SUMMARY

ECJ 1 March 2012, case C-393/10 (Dermond Patrick O’Brien - v - Ministry of Justice), Working time and leave, Part time work

Facts

Mr O'Brien was a part-time British judge with the title of "recorder". Contrary to full-time judges and to some part-time judges, he - like many other part-time recorders - was not paid a fixed salary but 1/220th of a full-time judge's salary for each day worked and he was not entitled to a retirement pension. Upon retirement at age 65 he requested his employer, the Department of Constitutional Affairs (now the Department of Justice), to pay him a retirement pension. He based his request on the Framework Agreement on part-time work annexed to Directive 97/81 (the "Directive"), which in Clause 4(1) provides that "*In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds*".

The Department of Justice turned down Mr O'Brien's request, whereupon he commenced proceedings before the Employment Tribunal. Although successful at first instance, he lost on appeal and again before the Court of Appeal. He took his case to the Supreme Court.

National proceedings

The Supreme Court noted that the Framework Agreement applies to "part-time workers who have an employment contract or employment relationship", but that it lacks a definition of "worker". Recital clause 16 to the Directive indicates why this is so: "*Whereas, with regard to terms used in the Framework Agreement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice, as is*

the case for other social policy Directives using similar terms, providing that the said definitions respect the content of the Framework Agreement". Therefore, the Supreme Court concluded that, in principle, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the "Regulations"), which transposed the Directive, are compatible with the Directive where they define "worker" as "*an individual who has entered into [...] (a) a contract of employment; or (b) any other contract [...] whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer [...]*".

The first question before the Supreme Court was whether judges qualify as "workers" within the meaning of the Regulations. The second issue related to the compatibility with the Directive of Regulation 17, which provides that the Regulations do not apply "*to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis*".

The Supreme Court decided to stay the proceedings and to refer two questions to the ECJ:

(1)

Is it for national law to determine whether or not judges as a whole are workers who have an employment contract or employment relationship within the meaning of Clause 2.1 of the Framework Agreement [É], or is there a Community norm by which this matter must be determined?

(2)

If judges as a whole are workers [É] within the meaning of [É] the Framework Agreement [É], is it permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions?

ECJ's findings

1.

There is no single definition of "worker" in EU law; it varies according to the area in which the definition is to be applied (¤ 30).

2.

The Framework Agreement was not intended to harmonise all national laws on part-time

work, merely aiming to establish a general framework for eliminating discrimination against part-time workers. Hence the concept of worker is to be interpreted in accordance with national law. However, Member States may not apply rules which are liable to deprive the Directive of its effectiveness. In particular, a Member State may not remove at will certain categories of persons from the protection afforded by the Directive (¤ 31-37).

3.

According to the UK government, judges are not employed under a contract and domestic law does not recognise any category of "employment relationship" as distinct from the relationship created by a contract. Therefore, judges do not fall within the scope of the Directive and Regulation 17 is superfluous (¤ 39).

4.

The exclusion of a category of persons from the protection of the Directive may be permitted, if it is not to be regarded as arbitrary, only if the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of "workers" under national law. This is for the national courts to determine, taking into account the following (¤ 41-43).

5.

Judges are expected to work during defined times and periods. Furthermore, they are entitled to sick pay, maternity or paternity pay and other similar benefits (¤ 45-46).

6.

The fact that judges might be regarded as workers within the meaning of the Framework Agreement in no way undermines the principle of the independence of the judiciary, nor does it have any effect on national identity or the free movement of workers (¤ 47-50).

7.

If a part-time judge qualifies as a "worker" within the meaning of the Framework Agreement, the question arises whether a part-time judge is treated less favourably than "a comparable full-time worker" as defined in Clause 3(2) of the Framework Agreement, namely "*a full-time*

worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualifications/skills". These criteria are based on the content of the activity of the persons concerned. Therefore, the UK government's argument that full-time judges and recorders are not in a comparable situation because they have different careers (recorders retaining the opportunity to practise as barristers), is not valid. The crucial factor is that they perform essentially the same activity. Their work is identical and they carry out their functions in the same courts and at the same hearings (¤ 60-62).

8.

A difference in treatment between part-time workers and full-time workers cannot be justified on the basis of a general, abstract norm. An unequal treatment must respond to a genuine need, be appropriate for achieving the objective pursued and be necessary. Budgetary considerations cannot justify discrimination (¤ 63-66).

Ruling

1.

European Union law must be interpreted as meaning that it is for the Member States to define the concept of "workers who have an employment contract or an employment relationship" in Clause 2.1 of the Framework Agreement on part-time work [É] and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81 [É]. An exclusion from that protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers.

2.

The Framework Agreement [É] must be interpreted as meaning that it precludes national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, for the purpose of access to the retirement pension scheme, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Creator: European Court of Justice (ECJ)
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Case number: C-393/10