SUMMARY

2013/2 Part time judges entitled to pensions on terms equivalent to full timers (UK)

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Facts

Mr O'Brien sat as a Recorder from 1 March 1978 to 31 March 2005. Recorders are judges who are remunerated, not on the basis of a fixed salary, but on a 'fee-paid' basis. This means that Mr O'Brien was paid 1/220th of the salary of a full-time circuit judge for each day he sat. Unlike full-timeand part-time judges with a fixed salary, Recorders are not entitled to a retirement pension.

Upon retirement at age 65, Mr O'Brien asked the Ministry of Justice to be paid a pro-rated pension. He based this request on Directive 97/81 implementing the Framework Agreement on part-time work (and Directive 98/23, by which Directive 97/81 was extended to the UK).

Clause 2.1 of the Framework Agreement provides that:

"This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State." [my italics]

Clause 4 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" [my italics].

Mr O'Brien's request for a pro-rated pension was denied on the grounds that Regulation 17 of the UK law that transposed Directive 97/81, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the 'Regulations'), 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*". Mr O'Brien argued that Regulation 17 was not compatible with the Framework Agreement and Directive 97/81.

Mr O'Brien brought a claim before the Employment Tribunal (the 'ET') on 29 September 2005 against the Department for Constitutional Affairs (since renamed The Ministry of Justice, the 'MoJ'). By regulation 8 of the Regulations, claims to tribunals must be made within three months, but there is discretion for out-of-time complaints to be considered.

Judgment

The MoJ lost at first instance, but appealed to the Employment Appeal Tribunal on the substantive issues and also on the grounds that Mr O'Brien's claim had been made out of time. It was later ordered by consent that these matters would be considered by the Court of Appeal, as a test case. The Court of Appeal held that Mr O'Brien's claim could be heard, despite being out of time, but it referred the matter back to the ET, with directions to dismiss it, as Mr O'Brien was not a 'worker' for the purposes of the Regulations, but exempted as a 'judicial office holder'. Mr O'Brien appealed to the Supreme Court.

The MoJ argued before the Supreme Court that Recorders are more akin to self-employed persons than employed ones. It said that the special position of the judiciary, for whose work independence of judgment is an essential feature, was sufficient to exempt judges from being 'workers'. The Supreme Court was not persuaded and issued a preliminary ruling that Mr O'Brien was a 'worker' for the purposes of Clause 2.1 of the Framework Agreement, but referred two questions to the ECJ – one of which was whether the Supreme Court was right to determine the 'worker' issue itself. The two questions, as reported in EELC 2012/2 (case C-393/10), were as follows:

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 the Framework Agreement, or is there a Community norm by which this matter must be determined?

2.If judges as a whole are workers [...] within the meaning of clause 2.1 of the Framework Agreement, 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?

The ECJ ruled that it was for Member States to define the concept of "workers who have an employment contract or an employment relationship" and whether judges fall within that concept. However, this must not lead to the arbitrary exclusion of judges from the protection offered by the Framework Agreement and subsequent Directive. Judges could only be excluded if the relationship between them and the MoJ was, by its nature, substantially different from that between employers and employees who would be regarded as workers according to national law.

The ECJ further said that the Framework Agreement precludes national law from distinguishing between full-time judges and part-time judges for the purposes of access to pension, unless such a difference in treatment is justified by objective reasons. This was a matter for the referring court to determine.

This ruling had the effect of dividing the issues to be considered by the Supreme Court into two parts. The first was whether Mr O'Brien was a 'worker' within Clause 2.1 of the Framework Agreement and the second was whether there was objective justification for the difference in treatment of Recorders.

1. The 'worker' issue

In deciding whether Recorders were workers, the ECJ stated that the court must take certain factors into account, as follows: (1) the distinction between workers and self-employed people; (2) the rules for appointing and removing judges and the way their work is organised,

along with the benefits they are entitled to (e.g. sick pay); and (3) that the fact that they might be regarded as workers would not undermine the principle of independence of the judiciary.

The Supreme Court decided it need not determine whether servants of the Crown have contracts of employment, but restricted itself to the issue of whether there was an employment relationship for the purposes of Clause 2.1 of the Framework Agreement. The Court decided that judicial office has most of the characteristics of employment and that

Mr O'Brien was a worker who had an employment relationship with the MoJ. The Court distinguished self-employed persons, saying "*the self- employed person has the comparative luxury of independence. He can make his own choices as to the work he does and when and where he does it. […] He is not subject to the direction and control of others.*" The Court found that "*the reality is that recorders are expected to observe the terms and conditions of their appointment and they may be disciplined if they fail to do so*". (Mr O'Brien had given evidence that he had been reprimanded during his time as a Recorder, when he failed to sit for the required number of sittings in a given year.)

The Court saw no reason to depart from its preliminary finding that Recorders were workers.

2. Objective justification

The Court noted that Directive 97/81 was unusual in allowing the justification of direct discrimination against part-time workers. It also noted that there was little guidance from the ECJ as to what might constitute objective grounds amounting to justification. However, the ECJ had said that it was not sufficient for a Member State simply to provide for a difference in treatment in law and Advocate General Kokott in his opinion had said that the unequal treatment must be justified by the existence of "precise, concrete factors […] on the basis of objective and transparent criteria for examining the question of whether the equal treatment responds to a genuine need". The Supreme Court applied those principles.

It seems that originally the MoJ's reasoning for treating Recorders differently from their full time counterparts had been purely to do with cost. However, the Court allowed it to present evidence retrospectively to justify its policy on expanded grounds.

The MoJ therefore advanced three arguments, the first of which was that Recorders, being part time, could accrue pension from other sources and so were not dependent on this source and that Recorders did not fit the profile of those the Framework Agreement had intended to protect. However, the Court felt that that line of argumentation was not sufficient to justify less favourable treatment.

The MoJ also said it was important to reward full time judges particularly well in order to attract the best candidates. However, the Court felt that recruiting good candidates was important equally in relation to part timers.

In relation to cost, the MoJ did not seek to argue that budgetary considerations could be used to justify discrimination as such, but said that cost plus other factors could be sufficient. The Court was unconvinced of this, holding that it is for each state to decide how much to spend on a particular benefit, but within that, the choices it makes must be consistent with the

principles of equal treatment and non-discrimination.

The Supreme Court found no objective justification and therefore allowed Mr O'Brien's appeal and remitted the matter back to the Employment Tribunal to determine the amount of pension he would be entitled to.

Commentary

The Supreme Court heard some interesting statistics that are perhaps a sign of the times. Until the 1970s part time judges in the UK were outnumbered by full time ones by about 3:1. However, their numbers have markedly increased since then. There are now about 30 different types of fee-paidpart-time judges and in 1993 there were 2,041 part-time judges and by 2005, there were 2,414. Part-time judges now outnumber full time ones by 2:1. Some of the reasons for this change in structure appears to be the flexibility part-time workers offer, but some of it is also attributable to the cost to the public purse. More generally, part time and casual arrangements of all kinds are increasingly common both in the public and private sectors in the UK, probably for similar reasons. The Court could not give consideration to budgetary issues, but it is clear that the judgment will have quite significant cost implications for the MoJ. In these economically difficult times, it seems less likely the MoJ will be able to retain the pension rates of full time judges and more likely that it will cut them to fund the new pension rights of part timers.

Subject: Other forms of discrimination, part time work

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