisdictions in question are engaged on broadly similar work with either the CMMs or the RMMs either by virtue of their sitting commitment alone or by virtue of their ability, if required, to undertake other tasks such as appraisal, training and recruitment in addition to sitting. I only need to consider whether either the subset which she has identified or Dr Moultrie in her own right are engaged on broadly similar work if I am against her on both of those contentions. She invites me to make findings in respect of each lead claimant and their comparators, but there is no need to do so given my finding in para 18 that all typical FPMMs across the three jurisdictions to the same role. Where a lead claimant has individual responsibilities over and above that of sitting they fall to be considered either in the context of Ms Crasnow's subsidiary contention or her sub-set alternative.

44. Ms Crasnow's subsidiary contention cannot stand as it would offend the principles established in *Marshall,* most notably by Lord Hope in para 14. If it is impermissible to attempt to widen the gap between claimant and comparator by taking into account tasks which the comparator group are qualified to do but do not do, it must be equally impermissible to attempt to narrow that gap by taking into account tasks which the claimant group are qualified to do but do not do. The only permissible comparison (subject to the subset) is therefore between the FPMMs on the basis exclusively of their sitting on the one hand and the CMMs and RMMs on the other.

45. In my judgment, it is clear almost beyond argument, that the roles of the CMMs and the FPMMs are by no means broadly similar. This, to my mind, is virtually self-evident from the description of the roles which I have set out above. The CMMs have important strategic and leadership functions. They are, to a greater or lesser degree, involved in a broad range of activities which are vital to the functioning of their respective jurisdictions over and above their commitment to sit. They function at a level which is very roughly the medical equivalent of Principal Judge. Whilst it might be thought that the

point is a fortiori in the case of Dr Raynor, Dr Rutherford in fact fulfils both the CMM and RMM roles within MHT. In Dr Raynor's case only a small proportion of her work is exactly the same as that of the FPMM. In Dr Rutherford's case while that proportion is greater, I am in no doubt that in her case as well as Dr Raynor's, the differences between what she does and what the FPMMs do are of such importance as to prevent the jobs being broadly similar. To adopt Mr Bourne's phrase, there is clear blue water between them.

46. The single fact that the RMMs sit for such a large proportion of their time calls for a much closer scrutiny of the other part of their role. Using Mr Bourne's analysis of what *Marshall* requires me to consider which I have set out at para 12, some first answers are relatively easy to give. The differences between the two roles are largely qualitative rather than quantitative and there are no, or no relevant, differences between the levels of qualification, skill and experience between the two groups (ignoring the new intake who are not typical for this purpose). The extent to which the claimants' work is exactly the same as that of the RMM is considerable – between 80% and 85%. That leaves only two questions for consideration, namely the relative importance of the work and whether the similarities are more or less important that the differences. Turning to the emphasised passages in para 44 of Baroness Hale's speech on which Ms Crasnow relies, there is no doubt that the work which both groups do, sitting, is of the highest importance to the enterprise as a whole. In summary then, in a single graphic proposition, the question which I have to answer appears to be this: does the importance of what the RMMs do which the FPMMs do not do, trump the fact that for most of their time the RMMs are doing work which is for practical purposes identical to the work of the FPMMs, that work being of high importance?

47. This is very much a matter of drawing impressions from the findings of fact which I have made and before reaching my conclusions I have revisited and carefully reread those findings in order to gain as accurate an impression as I can. RMMs are not just FPMMs who take on additional tasks, that much is clear. It seems to me that they were designed to occupy a layer in the structure between those occupied by the CMM and the FPMM at a level very much akin to that of the District Judge. While they are not in a technical sense the CMMs deputies within a region, important parts of her role are deputed to them – and not just the mechanical functions of carrying out appraisals or conducting interviews. I was impressed by the evidence of Judge Martin who, in my judgment, gave a thoughtful and detailed analysis both of the role and the thinking which lay behind it. The RMMs are people who have, or are in the processes of acquiring, a certain status, albeit that of first amongst equals, making them the focal point for the medical members in their region. They are the mentors, even tutors in a limited way, for newly appointed FPMMs and the benchmarkers for new jurisdictions such as Personal Independence Payments. They are beginning to take on an outward facing role in representing the jurisdiction with external bodies. None of this they have taken from FPMMs – it is delegated down to them from the CMM and the Chamber President. It is something which FPMMs have never done (or in the case of the mentoring of newly appointed FPMMs, not in this

formalised, structured way) and sets the RMMs apart from them to a significant degree. The importance of this work to the enterprise cannot be doubted. RMMs are now the first port of call when a competition or training is to be organised and they are supplanting the FPMMs in dealing with appraisals and recruitment.

48. The workload of SSCS has grown substantially in recent years. Ms Crasnow contends that non-judges could have been appointed to undertake training, appraisal and recruitment but instead judges who, she submits are very like FPMMs, have been appointed, implying, I think, that the non-sitting element of the RMM role is much like that of an administrator or HR officer. While I reject this comparison as significantly underestimating the nature and importance of the RMMs additional tasks, the submission seems to me to miss the point. A solution to the problem which the jurisdiction faced in 2010/11 could have been to delegate more widely among the FPMMs tasks such as appraisal, recruitment and training, and just take on some salaried medical members to sit full time. But what was done was to intentionally create an entirely new role which was qualitatively different from that of the FPMM and which brought a new dimension to the judicial structure of the jurisdiction. It took elements from below and above and an essential part of the thinking behind its creation was that it should relieve the pressure on the CMM.

49. In my judgment therefore the importance of what the RMMs do and which the FPMMs do not, does indeed trump the fact that for most of their time they do the same thing. They are not, therefore, engaged on work which is broadly similar.

The sub-set

50. Ms Crasnow submits that if I am against her on her main submissions, a sub-set of FPMMs can nonetheless succeed because the extra responsibilities which they have voluntarily undertaken but for which (at least in the main) they are paid, makes their personal work broadly similar to that of the RMMs. The sub-set for which she contends is as follows:

a) all Regional Medical Appraisers in SSCS
b) the 7 FPMMs in MHT who carry out appraisals
c) all FPMMs who engage in training
d) all FPMMs who have participated in recruitment exercises
e) all FPMMs who write articles about their work (it is this activity where I am unsure if the writing of all such articles attracts a fee)
f) all FPMMs who have attended additional meetings with internal or external groups
g) the 5 to 10 FPMMs in MHT who are involved in mentoring
h) the two FPMMs in WPAFCC whose non-sitting work is akin to Dr Moultrie's.

51. In my judgment this submission is doomed to failure by the choice of the sub-set. The net is cast far too wide and would, as Ms Crasnow accepted, include a FPMM who had written a single article or attended a single meeting

alongside the most active RMA who also took part in training and recruitment. Plainly, that can't be right and I understood Ms Crasnow to agree that the writing of a single article could not make a FPMM eligible for a pension if they were not otherwise eligible although it would seem to make them a member of her sub-set. It is simply unarguable, in my judgment that the additional work of the former is broadly similar to the additional work of the latter let alone the work of the RMM. In short it is not a valid sub-set. As I am offered no other sub-set as a basis for comparison, strictly that is the end of the matter, but I will add a short paragraph about the RMAs and others like them who also undertake activities such as training and recruitment on a regular basis (these last words being important) as, at least at first sight, they make a far more promising sub-set.

52. In my judgment had I been offered such a sub-set the comparison with the RMMs would still not have gone through because it ignores the importance of the qualitative distinction between the role of the RMM taken as a whole and that of the FPMM even taking into account what I might (rather disparagingly perhaps in order to make the point) describe as the mere mechanical similarities of the shared activities of appraisal etc which changes the ratio of the similarity of the work done by the two groups in favour of the RMAs. My reasons for this conclusion are set out in paragraphs 47 and 48 above.

Dr Moultrie

53. That leaves Dr Moultrie whose case troubles me for a number of reasons. I fear that I sensed in her evidence a tendency to over-estimate the importance of her role and to play down the importance of, almost to belittle, the role of Dr Raynor with whom she primarily seeks to compare herself. Indeed she seemed reluctant to accept that the role of the CMM had any real relevance. But equally I sensed in the evidence of Judge Horrocks a tendency to over-estimate the degree of over-estimation although there are some genuine disputes about exactly what Dr Moultrie does and has done. To speak of Dr Moultrie's 'role' raises an issue which was not addressed in *Marshall,* namely its transient nature. Judge Bano, the then Chamber President, was frustrated by the administration, who felt the post could not be justified, in his desire to create a part-time salaried medical member position which he anticipated Dr Moultrie would occupy, although whether that would have been the equivalent of the CMM or RMM position I have not been told and it may not have been decided and my estimation of her is that she nonetheless regards herself as holding such a position. However she has come to that position by volunteering for or being invited to undertake the range of tasks which fall within it. She has therefore aggregated to herself a number of responsibilities which may well be disaggregated (at least to some extent) among several individuals should she cease to be a member of the chamber and as none appear to be contractual in nature could presumably be removed from her at any time. No point is taken by Mr Bourne that this in some way impacts upon the comparison which I must make for the purposes of the Regulations nor, perhaps more surprisingly, does he make a separate

objective justification argument in respect of her case based upon it. Having mentioned the point I therefore propose to say nothing more about it.

54. Dr Moultrie's case raises another issue not canvassed in argument or in *Matthews* which is the extent to which what the Senior Salaries Review Body tend to refer to as job weight features, if at all, in determining whether jobs are broadly similar. The point has to be made that what I am not concerned with is whether jobs are of equal value which is an equal pay issue. But can it really be said that, if it be the case factually that person A performs a microcosm of the role of person B but person B is performing her role in respect of a constituency numbering in the high hundreds while person A is performing it for a constituency numbering in the very low tens, that the jobs are nonetheless broadly similar?

55. Dr Moultrie has been a FPMM of SSCS since September 1993 and a FPMM of WPAFCC since the 15th of November 2005. However, she has only held the most important and time consuming of her additional roles, which is to do with training, since about March 2011. She relied on a wide range of activities which she had undertaken, primarily in WPAFCC but also on SSCS, in support of her contention that her work was broadly similar to that of Dr Raynor or alternatively of the RMMs. But some of what she relied on appears largely historical and some ad hoc.

56. In her witness statement she lists at two separate places the things on which she relies. I will deal with them roughly in the order in which they appear.

57. Appraisals. The first is a claim that she had designed and developed the appraisal system for medical members in WPAFCC. This considerably overstates her contribution. Following a recognition that appraisal within the chamber needed re-invigorating, it was agreed that it should be standardised using basically the same form for judges, medical members and service members. The appraisal form was designed by Judge Horrocks and Dr Moultrie adapted it for medical members by ensuring that it also reflected the requirements of the GMC. This exercise appears to have taken a day. She along with two other FPMMs is trained as an appraiser but one of the other FPMMs undertakes the administration with regard to FPMM appraisal. She claimed in her witness statement to have trained the other two appraisers but Judge Horrocks gave evidence that Dr Moultrie was merely asked to lead on appraisals because of her JSC role and the training was done by the Judicial College. This conflict was not explored in cross examination and I am unable to resolve it. The only appraisal that she appears to have carried out is of one of the other appraisers (each appraiser has been appraised by another), the two other appraisers having done the 6 or 7 that have so far taken place. Within SSCS she is a Regional Medical Appraiser.

57. Developing and delivering training. Within SSCS the two specific examples in her witness statement of being invited to deliver training both date from 2005. I am not satisfied that her training role within SSCS is any greater than any other FPMM and will therefore have declined since the

creation of the RMM role. The position in WPAFCC is rather different although, as Dr Moultrie herself acknowledged, the difference is attributable to the smallness of the jurisdiction. So far as developing training is concerned, there is no doubt that Dr Moultrie has an important function as the jurisdiction's Judicial Studies Co-ordinator (JSC), a post which she has held since March 2011, in which capacity she chairs the chamber's Judicial Studies Planning Group (JSPG). Training within the chamber may be unique in that it embraces the three different jurisdictions of Northern Ireland, Scotland and England and Wales. An important function of the role of the JSC is to co-ordinate training across the three jurisdictions, the first holder of the post in 2009 being the deputy president of the Northern Ireland Pensions Appeal Tribunal who retired from the role on becoming chamber President in Northern Ireland in 2011. Dr Moultrie herself is based in Glasgow.

58. I rather got the impression that in Judge Horrocks' view the word 'Co-ordinator' effectively says all that needs to be said about the role. Indeed, that is what the job description says but the main duties include: identifying training needs for judges and medical members (although Dr Moultrie agreed that the FPMMs themselves play an important part in this through the completion of their self-assessment forms as part of the appraisal process); identifying the resources available; developing methods of monitoring the effectiveness of training; advising on the development of a training and development strategy; chairing the JSPG; and participating in the planning of training conferences. There is clearly rather more to the role than mere co-ordination. Judge Horrocks explained the reasons for appointing Dr Moultrie to the post. They are all entirely pragmatic and were not challenged by Ms Crasnow. She is based in Scotland which was thought to be beneficial for promoting co-ordination with the Scottish and Northern Irish jurisdictions; as a doctor rather than a legal member (training had been the preserve of the Chamber President prior to the creation of the JSC role, the first holder of which was a salaried judge) which would help to ensure a better balance of training for all members, legal, medical and services; and because she also sits in SSCS from which it was hoped she could bring training skills and ideas. Dr Moultrie had had some involvement with training in the WAPFCC prior to becoming the JSC.

59. The amount of training done is largely budget driven and the JSC post itself is funded for only 18 days a year. It is the JSPG as a group, which includes legal, medical and service members, rather than Dr Moultrie as an individual, which determines the training programme for the year, discussing who is to deliver what topics. This evolves over time until the final agenda is reached, a process of which, as Judge Horrocks put it, Dr Moultrie has 'ownership'. I accept what I regard as a very important passage of evidence from Judge Horrocks which was not, in substance, challenged, although some detail was added in cross examination. Once the initial 'skeleton' training agenda is agree upon by the JSPG, the bulk of the content is worked up by Judge Horrocks and the Chamber President, now Judge Stubbs, with input from other FPMMs and Judge Mullan the President in Northern Ireland. Judge Horrocks personally deals with around 70% of the administration and content of the training, in particular the central co-ordination of the training

material. For a two day training event in October 2013 she personally worked up virtually all the training scenarios, case studies and background information. Dr Moultrie co-ordinates, liaising with the Judicial College which provides logistical support and a report on evaluation feedback and she may provide one or two slots herself and help with facilitation and facilitators meetings. She also developed some scenarios for a panel discussion on conflict of interest. Judge Horrocks did accept that she and Dr Moultrie were the joint course organisers and that Dr Moultrie did the (very brief) introductory sessions on both days. Training within the chamber is therefore very much a team effort, the team including the administration and Judge Horrocks' PS. Training for legal members only is organised by Judge Horrocks and Judge Stubbs between them.

60. Dr Moultrie includes within her training duties the role of chambers librarian. This appears to be a largely if not entirely co-ordinating and facilitating role concerning the material which is available to members on the tribunal's intranet including training material and access to important medical publications. I assume, because no separate figure is given for it, that the time which she spends on this role is included in the 18 days allowed for the JSC role.

61. Recruitment. The principal responsibility for recruitment, including competitions for recruiting FPMMs, falls on Judge Horrocks. It is very time consuming. For the FPMMs competition on 2013 she developed a case study for the candidates to consider prior to interview. Having found a suitable appeal she edited the evidence and documents down to manageable proportions and sent them to Dr Moultrie with a request to design the questions and model answers for the situational questioning. This took Dr Moultrie a day. Dr Moultrie was not on the sift panel for that competition, the sift being done by three other FPMMs, but she did take part in the interviewing along with one other FPMM. The newly appointed FPMMs will be mentored by 5 'old hands'.

62. In addition Dr Moultrie is the WPAFCC representative on the Tribunals Judiciary Advisory Group (TJMAG) and attends meetings on behalf of the chamber, for example with the medical advisors to the Veterans Agency and with the MoD. She also claims to have provided guidance to FPMMs on medical regulation including GMC revalidation and advised the President in connection with it but she provides no further detail in particular with how much time this involved.

63. The most accurate picture of her personal contribution to WPAFCC can perhaps be gleaned from the statistics. In 2012/13 she claimed fees for 44½ days work of which 17 were sitting, 18½ were for training, 3 days were for attending a conference, presumably being trained, 5 days for attendance at TJMAG and 1 in connection with an appraisal workshop. She thus spent 38% of her time sitting. In the first 6 months of 2013/14 she spent only 3 days or 17% of her time sitting, 5 on training, one on an appraisal workshop, 4 at meetings and 5 on recruitment a total of only 18 days.

Conclusions

64. This detailed analysis of the evidence supports my initial impression that Dr Moultrie was overestimating both the quantitative and qualitative importance of her non-sitting roles. That is not to say of course that they are unimportant only that they are not as important as she claims. They are clearly not, as she contends at para 58 of her statement, 'more comparable to the role of the CMM.' In particular, in connection with training, which is the largest single element of Dr Moultrie's additional responsibilities, Dr Raynor's role is much more strategic and more all-encompassing. To use Ms Crasnow's phrase, this is not an apt comparison.

65. If any comparison is to be had it is with the RMMs but even here I am not satisfied that the roles are broadly similar. The nearest analogue to Dr Moultrie's position is that of the RMA in SSCS of which, of course, she is one, although within WPAFCC it is training rather than appraisal that is the main 'add on.' But in Dr Moultrie's case it appears to be becoming not so much an add on as a substitute for sitting. In para 52 I gave brief reasons for rejecting a comparison between the RMAs and the RMMs had I been asked to make one. Those reasons won't quite do here as I accept that there is something more than merely mechanical in Dr Moultrie's involvement with training which does take it some way towards what RMMs do at a local level in this respect. But there is another important distinction. Whereas the RMMs sit perhaps 80% of their time Dr Moultrie sits less than half, this year less than one quarter, as much. Sitting is the core work of the FPMM and so to any extent that the scales are tilted towards Dr Moultrie by the nearer similarity of her training work to that of the RMM, they are tipped firmly away from her because that commitment has come at the expense (at least on the evidence of this year and the previous year) of her core role. The niche which she has carved out for herself is therefore sui generis, one of a kind, and as we are concerned not with equal value (which would almost certainly bring into the equation the different sizes of the respective constituencies) but with whether work is the same or broadly similar, that must mean that this comparison cannot go through either.

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Employment Judge

Date: 14th November 2013

JUDGMENT SENT TO THE PARTIES ON

14 NOVEMBER 2013

AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS