Case Number: 2202623/05

EMPLOYMENT TRIBUNALS

Between

Claimant	**Respondent**
Mr D P O'Brien	The Ministry of Justice (formerly the Department of Constitutional Affairs)

Preliminary Hearing

Held at: London Central On: Monday 22 and Tuesday 23 July 2013 and Thursday 15 and Friday 16 August 2013

BEFORE Employment Judge Macmillan

REPRESENTATIVES

For the claimant: Mr Robin Allen QC
Ms Rachel Crasnow

For the respondent: Mr John Cavanagh QC and Ms R Kamm[1]
Mr Charles Bourne and Ms Hannah Slarks[2]

RESERVED JUDGMENT

1. Mr O'Brien is entitled to a pension based on service in the office of recorder from the 1st March 1978.

[1] On 22 and 23 July
[2] On 15 and 16 August

2. Mr O'Brien is entitled to aver that his earnings in the office of recorder for the purposes of calculating his pension entitlement should reflect a whole day's fee rather than a half day's fee for attending certain training courses.

3. Mr O'Brien is entitled to compensation under reg. 8(7)(b) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 of an interest like nature because of the delayed payment of his pension and lump sum payable on retirement.

4. By consent, the maximum period of pensionable service which can be claimed by a fee paid judicial office holder is 15 years if they retire under the Judicial Pensions Act 1981 or 20 years if they retire under the Judicial Pensions and Retirement Act 1993.

5. The multiplicand for the purposes of computing pension entitlement for a recorder is determined by multiplying the salary of a full time circuit judge as at the date of the recorder's retirement by a factor which equals the total number of days on which the recorder has sat throughout his career divided by 210, and dividing the result by the recorder's length of service

6. By not later than 28 days from the date of this judgment the remedy judgment set out at annex 1 will be issued unless reasons to the contrary are shown

REASONS

The background

1. Mr O'Brien is the standard bearer for a growing army of fee paid judicial officer holders (and some others in analogous positions) seeking a pension in respect of their years of service. Other claimants also bring other claims relating to their terms and conditions of appointment. This is the first of what is likely to prove a fairly lengthy series of hearings, some, as here, concerned only with remedy, others with liability, including entitlement to bring proceedings. Because it is the stated intention of the respondent to bring into effect in due course a new judicial pension scheme for fee paid judges, the structure and cost of which will, at least in part, depend on the outcome of these hearings, and because Mr Allen QC also represents at least the great majority of the represented claimants in the remaining cases (collectively referred to as Miller and others) and Mr Cavanagh QC also represents all but two of the respondents to the claims brought by those in analogous positions, I shall structure my judgments to be read (very roughly) as chapters of an informal book, thus enabling me to set out the background to the litigation as a whole and the terms and mechanisms of the existing Judicial Pension Schemes (so far as it is necessary to do so) only once. Although the issues to be dealt with at the various hearings have, by and large, already been identified I shall set them out at the beginning of each 'chapter', not least because (as has happened in this case) those issues are likely to evolve during the hearings themselves.

2. Mr O'Brien was appointed as a recorder on the Western Circuit on the 1st March 1978. He retired from that office on the 31st March 2005 and commenced these proceedings on the 29th September 2005. He claims that the respondent's failure to pay him a pension upon retirement equivalent (pro rata) to that of his full time salaried judicial counterpart, a circuit judge of the same age who had served for the same length of time, was a breach of the Part-time Workers (Prevention of

Less Favourable Treatment) Regulations 2000[3] (PTWR) (that claim being out of time) alternatively of the Equal Pay Act 1970 (that claim being in time), this latter claim being now stayed pending the outcome of his primary complaint of a breach of the Regulations as it becomes redundant if he succeeds in full under the Regulations. Judicial pensions are payable by virtue of either the Judicial Pensions Act 1981 (JPA) or the Judicial Pensions and Retirement Act 1993 (JPRA) which provide pensions only for salaried judicial office holders. Under the 1993 Act provision is made for the first time for salaried judicial office holders who work part-time but no provision is made for office holders remunerated only by a daily fee. A judge appointed prior to the coming into force of the 1993 Act (31st March 1995) but retiring after that date has the right to elect under which scheme their pension and lump sum are to be paid.

3. The respondent resisted the claim on three grounds: that the claim was out of time; that Mr O'Brien did not fall within the protection afforded by the PTWR or the Part-time Workers Directive[4] (PTWD) which gave rise to them as he was not a worker; alternatively, that the exclusion of fee paid recorders from the Judicial Pension Scheme was objectively justified. They relied in particular on reg 17 PTWR which expressly excluded fee paid judicial office holders. When the case reached the Court of Appeal it was held that the employment judge had been entitled to hold that although the claim was out of time it was just and equitable to extend time, but the claim nonetheless failed as Mr O'Brien was not a worker. The former point was not appealed further. The latter point was appealed to the Supreme Court which referred certain preliminary question to the Court of Justice of the European Union (CJEU). The CJEU held that it was for member states to interpret the concept of 'workers who have an employment contract or employment relationship' in clause 2.1 of the Framework Agreement on Part-time Working annexed to the Directive, in accordance with national law, but a member state could not remove certain categories of persons from the protection of the Directive who, on that interpretation, would otherwise fall within it. The crucial question was whether full time judges and their fee paid equivalents performed essentially the same activity and if so whether the failure to pay a pension to the latter could be objectively justified.

4. On the 4th July 2012 the Supreme Court heard argument on the 'worker' point and on the 9th July gave a preliminary ruling that Mr O'Brien was a worker for the purposes of the Regulations and (in effect) disapplying reg 17. They subsequently heard argument on the objective justification point (which was expressly confined to justifying the exclusion of recorders from the scheme) and dismissed (indeed it has to be said were rather dismissive of) the respondents contentions. The Court held [paragraph 75] that Mr O'Brien was 'entitled to a pension on terms equivalent to those applicable to a circuit judge' and remitted back to this tribunal 'the determination of the amount of the pension to which Mr O'Brien is entitled under the Regulations in accordance with this judgment' [para 76]. Following a case management discussion held by the President, Judge David Latham, on the 3rd June 2013, the respondent formally conceded that where there was a full-time comparator, those appointed to a judicial office listed in the concession and who had to be legally qualified in order to be eligible for appointment, are entitled to a pension. That concession was however subject to two points. (In fact it was said to be subject to 5 but three were inherent in the wording of the concession itself). It applied only to pension cases: therefore there was no abandonment of any objective justification defence in respect of terms and conditions claims such as the payment of only a half day fee when a fee paid judge (in some jurisdictions) attended a full days training. Subject to the Moratorium which had previously been issued and which was reissued in a revised version, there was no abandonment of any time limit

[3] SI 2000/1551
[4] 97/81/EC

point or any other jurisdictional point which could be taken. I will deal briefly with the Moratorium below. The list of judicial office holders to whom the concession applies is at Annex 2 of these reasons.

5. The Moratorium was originally issued by the Ministry of Justice on 5th April 2013 with the laudable intention of stemming the flow of new claims and thus reducing the administrative burden on both the Ministry as primary respondent to the proceedings and the tribunal. It is however confined to pension claims whereas almost all recent claims include complaints relating to terms and conditions as well (most but not all to the amount of the daily fee which is said not to be *pro rata temporis*[5] the amount paid to a salaried judge for sitting and therefore in breach of the PTWR and the payment of a half day fee for training and certain other activities). Paragraph 3 of the Moratorium states that 'If you are a potential claimant, the Ministry of Justice will treat you as if you had issued a pension related claim as at 1st March 2013 and that the claim had been stayed' provided the claim was not already out of time by that date. The Ministry was quite right to issue this cautionary note at para 6 of the revised version:

   "It is for the Employment Tribunal, not the Ministry of Justice, to determine whether a claim is in time. However, the Minister of Justice believes that, in the light of this statement, it is as certain as it can be that the Employment Tribunal will accept the approach proposed here. A potential claimant should, therefore, suffer no disadvantage from any delay in claiming after 1st March 2013."

6. I do no more than draw the attention of potential claimants to the case of *Rogers v. Bodfari (Transport) Ltd* [1973] I.C.R. 325 NIRC which held, in relation to a complaint of unfair dismissal, that the time limit for presenting a claim was a jurisdictional provision which could not be waived by the parties, not a limitation provision which could be waived.

7. The President has held a series of case management discussions, two in O'Brien and two in Miller and others, and listed a number of issues before me for preliminary determination. Mr Cavanagh has made it clear all along that at some stage he will be seeking a continuation of the current stay on all claims other than Mr O'Brien's and those which will be (in effect) the test cases in the other hearings, and the imposition of a stay in Mr O'Brien's claim itself, while the necessary consultation about a new judicial pension scheme and the ensuing post consultation parliamentary processes, take place. I should add, if by way only of a footnote, that no question of actual bias arises over my hearing of the pension elements of these claims as I have recently retired as a salaried Regional Employment Judge on full pension having completed more than the 20 years of service which is the maximum permitted for calculating pension entitlement, and that Mr Cavanagh on behalf of the respondent has expressly waived any objection of bias that could be taken in respect of the terms and conditions elements of the claim given that I continue to sit as a fee paid employment judge.

The issues

8. The President identified eight issues to be determined in Mr O'Brien's case in two preliminary hearings (as they are now called since the 2013 Rules of Procedure come into effect on the 29th July). During the first of those hearings it appeared that certain points could more advantageously be dealt with at other times and that one or possibly two might be dealt with by agreement. Other

[5] classicists will note with a wry smile that according to several websites this is said to be a recently coined phrase

issues were refined. It was agreed that rather than issue one judgment at the end of each hearing, I should issue a single judgment at the conclusion of both. The issues as they have finally emerged are as follows. For the first hearing:

8.1 **'The year 2000 point'.** Does the period of reckonable service for the purpose of calculating Mr O'Brien's pension entitlement and lump sum begin on the 7th April 2000, the date by which the UK government should have transposed the Directive into domestic law, or the 1st March 1978, the date on which Mr O'Brien was appointed?

8.2 **'The maximum point'**. If the answer to the 'Year 2000 point' is the 1st March 1978, what is the maximum period of pensionable service which can be claimed and how is this calculated? This issue was originally intended to be dealt with at the first hearing but as it seemed very likely that the parties would agree the maximum period provided the respondent's contentions for the second hearing produced nothing unexpected, it was deferred to the second hearing. As anticipated, at the second hearing Mr Allen accepted that the respondent's formulation of the way a part-time judicial office holders pension should be calculated meant that the maximum periods of pensionable service were the same for salaried full time judges and fee paid judges, namely 15 years under JPA and 20 years under JPRA.

8.3 '**The training days point'.** This point, it emerged, includes two elements. The first was whether, not having expressly pleaded the point, Mr O'Brien could contend that his pensionable earnings (the multiplicand in the pension calculation) should take days attendance at certain training days into account as though a full days fee had been paid rather than the half day fee which was actually paid, payment of the half day fee being less favourable treatment of him as a part-time worker. That element of the point is dealt with below. The second element is whether the payment of a half day's fee is objectively justified, something which will require evidence to be called and possibly a day of hearing time to determine. That element was therefore adjourned and will now form part of the main hearing in Miller and others to take place between the 2nd and the 17th December 2013. In consequence, if I am with Mr O'Brien on the first element, his pension entitlement cannot be calculated precisely until the second element has been dealt with.

8.4 **'The interest point'.** Does the tribunal have power to award interest on any financial award made in favour of Mr O'Brien under the Regulations? This point was refined further in argument as I explain below.

8.5 **'The future point'**. Does the tribunal have power to make an award of future pension payments or can it only award compensation which takes account of future pension loss? At the start of the first hearing I suggested to the parties that an appropriate method of disposing of Mr O'Brien's claim would not be to award compensation but to make a declaration that he was to be retrospectively admitted to membership of the existing Judicial Pension Scheme which would have the necessary consequence of securing his entitlement to future payments and therefore make this point redundant. This approach had been adopted by agreement in the part-time worker pension cases[6] including where the pension scheme in question was statutory in origin. The parties were invited to make representations about the suitability and wording of such a declaratory judgment at the second hearing and the point was therefore deferred until that hearing. At that hearing although Mr Bourne objected to any declaration that purported to require the respondent to admit Mt O'Brien to the pension scheme on the grounds that it was beyond the tribunal's powers as it involved (in effect) a rewriting of the statutory provisions, he had no objection in principle to a declaration that required Mr O'Brien to be treated by the

[6] *Preston and others v. Wolverhampton Healthcare NHS Trust and others (No. 3)* [2006] ICR 606 HL(E)

respondent in all respects as though he had been so admitted. This would produce the same outcome including securing future pension payments in a way which was enforceable without further order of this tribunal and so resolved the future point. How that declaration is to be worded is dealt with at the conclusion of these reasons.

For the second hearing:

8.6 **'The pay calculation point'**. How is pensionable pay to be calculated; by reference to the best 12 months earnings in the last 3 years or on some other basis?

8.7 **'The full-time rate of days point'**. Having regard to the pro rata principle, whether the daily fee paid to a recorder is less favourable treatment of him on the grounds of his part time status in comparison with his full time equivalent, the circuit judge. This point is similar in effect to, but has greater impact on the outcome than, the training days point. It is a contention that the pensionable pay should be calculated not on the basis of actual earnings but on some higher daily rate which is not discriminatory against part-time recorders. Mr O'Brien has not brought a claim in respect of the fee itself so in his case the point arises only as a component in the calculation of his pension.

8.8 **'The whole day credit point'**. Should Mr O'Brien be credited in the pension calculation for a whole day fee for those days other than training days on which he worked or was available for work but was only paid a half day fee? During the hearing Mr O'Brien accepted that all the half day fees he had received during his career were in respect of days when he had only been booked to sit for half a day, usually to pass sentence, and so he was no longer pursuing this point. However, I was invited by both Mr Allen and Mr Bourne to record in these reasons a statement of the MoJs position on half day fees for recorders for the avoidance of future doubt. It is this: where a recorder is booked to sit for a full day but having arrived at court finds that there is no work or less than a full days work and is in consequence sent away without sitting or after sitting a half day or less, the recorder is entitled to a full days fee. The recorder only loses this entitlement if they leave the court of their own volition without first having been released by the court staff when a half days fee is payable.

9. I am greatly indebted to both legal teams for their extremely thorough and well-argued written and oral submissions which have greatly simplified my task. I intend no disrespect if in the interests of brevity I merely sketch out the essential elements of their submissions on each point.

<u>The year 2000 point</u>

i. The issue

10. This point has the single greatest significance, both for Mr O'Brien and the litigation as a whole. As Mr Cavanagh points out, if I was to find in favour of Mr O'Brien it is likely to cost the public purse some millions of pounds. The point can be stated very simply. Given that from the 7th April 2000 Mr O'Brien became entitled by virtue of the PTWD (and shortly thereafter the PTWR) to be treated equivalently in the matter of pension rights to his full time comparator, a salaried circuit judge who had also been appointed on the 1st March 1978, and given that when that judge retired on the 31st March 2005 his or her service to a maximum of 15 years if they chose to retire under the 1981 scheme (the JPA) or 20 years if they chose to retire under the apparently more beneficial terms of the 1993 scheme (the JPRA) was taken into account when calculating both their pension and their lump sum, is Mr O'Brien entitled to have his pension and lump sum calculated on the same basis or only on the basis of service from the 7th April 2000 that being the date on which the

PTWD should have been implemented into domestic law? The essence of the dispute revolves around the nature of the JPA and the JPRA and the meaning and practical application of the EU law 'future effects' principle.

ii. The competing contentions

11. Mr Cavanagh very helpfully distilled his submissions on this point to 5 propositions to which Mr Allen, equally helpfully, responded. Mr Cavanagh submits as follows:
    - 11.1 The right to a pension accrues while reckonable service takes place. This is clear from a number of European authorities including *Magorrian v. Eastern Health and Social Services Board* (C-246/96) [1998] ICR 979
    - 11.2 No claim in reliance upon EU law can be brought in respect of a period before implementation of that law unless the law says so or it is absolutely clear from the context that it has retrospective effect: see inter alia *Land Nordrhein-Westfalen v. Pokrzeptowicz-Meyer* (C-162/00) [2002} 2 CMLR 1
    - 11.3 The PTWD does not expressly or by necessary implication have retrospective effect
    - 11.4 The 'future effects principle' just means that the fact that a contract or the legal relationship in question is already in existence does not prevent EU law from taking effect from the date of implementation where that occurs part way through the contract or legal relationship. But, importantly, EU law only applies going forward: the employee/worker simply 'hits the ground running'
    - 11.5 The case of *Istitutio Nazionale della Previdenza Sociale (INPS) v. Bruno and others* (joined cases C-395/08 and C-396/08) [2010] IRLR 890 CJEU (*Bruno and Pettini)* is just an example of the principle that unless qualifying service which predates the implementation of new EU law is taken into account, there will be a major time lag between the date of implementation and the new law taking effect

12. Mr Allen ripostes thus:
    - 12.1 In the case of both the JPA and the JPRA there is no vested right to a pension until retirement: what happens in other schemes is irrelevant
    - 12.2 Mr O'Brien is not contending for retrospective effect: such a contention would involve a claim that had he retired before 7th April 2000 he could nonetheless bring a claim on the coming into force of the PTWD on that date
    - 12.3 The PTWD does not have retrospective effect
    - 12.4 The 'future effects principle': This depends on what you mean by 'only applies going forward'. *Bruno and Pettini* shows that what had previously happened between them and their employer's signifies for their pensions after the Directive came into effect. There is no 'hit the ground running' point.
    - 12.5 *Bruno and Pettini* shows the exact opposite of what the respondent contends and is absolutely in favour of Mr O'Brien.

iii. The nature of the schemes

13. In his written submissions Mr Cavanagh contended that the Judicial Pension Scheme was a contributory scheme. Although he did not expressly abandon the claim during oral submissions he did not pursue it. I am concerned only with the date of Mr O'Brien's retirement as in much more recent times (from 1st April 2012) there is no doubt that for all newly appointed judges and for more recently appointed judges the scheme did become contributory. Prior to that date the scheme was non-contributory. A judge could even elect (at least under the JPA) not to make contributions towards the dependent partner's element of the pension, but if they did so and on retirement had a dependent partner, the necessary contributions would be deducted from the

lump sum. The pension for the judge himself was non-contributory as the respondent's own Guide to the 1993 Scheme makes clear at paragraph 9. The scheme is also unfunded as the Guide also states at paragraph 9.

14. Under the JPA there was no qualifying period of service, a judge retiring within 5 years of appointment being entitled to a pension calculated on the basis of 6/40ths of his last annual salary (JPA s. 5(3)(a)) The JPRA did introduce a qualifying period of sorts in that prior to completing 5 years of service there was no entitlement to pension (JPRA 1993 s. 2(1)(b)). However, upon crossing that threshold it was not a case of the clock beginning to tick for the first time: the preceding 5 years of service immediately and fully signified for pension calculation purposes.

15. The year 2000 question as framed at the CMDs includes, in Mr Allen's submission, a linguistic solecism. The use of the expression 'reckonable service' is, he submits, inapt. It occurs in neither the JPA nor the JPRA and is not a term of art and he objects to the distinction, relied upon by Mr Cavanagh in interpreting the cases on the future effects principle, between reckonable and qualifying service: not only is no such distinction to be found in the legislation or the European case law, it would be illogical. I take it that by 'qualifying service' Mr Cavanagh means years of service during which no pension entitlement accrues but during which one is (in effect) demonstrating a commitment to one's employer which in due course earns one the right to join the pension scheme. In the case of the JPRA (and no doubt many other schemes) once that right is earned the qualifying service instantly converts into an equivalent period of reckonable service, that is service which counts for pension calculation purposes.

16. The basis for the calculation of the circuit judge's pension is years of service, that is years during which the office is held, irrespective of the amount of work actually done: JPA s. 5(5); JPRA s.3(2). The right to a pension arises on retirement having reached the age of 65 (JPA s. 5(1)(a); JPRA s 2(1)(a)). Prior to that, Mr Allen submits, the right is merely provisional and contingent. However, there is a clear and direct link between length of service and the ultimate pension (subject to actuarial reductions for premature retirement for reasons unrelated to health). Under the JPA (s. 5(2)) the annual rate of pension for a judge retiring with 15 years service was one half of the judge's last annual salary. For judges retiring with periods of service between 5 and 15 years the rate of pension was one quarter of their final annual salary plus 1/40th for each completed year of service exceeding 5 (JPA s. 5(3)(b)). Under the JPRA the appropriate annual rate of pension is one half of the judge's pensionable pay if she retires with at least 20 years service (JPA s. 3(1)) or in the case of judges with less than 20 years service one-fortieth of pensionable pay multiplied by the aggregate length of service expressed in years and fractions of a year (JPRA s. 3(2)). The rather complicated definition of pensionable pay need not concern us nor need the mechanics and effect of electing to transfer from the JPA to the JPRA. I am also not concerned at this stage with the computation of either the pension or lump sum under either Act. That will be examined (at least so far as the JPRA is concerned) in connection with the 'pay calculation' point.

iv. The future effects principle

17. The principle is well established. I have had my attention drawn to a number of cases in which it has been applied by the Court of Justice of the European Union (CJEU) but I propose to deal at length with only one of them, *Bruno and Pettini,* as Mr Allen submits that it is absolutely in Mr O'Brien's favour. The statement of the principle is not in dispute (judgment of the CJEU in *Bruno and Pettini* para 53):

"According to settled case law, new rules apply, unless otherwise specifically provided, immediately to the future effects of a situation which arose under the old rule (see, to that effect Case 68/69 Brock [*1970] ECR 171, paragraph 7*; Case 270/84 Licata v. ESC *[1986] ECR 2305, paragraph 31;* Case C-290-00 Duchon *[2002] ECR I-3567*, *paragraph 21;* Case C-334/07 P Commission v. Freistaat Sachsen *[2008] ECR I-9465, paragraph 43; and* Case C-443/07 P Centeno Mediavilla and others v. Commission *[2008] ECR I-10945, paragraph 61)"*

18. With the exception of the *Centeno Mediavilla* case all have been referred to during the hearing or I have referred to them myself. Save in respect of how it answers the year 2000 point, the application of the principle does not seem to be in dispute either. It can work against the interests of a party by taking away vested rights (*Butterfly Music Srl v. Carosello Edizioni Musicali E Discografiche Srl (Cemed)* (Case C-60/98) [2000] 1 CMLR 587) as well as in their favour by creating new rights, by resurrecting old, defunct, rights (*Butterfly Music)* or by improving existing rights. Although Mr Allen rejects Mr Cavanagh's 'hitting the ground running' analogy, he is at best only right to do so on the basis that it is but a partial (and in consequence misleading) description of a wider concept. Thus there is no dispute that the fact that the date of Mr O'Brien's last reappointment was before the PTWD came into effect and in consequence the worker relationship in question in these proceedings was established before that date, does not prevent the Directive applying to him. Similarly, to the extent that the JPRA includes a qualifying period of service, the principle requires that his service before the PTWD came into effect be taken into account to fulfil that qualifying period. However, to take that service into account as reckonable service, Mr Cavanagh submits, would require the future effects principle to give the PTWD retrospective effect despite Mr Allen's denial that there is any claim for retrospectivity. The dispute therefore seems to be confined to this last point.

19. Mr Allen submits that this distinction between reckonable and qualifying service makes no sense. How can the same service be taken into account for one purpose but not the other? He further submits that *Bruno and Pettini* unequivocally resolves the dispute in Mr O'Brien's favour. The question, it seems to me, can be put in this way. Was the court in *Bruno and Pettini* dealing with past service which signified only for the purpose of entitlement to access to benefits (qualifying service) or which signified in relation to level of benefits (reckonable service) or to both? Unless the answer is only the former then Mr Allen is right. If it is only the former, Mr Cavanagh is right. *Bruno and Pettini* is something of an oddity as it seems to be about a social security scheme to which the PTWD did not apply rather than an employer's pension scheme to which it would have applied. Nonetheless, the reference by the national court to the CJEU was deemed admissible if only on the basis that it wasn't obviously inadmissible, it not obviously being inadmissible being due at least in part to the poor quality of the reference itself and its 'summary' treatment of the national (Italian) law (opinion of Advocate-General Sharpston paragraphs 11 and 29). These circumstances do not assist understanding. However, in my judgment the issues in the case are tolerably clear.

20. The applicant in the main proceedings, the public body responsible for managing the scheme, INPS, contended that in relation to Ms Bruno and two other respondents, the reference was in any event inadmissible as the framework agreement annexed to the PTWD only applied to periods of employment occurring after the Directive had come into force and the periods of their employment to which the allegedly discriminatory calculation of pension rights pertained had occurred, either in whole or in part, prior to that date [Advocate-General's opinion paragraph 32]. The scheme was said to be discriminatory in the way that it dealt with workers in a 'vertical (or 'vertical cyclical') part-time relationship' that is who worked full time hours or less but for only a pre-determined

proportion of the year. Whereas the amount of pension was calculated on the basis of hours remunerated in a calendar year divided by the number of hours which constitute the weekly working hours of a full time worker (thus treating all workers equally pro rata), access to the pension was determined on the basis of the number of weeks worked in a year. So a vertical-cyclical part-time worker working full time for only 26 weeks a year would have to work for twice as long as a full time worker who worked throughout the year to gain access to the pension scheme (for the sake of simplicity I omit reference to the other comparator the 'horizontal' part-time worker who, on one analysis, was treated more favourably than a full time worker).

21. The relevant national law was Article 7.1 of Legislative Decree No. 463 of 12th September 1983 as amended which, so far as material, provided:

> *"For each year subsequent to 1983, the number of weeks contributions to be credited to employed workers during the course of the year* ***for the purpose of calculating the retirement pension paid by the INPS*** *shall equal the number of weeks of that year for which a salary was paid…"* [emphasis added]

22. The first question referred by the national court to the CJEU asked:

> "*Is…Article 7.1…which results in periods not worked under 'vertical' part-time arrangements not being taken into account as periods of qualifying contributions for the purpose of acquiring pension rights compatible with [the Directive] … ?*

23. On the inadmissibility point, the Advocate-General agreed with the submission made by the Commission at the oral hearing that the PTWD applies to the calculation of past qualifying periods for access to a future pension, by virtue of case law settled since *Brock* (Case 68/69) [Advocate-General's opinion paragraphs 34 and 35].

24. At paragraphs 52 to 55 of the judgment the Court dealt with the temporal scope of the framework agreement. It recorded the INPS's objection at paragraph 52:

> "*The INPS submits, in essence, that the framework agreement may be applied only to periods of employment after the entry into force of the national measure implementing [the PTWD]… As regards Ms Bruno, Ms Lotti and Ms Matteucci, the calculation of the period of service required to qualify for a retirement pension relates, wholly or in part, to periods before the expiry of the deadline for transposing [the Directive] which do not therefore fall within the scope of the framework agreement."*
>
> and, having enunciated the law at paragraph 53 (see para 19 above) replied to it at paragraph 55:
>
> "*Accordingly, the calculation of the period of service required to qualify for a retirement pension such as the pensions at issue in the main proceedings is governed by [the PTWD], including periods of employment before the directive entered into force".*

25. The Court therefore answered the first question referred to it in the negative, unless the difference in treatment was objectively justified [judgment paragraph 75].

v. Conclusions

26. Mr Allen suggests that the answer to the year 2000 question is to be found in paragraph 75 of the judgment of the Supreme Court which I have quoted at paragraph 4 above. But that is to beg the question. I derive little assistance form Mr Allen's and Mr Cavanagh's competing first submissions which appear to be two sides of the same coin. In a sense both are right and neither are capable of being dispositive of the point, not even, I suspect had the scheme been a contributory one, given the view which I take of the future effects principle. A judge earns her pension day by day, year by year and, in at least some senses, in all pension schemes the right to a pension is provisional and contingent upon retirement in accordance with the rules of the scheme (although the fact that other schemes are funded and members have certain rights relating to the transfer of accumulated entitlements or contributions to that fund are significant differences from the judicial scheme).

27. The answer to the question is to be found in *Bruno and Pettini.* It is clear from Art 7.1 of Legislative Decree No 463 that the periods of service of Ms Bruno and her colleagues prior to the date on which the Directive came into effect were relevant for the purpose of calculating their retirement pensions, that is they were relevant to the level of benefits they were to receive. They were also a qualifying period in that if Ms Bruno and her colleagues did not achieve a minimum level of qualifying weeks of work over their life-times they apparently got no pension at all (at least not under that scheme). The effect of those weeks was therefore identical to the first five years of service of a judge under the JPRA – they were both qualifying and reckonable.

28. Mr Allen is therefore correct. *Bruno and Pettini* does unequivocally resolve the year 2000 question in Mr O'Brien's favour. By reading paragraph 55 of the judgment in the context of the first referred question and the Legislative Decree to which it relates, the effect of the Court's ruling is seen to be that the future effects principle means that where the calculation date for determining the amount of, as well as entitlement to, a pension falls after the date on which the PTWD came into effect, years of service prior to that date which had previously been excluded for a reason which the Directive now prohibits as unlawful, must be taken into account in the calculation for both purposes. Mr Allen's strictures about the misuse of terms such as 'qualifying' and 'reckonable' are also seen to be justified as the former is used in *Bruno and Pettini* to mean both.

29. Accordingly, the answer to the year 2000 question is that Mr O'Brien is entitled to a pension based on service in the office of recorder from 1st March 1978.

The training day point

30. Mr Cavanagh submits that as no mention is made in the claim form of the payment of half a day's fee for attending training sessions, Mr O'Brien cannot now contend that his pension should be calculated as though he was entitled to be paid a whole day's fee for those days. Should he wish to so contend he must first apply to amend his claim but any such application must be refused because it is made many years out of time (the last possible date from which time can run being the date of his retirement) and it would clearly not be just and equitable to extend time given that he first complained of the underpayment in 1994 and has been represented throughout (including prior to bringing the claim, if only on an informal basis) by distinguished Queen's Counsel.

31. Mr Allen submits that the respondent's position is misconceived. There is no question of seeking to add a new claim. Mr O'Brien is not claiming the missing half day fees as such. This is purely a remedy point. Mr O'Brien is entitled to have his pension calculation done on the basis of the daily fee which should have been paid not on a basis which reflects discriminatory measures.

32. I agree with Mr Allen. The basis on which this claim has been remitted by the Supreme Court – to determine the amount of the pension to which Mr O'Brien is entitled – necessarily involves an investigation into both the multiplier (the years of service) and the multiplicand (pensionable earnings). The training days point is merely a component of Mr O'Brien's submissions on what the multiplicand should be. It is a pure remedy point and as such does not require to be pleaded. Mr O'Brien is therefore at liberty to contend that his pensionable earnings should take training days into account as though a full days fee had been paid rather than a half days fee. Whether that contention succeeds will be considered during the hearing of Miller and others beginning on the 2nd of December.

The interest point

i. The claimant's submissions

33. Mr O'Brien retired some 8 years ago. By the time that these remedy issues are finally settled he is likely to have beenretired at least 9 years and possibly 10 during which time he will have been kept out of money to which there is now no dispute that he is entitled. The respondent says that they are under no obligation to pay him any interest. I suggested to Mr Allen that what he was really seeking was compensation rather than interest as such, the amount to be determined by some interest-like calculation. He agreed, at the same time conceding that there was no entitlement to interest as such.

34. Mr Allen submits that an award of interest or, I think he must mean having regard to his earlier concession, its equivalent in compensation, is required to secure compliance with European law and he cites the well know authority of *Marshall v. Southampton and South West Hampshire Health Authority (Teaching) (No. 2)* (Case C-271/91). He relies in particular on two passages from the judgment. Paragraphs 24 and 31:

> *"24. … the objective [of the Equal Treatment Directive (76/207/EC)] is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality where it has not been observed. As the Court stated in the* von Colson *case … those measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.*
>
> *"31. With regard to …. the question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment."*

35. In *Marshall* the claimant had been dismissed on reaching her 62nd birthday, the respondent's retirement age for women, whereas the retirement age for men was 65. She succeeded in a claim of sex discrimination but at the time (she was in fact dismissed in 1980 and the case was paying its second visit to the CJEU on the remedy issue) compensation for discrimination was capped and there was no provision for awarding interest. The industrial tribunal (as it then was) had recognised these problems and had accordingly awarded the claimant compensation which significantly exceeded the cap and included interest. Both the Equal Treatment directive which was in issue in *Marshall* and the Part-time Worker Directive which is in issue in these proceedings,

have been held to be directly applicable against emanations of the state acting in the capacity of employer.

36. Mr Allen also relies on *Melia v. Magni Kansei* [2006] I.C.R. 410 as showing that an award of interest on compensation is not incompatible with UK law. The facts of *Melia* were however rather special as the claimant's award for future loss had been discounted for accelerated receipt and it seems to have been that factor which persuaded the Court of Appeal to uphold an essentially counterbalancing award of interest on the compensatory award for past loss.

37. The essence of Mr Allen's submission is that a remedy which merely grants a pension cannot be said to be dissuasive as required by paragraph 24 of the judgment in *Marshall*: it fails to meet the obligation of deterrence. An award should therefore be made as the respondent has profited by the delay in paying the pension the value of which when it finally reaches Mr O'Brien, will be much diminished.

ii. The Respondent's submissions

38. In reply Mr Cavanagh submits that I cannot do what the tribunal did in *Marshall* because here there is nothing for me to disapply – there is nothing equivalent to the statutory cap. The question of interest is a matter for Parliament: the tribunal cannot make new law and if Parliament has chosen, as it appears to have done, not to extend the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996[7] which were introduced to deal with the interest point in *Marshall,* and which were amended in 2010 to extend them to awards under the Equality Act 2010, not to put too fine a point upon it, there is nothing I can do about it (my words not his).

39. Mr Cavanagh does however concede that if I decide that it was just and equitable to award compensation which includes or reflects interest (PTWR reg 8(9)) he would have a problem, but that concession is subject to two provisos. The first is that I should not so find as given that awards in discrimination cases are also on the basis of what it just and equitable, the Interest Regulations would be unnecessary if that concept extended to interest. In consequence I should find that I have no power to award interest on a just and equitable basis. The second is that the concession is made because of *Melia* and if I am against him he reserves the right to argue elsewhere that *Melia* is wrongly decided.

40. Mr Cavanagh also urges upon me the logistical difficulties which would face both the tribunal (at least potentially) and the respondent (undoubtedly) if I was to find in Mr O'Brien's favour as all claimants who have already retired and have been kept out of their pensions for any length of time would be calling for interest as well which would have to be separately calculated in each case.

iii. Conclusions

41. It was agreed that I should only determine this question in principle leaving for another day any issue concerning calculation which would require further submissions about interest rates and possibly other things.

42. I accept Mr Cavanagh's submissions that the approach adopted by the tribunal in *Marshall* is not open to me. But, although he has perhaps been somewhat equivocal about it, I think that Mr Allen has accepted that there is no claim available for interest as such, only for compensation of an interest-like nature. If he has not accepted that then I am against him. I have no power to award

[7] S! 1996/2083

interest because Parliament has not given that power to the tribunal and I cannot make new law. But, as Mr Cavanagh recognises, that is not the end of the matter.

43. The starting point must be the PTWR (I quote here as elsewhere in these reasons from the Regulations as they stood at the date of Mr O'Brien's retirement). Mr Allen's concession that there is no entitlement to interest as such is plainly right as reg 8(7) provides only for the making of a declaration as to the claimant's rights (reg 8(7)(a)), the award of compensation (reg 8(7)(b)), and a recommendation that the employer take action for the future for the purpose of obviating or reducing the adverse effect on the claimant of the matter to which the complaint relates, the tribunal being obliged to take such of those steps as it considers just and equitable where it finds that a complaint under the Regulations is well founded.

44. Reg 8(7) is supplemented by reg 8(9) and (10) which provide:

> *"(9) Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to –*
>
> *(a) the infringement to which the complaint relates;*
>
> *(b) any loss which is attributable to the infringement having regard, in the case of an infringement of the right conferred by regulation 5, to the pro rata principle except where it is inappropriate to do so.*
>
> *(10) The loss shall be taken to include –*
>
> *…..*
>
> *(b) loss of any benefit which he might reasonably be expected to have had but for the infringement"*

45. That the complaint is well founded is established by the judgment of the Supreme Court, the infringement to which the complaint relates being the denial of a pension from the date of retirement. Mr Allen is plainly right that the passage of between 8 and 10 years means that by the time Mr O'Brien is in receipt of his pension and lump sum its value will be much diminished. It would therefore clearly be just and equitable to award compensation to Mr O'Brien in addition to any declaration as to his rights. Had I been in any doubt on the matter, which I am not, I am persuaded that paragraphs 24 and 31 of the judgment in *Marshall* would have required me to make such an award – but I emphasise of compensation not of interest *per se*. Turning to reg 8(9) the loss which is attributable to the infringement includes not only the depreciation in the value of the pension and lump sum by the time it is received but (reg 8(10)) the loss of the benefit of the interest on investing at least the lump sum. Mr O'Brien is therefore entitled to compensation of an interest like nature in addition to the payment of arrears of pension and the lump sum. Whether *Marshall* makes such an award obligatory as Mr Allen contends is therefore not in issue in this case: it is plainly right as a matter of UK law to make the award. Mr Cavanagh's objection that the Interest Regulations are thereby made redundant is, in my judgment, wrong. The Regulations require the payment of interest in certain circumstances to meet the UKs EU law obligations. That requirement says nothing about an award of this nature on the basis of justice and equity. However, there may well be an argument the other way that the failure to include the PTWR in the Interest Regulations is a breach of the UKs EU law obligations in the light of *Marshall.*

46. What form should this compensation take? The starting point is likely to be the application of a rate of interest to the aggregated amount of the lump sum and the arrears of pension prior to the date of actual payment. But this is not a matter merely of arithmetic. On the one hand are the objective factors of the prevailing rate of interest and the depreciation in the value of sterling since 2005. On the other are the subjective factors: e.g. might Mr O'Brien have decided to blow the lot on a wildly frivolous depreciating asset or an injudicious investment (points I hasten to add not to be determined by reference to the characteristics of the individual claimant but just to bring into the equation the levelling effects of chance)?

47. Mr Cavanagh's logistical dystopia can be accommodated provided pragmatism rather than legalism rules. It seems to me that the balancing of these various factors can best be achieved by the application of a formula which might, at the end of the day, look rather like an interest calculation, although because of the need to compensate for both depreciation and the loss of the chance to invest, the rate to be applied is likely to be a little higher than the average market rate for investments prevailing during the period when the pension was withheld. For fear of trespassing on matters yet to be the subject of submissions I will say no more at this point other than that for those retiring later than Mr O'Brien, in particular those retiring since the start of the recession, roughly from 2009 onwards, the rate to be applied will probably be somewhat lower. For the avoidance of doubt I should add two things: that this conclusion owes nothing to *Melia* which may be said to turn on its own special facts: that (reg 8(9)(b)) it is inappropriate to have regard to the *pro rata* principle in this 'calculation' as the loss which Mr O'Brien has suffered by not receiving timeous payment of his pension is a full loss on an already pro rated amount.

The pay calculation point

i. Introduction

48. In his skeleton argument for the hearing in July, Mr Allen put forward two alternative contentions on this point which I will explore in more detail below. For the moment they can be called the last three years approach (alternative 1) and the career average approach (alternative 2). Mr Bourne advances on behalf of the respondent a more detailed exposition of the career average approach which differs from Mr Allen's only in that it is predicated on two assumptions which he rejects, namely that the divisor in the equation should be 220 (this is the 'full time rate of days' point which I deal with below) and that only Mr O'Brien's service as recorder between the 7th April 2000 and 31st March 2005 can be taken into account (the 'year 2000' point on which I have already found against the respondent). It is however common ground that an adverse finding on the year 2000 point – and indeed a rejection of 220 as the divisor if that should also come about – does not undermine the principles of Mr Bourne's proposal: it merely changes the numbers. Immediately before the second preliminary hearing an unexpected division in the ranks occurred as it emerged that while Mr Allen, in his capacity as leading counsel for all the represented judicial office holders and in particular all the represented recorders, wished to espouse alternative 2, Mr O'Brien wished to espouse alternative 1 for the very simple reason that it gives him (and he suggested many other recorders) a better outcome than alternative 2 because (purely for reasons of personal preference) he chose to sit more and practice at the bar less during the last 2 years before retiring. He therefore became a litigant in person on this point only and made his own, very helpful, submissions to me.

49. It has to be said that as the submissions on this point progressed I became increasingly unclear just where Mr Allen stood. As will become clear in a moment, there is likely to prove a difficulty – possibly a major difficulty – in applying alternative 2 in practice to historical cases because the

respondent's records of sittings of recorders are, to say the least, defective and it seems very likely that many recorders will not have been so meticulous in their record keeping, or so assiduous in the retention of old records, as Mr O'Brien. The further back in time one goes the worse the problem becomes and my findings on the year 2000 point mean that the respondent will have to go back into periods of time where records almost certainly do not exist. I put this point (in general terms only) to Mr Bourne and enquired what he suggested I should do if I came to the conclusion that alternative 2 was legally correct but likely to prove highly problematic to apply in practice. His response was to the effect that that should not concern me and that a method, possibly to be explored in further test cases where the problem actually arose (Mt O'Brien has a virtually complete record of his sittings) or possibly to be resolved by agreement between the parties, possibly on a collective basis, would have to be devised to overcome the difficulty, hopefully without a string of individual remedy hearings. Mr Allen submitted that that could not be right and drew my attention once again to *Marshall* and reminded me of the tribunal's obligation under EU law to provide an effective remedy and to reg 8(7) PTWR and suggested that it could never be just and equitable to provide a remedy that while legally impeccable was unimplementable in practice. Nonetheless, at least as I understand it, he did not resile from alternative 2 nor switch his allegiance to alternative 1 as he had no instructions to do so. He contented himself by suggesting that alternative 2 was correct where records existed but where they don't alternative 1 was the only viable option.

ii. Alternative 1

50. This is in effect a straight read across from the formula in both the JPA and the JPRA for calculating the pension of a salaried circuit judge. It takes the recorder's years of service up to a maximum of 15 (in the case of the JPA) or 20 (in the case of the JPRA) and applies them in exactly the same way as they would be applied in the case of a salaried judge to a multiplicand which is the actual earnings of the recorder in question during the last 12 months prior to retirement in the case of a recorder retiring under the JPA or their earnings in either the last 12 months or (if higher) any other 12 month period falling within the period of 3 years ending on the date of retirement in the case of a recorder retiring under the JPRA. In consequence a recorder such as Mr O'Brien who elects to retire under the JPRA after 27 years of service would have a pension of 20/40ths or ½ of their best 12 months earnings during their last 3 years in office. The claim is that this method gives the greatest equivalence to the entitlement of the comparator circuit judge as it reflects the personal earnings of both the comparator and the recorder in the same period. The pro-rating required by the PTWR is said to be achieved by using the recorder's personal earnings which, in effect, self-pro-rate, reflecting as they do the much shorter number of days worked in the chosen 12 month period compared with the salaried circuit judge.

iii. Alternative 2

51. I am most grateful to Ms Shirley Hales, the head of Judicial Pay and Pensions Branch and the Judicial Pensions Administrator at the MoJ for her very clear explanation of this alternative in her witness statement. This alternative works by taking as the multiplicand the salary of a circuit judge and pro-rating it by a number of steps. Step 1 involves adding up the total number of days which the retiring recorder has sat in his or her career (including ¼ days and ½ days). At step 2 the resulting total of days is divided by 220 to convert it into years, 220 being the figure which the respondent says is the number of working days in the year of a full time salaried judge. To achieve equivalence, this is capped (for the purposes of the JPRA) at 20 years worth of service which, it is important to understand, does not mean that only the sitting days during the last 20 years of service are counted. It means that the total of all the sitting days throughout a fee paid judges judicial career when divided by 220 must not produce a number greater than 20. If it does,

then the number is capped at 20. At step 3 the number of years thus achieved, is divided by the number of years the recorder has held office (capped again at 20) and multiplied by the salaried judge's final; salary. This multiplicand, which is called the 'fee-paid reckonable pay', is then multiplied by the same multiplier as for full time salaried judges, that is (again for the purposes of the JPRA) number of years of appointment divided by 40, to produce the resulting pension.

52. An example, lifted from Ms Hales' statement, will make things clearer. Take a recorder who has been appointed for 13 years during which she sat a total of 352 days. The first step is to convert the days into years by dividing 352 by 220 (a figure which will of course change if I am against the respondent on the 'full time rate of days' point). The result is 1.6 years. To get the fee-paid reckonable pay the circuit judge's annual salary of £129,579 is multiplied by 1.6 and divided by 13 = £15,948.18. To get the pension, the fee paid reckonable pay is multiplied by 13 and divided by 40 producing an annual pension for the recorder (rounded up) of £5,184.00. It is immediately apparent that this alternative is dependent for its efficacy upon an assumption that career long sitting records for the recorder in question will be available, an assumption that is almost certainly not true in all cases.

iv. The Regulations

53. I cannot of course look at the competing alternatives in a vacuum. Unless they satisfy the PTWR (I need not look at the PTWD here as it is not submitted that the PTWR is defective in its application of the Directive) and produce a result which achieves equivalence, they must go, however attractive they may appear or however efficacious in practice.

54. So far as material the Regulations provide as follows:

"1(2) "pro rata principle" means that where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker

(3) In the definition of the pro rata principle … "weekly hours" means the number of hours a worker is required to work under his contract of employment in a week in which he has no absences from work and does not work any overtime or, where the number of such hours varies according to a cycle, the average number of such hours.

5(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker –

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

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro-rata principle shall be applied unless it is inappropriate".

v. Submissions and conclusions

55. There is an obvious problem applying the PTWR and indeed the PTWD where the comparator is salaried and the part time worker is paid by the day irrespective of the number of hours worked during it. Despite that difficulty the underlying principles are transferable to such a situation. The starting point is to understand the nature of the judicial pension and how it is acquired. Mr Bourne

made two submissions, both of which I accept, as being an accurate description of the mechanism in play in the Judicial Pension Scheme (JPS). They might be said to be alternate ways of making the same point. The first is that full time judge's pensions are dependent on them consistently working full time over a period of years, not just doing so at the end of their service – the last 12 months under the JPA, the best 12 months in the last 3 years under the JPRA. The second is that under either scheme the pension is paid in return for a quantity of service. That quantity of service, in my judgment, has two components: the number of years the judge serves and their commitment of time in each year which in order to achieve a pension under the current regime must be full time. Mr O'Brien submits that equivalence is achieved in alternative 1 by the very simple method of substituting only the earnings of the recorder for the salary of the judge but otherwise retaining the statutory formula intact.

56. How do the two alternatives measure up against that analysis? To satisfy the PTWR they must produce a result which places the recorder in an equivalent position *pro rata temporis* to the salaried full time judge. It was not a matter of luck that Mr O'Brien sat more often in his last two years than he had previously done, he planned it that way. But luck might have a large part to play for some recorders. Long term illness, the demands of their private practices, a non-discriminatory clamp down by the MoJ for budgetary reasons on the sittings of all fee paid judges, might all conspire to produce an adverse rather than a favourable outcome from alternative 1. So far that is nothing more than an observation. How do we know that an outcome is adverse or favourable? By comparing it with the career average sittings of that judge. But unless that is what equivalence *pro rata temporis* demands that is also no more than an observation. It follows from my analysis of how the JPS works derived from Mr Bourne's submissions that that in fact is precisely what equivalence does demand. If the pension of the salaried judge is paid in return for a quantity of service measured over their whole career as I hold to be the case, then the pension of the fee paid judge must be paid in return for the same thing. That requires a career average approach not a snapshot approach.

57. This would not rule out alternative 1 if we could have confidence that it produced the same outcome, that is a career average, by a shorter, more practical, less evidence dependent, route. But it is clear that alternative 1 if it ever produces a figure that is equivalent to a career average, it does so purely by chance. In any case where the application of alternative 1 produced an outcome which was below what equivalence demands there would be a continuing breach of the PTWR and the PTWD and, if alternative 1 was held to be the legally correct remedy, a further, probably actionable, breach of the UK governments obligation to accurately transpose the Directive. Any case in which the outcome was greater than equivalence would impose an unwarranted additional burden on the public purse and give the claimant an undeserved windfall. Alternative 1 must therefore be rejected because it fails to deliver equivalence. No matter what the problems inherent in alternative 2, alternative 1 cannot be used as a fall-back: it is flawed in principle.

58. Alternative 2 on the other hand meets all the requirements of equivalence taking as its starting point the final salary of the comparator and apportioning or pro rating it according to the level of service given by the recorder across the whole of their career which is what the JPS effectively does for the salaried judge. For the future, and very probably for the recent past, there should be no difficulty in applying it in practice. For the more distant past I see no alternative to accepting Mr Bourne's suggestion that a solution to the absence of records must be found either by judicial determination or agreement – perhaps by treating such fragmentary records as exist as being sufficiently typical to form the basis of the calculation unless there is good reason to believe that

they might not be. There will be winners and losers in this approach but, except where few if any records survive, where the approach may not be appropriate in any event, only marginally. It would be wrong in principle to decline to uphold alternative 2 because in certain situations its application in practice is going to be problematic where it is legally correct and no further alternatives are offered. Mr Allen, no doubt in jest, suggested I might like to find my own alternative but none suggest themselves (solutions involving career average salaries as opposed to service average involve exactly the same evidential problem where the earnings in question are those of the recorder and very obvious additional anomalies where the earnings are those of the comparator when in times of stagnation of judicial salaries a short serving fee paid judge would have their pension calculated on the basis of a much higher career average than a colleague who has served for a longer period of time during which full timers salaries rose considerably).

59. The correct basis for calculating Mr O'Brien's pension is therefore alternative 2 subject to the resolution of the final question, the 'full time rate of days' point.

The full time rate of days point

i. The respondent's contentions

60. I heard evidence form Mr Ian Gray, the Deputy Director, Judicial Reward and Pensions Reform who explained how the Senior Salaries Review Body (SSRB) arrived at the divisor figure of 220 and reaffirmed it subsequently, and from Mr Sean Palmer a Deputy Director of HMCTS who addressed the statistics concerning salaried judge sittings submitted by Mr O'Brien and produced a breakdown of circuit judge days for the Western Circuit for 2012/13 explaining how at least some of the days when a judge was not sitting were spent on other judicial business. The difficulty in translating annual salary into daily fee is well recognised. The adoption of the divisor of 220 is not arbitrary but evidence based. It is the standard public sector working year arrived at by deducting 104 days (representing 52 weekends) 8 days public and bank holidays and 2.5 privilege days from a 365 day year. It is applied across all courts and tribunals and is expressly referred to in the 2012 edition of the Circuit Judge Outline Conditions of Appointment and Terms of Service, paragraph 11, which includes the phrase *"The Lord Chancellor and the Lord Chief Justice ….. expect that the initial yearly plan for any year's work will provide for judges to devote between 215 and 220 days to judicial business'.*

ii. The claimant's contentions

61. Without going so far as to dismiss the respondent's position as nonsense on stilts, Mr Allen roundly attacks it as being little short of a fiction. If it ever was the case that judges were expected to devote 220 days a year to the court it is an expectation that has long since been waived. He too relies on paragraph 11 of the Terms of Service and its predecessor in 2004 both of which include this passage: "The Lord Chancellor [Secretary of State in the 2004 iteration] and the Lord Chief Justice considers (sic) it essential, in particular because of the burden of work on the courts and tribunals, for Circuit Judges … to devote at least 210 days in each year, and perhaps more, to the business of the courts." He points also to Mr Palmer's own statistics which show that in 2012/13 each judge on the Western Circuit who was available for the full year had their year planned on the basis of 209 days (there being an extra bank holiday in that year) and that any judge who sat more than that number was entitled to have the excess deducted from their sitting target in the following year. There was no suggestion that 2012/13 was anomalous nor that in other years the figure used had been 220 rather than 210. Moreover, in Annex 5 of the April 2008 edition of 'Judicial Salaried Part-time Working: A Practical Guide' the pro rata calculation of sitting days for circuit judges shows 100% to be 210 days.

62. Mr Allen contended for two alternative approaches, the second being his strongest. The first was that if one ignored the statistics the starting point had to be 210 not 220 as it was clear beyond argument that that was all a circuit judge was expected to do. The established practice of offsetting any days sat in excess of 210 in year one against the judge's sitting requirement for year two proved the point. The approach of the SSRB in deducting certain days from the 365 day year because they were days for which fee paid judges did not get paid was correct but did not go far enough and so from the starting point of 210 there fell to be deducted a further figure representing sick and compassionate leave and indeed any other days where the statistics show the judge to be engaged in non-judicial activities. On Mr Palmer's figures that suggests a divisor of around 200.

63. But the correct approach he submits is to look at such statistics as there are which show a much lower level of judicial activity and build back into them some allowance for work done by the judges which does not appear as sitting in court or in chambers. His starting point here is the statistics produced by Mr O'Brien from publically available material on judicial sittings presented annually to Parliament which show that between 1994 and 2010 the average number of sitting days in court and in chambers was only 174. Whilst he accepts that some additional days must be added to accommodate other judicial or quasi-judicial tasks which do not count as sitting, the gap between 174 and 220 is 9 weeks of 5 working days and even between 174 and 210 is 7 weeks which is simply unbridgeable on the evidence. Starting with the statistics, he submits, the respondent cannot show more than about 185 to 190 days at best. And it is, he submits, for the respondent to show. The claimant has painted a credible picture of the reality of a salaried judge's working year by producing such evidence as he can and it is for the respondent to rebut it by calling other evidence which they have failed to do. He submits forcefully that far from calling a circuit judge to explain the realities of salaried judicial life they have called only Mr Palmer whose knowledge is second hand and anecdotal. Moreover, while Mr O'Brien's evidence is generic, by which Mr Allen means based on national performance, the respondent has chosen to adduce evidence from one circuit for one year.

iii. The statistical approach

64. I reject the statistical approach on principle which is why, with respect to Mr Allen's rigorous analysis of Mr Palmer's figures I do not propose to set out the detail of his arguments here. I do so for two reasons: the unreliability of such statistics and the uncertainty of the outcome which the statistical approach would produce. I will deal with the latter point first. Mr Allen has helpfully set out the extract from Mr O'Brien's witness statement for the Supreme Court hearing on justification in his skeleton argument, the statistics being at para 117 of that statement. Although the average over the 17 year period covered by the figures was 174 the fluctuations on either side of that average were significant – from 163 to 195. Mr Allen suggests that the figures show a consistent pattern – far from it. As with all averages the outcome depends on the contents of the period under scrutiny and the length of that period. How is that period to be fixed in the context of determining a retiring recorders pension entitlement? Is the recorder retiring in 2010 with 7 years service to have her pension calculated on the average sitting days of circuit judges over the same 7 year period or some other period? If the relevant period is only the retiring judge's period of service then her divisor, on Mr O'Brien's figures is 171.4, but her colleague who retires at the same time after 12 years service gets a better deal as his divisor is only 170.1 (the lower the divisor the higher the pension). Instinctively, that can't be right. Mr Allen made no suggestions as to how the figures which Mr O'Brien had produced should be applied. Presumably they must be applied as at the date a recorder retires, so (using complete years only) when Mr O'Brien retired in 2005 his divisor would have been 175.8 which gives him a comparatively poor deal.

Even if one were to adopt a system where all previous years counted rather than only the years during which the recorder in question had been in service, and in consequence the fluctuations would become less and less over time, it could still mean that a recorder with 20 years service who retired in 2020 might well have a marginally different pension (ignoring any increase in the annual salary) than a colleague who retired the following year with the same service merely because 2021 happened to be a particularly busy or particularly quiet year for the criminal courts. Again instinctively that can't be right. It introduces an arbitrary element of chance into the equation which would produce inconsistent and, in consequence, unfair, outcomes. Pace Mr Allen's submissions on alternative 2, a remedy which includes an element of lottery in it and has such consequences cannot be just and equitable, at least not if an alternative is available.

65. I asked during the hearing whether I could take judicial notice of the fact that civil service statistics were notoriously unreliable. I was not told that I could not. But I do not do so. As Mr Bourne submits, there is cogent evidence that that is so in respect of these particular statistics. It is nothing to do with sloppy record keeping or incorrect posting of such records as there are, both of which may safely be assumed. It is more fundamental. The statistics do not capture and are not designed to capture at least one element of judicial work namely weekend working. If a circuit judge works at home over the weekend, for example to read in for a case starting on the Monday or preparing a summing up to be delivered on the Monday, that is not recorded anywhere. As I understand it, Mr Allen does not deny that such work occurs but he says there is no evidence of the extent to which it occurs and recorders also have to work over weekends in connection with their sittings. Both are beside the point. This part of the enquiry is not about whether recorders are fairly remunerated for the work they do but whether the statistics accurately reflect what circuit judges do. Once it is accepted that the statistics fail to record an element of what circuit judges do, even if the average judge only works at weekends half a dozen times a year that would have a significant impact on the overall figures. We cannot of course know the extent to which the figures understate the judges' work but once it is established that they do understate it, it would clearly be inappropriate to use them as the basis for such an important calculation unless there was no other basis available.

iv. The SSRB approach

66. I do not accept much of Mr Allen's criticisms of the respondent's use of the SSRB figure of 220 days. He submits that the reports of the Board provide no reliable basis for showing that that figure meets the criteria of equivalence required by the PTWR because the Board's remit is wholly different from the remit of this tribunal and the things to which it is required to have regard, as set out in the Foreword to their 1999 report, are irrelevant to my task. The one criteria which was, on its face, relevant – to ensure that the remuneration of those covered by the remit is consistent with the Government's equal opportunities policy – is in fact irrelevant because of the failure at that time to recognise that the policy extended to part-time workers. Moreover, to the extent that the recommendation that the appropriate divisor is 220 is evidence based none of that evidence is before me. While all of that is true it ignores the fact that the Board's reasoning is clear and its methodology consistent with the task of this tribunal.

67. Chapter 5 of the 1999 report deals with fees for part-time judicial posts. Although paragraphs 107 and 108 refer to evidence which is not before me, para 108 makes clear how the Board approached the issue of the divisor:

"*All of those who presented evidence argued for a direct link between the daily fee of a part-timer and the salary for the full time post. It was put to us that, in the great majority of*

jurisdictions, part-timers are interchangeable with full-time appointees and carry a significant share of the workload of the court or tribunal. As such, their remuneration, pro rata, should be no less than that of their full time counterparts. We are persuaded that there is a strong case in equity for such a link. It provides a bench mark against which we have assessed other proposals … These related to:

(a) the divisor used to calculate the daily fee.

68. It is therefore clear that the Board had in mind the comparability of the work of fee paid part timers and their full time comparators and in consequence the need for the remuneration of the former to reflect, pro rata, the remuneration of the latter – precisely the task of this tribunal, albeit that I approach the issue as being one of law rather than as one of equity. .

69. The Board then went on to explain that 220 days represented the typical public sector working year and in rejecting submissions from various groups that the divisor should more nearly reflect the minimum number of sitting days of the corresponding full time post holder in the various jurisdictions (the argument now advanced by Mr Allen) said this [at para 110].

"We are not persuaded that the divisor of 220 should be changed to reflect minimum sitting requirements in different courts or tribunals. Such a link would ignore the fact that, unlike part timers, full time post holders in all jurisdictions have a continuous commitment to the court, with consequential research, preparation, administrative and other obligations. We therefore recommend that the divisor for calculating daily fees remains at 220 days."

v. Conclusions

70. In my judgment the approach of the SSRB to the problem of how to assess the divisor is correct. Circuit judges, and salaried judges of all sorts, are atypical workers for a variety of reasons. I have already mentioned the difficulty in applying the PTWR to a situation where the comparator is salaried and the part timer remunerated by reference to a daily fee which is not dependant on the number of hours worked in the day. Another problem now emerges, namely that salaried judges do not have contracts of employment and the vital constitutional importance of an independent judiciary precludes anything approaching a traditional managerial structure. In other words judges can't be told what to do even in the rather basic matter of how often they must sit. But judges do have conditions of appointment and there are clearly norms of behaviour which judges are expected to observe and which they do observe. In place of the contract of employment there is, as the SSRB recognised, the concept of the judge's continuing commitment to the court. The concepts which underpin the PTWR continue to be transferable to this atypical situation if one substitutes the concept of the continuing judicial commitment of the full time judge for the concept of the contract of employment.

71. However, while the approach of the SSRB is correct, there is a rather obvious gap in its reasoning – the assumption without more that the judicial commitment and the typical public sector working year are coextensive. In the case of circuit judges that does not appear to be the case. The literature points inexorably to a different figure – 210 days. The judge's outline conditions of appointment speaks of a requirement to devote at least 210 days each year to the business of the courts 'and perhaps more'. The 'requirement' is therefore 210. The practical guide to judicial salaried part-time working shows 100% of a circuit judge's commitment to be 210 days and Mr Palmer's own figures show that in practice judges and administrators alike regard 210 as the benchmark figure. Although a judge would not refuse to sit more than 210 days if the exigencies of the list demanded it, they would be expected by both sides of the 'commitment' to have any

days over 210 offset against their work plan for the following year. The starting point for the divisor is therefore 210 not 220.

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72. Should the figure of 210 be discounted further to reflect other days that judges do not sit but for which they are remunerated such as days of sickness absence and if so how is that to be done? This is at first sight a powerful argument as it would appear to be a logical extension of the SSRBs approach to calculating the typical public sector year. Moreover, Mr Allen submits, the PTWR in defining working hours requires absence to be ignored. In my judgment, this latter point is wrong, at least in the consequence Mr Allen claims it to have. While reg 1(3) does require absences to be ignored the point is against Mr Allen, not in his favour. It requires a comparison between the normal working hours of the part-timer and the normal working hours of the full timer ignoring both overtime and time lost through absence. In other words, in this atypical world of commitment rather than contract a comparison between two typical days. On a typical day neither the fee paid nor the salaried judge is away from work ill nor absent for some other reason. So in my judgment reg 1(3) precludes Mr Allen's argument that the figure of 210 be reduced to accommodate sickness and other similar absence by circuit judges as a matter of law. Moreover the suggestion that to discount the starting figure of 210 to allow for sickness and other absences would be a logical extension of the SSRBs reasoning is also flawed. The SSRB has discounted non-work days whose existence is known and fixed in advance. Sick days are contingent, random and entirely unpredictable. Mr Allen submits that because Mr Palmer's figures show that on the Western Circuit the average number of days lost through sickness per judge during 21012/13 was 6.12 a discount of that order should be made. But that ignores the reality. Of the 62 judges on the circuit only 14 had any sick leave at all. Therefore the typical or median judge has no sick days per annum on the basis of those figures. Moreover, of the total of 379.5 days lost to sickness in the year, 307 days were attributable to just 3 judges. I am not satisfied therefore that, even if reg 1(3) permitted it, which I am content it does not, it would be right in principle to make any deduction for the possibility of sickness absence from the starting figure of 210 days for the simple reason that the typical judge (and the comparator must be a typical judge rather than a particular judge) loses no days through sickness in a typical year.

73. Mr Palmer's figures also include a column headed 'Medical'. He was unable to explain what if anything was the difference between medical and sick but even if I include those figures the picture does not change significantly. Thirteen judges had days off for medical reasons but at least 4 of them also had days off for reasons recorded as sick. Therefore lumping the two figures together gives a total of only 23 judges out of 62 who lost days in the year for medical/sick reasons. Of those 7 had absences of 1.5 days or less. The conclusion remains that in a typical year the typical judge loses no days through sickness absence or at the very most a statistically insignificant number of days Whether it would be right for recorders to be compensated in some way for losing a days fee through illness is another matter which is likely to be an issue in the Miller and others hearings in December.

74. The answer to the 'full time rate of days point' in the case of recorders is therefore 210.

vi. Summary

75. Combining the answers to the pay calculation point and the full time rate of days point produces the following: fee paid reckonable pensionable pay (the multiplicand) for the purposes of computing pension entitlement for a recorder is determined by multiplying the salary of a full time circuit judge as at the date of the recorders retirement by a factor which equals the total number of

days on which the recorder has sat throughout his career divided by 210, and dividing the result by the recorders length of service.

Remedy

76. Although this was not intended to be a remedy hearing as such but only a hearing or series of hearings which would pave the way for a final remedy hearing, the parties having adopted my suggestion that the appropriate remedy is a declaration incorporating the terms of my decisions on the various points in issue, it seems that such a hearing may no longer be required. The basic form of the declaration is agreed – not of retrospective admission to the JPS rather of entitlement to be treated as though Mr O'Brien had been retrospectively admitted – but the final wording has not, simply through lack of time. It was agreed that I should set out at the conclusion of these reasons a draft form of judgment and allow the parties 28 days from the date of the judgment to give reasons why I should not issue the judgment in that form or in a modified form agreed between them. If agreement could not be reached the matter would have to come back before me. The form of the judgment which I propose to issue is at Annex 1 to these reasons.

.....
Employment Judge

Date: 19th August 2013

JUDGMENT SENT TO THE PARTIES ON

19 August 2013

AND ENTERED IN THE REGISTER

.....
FOR SECRETARY OF THE TRIBUNALS

Case Number: 2202623/05

Annex 1

Draft JUDGMENT

1. The tribunal declares that the claimant is entitled:
   (a) to be treated by the respondent in all respects as though he had been retrospectively admitted to membership of the Judicial Pension Scheme between the 1st March 1978 and the 31st March 2005,
   (b) to be treated by the respondent as though he had retired from the office of circuit judge on the 31st March 2005,
   (c) to be paid a pension from that date together with the appropriate lump sum calculated in accordance with the judgment of the employment tribunal on the preliminary issues.

2. Not later than 56 days from the date of this judgment (whether or not the judgment of the tribunal on the preliminary issues is the subject of an appeal by either party in any respect) the respondent shall provide to the claimant the following calculations which shall be prepared in two alternatives, the first showing training days as half days, the second showing training days as whole days:
   (a) of the pension and lump sum to which the claimant becomes entitled on the basis of paragraph 1 of this judgment from the 31st March 2005 to the date of this judgment under both the Judicial Pensions Act 1981 and the Judicial Pensions and Retirement Act 1993, the multiplicand being computed in accordance with paragraph 74 of the reasons for the tribunal's judgment on the preliminary issues and the multiplier being 20/40,
   (b) of the pension to which he is entitled on the basis of paragraph 1 of this judgment from the date of this judgment.

3. Not later than 28 days after the date on which the respondent provides the calculations required by paragraph 2 of this judgment, the claimant will give notice to the respondent and to the tribunal that:
   (a) he agrees the calculations and elects to retire under either the 1981 Act or the 1993 Act, or
   (b) that he disputes the calculations

4. If the claimant disputes the calculations he shall within a further 28 days provide to the respondent details of his alternative calculation. Unless within 28 days thereafter the respondent agrees the claimant's alternative calculation or the parties otherwise reach agreement, the issue will be relisted at the earliest convenient date limited to deciding the correct calculation.

5. Unless the compensation under paragraph 3 of the tribunal's judgment on the preliminary issues is agreed by not later than 30th November 2013 the question of the amount of compensation to be awarded will be determined by the tribunal during the hearing of Miller and others which hearing commences on the 2nd December 2013.

Annex 2

Fee paid judicial offices covered by the MoJ's concession

Assistant Recorder
Recorder
Deputy District judge
Deputy District judge (Magistrate's Courts)
Deputy High Court judge
Deputy Master of the Queen's Bench Division
Deputy costs judge
Deputy Taxing master
Deputy District judge of the Principal Registry of the Family Division
Employment Judges/Chairmen including judges appointed in Scotland

Legally qualified Lawyer Chairmen of the rent assessment panel for an area in England appointed under para 2 of Schedule 10 to the Rent Act 1977

Judges of the First-tier Tribunal appointed under para 1(1) of Schedule 2 to the Tribunals, Courts and Enforcement Act 2007 (TCEA) and predecessor offices to the extent outlined below

Transferred-in judges of the First-tier Tribunal appointed under sec 31(2) TCEA and predecessor offices to the extent outlined below

Deputy judges of the Upper Tribunal appointed under para 7(1) of Schedule 3 to TCEA and predecessor office to the extent outlined below

Deputy judges of the Upper Tribunal by virtue of an order under sec 31(2) TCEA and predecessor offices to the extent outlined below

The reference to predecessor offices is limited to those offices which

(a) required a legal qualification in order to be eligible for appointment
(b) had a salaried full-time comparator
(c) no longer exist but whose jurisdiction is now only exercised by judges of the First-tier Tribunal or judges of the Upper Tribunal and not by judges or members of another tribunal. In particular it does not include those judicial offices relating to tribunals which have become the responsibility of the devolved administrations in Northern Ireland, Scotland and Wales.