



Hilary Term
[2013] UKSC 6
On appeal from: [2008] EWCA Civ 1448

JUDGMENT

O'Brien (Appellant) v Ministry of Justice (Formerly the Department for Constitutional Affairs) (Respondents)

before

**Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Clarke
Lord Dyson**

JUDGMENT GIVEN ON

6 February 2013

Heard on 21 and 22 November 2012

Appellant

Robin Allen QC
Rachel Crasnow

(Instructed by Browne
Jacobson LLP)

Respondent

John Cavanagh QC
Sarah Moore
Holly Stout
(Instructed by Treasury
Solicitor)

*Intervener (Council of
Immigration Judges)*

Ian Rogers
(Instructed by Underwood
Solicitors LLP)

LORD HOPE AND LADY HALE (delivering the judgment of the court)

1. The appellant Dermot Patrick O'Brien ("Mr O'Brien") is a retired barrister. He also held part-time judicial office as a recorder appointed under section 21 of the Courts Act 1971, as amended. He claims to be entitled to a pension in respect of his part-time non-salaried judicial work. The case raises questions of domestic law about the status and terms of service of part-time non-salaried judges in England and Wales. They include chairmen and members of tribunals and others exercising judicial functions for remuneration. It also raises important questions of EU law as to which, having sought a preliminary ruling under article 267 of the Treaty for the Functioning of the European Union ("the TFEU"), the court has now received guidance from the Court of Justice of the European Union ("the CJEU"). The effect of section 3(1) of the European Communities Act 1972 is that the questions of EU law must be determined in accordance with the principles laid down in its preliminary ruling by that court.

2. The EU law questions relate to Council Directive 97/81/EC of 15 December 1997 [1997] OJ L 14/9 ("the PTWD") concerning the Framework Agreement on part-time work which was concluded on 6 June 1997 between the general cross-industry organisations (UNICE, CEEP and ETUC) and is annexed to the Directive ("the Framework Agreement"). Directives are binding as to the result to be achieved, leaving only the choice of form and methods to the Member State: article 288 TFEU. The PTWD was extended to the United Kingdom by Directive 98/23 [1998] OJ L 131/10. It was transposed into domestic law by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551 ("the 2000 Regulations"), which were made under section 19 of the Employment Relations Act 1999. They came into force on 1 July 2000.

Background

3. With the encouragement of the leader of the Western Circuit, Mr O'Brien, who was then in practice as a barrister, decided to apply to become a recorder. He was appointed as a recorder with effect from 1 March 1978, and he continued sitting as a recorder with regular extensions until he ceased to hold that office on 31 March 2005. The question then arose as to whether, as he was no longer the holder of a judicial office, he was entitled to a pension under the judicial pension scheme. The office of recorder is not one of the judicial offices for which provision for the payment of pensions was made in the Judicial Pensions Act 1981.

4. Further provisions for the payment of pensions to judicial office holders are contained in the Judicial Pensions and Retirement Act 1993 ("the 1993 Act"). Section 2 of the 1993 Act provides that any person retiring from "qualifying judicial office" having attained the age of 65 and having completed at least 5 years' service in qualifying judicial office is entitled to receive a pension at the appropriate annual rate.

Section 1(6) provides that, for the purposes of the Act, any reference to a qualifying office is a reference to any office specified in Schedule 1 to the Act if that office is held on a salaried basis. The office of recorder is not one of the offices specified in Schedule 1.

5. On 9 June 2005 Mr O'Brien wrote to the Department of Constitutional Affairs requiring that he be paid a retirement pension on the same basis, adjusted pro rata temporis, as that paid to former full-time judges who had been engaged on the same or similar work. He was informed by the Department in its reply dated 5 July 2005 that he fell outside the categories of judicial office holder to whom a judicial pension was payable. This was because the office of recorder was not a qualifying judicial office under the 1993 Act, and because there was no obligation to provide him with a pension under European law as he was an office-holder, not a worker.

6. Mr O'Brien was not satisfied with the reasons he was given. On 29 September 2005 he started proceedings in the Employment Tribunal in which he claimed among other things that he was being discriminated against because he was a part-time worker. His claim was brought under the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Human Rights Act 1998 together with the PTWD and the 2000 Regulations. The claim was opposed by the Department of Constitutional Affairs (now the Ministry of Justice) unsuccessfully in the Employment Tribunal, but successfully on appeal to the Employment Appeal Tribunal, on the grounds that it was out of time, as it ought to have been presented within three months of the date when he ceased to hold office, and that there was no relevant statutory extension of the time within which a claim could be presented. But it was later ordered, by consent, that the substantive issue and the time limit issue should both be heard by the Court of Appeal as a test case.

7. On 19 December 2008 the Court of Appeal (the Chancellor, Smith and Maurice Kay LJJ) allowed Mr O'Brien's appeal on the time limit issue, but directed the Employment Tribunal to dismiss the claim on the issue of substance: *Department of Constitutional Affairs v O'Brien* [2008] EWCA Civ 1448, [2009] ICR 593, [2009] 2 CMLR 15. Its findings on the substantive issue were that judges are not "workers", either under the main definition in regulation 1(2) of the 2000 Regulations which requires there to be a contract or under the extended definition of "worker" in regulation 12 which applies to "Crown employment": see paras 15 and 17, below. Mr O'Brien was given permission to appeal to the Supreme Court.

8. On 28 July 2010 this court, having considered the parties' written and oral submissions and submissions for the Council of Immigration Judges as interveners, referred two questions to the CJEU for a preliminary ruling under Article 267 TFEU: see [2010] UKSC 34, [2011] 1 CMLR 36, to which reference may be made for much of the background. The questions that were referred 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 of the Framework Agreement, or is there a Community norm by which this matter must be determined?

2) If 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, 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?"

9. On 1 March 2012 the Second Chamber of the CJEU, having received the opinion of the Advocate General (Kokott) on 17 November 2011, gave judgment. It answered the questions as follows [2012] ICR 955, para 68:

"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 . . . 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, as amended by Directive 98/23, and that agreement. 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 . . . must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine."

10. The effect of the questions that were referred, and of the ruling in response to them, is to divide the issues raised by Mr O'Brien's case into two parts. Firstly, there is the worker issue: whether the relationship between judges and the Ministry of Justice is substantially different from that between employers and persons who fall to be treated in national law as workers. The principles to which the CJEU refers are of general application. So although the argument was directed to the position of recorders like Mr O'Brien, the issue is of interest to all part-time judges, not just recorders. Secondly, there is the objective justification issue: whether the difference in treatment of part-time judges is justified by objective reasons. The answer to this issue may differ from one kind of non-salaried part-time judge to another. So, in addressing it, the court will confine its attention to recorders. The question is whether there is an objective justification for treating recorders, all of whom are non-salaried, differently

from full-time or salaried judges for the purposes of access to the retirement pension scheme.

11. The matter came before this court for a further oral hearing on 4 July 2012, when it also had before it written submissions on behalf of the Council of Immigration Judges. In the light of the discussion at that hearing the court made a preliminary ruling that Mr O'Brien was at the material time a part-time worker within the meaning of clause 2.1 of the Framework Agreement, for reasons that were to be given in writing at a later date. That ruling was communicated to the parties by the Registrar on 9 July 2012. The court also gave case-management directions for the future course of the proceedings. The parties were told that the court had decided not to direct an immediate remission to the Employment Tribunal on the issue of objective justification, and that remission would be appropriate only if there were significant disputed issues of fact to be determined. Directions were given for the presentation of the parties' cases on the objective justification issue as it applied to recorders at a further hearing to be held on 21 November 2012, at which the court would determine what issues, if any, should be remitted and decide any issues that were not to be remitted.

12. This judgment does two things. First, it sets out the court's reasons for its preliminary ruling on the worker issue which, together with the introduction, have been prepared by Lord Hope. Secondly, it sets out the court's reasoning and conclusions on the issue of objective justification. They have been prepared by Lady Hale. The court acknowledges and is grateful for all the work by the legal advisers on both sides in preparing a considerable volume of documentary evidence and other material against a demanding timetable.

The PTWD and the Framework Agreement

13. The PTWD contains in recital (11) a reference to the parties to the Framework Agreement wishing "...to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike". Recital (16) is as follows:

“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.”

Article 1 states that the purpose of the Directive is to implement the Framework Agreement. Article 2 requires Member States to transpose it into national law by 20 January 2000 at the latest.

14. Clauses 1 and 2 of the Framework Agreement are as follows:

“Clause 1: Purpose

The purpose of this Framework Agreement is:

(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;

(b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers.

Clause 2: Scope

1. 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.

2. Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish if the objective reasons for making them remain valid.”

The Ministry of Justice do not place any reliance on Clause 2(2). Clause 3 contains definitions of “part-time worker” and “comparable full-time worker”. Clause 4 sets out the principle of non-discrimination:

“Clause 4: Principle of non-discrimination

1. 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.

2. Where appropriate, the principle of *pro rata temporis* shall apply.

3. The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice.

4. Where justified by objective reasons, Member States after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification. Qualifications relating to access by part-time workers to particular conditions of employment should be reviewed periodically having regard to the principle of non-discrimination as expressed in Clause 4.1.”

The domestic regulations

15. The United Kingdom gave effect to the PTWD and the Framework Agreement by the 2000 Regulations which were made on 8 June 2000 and came into force on 1 July 2000. The Regulations were made under section 19 of the Employment Relations Act 1999.

16. Regulation 1(2) contains definitions, including:

“‘contract of employment’ means a contract of service or of apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

‘worker’ means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under –

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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 of any profession or business undertaking carried on by the individual.”

There is no reference to “employment relationship.” Regulation 2 (as amended) contains definitions of a full-time worker, a part-time worker and a comparable full-time worker. It is common ground that if Mr O’Brien was a worker at all, he was a part-time worker.

17. Regulation 5 sets out the prohibition on unjustified less favourable treatment of part-time workers:

“5. Less favourable treatment of part-time workers

(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 –

(a) as regards the terms of his contract; or

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

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

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

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

(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.”

18. Part IV of the regulations is headed “Special Classes of Person” and contains six Regulations numbered 12 to 17. Regulation 12 (Crown employment) provides (so far as now material):

“(1) Subject to regulation 13, these Regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees and workers.

(2) In paragraph (1) ‘Crown employment’ means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.”

Regulations 13 (Armed forces), 14 (House of Lords staff), 15 (House of Commons staff) and 16 (Police service) make similar provision for the classes of service personnel, office holders or employees to which they relate (but subject to an exception for certain types of military training under the Reserve Forces Acts).

Subject to that exception, all these provisions include within the scope of the Regulations persons who would not or might not otherwise be included.

19. By contrast regulation 17 (Holders of judicial offices) disapplies the Regulations in relation to fee-paid part-time judges:

“These 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 parties take different views as to whether, in the absence of regulation 17, fee-paid part-time judges would have been treated as part-time workers for the purposes of the Regulations.

The facts

20. Until the 1970s part-time judges, variously styled as recorders, commissioners or chairmen of Quarter Sessions, were a smaller proportion of the judiciary in England and Wales than they are now. Many part-time judicial officers who are now called judges were then designated by other terms such as registrars, stipendiary magistrates, tribunal chairmen and social security or tax commissioners. Professor Bell, *Judiciaries in Europe* (2006), p 312 records that in 1970 full-time judges outnumbered part-time judges by about three to one. All these part-time judges were the holders of a statutory judicial office. They were remunerated by fees calculated on a daily fee-paid basis.

21. The Courts Act 1971 made major changes in the justice system and (as amended) conferred the powers under which all recorders are still appointed. Section 21 of the Courts Act 1971, as originally enacted, was in the following terms:

“(1) Her Majesty may from time to time appoint qualified persons, to be known as Recorders, to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them under this or any other enactment.

(2) Every appointment of a person to be a Recorder shall be of a person recommended to Her Majesty by the Lord Chancellor, and no person shall be qualified to be appointed a Recorder unless he is a barrister or solicitor of at least ten years' standing.

(3) The appointment of a person as a Recorder shall specify the term for which he is appointed and the frequency and duration of the occasions during that term on which he will be required to be available to undertake the duties of a Recorder.

(4) Subject to subsection (5) below the Lord Chancellor may, with the agreement of the Recorder concerned, from time to time extend for such period as he thinks appropriate the term for which a Recorder is appointed.

(5) Neither the initial term for which a Recorder is appointed nor any extension of that term under subsection (4) above shall be such as to continue his appointment as a Recorder after the end of the completed year of service in which he attains the age of 72.

(6) The Lord Chancellor may if he thinks fit terminate the appointment of a Recorder on the ground of incapacity or misbehaviour or of a failure to comply with any requirement specified under subsection (3) above in the terms of his appointment.

(7) There shall be paid to Recorders out of money provided by Parliament such remuneration and allowances as the Lord Chancellor may, with the approval of the Minister for the Civil Service, determine.”

22. The section has been amended from time to time. The most significant amendment, influenced by the Human Rights Act 1998, was the introduction of safeguards limiting the Lord Chancellor’s right to decline to extend, or to terminate, an appointment. This amendment gave effect to new terms and conditions of service promulgated by the Lord Chancellor’s Department in 2000. Recorders’ appointments are automatically extended under section 21(4) at the end of the five year appointment for further successive terms of five years, subject to the individual’s agreement and the upper age limit, unless a question of cause for non-renewal is raised or the individual no longer satisfies the conditions or qualifications for appointment.

23. Since the Courts Act 1971 was enacted there has been a remarkable growth in the number and type of part-time judges. The Council of Immigration Judges estimate that there are now about thirty types of fee-paid part-time judges in the United Kingdom, and that they are relied upon substantially in all but three specialist tribunals. Statistics in Professor Bell’s chapter (table 6.1a) show that there were 2,041 part-time judges (recorders and deputy district judges) in 1993 and 2,414 in 2005 (including 200 female deputy district judges, up from 89 in 1993, indicating the success of the official policy of encouraging women to become part-time judges). There are now almost twice as many part-time judges (recorders and deputy district judges) as full-time judges. These figures do not take account of remunerated chairmen and members of tribunals, the structure of which has been radically reformed by the Tribunals Courts and Enforcement Act 2007. Submissions from the Council of Immigration Judges show that in 2009 there were 145 full-time immigration judges and 440 part-time immigration judges (the latter group being divided between salaried part-time judges and fee-paid part-time judges as mentioned below). The proportion of sitting days worked by fee-paid judges rose from 49% in 2008 to 72% in 2010 and 2011.

24. For about 30 years after the Courts Act 1971 all part-time judges were remunerated on a fee-paid basis. That was not a statutory requirement, as section 21(7) is in very general terms. It was an administrative arrangement chosen by the Lord Chancellor's Department (later the Department of Constitutional Affairs, and now the Ministry of Justice). Since about 2000 there has been an increase in salaried part-time judges, especially among district judges and immigration judges. As they are salaried holders of qualifying judicial offices, they are entitled to receive a judicial pension under the 1993 Act on their retirement.

25. The Lord Chancellor has from time to time issued and amended written memoranda as to the terms and conditions of service of recorders. The memorandum current in 1978 when Mr O'Brien was appointed contained 15 paragraphs covering, among other things, a requirement for attendance at sentencing conferences, and the frequency and duration of sittings and fees. There was a minimum sitting requirement of at least 20 days a year, which could be split into two periods of at least ten days. Subject to certain limitations provided for in the terms and conditions, he was not precluded from continuing in professional practice. Many recorders continued to provide services for remuneration as barristers or solicitors in addition to holding that judicial office. It was the expectation of the Lord Chancellor when preparing these memoranda that persons appointed as recorders would normally be in active practice or hold a full-time judicial office.

26. The version of the terms and conditions current at Mr O'Brien's retirement, which was issued in April 2000, is a more elaborate document of 49 paragraphs together with two appendices on relations with the media. Most of the new material dealt with the renewal of appointments and judicial conduct. A recorder is entitled to be offered a minimum of fifteen sitting days a year and may be required to sit for up to thirty days unless there are reasonable grounds for not sitting. The daily fee is unspecified. But in practice all part-time judicial office holders are paid one 220th of the annual salary of a full-time judicial office holder of the same court or tribunal. A fee at half the daily rate is paid for attending Judicial Studies Board residential conferences.

27. The submissions for the Council of Immigration Judges state that some immigration judges work part-time on a salaried basis. A substantial majority, estimated to be about 75%, work part-time on a daily fee-paid basis. Fee-paid part-time immigration judges' sittings should not normally exceed 105 days a year, but for each day's sitting an immigration judge is credited a further day's work and pay for writing determinations and similar out-of-court duties. In practice they work up to 210 days per year. They are paid at about half a day's fee to attend mandatory training days. Some immigration judges combine their work as a fee-paid immigration judge with other fee paid judicial work in courts and other tribunals. But about half are estimated to rely on their remuneration as fee-paid immigration judges as their principal income.

28. All part-time judges are entitled, where appropriate, to sick pay, maternity or paternity pay and similar benefits during service. Full-time judges and salaried part-time judges are entitled to pensions on retirement, subject to and in accordance with the provisions of the Judicial Pensions Act 1981 and the Judicial Pensions and Retirement Act 1993. Fee-paid part-time judges have no entitlement to a judicial pension on retirement. Pensions under the 1981 Act are calculated on a basis related to salary and, as already noted, references in the 1993 Act to a qualifying judicial office limit the entitlement to the holder of an office specified in Schedule 1 to the Act that is held on a salaried basis: 1993 Act, section 2(1).

The worker issue

29. The CJEU noted in paras 30 to 33 of its judgment that there is no single definition of worker in EU law. The PTWD and the Framework Agreement do not aim at complete harmonisation of national laws in this area, but only, as the agreement's name indicates, to establish a general framework for eliminating discrimination against part-time workers. It is for national law to determine whether a person in part-time work has a contract of employment or an employment relationship: *Wippel v Peek & Cloppenburg GmbH & Co KG* C-313/02 [2005] 1CR 1604, para 40. The discretion given to member states is however qualified by the need to respect the effectiveness of the PTWD, and general principles of EU law: paras 34 to 38. A member state may not remove at will, in violation of the effectiveness of the directive, categories of persons from protection. In particular, the sole fact that judges are treated as judicial office holders is insufficient in itself to exclude the latter from enjoying the rights provided for by the Framework Agreement: para 41. Such an exclusion may be permitted, if it is not to be regarded as arbitrary, only if the nature of the employment relationship is substantially different from the relationship between employers and their employees which fall within the category of "workers" under national law.

30. The CJEU stated in para 43 of its judgment:

"It is ultimately for the referring court to examine to what extent the relationship between judges and the Ministry of Justice is, by its nature, substantially different from an employment relationship between an employer and a worker. The court may, however, mention to the referring court a number of principles and criteria which it *must* take into account in the course of its examination." [emphasis added]

The principles and criteria which it then set out include the following:

"(1) The term 'worker' is used in the definition of the scope of the Framework Agreement to draw a distinction from a self-employed person, and the court will have to bear in mind that this distinction is

part of the spirit of the Framework Agreement on part-time work: para 44, referring to para 48 of the opinion of the Advocate General.

(2) The rules for appointing and removing judges must be considered, and also the way their work is organised. The fact that judges are expected to work during defined times and periods, albeit with a greater degree of flexibility than members of other professions, and that they are entitled to benefits such as sick pay are also relevant: paras 45 and 46.

(3) The fact that judges are subject to terms of service and that they might be regarded as workers within the meaning of the Framework Agreement on part-time work would not undermine the principle of the independence of the judiciary, or respect for the national identities of Member States. It merely aims to extend to those judges the scope of the principle of equal treatment and to protect them against discrimination as compared with full-time workers: paras 47 to 49.”

31. At the hearing on 4 July 2012 there was argument about whether the case should be remitted to the Employment Tribunal for further fact-finding on the issues of (i) whether Mr O’Brien was a worker for EU law purposes, and (ii) objective justification. This court concluded, although only after the end of the oral argument, that it had sufficient evidence to determine the worker issue. It has also concluded that it need not, and should not, decide the very large question of whether all or any servants of the Crown have contracts of employment. Mr Allen QC for Mr O’Brien pragmatically observed that his client wanted to win and that, so long as his client did so, he did not intend to press the court to express a view about the existence of a contract of employment. So the issue turns on whether there is an employment relationship in the relevant sense.

32. Mr Allen pointed out that in making the reference to the CJEU the Supreme Court had already expressed the view that recorders are subject to the sort of terms of service referred to by Sir Robert Carswell LCJ in *Perceval-Price v Department of Economic Development* [2000] IRLR 380. The claimants in that case were three female holders of full-time judicial office. They brought claims on sex discrimination grounds, but the statutory provisions under which they were made excluded the holder of a statutory office. Giving the judgment of the court, Sir Robert Carswell pointed out that the purpose of article 119 of the Treaty and of the Equal Pay and Equal Treatment Directives was to protect against discrimination. At p 384 he said:

“All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the president of the industrial tribunals or the Court Service, or more loosely arranged in collegiate fashion between

the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment . . .”

33. Agreeing with these observations, this court said in para 27 of its judgment on the reference that judicial office partakes of most of the characteristics of employment. However, because domestic law could not readily be disentangled from EU law on this issue, it preferred to express no concluded view as to whether judges as a general class would qualify as “workers” under the Regulations, or whether Mr O’Brien would qualify as a worker if regulation 17 were to be disregarded, until it had received guidance from the CJEU. Mr Allen submitted that nothing in the judgment of the CJEU tended to cast doubt on this court’s provisional opinion.

34. The argument for the Ministry of Justice is that there is no obligation to provide Mr O’Brien with a pension under European law as he was a judicial office-holder, not a worker. As Mr David Staff of the then Department of Constitutional Affairs explained in a statement that was shown to the Employment Tribunal, judicial office holders were seen as being in a distinct category with an entirely separate status. Fundamental to the concept of judicial independence was the fact that judicial office holders exercise their function wholly independently of influence or direction by any Minister, Government Department or agency. The CJEU has, however, made it clear that the principle that judges are independent in the exercise of the function of judging as such is not called into question by extending to part-time judges the scope of the principle of equal treatment to protect them against discrimination as compared with full-time workers: paras 47-49. In these paragraphs the court was, in effect, endorsing the observations of Advocate General Kokott, where she said in paras 50-51 of her opinion:

“50 In this connection, I would also point out that it is difficult to determine how the rights granted by the Framework Agreement in general, and an entitlement to a retirement pension in particular, can jeopardise the essence of the independence of a judge; on the contrary, an entitlement to a retirement pension strengthens the economic independence of judges, and thus also the essence of their independence.

51 Independence in terms of the essence of an activity is not therefore an appropriate criterion for justifying the exclusion of a professional category from the scope of the Framework Agreement.”

35. In these circumstances Mr Cavanagh QC for the Ministry did not pursue the argument that the principle of the independence of the judiciary justified according a different status for the purposes of the Framework Agreement to recorders from that which governed ordinary departmental staff in the civil service. The fact that recorders

are not subject to direction or control over the decisions that they take in the performance of the responsibilities of their office does not deprive them of the protection against discrimination that the Framework Agreement was designed to provide. Instead, recognising that this argument was no longer open to him, Mr Cavanagh confined his argument to addressing points of detail.

36. He submitted that a recorder's terms and conditions of service, as set out in a succession of memoranda from the Lord Chancellor, did not tell the whole story. It was, he submitted, necessary to go into the reality and substance of the matter. The issue could only be resolved if one was in possession of the full facts. In particular, evidence could usefully be heard about such matters as the way recorders were appointed and removed, the way their work was organised, whether sanctions were imposed upon recorders for sitting less than the minimum of 15 days a year and whether in practice the fixing and carrying out of sitting engagements was substantially different from the other professional commitments they undertook. He submitted that, while salaried part-time judges would have a stronger case for being regarded as workers, fee-paid part-time judges are in a position similar to self-employed persons. If the case were remitted to the Employment Tribunal, the evidence would show that the booking of judicial sittings by a recorder is similar to the booking of counsel's engagements. One could not assume that the position of other judges was the same as that for recorders, although his position was that they all fell outside the definition of worker within the meaning of the Framework Agreement.

37. As narrated in para 11, above, the court was satisfied that it was unnecessary to remit the matter to the Employment Tribunal on the worker issue, and that it should confirm its provisional view expressed in paragraph 27 of its judgment on the reference. Nothing in the judgment of the CJEU is inconsistent with that provisional view, and much of the judgment supports it. Following the guidance that the CJEU provided in para 43 of its judgment (see para 30, above), account in arriving at this decision was taken of the following matters mentioned in paras 44-46: (i) the fact that the character of the work that a recorder does in the public service differs from that of a self-employed person; (ii) the rules for their appointment and removal, to which no self-employed person would subject himself; (iii) the way their work is organised for them, bearing in mind that recorders, in common with all other part-time judges, are expected to work during defined times and periods; (iv) their entitlement to the same benefits during service, as appropriate, as full-time judges.

38. The court does not accept that the terms and conditions laid down by the Lord Chancellor for recorders do not give a true picture of the reality of the work that is done by a recorder. On the contrary, Mr O'Brien's evidence shows that he was on one occasion required to explain why he had in two successive years failed to achieve the required number of sittings, and Mr O'Brien had to explain and apologise. The reality is that recorders are expected to observe the terms and conditions of their appointment, and that they may be disciplined if they fail to do so. The very fact that most recorders are self-employed barristers or solicitors merely serves to underline the different character of their commitment to the public service when they undertake the office of recorder.

39. As the CJEU made clear in para 44, the spirit and purpose of the Framework Agreement requires that a distinction must be made between the category of “worker” and that of self-employed persons. The matters referred to in the previous paragraph, taken together, really speak for themselves. 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 works for himself. He is not subject to the direction or control of others. Of course, he must adhere to the standards of his trade or profession. He must face the reality that, if he is to succeed, he must satisfy the needs and requirements of those who engage his services. They may be quite demanding, and the room for manoeuvre may be small. But the choices that must be made are for him, and him alone, to take.

40. In *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28, para 141, Lady Hale referred to the authors’ comment in *Harvey on Industrial Relations and Employment Law*, para A[4] that the distinction as to whether a person is in an employment relationship is between those who work for themselves and those who work for others, regardless of the nature of the contract under which they are employed. This was the same distinction that in para AG48 Advocate General Kokott said must be made in order to have regard to the spirit and purpose of the Framework Agreement. In para 145 Lady Hale quoted the passage from Sir Robert Carswell’s judgment in *Perceval-Price v Department of Economic Development* [2000] IRLR 380, 384, where he said that judges are not free agents to work as and when they choose as are self-employed persons, and that their office partakes of some of the characteristics of employment: see para 31, above.

41. In para 146 Lady Hale went on to say this:

“I have quoted those words ... because they illustrate how the essential distinction is, as *Harvey* says, between the employed and the self-employed. The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God’s word, as interpreted in the doctrine of their faith, governs all that they practise, preach and teach. This does not mean that they cannot be ‘workers’ or in the ‘employment’ of those who decide how their ministry should be put to the service of the Church.”

As that was a case about the rights of a member of the clergy, she did not say, and did not have to say, in so many words that judges can be “workers”. But in their case too, and especially in the case of those who work as part-time judges, the same essential distinction between the employed and the self-employed can be drawn. The fact is, as the matters referred to above make clear, that they are not free agents to work as and when they choose. They are not self-employed persons when working in that capacity.

42. For these reasons the court holds recorders are in an employment relationship within the meaning of clause 2.1 of the Framework Agreement on part-time work and that, as the result to be achieved by the PTWD is binding on the United Kingdom, they must be treated as “workers” for the purposes of the 2000 Regulations.

Objective justification

43. The Part-Time Workers’ Directive, like the Fixed-term Work Directive, is unusual in allowing the justification of direct discrimination against part-time workers. Clause 4.1 of the Framework Agreement (quoted at para 14 above) prohibits treating part-time workers less favourably than comparable full-time workers, solely because they work part-time, “unless different treatment is justified on objective grounds”. Regulation 5(2) of the domestic 2000 Regulations (quoted at para 17 above) is to the same effect. However, clause 4.2 of the Framework Agreement sets out the general principle that “where appropriate, the principle of *pro rata temporis* shall apply”. Regulation 5(3) is to the same effect. Hence the usual expectation is that part-time workers will receive the same remuneration and other benefits as comparable full-time workers, calculated on a *pro rata* basis, unless there are objective grounds for departing from this principle.

44. There is, however, little guidance from the CJEU as to what might constitute such objective grounds, other than that which we have been given in this particular case, at paras 64 to 66 of the judgment of the court:

“64 . . . the concept ‘objective grounds’ . . . must be understood as not permitting a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. On the contrary, that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose: see, by way of analogy with clause 5.1(a) of the Framework Agreement on Fixed-term Work, *Del Cerro Alonso* [2008] ICR 145, paras 57 and 58.

65 Since no justification has been relied on during the proceedings before the court, it is for the referring court to examine whether the inequality of the treatment between full-time judges and part-time judges remunerated on a daily fee-paid basis may be justified.

66 It must be recalled that budgetary considerations cannot justify discrimination: see, to that effect, *Schönheit v Stadt Frankfurt am Main* (Joined Cases C-4/02 and C-5/02 [2003] ECR I-12575, para 85, and *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* (Case C-486/08) [2010] ECR I-3527, para 46.”

45. The first sentence of para 64 means no more than that it is not enough for a member state to provide for the difference in treatment in its law (or enforceable collective agreement): see *Adeneler v Ellenikos Organismos Galaktos* (Case C-212/04) [2006] ECR I-6057. The fact that regulation 17 of the domestic Regulations excludes fee-paid part-time judicial officers from the protection given by the Regulations is neither here nor there. The second sentence of para 64 repeats the familiar general principles applicable to objective justification: the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary to do so.

46. The opinion of Advocate General Kokott is slightly more expansive at para 62:

“62 The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued: see *Del Cerro Alonso* [2008] ICR 145, para 58, and *Angé Serrano v European Parliament* (Case C-496/08P) [2010] ECR I-1793, para 44.”

This court proposes to follow the guidance given by the CJEU and the Advocate General in those passages. Although the CJEU did not repeat the first part of para 62 of the Advocate General’s opinion, it is merely a longer quotation from para 58 of the judgment in *Del Cerro Alonso v Osakidetza-Sevicio Vasco del Salud* [2008] ICR 145 which the court did cite.

47. The Ministry of Justice face the difficulty that they have not until now articulated a justification for their policy. It is clear from the history that when the 2000 Regulations were made the Lord Chancellor took the view that judges were not “workers” for this purpose, a view which was maintained until this court rejected it following the renewed hearing of this case in July 2012. This does not preclude the Ministry from now advancing a justification for maintaining the policy: see *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716, para 60, citing *Petersen v Berufsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (Case C-341/08) [2010] ECR I-47. It is also clear from the history that, insofar as there was a reason for ensuring that fee-paid part-time judges were not covered by the 2000 Regulations, it was to save cost. By itself, of course, this cannot constitute justification. But once again, this does not preclude the Ministry from now advancing a different and better justification: see *Finalarte Sociedade Construção Civil Lda v Urlaubs-und-Lohnausgleichskasse der Bauwirtschaft* (Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98) [2003] 2 CMLR 11.

48. However, in this as in any other human rights context, this court is likely to treat with greater respect a justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted: see

Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19, [2007] 1 WLR 1420, paras 26 and 37; *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, para 31. In particular, as Mummery LJ pointed out in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at paras 128 to 132, it is difficult for the Ministry to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at that time.

49. In their pleaded case, the Ministry advance three inter-related aims for the treatment complained of:

“(i) “fairness” in the distribution of the State’s resources that are available to fund judicial pensions;

(ii) to attract a sufficiently high number of good quality candidates to salaried judicial office; and

(iii) to keep the cost of judicial pensions within limits which are affordable and sustainable.”

In Mr Cavanagh’s written and oral submissions on their behalf, fairness was divided into two elements: (a) the alternative opportunities available to part-timers, but denied to full-timers, to make provision for their retirement; and (b) the greater contribution made by the full-timers to the working of the justice system.

Remission?

50. Before considering each of these suggested justifications, it is necessary to consider whether the case should be remitted to the Employment Tribunal for the determination of any relevant disputed facts. The Ministry, Mr O’Brien and the interveners have all filed extensive evidence in accordance with this court’s directions in July 2012. While much is agreed, Mr Cavanagh argues that there are five key areas of dispute:

“(i) the extent to which Recorders also have practices as barristers or solicitors;

(ii) the number of days which Recorders are required to sit in a year and the extent of the flexibility which they are allowed in order to accommodate the demands of their practices;

(iii) whether the work of Recorders is in general less onerous than the work of Circuit Judges;

(iv) the extent to which Recorders suffer a drop in pay if they become Circuit Judges and whether there would be a drop in high quality candidates for full-time appointment if the pensions payable to full-timers were reduced; and

(v) how much it would cost to provide *pro rata* pensions to Recorders.”

Mr Cavanagh acknowledges that the most important areas are (i) and (iii), as these are directly relevant to the “fairness” justification. Once the arguments were examined in detail, however, it became apparent that resolving these factual issues would not resolve the central issue of whether the discrimination is objectively justified. To the extent that it might do so, the court was content to take the factual basis of the Ministry’s case at the highest at which it could properly be put. Accordingly, the court decided not to remit for this purpose.

Fairness: alternative means of providing for retirement

51. The Ministry point out that recorders are far removed from the type of part-time worker for whom the protection of the PTWD was designed. These were, it is said, low-paid workers who were driven to take part-time jobs by their personal circumstances, often their childcare or other domestic responsibilities, and were in a very weak bargaining position compared with their full-time and more often unionised colleagues. Many of them were women. Indeed, before the PTWD, there were many cases decided where discrimination against part-time workers was held to be indirect discrimination on grounds of sex because women were so much more likely to be adversely affected by it than men: see, for example, *R v Secretary of State for Employment, Ex p Seymour-Smith (No 2)* [2000] 1 WLR 435. The aim of the Directive was to promote more flexible working patterns, by eliminating discrimination against part-time workers and assisting the development of opportunities for part-time working in a way which would benefit both employers and workers.

52. Recorders, it is said, do not undertake their part-time judicial work “in order to prepare for retirement, reconcile professional and family life, and take up education and training opportunities” (the reasons mentioned in the fifth of the General Considerations listed in the Framework Agreement for attaching importance to measures which would facilitate access to part-time work). The great majority of recorders are either in practice at the Bar or as solicitors or hold other judicial offices as District or Tribunal Judges. A few may be employed, for example as academic lawyers or even Law Commissioners. The point is that they have a principal occupation which is not judging. This means that they can provide for their retirement in other ways: a sole practitioner such as a barrister can build up his own pension pot from his earnings at the Bar; a partner in a solicitors’ practice can take part in the

firm's pension scheme; an employed person can take part in his occupational or other pension arrangements. They do not need to rely upon a pension from their very limited time sitting in court. The availability of other resources has been taken into account in the justification of age discrimination: see, for example, *Palacios de la Villa v Cartefiel Services SA* (Case C-411/05) [2009] ICR 1111; *Rosenblatt v Oellerking Gebäudereinigungs GmbH* (Case C-45/09) [2011] IRLR 51. Full-timers, on the other hand, have hardly any opportunity for outside earnings and have no means other than the judicial pension scheme to make provision for their retirement. It is fair, therefore, that the limited sums available for judicial pensions should be allocated to the full-timers (and to the salaried part-timers) rather than to the fee-paid part-timers. The full-timers need them and the part-timers do not.

53. The Ministry are able to make this argument with particular force because this case happens to be about a recorder. The great majority of recorders do have other sources of income from which to provide for their retirement. As the Council of Immigration Judges make clear, this is by no means true of many fee-paid judicial officers. Some, indeed, are sitting virtually full-time but on a part-time fee-paid basis. Some have a portfolio of fee-paid offices which add up to a full-time post. Some are sitting part-time precisely because they need more flexible work to accommodate their domestic or other responsibilities. None of these have the opportunity to provide for their retirement out of other income. They are just the sort of people for whom the PTWD was designed.

54. The fallacy in the Ministry's argument, it is said, is that fee-paid part-timers may (or may not) have the opportunity to provide for their retirement out of other earnings, but they do not have the opportunity to do so while they are engaged in their part-time sittings. While engaged on judicial duties they are deprived of the opportunity to make other earnings and the pension contributions which could be made from them. Occupational pension schemes are part of the package of remuneration which goes with a particular occupation: they are often referred to as deferred pay. They are part of the price which the employer pays for the worker's services. It would not be justifiable for an employer to pay a lesser daily rate to a fee-paid part-timer than to a full-timer: indeed, recorders are paid a daily rate which is the equivalent *pro rata temporis* to the salary of a full-time circuit judge, but without the pension element in the package. It is equally unjustifiable, it is said, to separate out the pension element in the remuneration package and refuse to apply the *pro rata temporis* principle to it.

55. In this respect, it is irrelevant that the employer is the State. The Ministry should be regarded like any other employer. A private employer would not be able to justify paying part-time workers less or denying them access to its occupational pension scheme and the State should be in no different position. At bottom, this is not an argument about fairness. It is premised on there being a limited pot of money available to fund judicial pensions. That, it is said, is an impermissible premise: budgetary considerations cannot justify discriminatory treatment.

Fairness: the greater contribution made by full-timers

56. Another aspect of fairness, argue the Ministry, is that recorders generally do the less onerous work in the Crown and county courts. They only sit for a limited period each year and so cannot try the longer and more complicated cases, nor do they generally have to do the paperwork which the full-time judges have to do. There are also a few, very limited, powers which are statutorily reserved to circuit judges.

57. Against that, and with those very limited exceptions, it is said that the statutory jurisdiction of recorders is exactly the same as the jurisdiction of a circuit judge (as indeed the jurisdiction of a deputy district judge is exactly the same as the jurisdiction of a district judge). Certain types of work require a “ticket” – for example, to try serious sexual offences, for child care cases, or for Technology and Construction Court work. But some recorders have such tickets (Mr O’Brien, for example, was ticketed to do Technology and Construction Court work) and many circuit judges do not. Some recorders, especially if they sit in the smaller courts, may also be required to do paperwork. If circuit judges do undertake tasks which recorders are not required to undertake, the proper response is to reward these with extra responsibility payments, not to make a whole-sale and indiscriminate exception to the *pro rata temporis* principle.

58. A further aspect of this fairness argument, which tells against the Ministry, is that it suits Her Majesty’s Courts and Tribunals Service to have a cadre of fee-paid part-timers who can be flexibly deployed to meet the varying demands of court business. If all the work was done by full-timers, there would have to be enough judges to cater for the busiest times. Inevitably, some would not have enough to do at other times. But once a judge is appointed to a full-time post, it is not possible to dismiss him for redundancy. Appointing a large number of fee-paid part-timers enables the system to respond economically and flexibly to the fluctuations in demand for the courts’ services. Like a bank of agency nurses or supply teachers, it is an efficient method of working which benefits everyone. This efficiency should not be purchased at a price which discriminates against the part-timers.

Recruitment

59. The Ministry argue that (even with the recent and proposed changes) the judicial pension scheme is a substantial incentive for high quality practitioners to seek and accept a full-time appointment. It is a matter of general public importance that the remuneration package of circuit judges is sufficiently appealing to attract a sufficient number of high quality candidates. Barristers and solicitors in private practice frequently suffer a drop in income when they are appointed to the Bench. The pension sweetens the pill.

60. This argument does, of course, assume that the persons best qualified to serve as circuit judges are the barristers and solicitors who have been most successful in

private practice. Even assuming that to be the case, however, it is difficult to see why denying pensions to recorders increases the attractions of full-time appointment. (It has echoes of the argument that denying the benefits of marriage to same sex couples increases the attractions of marriage to couples of opposite sexes.) The effect of paying pensions to part-timers would be to increase their remuneration package for the limited number of days on which they sit. For recorders in particular, it would come nowhere close to making proper provision for their retirement. The pension entitlement attached to a full-time appointment would still present a significant attraction, especially to a practitioner who had not already built up a very substantial pension pot of his own.

61. Further, the Ministry do not argue that the recent and proposed changes to the judicial pension scheme, which will significantly reduce its attractiveness to the most successful practitioners, have had any impact upon the quantity and quality of applications for the full-time Circuit bench. Quite the reverse. Their assessment of the impact of the introduction of contributions last year was that this would not have a significant effect upon recruitment.

62. Promoting a high quality judicial system is of course a legitimate aim but it applies just as much to the part-timers as to the full-timers. Both must be of a high standard, so it is not an aim which divides them. While there is no evidence that the lack of a pension deters good quality candidates from applying to be recorders, the same may not be true of those parts of the justice system which rely upon fee-paid part-timers to do the great majority of the work.

Cost

63. The Ministry accept that cost alone cannot justify discriminating against part-time workers. But they argue that “cost plus” other factors may do so. This is a subtle point which is not without difficulty.

64. The starting point for the discussion of this issue is the statement of the ECJ in *MA de Weerd (Roks) v Bestuur Van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* (Case C-343/92) [1994] 2 CMLR 325, a case about sex discrimination in social security benefits, at para 35:

“35...although budgetary considerations may influence a Member State’s choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot in themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes.”

In other words, richer states may have more generous benefits systems than do poorer states. Cost may inform how much the state will spend upon its benefits system, but

the choices made within that system must pursue policy aims other than saving cost. The court continued:

“36 Moreover, to concede that budgetary considerations may justify a difference in treatment as between men and women which would otherwise constitute indirect discrimination on grounds of sex . . . would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.”

It is one thing to set benefits at a particular level for budgetary reasons. It is another thing to pay women less than men because it is cheaper so to do. Sex discrimination is wrong whether the state (or the employer) is rich or poor.

65. But, say the Ministry, the fact that a social policy aim is affected by budgetary considerations does not invalidate it if it is otherwise justified. Mr Cavanagh’s “best case” is *Jørgensen v Foreningen af Speciallaeger and Sygesikringens Forhandlingsudvalg* (Case C-226/98) [2000] IRLR 726. Mrs Jørgensen, a specialist rheumatologist, complained about a rule which meant that, if she sold her practice, it would, because of its turnover, be treated as a part-time practice and subject to a cap on the fees it could receive from the Danish national health authorities. She argued that this was indirectly discriminatory on grounds of sex, because her lower turnover was the result of her domestic responsibilities, which affected many more women than men. The aim of the scheme which imposed the cap was to limit the exercise of part-time specialist practice, it being considered that many doctors who worked principally in a hospital and part time in their own practices neglected the former for the sake of the latter.

66. Among other questions, the Danish court asked the ECJ whether considerations relating to budgetary stringency, savings or medical practice planning might be regarded as objective considerations justifying a measure which adversely affected a larger number of women than men. In answering the question, the court repeated (at para 39) paragraphs 35 and 36 of *Roks* (see para 64 above) but agreed with the Commission that “reasons relating to the need to ensure sound management of public expenditure on specialised medical care and to guarantee people’s access to such care are legitimate” (at para 40). Their answer to the question was that “budgetary considerations cannot in themselves justify discrimination on grounds of sex. However, measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people’s access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end” (at para 42).

67. If this is the Ministry’s best case on budgetary considerations, it can be said, then it does not take them very far. Sound management of the public finances may be a legitimate aim, but that is very different from deliberately discriminating against

part-time workers in order to save money. In *European Commission v The Netherlands* (Case C-542/09), the Commission complained that imposing a residence requirement upon migrant workers and their families for eligibility for student support for courses outside the Netherlands breached the principle of non-discrimination against migrant workers. The Netherlands argued that the requirement was “necessary in order to avoid an unreasonable financial burden which could have consequences for the very existence of the assistance scheme” (para 56). The court reiterated (at paras 57 and 58), *mutatis mutandis*, the principles set out in *Roks* (see para 64 above) and concluded that “the objective pursued by the Kingdom of the Netherlands of avoiding an unreasonable financial burden cannot be regarded as an overriding reason relating to the public interest, capable of justifying the unequal treatment of workers from other Member States as compared with Netherlands workers” (para 69). As Advocate General Sharpston had put it in her opinion, “Any conditions attached to [the scheme] in order to keep expenditure within acceptable limits must be borne equally by migrant workers and Netherlands workers” (para 89).

68. On the other hand, the court held that the aim of promoting student mobility was legitimate and a residence requirement was an appropriate means of achieving that aim, as only students resident in the Netherlands would need to be encouraged to study elsewhere; but the Netherlands had not succeeded in establishing that the particular residence rule adopted did not go beyond what was necessary in order to achieve that objective. So a completely different aim might have been capable of justifying the policy.

69. Hence the European cases clearly establish that a Member State may decide for itself how much it will spend upon its benefits system, or presumably upon its justice system, or indeed upon any other area of social policy. But within that system, the choices it makes must be consistent with the principles of equal treatment and non-discrimination. A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost. No doubt it was because the CJEU foresaw that the Ministry would seek to rely upon considerations of cost when the case returned to the national courts that it took care to reiterate that “budgetary considerations cannot justify discrimination” (para 66).

70. Our attention was drawn to some domestic authorities, and in particular to *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330, [2012] ICR 1126. This was an age discrimination case, in which the claimant complained that the trust had deliberately failed to comply with a requirement to consult before declaring him to be redundant, so that his employment would cease before he reached the age which would trigger a higher severance payment. The Court of Appeal held that the dismissal notice was not served with the simple aim of dismissing him before his 49th birthday but in order to give effect to a genuine decision that his position was redundant. It was justifiable to implement that decision in a way which saved money. This court must, however, take its guidance from the jurisprudence of the CJEU, and in particular the guidance which we have been given in this very case. In the circumstances it is unnecessary for us to express a view upon whether the case of *Woodcock* was rightly decided.

Conclusions

71. We agree with the arguments advanced on behalf of Mr O'Brien. The Ministry have struggled to explain what they are seeking to achieve by denying a pension to part-timers while granting one to full-timers. One aim seems to be to give a greater reward to those who are thought to need it most. This might be a legitimate aim, but (as Advocate General Kokott explained) the unequal treatment of different classes of employees must be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria. An employer might devise a scheme which rewarded its workers according to need rather than to their contribution, but the criteria would have to be precise and transparent. That is not so here. Some part-timers will need this provision as much as, if not more than, some of the full-timers. On examination, this objective amounts to nothing more than a blanket discrimination between the different classes of worker, which would undermine the basic principle of the PTWD.

72. Similarly (but inconsistently), an employer might aim to give a greater reward to those who make the greater contribution to the justice system, but the Ministry have failed to demonstrate that fee-paid part-timers, as a class, make a lesser contribution to the justice system than do full-timers, as a class. Once again, the criteria for assessing such contributions are not precise and transparent. They amount to nothing more than a blanket discrimination between the two classes of worker. The proper approach to differential contributions is to make special payments for extra responsibilities. The argument also fails to take into account the benefits to the system in having a cadre of fee-paid part-timers who can be flexibly deployed to meet the changing demands upon it.

73. The aim of recruiting a high quality judiciary is undoubtedly legitimate, but it applies to the part-time judiciary as much as it applies to the full-timers. Nor has it been shown that denying a pension to the part-timers has a significant effect upon the recruitment of full-timers.

74. In effect, the arguments presented to us are the same as the arguments presented by the Kingdom of the Netherlands in *Commission v The Netherlands*: that if recorders get a pension, then the pensions payable to circuit judges will have to be reduced. That is a pure budgetary consideration. It depends upon the assumption that the present sums available for judicial pensions are fixed for all time. Of course there is not a bottomless fund of public money available. Of course we are currently living in very difficult times. But the fundamental principles of equal treatment cannot depend upon how much money happens to be available in the public coffers at any one particular time or upon how the State chooses to allocate the funds available between the various responsibilities it undertakes. That argument would not avail a private employer and it should not avail the State in its capacity as an employer. Even supposing that direct sex discrimination were justifiable, it would not be legitimate to pay women judges less than men judges on the basis that this would cost less, that

more money would then be available to attract the best male candidates, or even on the basis that most women need less than most men.

75. It follows that no objective justification has been shown for departing from the basic principle of remunerating part-timers *pro rata temporis*. Although this case is concerned only with the case of a recorder, it seems unlikely that the Ministry's argument could be put any higher than it has been. The court holds that the appellant is entitled to a pension on terms equivalent to those applicable to a circuit judge.

Disposal

76. For these reasons the appeal is allowed and the order of the Court of Appeal of 19 December 2008 is set aside. Working out exactly what this conclusion entails will not be without its difficulties. The case will be remitted to the Employment Tribunal for the determination of the amount of the pension to which Mr O'Brien is entitled under the Regulations in accordance with this judgment.



Trinity Term
[2010] UKSC 34

On appeal from: [2008] EWCA Civ 1448

JUDGMENT

O'Brien (Appellant) v Ministry of Justice (Formerly the Department for Constitutional Affairs) (Respondents)

before

**Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Clarke
Lord Dyson**

JUDGMENT GIVEN ON

28 July 2010

Heard on 14 and 15 June 2010

Appellant

Robin Allen QC
Rachel Crasnow

(Instructed by Browne
Jacobson LLP)

Respondent

John Cavanagh QC
Sarah Moore
Holly Stout
(Instructed by Treasury
Solicitor)

*Intervener (Council of
Immigration Judges)*

Ian Rogers
(Instructed by Underwood
Solicitors LLP)

LORD WALKER (delivering the judgment of the court)

Introductory

1. This appeal raises questions of EU law relating to Council Directive 97/81/EC of 15 December 1997 (“the PTWD”) concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC (“the Framework Agreement”) which the Court considers it necessary to refer to the Court of Justice under article 267 of the Treaty on the Functioning of the European Union. The appeal also raises questions of domestic law, as to the status and terms of service of judges in England and Wales (the term “judges” being here used as a compendious term so as to include, in general, chairmen and members of tribunals and others exercising judicial functions for remuneration, but not lay magistrates). The domestic law questions cannot easily be disentangled from the questions of EU law, partly because of the *Marleasing* principle (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89 [1991] I-ECR 4135) and partly because Clause 2(1) of the Framework Agreement refers to “employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State”.

2. This judgment is in five sections. The first section summarises the relevant parts of the PTWD, the Framework Agreement and the regulations transposing these EU measures into domestic law. The second and third sections set out the (largely undisputed) facts both as to the wider factual context (including the growing importance of part-time judges in the English legal system) and as to Mr O’Brien’s claim against the Ministry of Justice. The fourth section considers and gives this Court’s opinion on the relevant principles of domestic law, but with the important qualification that (because of their entanglement with EU issues) some of the Court’s conclusions must be treated as provisional, and may have to be revisited in the light of the Court of Justice’s preliminary ruling. The fifth and final section explains why a preliminary ruling is necessary, and sets out the questions referred to the Court of Justice.

I

The PTWD, the Framework Agreement and the domestic regulations

3. The PTWD contains in recital (11) a reference to the parties to the Framework Agreement wishing “...to establish a general framework for

eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike”. Recital (16) is as follows:

“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.”

Article 1 states that the purpose of the Directive is to implement the Framework Agreement. Article 2 requires Member States to transpose it into national law by 20 January 2000 at latest.

4. Clauses 1 and 2 of the Framework Agreement are as follows:

“Clause 1: Purpose

The purpose of this Framework Agreement is:

(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;

(b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers.

Clause 2: Scope

1. 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.

2. Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with

national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish

if the objective reasons for making them remain valid.”

The Ministry of Justice does not place any reliance on Clause 2(2). Clause 3 contains definitions of “part-time worker” and “comparable full-time worker”. Clause 4 sets out the principle of non-discrimination:

“Clause 4: Principle of non-discrimination

1. 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.

2. Where appropriate, the principle of *pro rata temporis* shall apply.

3. The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice.

4. Where justified by objective reasons, Member States after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification. Qualifications relating to access by part-time workers to particular conditions of employment should be reviewed periodically having regard to the principle of non-discrimination as expressed in Clause 4.1.”

5. The PTWD did not initially apply to the United Kingdom. But Council Directive 98/23/EC of 7 April 1998 provided for it to apply to the United Kingdom with 7 April 2000 being substituted for 20 January 2000 as the final date for transposition.

6. The United Kingdom gave effect to the PTWD and the Framework Agreement by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000 No.1551) (“the Regulations”) which were made on 8 June 2000 and came into force on 1 July 2000. The Regulations were made under section 19 of the Employment Relations Act 1999.

7. Regulation 1(2) contains definitions, including:

“contract of employment” means a contract of service or of apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

“worker” means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under –

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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 of any profession or business undertaking carried on by the individual.”

There is no reference to “employment relationship.”

Regulation 2 (as amended) contains definitions of a full-time worker, a part-time worker and a comparable full-time worker. It is common ground that if Mr O’Brien was a worker at all, he was a part-time worker.

8. Regulation 5 sets out the prohibition on unjustified less favourable treatment of part-time workers:

“5. Less favourable treatment of part-time workers

(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 –

(a) as regards the terms of his contract; or

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

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

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

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

(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.”

9. Part IV of the Regulations is headed “Special Classes of Person” and contains six Regulations numbered 12 to 17. Regulation 12 (Crown employment) provides (so far as now material)

“(1) Subject to regulation 13, these Regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees and workers.

(2) In paragraph (1) ‘Crown employment’ means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.”

Regulations 13 (Armed forces), 14 (House of Lords staff), 15 (House of Commons staff) and 16 (Police service) make similar provision for the classes of service personnel, office holders or employees to which they relate (but subject to an exception for certain types of military training under the Reserve Forces Acts).

Subject to that exception all these provisions include within the scope of the Regulations persons who would not or might not otherwise be included.

10. By contrast Regulation 17 (Holders of judicial offices) disapplies the Regulations in relation to fee-paid part-time judges:

“These 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 parties take different views as to whether, in the absence of Regulation 17, fee-paid part-time judges would have been treated as part-time workers for the purposes of the Regulations.

II

The facts: the part-time judiciary

11. Until the 1970s the English judicial system had relatively few part-time judges, variously styled recorders, commissioners or chairmen of quarter sessions. All these part-time judges were remunerated by fees calculated on a daily basis (“fee-paid”). Professor Bell (*Judiciaries in Europe* (2006) p312) records that in 1970 full-time judges outnumbered part-time judges by about three to one. Many judicial officers who are now called judges were then designated by other terms such as registrars, stipendiary magistrates and social security or tax commissioners.

12. The Courts Act 1971 made major changes in the justice system and (as amended) conferred the powers under which all recorders are still appointed. Section 21 of the Courts Act 1971, as originally enacted, was in the following terms:

“(1) Her Majesty may from time to time appoint qualified persons, to be known as Recorders, to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them under this or any other enactment.

(2) Every appointment of a person to be a Recorder shall be of a person recommended to Her Majesty by the Lord Chancellor, and no

person shall be qualified to be appointed a Recorder unless he is a barrister or solicitor of at least ten years' standing.

(3) The appointment of a person as a Recorder shall specify the term for which he is appointed and the frequency and duration of the occasions during that term on which he will be required to be available to undertake the duties of a Recorder.

(4) Subject to subsection (5) below the Lord Chancellor may, with the agreement of the Recorder concerned, from time to time extend for such period as he thinks appropriate the term for which a Recorder is appointed.

(5) Neither the initial term for which a Recorder is appointed nor any extension of that term under subsection (4) above shall be such as to continue his appointment as a Recorder after the end of the completed year of service in which he attains the age of 72.

(6) The Lord Chancellor may if he thinks fit terminate the appointment of a Recorder on the ground of incapacity or misbehaviour or of a failure to comply with any requirements specified under subsection (3) above in the terms of his appointment.

(7) There shall be paid to Recorders out of money provided by Parliament such remuneration and allowances as the Lord Chancellor may, with the approval of the Minister for the Civil Service, determine.”

The section has been amended from time to time. The most significant amendment, influenced by the Human Rights Act 1998, was the introduction of safeguards limiting the Lord Chancellor's right to decline to extend, or to terminate, an appointment. This amendment gave effect to new terms and conditions of service promulgated by the Lord Chancellor's Department (the predecessor to the Ministry of Justice) in 2000.

13. Since the Courts Act 1971 there has been a remarkable growth in the number of part-time judges. Statistics in Professor Bell's chapter (table 6.1a) show that there were 2,041 part-time judges (recorders and deputy district judges) in 1993 and 2,414 in 2005 (including 200 female deputy district judges, up from 89 in 1993, indicating the success of the official policy of encouraging women to become part-time judges). There are now almost twice as many part-time judges

(recorders and deputy district judges) as full-time judges. These figures do not take account of remunerated chairmen and members of tribunals, the structure of which has been radically reformed by the Tribunals Courts and Enforcement Act 2007. Submissions from the Council of Immigration Judges show that in 2009 there were 145 full-time immigration judges and 440 part-time immigration judges (the latter group being divided between salaried part-time judges and fee-paid part-time judges as mentioned below).

14. For about thirty years after the Courts Act 1971 all part-time judges were remunerated on a fee-paid basis. That was not a statutory requirement (section 21(7) is in very general terms) but it was the administrative arrangement chosen by the Lord Chancellor's Department (later the Department of Constitutional Affairs, and now the Ministry of Justice). Since about 2000, however, there has been an increase in salaried part-time judges, especially among district judges and immigration judges.

15. The Lord Chancellor has from time to time issued and amended written memoranda as to the terms and conditions of service of recorders. The memorandum current in 1978 (when Mr O'Brien was appointed) contained fifteen paragraphs covering (among other things) the requirement for attendance at sentencing conferences, the frequency and duration of sittings (at least twenty days a year, which could be split into two periods of at least ten days) and fees (£60 a day). The version (issued in April 2000) current at his retirement is a more elaborate document of 49 paragraphs together with two appendices (on relations with the media). Most of the new material dealt with the renewal of appointments and judicial conduct. A recorder was entitled to be offered a minimum of fifteen sitting days a year and might be required to sit for up to thirty days. The daily fee was unspecified but in practice was (and still is) 1-220th of the salary of a full-time circuit judge. A fee at half the daily rate is paid for attending Judicial Studies Board residential conferences. The CIJ's submissions state that fee-paid part-time immigration judges' sittings should not normally exceed 105 days a year, and that for each day's sitting an immigration judge is credited a further day's work and pay for writing determinations and similar out-of-court duties.

16. All part-time judges are entitled (where appropriate) to sick pay, maternity or paternity pay, and similar benefits during service. Full-time judges and salaried part-time judges are entitled to pensions on retirement, subject to and in accordance with the provisions of the Judicial Pensions Act 1981 as amended and the Judicial Pensions and Retirement Act 1993 as amended. Fee-paid part-time judges have no entitlement to a judicial pension on retirement. That is what Mr O'Brien complains of in these proceedings. His complaint is founded on the PTWD and the Framework Agreement.

III

Facts relevant to Mr O'Brien's complaint

17. Mr O'Brien was born in 1939 and called to the bar in 1962. From about 1970 his practice was in civil (as opposed to criminal) work on the western circuit. He was appointed Queen's Counsel in 1983.

18. With the encouragement of the leader of the western circuit Mr O'Brien applied to become a recorder and was appointed as a recorder with effect from 1 March 1978. He then continued sitting as a recorder until 31 March 2005, with regular extensions, the last extension being in 1999. In 1986 and 1987 he was unable to comply with his sitting requirement because he was engaged in a heavy case in Hong Kong. For this he received what he called "a polite but firm reprimand" from the Lord Chancellor's Department. In 1998 the Department adopted the policy, set out in its memorandum of terms and conditions, of not renewing a recorder's appointment beyond the year in which he or she attained the age of 65. From 2000 the policy was for recorders' terms to be five years, automatically renewable except in the case of incapacity or misbehaviour.

19. Mr O'Brien started proceedings in the Employment Tribunal on 29 September 2005. Initially his claim was opposed by the Department of Constitutional Affairs (now the Ministry of Justice) unsuccessfully in the Employment Tribunal, but successfully on appeal to the Employment Appeal Tribunal, on the ground that it was out of time. But it was later ordered, by consent, that the substantive issue and the time limit issue should both be heard by the Court of Appeal as a test case. On 19 December 2008 the Court of Appeal (the Chancellor and Smith and Maurice Kay LJJ) [2008] EWCA Civ 1448, [2009] ICR 593 allowed Mr O'Brien's appeal on the time limit issue, but directed the Employment Tribunal to dismiss the claim on the issue of substance.

20. Mr O'Brien was given permission to appeal to the Supreme Court and this Court heard submissions on 14 and 15 June 2010. As often happens, each side's primary submission to the Court was that the matter was *acte clair* in its favour, and its secondary submission was that if the Court did not accept its primary submission, a reference under Article 267 was necessary. For the reasons set out at V below the Court accepts each side's secondary submission.

IV

Domestic law issues

21. Mr O'Brien makes two main alternative submissions, described by his counsel as his "high ground" and "low ground" positions. These submissions were developed at length but essentially both are founded on the contention that as a recorder appointed under section 21 of the Courts Act 1971 (as amended) Mr O'Brien *worked* for *remuneration* subject to *terms and conditions* akin to an employment contract. Either it was a contract, Mr O'Brien says, of a type falling within the definition of "worker" in Regulation 1(2) of the Regulations (his "high ground" position) or there was an "employment relationship" falling within Clause 2(1) of the Framework Agreement (his "low ground" position).

22. By contrast the position of the Ministry of Justice is that Mr O'Brien was not a person working under any sort of contract. He was, it is said, the holder of an office and (as the independence of the judiciary demands) was not subject to the direction of any employer. The fact that he was subject to income tax under Schedule E is of no assistance to him since income tax under Schedule E is charged on the earnings of an office or employment (Income Tax (Earnings and Pensions) Act 2003 section 5).

23. Both sides referred to numerous authorities, the most important being the decision of the House of Lords in *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73 [2006] 2 AC 28. That case concerned a claim for sex discrimination by a female associate minister of the Church of Scotland. Her claim was made under the Sex Discrimination Act 1975, section 82(1) of which contains a definition of "employment" substantially similar (in its requirement of a contract of service or a contract for personal execution of work or labour) to that in the Regulations. The House of Lords, by a majority of four (Lord Nicholls, Lord Hope, Lord Scott and Lady Hale) to one (Lord Hoffmann) allowed Ms Percy's appeal, holding that she was in employment and that the Employment Tribunal had jurisdiction to hear her claim.

24. In *Percy* the majority held that tenure of an office does not necessarily exclude employment, especially where there is a wide statutory definition of that term (see especially Lord Nicholls at paras 18-22, concurred in by Lord Scott and Lady Hale). Employment may extend beyond the traditional concept of a contract of service between "master and servant" (Lord Nicholls at para 13, Lord Hope at para 113, Lady Hale at para 141; compare Lord Hoffmann in dissent at para 66). The degree of control exercised over the employee is therefore less important, and in any case Ms Percy was, in that case, conducting her ministry under the control

of a senior minister (Lord Nicholls at para 13, Lord Hope at para 127, Lady Hale at paras 145-146 and 148).

25. Lord Hoffmann (at para 73) and Lady Hale (at para 145) referred to the principle laid down by the Court of Justice in *Lawrie-Blum v Land Baden-Wurtemberg* C66/85 [1986] ECR 2121, para 17:

“That concept [‘worker’] must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”

That was a case on free movement of workers under what was then article 48 of the Treaty. The claimant was a trainee teacher working in Germany. As the Court of Justice was concerned with a fundamental freedom, the term “worker” had to be given an autonomous Community meaning, and the concept was to be interpreted broadly (para 16).

26. Lady Hale, at paras 143-148, gave detailed consideration to the decision of the Court of Appeal of Northern Ireland in *Perceval-Price v Department of Economic Development* [2000] IRLR 380, a claim on sex discrimination grounds brought by three female holders of full-time judicial office (two were chairmen of tribunals and one was a social security commissioner). Their claims were made under statutory provisions which excluded the holder of a statutory office, but the Court of Appeal of Northern Ireland disregarded the exclusion as being inconsistent with the Equal Treatment Directive 76/207/EEC of 9 February 1976 (which had direct effect). Sir Robert Carswell LCJ, giving the judgment of the court, pointed out that the purpose of article 119 of the Treaty and the Equal Pay and Equal Treatment Directives was to protect against discrimination and continued (p384):

“All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the President of the Industrial Tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they

be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment . . .”

The Supreme Court agrees with these observations.

27. A recorder appointed under section 21 of the Courts Act 1971 (as amended) undoubtedly holds an office. Judicial office is one of the oldest and most important offices known to English law. That office is marked by a high degree of independence of judgment, as it must be in order to satisfy the requirements of Article 6 of the European Convention on Human Rights for an “independent and impartial tribunal.” A recorder, unlike the associate minister of religion in *Percy*, is not subject to the directions of any superior authority as to the way in which he or she performs the function of judging. Nevertheless recorders (and all judges at every level) are subject to terms of service of the sort referred to by Sir Robert Carswell LCJ. Indeed judicial office partakes of most of the characteristics of employment. However, because domestic law cannot readily be disentangled from EU law on this issue the Court prefers to express no concluded view, as to whether judges (as a general class) would qualify as “workers” under the Regulations, and as to whether Mr O’Brien would qualify as a worker if regulation 17 were to be disregarded (in the same way as part of a domestic measure was disregarded in *Perceval-Price v Department of Economic Development*).

V

The need for a reference to the Court of Justice

28. In approaching the EU issues this Court considers that three general points are clear. First, there is no single definition of “worker” which holds good for all the purposes of Community law: *Martinez Sala v Freistaat Bayern* C-85/96 [1998] ECR I – 2691 para 31; *Allonby v Accrington and Rossendale College* C-256/01 [2004] ICR 1328. Second, in contrast to the position under other Directives (where references to workers have an autonomous European meaning) the effect of Clause 2(1) of the Framework Agreement, read together with Recital (16) of the PTWD, is to make domestic law relevant to the interpretation of the expression “worker”. Thirdly, however, domestic law is not to oust or “trump” the principles underlying the EU legislation in such a way as to frustrate them. Its underlying purposes must be (as Recital (16) puts it) respected.

29. The Court has heard sharply conflicting submissions as to how these general points, which are not in dispute, should be applied to the circumstances of Mr O'Brien's case. In particular the Court has heard detailed submissions on three comparatively recent decisions of the Court of Justice, that is *Landeshauptstadt Kiel v Jaeger* C-151/02 [2004] ICR 1528, *Wippel v Peek & Cloppenburg GmbH & Co KG* C-313/02 [2005] ICR 1604 and *Del Cerro Alonso v Osakidetza (Servicio Vasco de Salud)* C-307/05 [2008] ICR 145.

30. *Jaeger* was concerned with the application of the definition of working time in para 2(1) of the Working Time Directive 93/104/EC of 23 November 1993 to time spent on call by junior doctors in German hospitals:

“‘working time’ shall mean any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice”.

The doctors had to be on call at the hospital, but when not actually working could sleep in accommodation provided for them at the hospital.

31. The Advocate General (Colomer) stated in para 36 of his opinion:

“despite the fact that article 2(1) of Directive 93/104 provides that the three criteria used to define working time are to be specifically delimited in accordance with national laws and/or practice, that stipulation does not mean that member states may refrain from applying those criteria and rely on rules of national law . . . However a member state may not rely on its own legislation to support the view that a doctor who carries out periods of duty on call in a hospital is not at the employer’s disposal at times when he is inactive but is waiting for his services to be called on again.”

32. The Court of Justice stated (paras 58 and 59 of the judgment):

“In any event the concepts of ‘working time’ and ‘rest period’ within the meaning of Directive 93/104 may not be interpreted in accordance with the requirements of the various legislations of the member states, but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that Directive as the Court did in *SIMAP*, at p1147, paras 48-50. Only such an autonomous

interpretation is capable of securing for that Directive full efficacy and uniform application of those concepts in all the member states.

Accordingly, the fact that the definition of the concept of working time refers to “national laws and/or practice” does not mean that the member states may unilaterally determine the scope of that concept. Thus, those states may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account, since that right stems directly from the provisions of that Directive. Any other interpretation would frustrate the objective of Directive 93/104 of harmonising the protection of the safety and health of workers by means of minimum requirements: see *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (Case C-84/94) [1999] ICR 443, 506, 510, paras 47 and 75.”

That passage has been adopted in another case on the Working Time Directive, *Pfeiffer v Deutsches Rotes Kreuz* C-397-403/01 [2005] ICR 1307, para 99.

33. These decisions seem to show that the need to make some reference to domestic law cannot be permitted to frustrate the overriding Community purpose of safeguarding the health and safety of workers. The Ministry of Justice’s written submissions (para 109) contend that a claim under the PTWD does not engage any fundamental Community right. But the aim of the PTWD and the Framework Agreement is to eliminate inequality and discrimination. As the Advocate General (Sharpston) stated in *Istituto Nazionale della Previdenza Sociale v Bruno & Pettini* C-395/08, para 119:

“The prohibition on discrimination in Clause 4 of the Framework Agreement is a particular expression of the general principle of equality. It must therefore be interpreted in accordance with that principle. Any national implementing measures must likewise respect the general principles of Community law, including the principle of equal treatment.”

The elimination of inequality and discrimination is at least as important a Community principle as the health and safety of workers.

34. *Wippel* was concerned with an Austrian part-time worker whose contract was of an exiguous character in that she was not entitled to be offered any minimum amount of work, nor was she bound to accept work if it was offered.

Nevertheless the Austrian Oberster Gerichtshof, in making its reference, stated that the claimant was recognised as a worker by domestic law. She was therefore within para 2(1) of the Framework Agreement.

35. In that case the Advocate General (Kokott) stated (para 45):

“Consequently, for the purposes of the Framework Agreement, the term ‘worker’ is not a Community law concept. Indeed, the personal scope of application of the Framework Agreement is defined by reference to the national law applicable in each case. The term ‘worker’ therefore has to be defined in reliance on the law, collective agreements and practices in force in each member state. The member states have wide discretionary powers in this respect. Only the very broadest limits can be determined in this respect by reference to Community law. It could therefore constitute a breach of the duty of co-operation (article 10 EC) if a member state were to define the term ‘worker’ so narrowly under its national law that the Framework Agreement on part-time work were deprived of any validity in practice and achievement of its purpose, as stipulated in Clause 1, were greatly obstructed. However, there is no sign of that here.”

The Ministry of Justice relies heavily on this passage, as did the Court of Appeal ([2008] EWCA Civ 1448, para 46) following Elias J in *Christie v Department of Constitutional Affairs* [2007] ICR 1553, para 40. The Court of Justice reached the same conclusion as the Advocate General, but its judgment on the first question (paras 35-40) appears to give no support to her statement that member states have “wide discretionary powers” or that “only the very broadest limits” can be set by reference to Community law.

36. *Del Cerro Alonso* was concerned with workers in the Basque health service who were initially classified as “temporary regulated staff” but were then regraded as permanent staff. They were refused length-of-service allowances in respect of their service in the temporary grade and made complaints under Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work. Their claims were resisted by the health service on the ground of objective justification, but the Kingdom of Spain intervened to contend that the regulated staff, as public-sector workers, were completely outside the scope of the Directive (which contained a definition of “worker” in terms very similar to that in Clause 2(1) of the Framework Agreement under the PTWD).

37. The Advocate-General (Poiares Maduro) considered this point in a long passage in his opinion (paras 11-15). It is sufficient to cite the conclusion in para 15:

“That conditional renvoi appears to me to be the process which is most faithful to both the letter and the spirit of the Community legislation. The effect of it is that the member state cannot merely rely on the formal or special nature of the rules applicable to certain employment relationships in order to exclude the latter from the benefit of the protection afforded by the Framework Agreement. If that were the case, there would be grounds for concern that the Framework Agreement could be rendered completely redundant. If it were the case, it would be open to any member state to make the contract staff of the public authorities subject to special rules in order to call in question the decisions adopted by the Court of Justice in *Adeneler v Ellinikos Organismos Galaktos (ELOG)* (Case C-212/04) [2006] ECR I-6057; *Marrosu v Azienda Ospedaliera Ospedale San Martino di Genova . . .* (Case C-53/04) [2006] ECR I-7213 and *Vassalo v Azienda Ospedaliera Ospedale San Martino di Genova . . .* (Case C-180/04) [2006] ECR I-7251. Consequently, the exclusion of public servants from the scope of Directive 99/70 cannot be accepted unless it is demonstrated that the nature of the employment relationship between them and the administration is *substantially* different from that between employees falling, according to national law, within the category of ‘workers’ and their employers.”

38. The Court of Justice observed (para 29 of the judgment):

“The mere fact that a post may be classified as ‘regulated’ under national law and has certain characteristics typical of the Civil Service in the member state in question is irrelevant in that regard. Otherwise, in reserving to member states the ability to remove at will certain categories of persons from the protection offered by Directive 99/70 and the Framework Agreement, the effectiveness of those Community instruments would be in jeopardy as would their uniform application in the member states: see, by analogy, *Landeshauptstadt Kiel v Jaeger* (Case C-151/02) [2004] ICR 1528, paras 58 and 59, and *Pfeiffer v Deutsches Rotes Kreuz* (Joined Cases C-397-403/01) [2005] ICR 1307, para 99. As is clear not only from the third paragraph of article 249 EC, but also from the first paragraph of article 2 of Directive 99/70, in light of recital (17) of the preamble to that Directive [which is identical to recital (16) of the PTWD] the member states are required to guarantee the result imposed by Community law: *Adeneler* [2006] ECR I-6057, para 68.”

39. For the Ministry of Justice, the high point of these citations is the statement by Advocate-General Kokott in *Wippel* that member states have “wide discretionary powers” (a statement not endorsed by the Court of Justice). For Mr O’Brien the high point is the passage (set out in the last paragraph) from the judgment of the Court of Justice in *Del Cerro Alonso*. The jurisprudence of the Court of Justice appears to give little clear guidance as to what type of national deviation from the Community norm shows a lack of “respect” (Recital (16) of the PTWD), or is justified by the nature of the post or office being “*substantially different*” from that of normal workers (para 15 of the opinion of Advocate-General Poiares Maduro in *Del Cerro Alonso*).

40. Accordingly the Supreme Court of the United Kingdom seeks guidance as to whether the permissibility of a national deviation from the Community norm should be judged by some or all of the following considerations: (1) the number of persons affected (large numbers of doctors and healthcare workers must have been affected by the issues raised in *Jaeger* and *Del Cerro Alonso*); or (2) the special position of the judiciary, for whose work independence of judgment, is an essential feature; or (3) the degree to which a particular exclusion under national law appears to have been effected with a particular Community measure in mind. In connection with this last point it is a particular cause for concern that the exclusion of fee-paid part-time judges by Regulation 17 of the Regulations has some appearance of being a deliberate ad hoc exclusion of a particular category while their full-time or salaried part-time colleagues, doing the same or similar work, will be entitled to judicial pensions on retirement.

41. The Supreme Court has therefore concluded that it is necessary to refer the following questions to the Court of Justice:

“(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, or is there a Community norm by which this matter must be determined?

(2) If 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, 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?”