THE INDUSTRIAL TRIBUNALS

CASE REFS: 1910/12
518/14
1214/12
540/12
1953/12

CLAIMANTS: **Hilary Keegan**
Isobel Margaret Brownlie
Ruth Collins
William Kenneth Duncan
Philip Nigel Gilpin

RESPONDENTS: **1. Ministry of Justice**
2. Department of Justice

DECISION

The unanimous decision of the tribunal is that the claimants have been unlawfully discriminated against by the respondents contrary to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (NI) 2000 and the Part-time Workers Directive 97/81 EC. Remedy will be determined at a separate remedy hearing.

Constitution of Tribunal:

Vice President: **Mr N Kelly**

Members: **Dr C Ackah**
Ms F Cummins

Appearances:

The claimants were represented by Mr R Allen, Queen's Counsel, and Mr A Colmer, Barrister-at-Law, instructed by O'Reilly Stewart, Solicitors.

The respondents were represented by Mr C Bourne, Queen's Counsel, and Mr B Mulqueen, Barrister-at-Law, instructed by the Crown Solicitor's Office.

Background

1. At the relevant times, the five claimants were salaried (not fee-paid) District Judges. They were appointed for open-ended terms.

2. At the relevant times, each of the claimants were also Deputy County Court Judges. They were appointed for fixed terms of three or five years which were renewed periodically.

3. Each of the claimants, while salaried District Judges, sat from time to time as a Deputy County Court Judge assisting the salaried County Court Judges in the conduct of County Court work.

4. While sitting as Deputy County Court Judges, each claimant continued to receive a salary as a District Judge. They did not receive any additional salary or payment in respect of the days when, for part of the day or for the whole day, they sat as Deputy County Court Judges.

5. Pension entitlement has accrued in respect of those days spent sitting as Deputy County Court Judges by reference only to the claimants' District Judge salaries and not by reference to the higher salary payable to a County Court Judge or by reference to any daily fee calculated on the basis of that higher salary.

6. The claimants allege that the respondents have unlawfully discriminated against them, in respect of both salary and pension, accrual contrary to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 (the 2000 Regulations) and the Part-time Workers Directive 97/81EC (the Directive).

7. The claimants have no current claims under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 or the Fixed Term Workers Directive 99/70/EC.

8. The only claim before this tribunal is the claim outlined in paragraph 6 above..

9. It has been agreed that this hearing shall proceed in relation to liability only.

10. The case-management process identified that there were four agreed legal issues to be determined by the tribunal. The first agreed legal issue was:-

> *"Whether or not the claimants were part-time workers within the meaning of Regulation 2(2) of the 2000 Regulations in their capacities as Deputy County Court Judges?"*

11. The second agreed legal issue was:-

> *"Whether a salaried County Court Judge is a comparable worker in relation to a Deputy County Court Judge for the purposes of Regulation 2(4) of the 2000 Regulations?"*

12. The third agreed legal issue was:-

"Whether the claimants have been subject to less favourable treatment when sitting as Deputy County Court Judges for the purposes of Regulation 5(1) of the 2000 Regulations?"

13. The fourth agreed legal issue was:-

"Whether, if there has been such less favourable treatment, the less favourable treatment has been on the ground that the claimants are part-time workers, for the purposes of Regulation 5(2)(a) of the 2000 Regulations?"

14. If the legal issues were to be resolved in favour of the claimants, the respondents did not wish to argue that any relevant treatment of the claimants had been objectively justified for the purposes of Regulation 5(2)(b) of the 2000 Regulations.

Procedure

15. Before the substantive hearing, the respondents conceded the third agreed legal issue. They accepted, if the first, second and fourth agreed issues were decided in favour of the claimants, that the claimants had been subjected to less favourable treatment for the purposes of Regulation 5(2)(a).

16. The witness statement procedure had been directed in the course of the case management discussions. The parties had therefore exchanged witness statements in advance of the hearing. Those witness statements were to take the place of oral evidence-in-chief. The intention was that each witness would swear or affirm to tell the truth, adopt their witness statement as their entire evidence-in-chief, and move immediately into cross-examination and brief re-examination.

17. Each of the claimants had provided a witness statement. On behalf of the respondents, Mr Peter Luney, Acting Chief Executive of the Northern Ireland Courts and Tribunal Service, and Mr Alistair Cook, Head of the Judicial Pay Team in the Ministry of Justice, had provided witness statements. Those witness statements had been exchanged with the claimants in accordance with directions.

18. On 27 March 2017 Judge Brownlie had exchanged an additional witness statement in response to the witness statements provided by the respondents.

19. In the substantive hearing, each of the claimants was cross-examined and re-examined.

20. Mr Peter Luney and Mr Alistair Cook were cross-examined and re-examined.

21. His Honour Judge McFarland also gave evidence and had provided a witness statement shortly in advance of the hearing. However, his evidence was not advanced on behalf of either the claimants or the respondents. His witness statement had been provided after the exchange of the parties' witness statements and after the provision of the additional witness statement by Judge Brownlie. Those witness statements had been provided to him before he prepared his own witness statement.

22. Since Judge Brownlie had provided an additional witness statement and since His Honour Judge McFarland has provided a witness statement, both parties were permitted to adduce additional oral evidence in chief. In the event, only Judge Brownlie and Judge Gilpin gave additional oral evidence in chief.

23. The parties provided skeleton arguments before the hearing. Copies are annexed to this decision.

24. The evidence was heard on 26 – 27 April 2017.

25. The parties exchanged and provided to the tribunal written submissions by 8 May 2017. Copies are annexed to this decision. In their written submission, the respondents conceded the second agreed legal issue. They accepted that a Deputy County Court Judge does work that is broadly similar to that of a County Court Judge and that a County Court Judge was a proper comparator. That left only the first and the fourth agreed legal issues to be determined by the tribunal.

26. The tribunal heard oral submissions on 19 May 2017.

27. On 30 May 2017, counsel for the claimants alerted the tribunal to the decision of the Supreme Court in ***R (Coll) v Secretary of State for Justice*** which had been delivered on 24 May 2017. They added a brief submission which was copied to the respondents. The respondents were asked to provide any response by 5.00 pm on 2 June 2017.

28. The tribunal met on 31 May 2017 to consider the evidence and the submissions and to reach its decision. The respondents' response in relation to ***Coll*** was provided later to the panel for consideration before the decision issued. This document is the tribunal's decision.

Relevant law

29. Article 1 of the *Council Directive 97/81/EC* ('the Directive') implemented a Framework Agreement on part-time work which had been reached between the Union of Industrial and Employer's Confederations of Europe, the European Trade Union Confederation and the European Centre of Enterprises with Public Participation. Article 1 of the Directive stated:-

> *"The purpose of this Directive is to implement the Framework Agreement on part-time work concluded on 6 June 1997 between the general cross-industry organisations (UNICE, CEEP and the ETUC) annexed hereto."*

30. The Framework Agreement was annexed to the Directive. The recitals to the Directive provided, inter alia, that the purpose of the Framework Agreement was:-

> *"Whereas the signatory parties wished to conclude a framework agreement on part-time work setting out the general principles and minimum requirements for part-time working : whereas they have demonstrated their desire 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."*

31. Clause 2(1) of the Framework Agreement provides that:-

> *"(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."*
>
> *[Tribunal's emphasis]*

32. Clause 3 of the Framework Agreement provides that:-

> *"For the purpose of this agreement:*
>
> *(1) The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.*
>
> *(2) The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations may include seniority and qualification/ skills."*

33. Clause 4 of the Framework Agreement provides that:-

> *"(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* (tribunal's emphasis).
>
> *(2) Where appropriate, the principle of pro rata temporis shall apply."*

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 ('the 2000 Regulations')

34. Regulation 2(1) and (2) of the 2000 Regulations provide:-

> *"(1) A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.*
>
> *(2) A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker."*

Regulation 2(4) of the 2000 Regulations provides:-

> *"A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place —*
>
> *(a) both workers are —*
>
> *(i) employed by the same employer under the same type of contract, and*
>
> *(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and*
>
> *(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (*a*), works or is based at a different establishment and satisfies those requirements."*

35. Regulation 5 of the 2000 Regulations provides:-

> *"(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 <u>on the ground</u> that the worker is a part-time worker; and [Tribunal's emphasis]*
>
> *(b) the treatment is not justified on objective grounds [Tribunal's note : the respondent do not argue objective justification in the present case].*
>
> *(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."*

36. Regulation 8(1) and (6) of the 2000 Regulations provides:-

> *"(1) Subject to Regulation 7(5), a worker may present a complaint to an industrial tribunal that his employer has infringed a right conferred on him by Regulation 5 or 7(2).*

(6) Where a worker presents a complaint under this Regulation it is for the employer to identify the ground for the less favourable treatment or detriment."

Appointment of County Court Judges

37. Section 102 of the County Courts Act (Northern Ireland) 1959 ('the 1959 Act') provides:-

"(1) Her Majesty may appoint a qualified person to be a judge.

(2) A judge shall sit in the county court in accordance with directions given by the Lord Chief Justice.

(3) A judge may, in accordance with such directions, sit as a judge for any division.

(4) Subject to sub-sections (2) and (3), the Lord Chief Justice shall assign one or more judges to each division and may from time to time vary any such assignment.

(5) The judge, or (if more than one) one of the judges, assigned to the division which is or includes —

(a) the area of the city of Belfast shall be styled the Recorder of Belfast;

(b) the area of the city of Londonderry shall be styled the Recorder of Londonderry.

(6) In this Act 'judge' means a county court judge, that is to say a judge appointed under this section."

38. Section 103 of the 1959 Act provides:-

"(1) A person shall not be qualified to be appointed a judge unless he is –

(a) a member of the Bar of Northern Ireland or at least ten years standing; or

(b) a solicitor of the Court of Judicature of at least ten years standing."

39. Section 106 of the 1959 Act provides for the payment of salaries to County Court Judges:-

"(1) There shall be paid to each judge such salary as may be determined by the Lord Chancellor with the consent of the Treasury.

(2) The salary payable to any judge shall begin from the date on which the judge takes the required oath or makes the required affirmation and declaration.

(3) The Lord Chancellor with the approval of the Treasury may allow to any judge, for the purpose of defraying his travelling and subsistence expenses, such sum as appears reasonable.

(4) Sums payable under subsection (3) are to be paid by the Department of Justice."

Appointment of Deputy County Court Judges

40. Section 107 of the 1959 Act provides for the appointment of Deputy County Court Judges:-

"(1) The Northern Ireland Judicial Appointments Commission may appoint as deputy judge a person who is —

(a) a member of the Bar of Northern Ireland of at least ten years' standing; or

(b) a solicitor of the Court of Judicature of at least ten years' standing.

(1A) The term for which a person is appointed as a deputy judge is to be determined by the Commission with the agreement of the Department of Justice.

(2) The appointment of a person as a deputy judge shall specify the term for which he is appointed http://www.legislation.gov.uk/apni/1959/25/section/107 - commentary-c21294871*as determined under subsection (1A).*

(3) Subject to subsection (4), the Commission may, with the agreement of a deputy judge and the Department of Justice, from time to time extend, for such period as it thinks appropriate, the term for which the deputy judge is appointed.

(4) Neither the initial term for which a deputy judge is appointed nor any extension of that term under subsection (3) shall be such as to continue his appointment as a deputy judge after the day on which he attains the age of seventy; but this subsection is subject to section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993 (... power to authorise continuance in office up to the age of 75).

(5) A deputy judge shall, while he is so acting, have the like authority, jurisdiction, powers and privileges as a judge in all respects http://www.legislation.gov.uk/apni/1959/25/section/107 - commentary-c17019981*and a reference in any statutory provision to, or which is to be construed as a reference to, a county court judge shall, for the purposes of or in relation to any proceedings in a county court, be*

construed as including a reference to a deputy judge appointed under this section.

(6) Where the hearing of any proceedings duly commenced before any deputy judge is adjourned or judgment is reserved therein, that deputy judge shall, notwithstanding anything in sub-section (2) or (4), have power to resume the hearing and determine the proceedings or, as the case may be, to deliver the judgment so reserved.

(7) The Department of Justice shall pay to every deputy judge, except a resident magistrate, such remuneration and allowances as the Lord Chancellor may, with the concurrence of the Treasury, determine." [Tribunal's emphasis]

41. It is notable that in Section 107(7) there is a specific exclusion of resident magistrates; but of no one else. There certainly is no exclusion of those who hold a lesser paid salaried appointment. That suggests that such Deputy County Court Judges are not meant to be excluded from payment; expressio unis est exclusio alterius.

Appointment of District Judges

42. District Judges are statutory officers and are included in Schedule 3 to the Judicature (Northern Ireland) Act 1978 ('the 1978 Act'). That Act states at Section 70:-

*"**Appointment and qualification of statutory officers***

(1) Appointments to the offices listed in column 1 of Schedule 3 shall be made by the Northern Ireland Judicial Appointments Commission after consultation with the Lord Chief Justice; and persons holding such offices are in this Act referred to as 'statutory officers'.

(1A) The Lord Chief Justice must be consulted before a determination (or a revision of a determination) is made under Part 3 of Schedule 3 to the Justice (Northern Ireland) Act 2002 in relation to statutory officers.

(1B) The terms and conditions of service for statutory officers are to be determined by the Lord Chancellor with the concurrence of the Treasury.

(1C) Any salary or other amounts payable under subsection (1B) shall be paid by the Department of Justice.

(2) Subject to subsection (3), a person shall not be qualified for appointment to any of the offices listed in column 1 of Schedule 3 unless he is —

(a) a barrister or solicitor who has at least the number of years standing specified in relation to that office in column 3 of that Schedule; or

(b) the holder of any other office so listed.

[Tribunal's note : Schedule 3 requires seven years' standing.]

(3) In exceptional circumstances, where it appears to the Commission that a suitable appointment cannot be made in accordance with the provisions of subsection (2) and Schedule 3, it may, notwithstanding those provisions, after consultation with the Lord Chief Justice, appoint any barrister, solicitor or other person whom it considers to be suitable for appointment having regard to his knowledge and experience.

(4) Without prejudice to section 68, the functions of the holder of each office listed in column 1 of Schedule 3 shall include the functions specified in relation to that office in column 4 of that Schedule (being functions heretofore exercised by the holder of the office or offices so specified) and accordingly —

(a) for a reference in any statutory provision relating to those functions to any office listed in column 4 of Schedule 3 or to the holder of any such office there shall be substituted a reference to the appropriate corresponding office listed in column 1 of that Schedule or to the holder of that office, as the case may be; and

(b) the offices specified in column 4 of Schedule 3 are hereby abolished.

[Tribunal's note : The relevant office abolished by the creation of the Office of District Judge is that of 'District Probate Registrar'.]

(5) The Department of Justice may by order made after consultation with the Lord Chief Justice at any time modify Schedule 3 by:—

(a) removing any office and any entry relating thereto from that Schedule;

(b) adding any office and any entry relating thereto to that Schedule;

(c) amending the title of any office or amending any entry relating to any office in that Schedule.

(6) An order under subsection (5) may make provision for any incidental, consequential, transitional or supplementary matters for which it appears to the Department of Justice to be necessary or expedient for the purpose of the order to provide and may amend or repeal any statutory provision (including any provision of this Act) so far as may be necessary or expedient in consequence of the order."

Career histories of the claimants

Judge Brownlie

43. Judge Brownlie had originally worked as a private practice solicitor. She had been appointed as a Deputy District Court Judge and had sat in that capacity for some years. During that fee-paid appointment she had dealt with the full range of District Judge work. She had not been told and had been unaware that salaried (not fee-paid) District Judges always held a concurrent appointment as Deputy County Court Judges.

44. Judge Brownlie then applied for the post of a salaried District Judge. She was appointed as a salaried District Judge on 29 September 1997.

45. Judge Brownlie was separately appointed by the Lord Chancellor to the post of Deputy County Court Judge on 4 September 1997. That appointment was made under different legislation and was effected by a separate warrant. It was periodically renewed thereafter (latterly for period of five years) and she continues to sit as a Deputy County Court Judge.

46. On each occasion when Judge Brownlie's appointment as Deputy County Court Judge was due to expire she was asked:-

    "Are you willing to be re-appointed for a further period of ____ years?"

    Judge Brownlie consented to the renewal of that appointment on each occasion. The offer and the acceptance of each renewal of the appointment was voluntary and not compulsory.

47. Judge Brownlie sat initially in the Southern Circuit, covering the County Court Divisions of Fermanagh and Tyrone, Armagh and South Down. She then sat in the Eastern Circuit, comprising the County Court Division of Downpatrick, Newtownards and Craigavon. Latterly she sat in the Belfast Circuit, comprising the County Court Division of Belfast.

    The different jurisdictions were combined into a single County Court Division on 31 October 2016 covering the whole of Northern Ireland. Judge Brownlie continued thereafter to sit in Belfast as a salaried District Judge and as a Deputy County Court Judge.

48. Judge Brownlie was appointed as the Presiding District Judge in 2013.

49. The position has changed over the last two to three years in Belfast. A County Court Judge, His Honour Judge Devlin, has dealt mainly with civil work over that period and was formally assigned as the Civil County Court Judge in Belfast in January 2017.

50. Before that change in practice in Belfast, Judge Brownlie would have dealt with matters falling within the jurisdiction of a Deputy County Court Judge on four days out of five per week. Since that change of practice in Belfast, she has dealt with work as a Deputy County Court Judge on three or four days out of five per week.

51. Judge Brownlie was appointed as a Deputy County Court Judge under a separate appointment, some three weeks earlier than her appointment as a salaried District Judge. The appointment was made under different legislation and was effected by a separate warrant. It required a different and longer qualifying period of professional practice.

52. Judge Brownlie had not been told in the notice from the Lord Chancellor in relation to the appointment as salaried District Judge that there would be a concurrent appointment as Deputy County Court Judge and she was surprised by that separate appointment.

53. No record has been kept of the sitting days during which Judge Brownlie exercised the role of Deputy County Court Judge. Her evidence, which was not rebutted and which the tribunal, in any event accepts, was that for the period up to approximately two years ago she was sitting on four out of five days per week doing partly or wholly Deputy County Court Judge work and latterly, for the last two years, was sitting on three or four days per week doing partly or wholly Deputy County Court Judge work. One such case was the Ashers Bakery discrimination case which lasted some days.

54. Judge Brownlie received no additional payment and accrued no additional pension entitlement for the days on which she had exercised the role of a Deputy County Court Judge. She received the salary as a salaried District Judge with no enhancement to take account of work performed at the higher level.

55. The evidence from Judge Brownlie, which was not rebutted, was that a colleague who sat as both the Deputy District Judge and a Deputy County Court Judge had been paid at the higher rate of a Deputy County Court Judge whenever he sat on mixed lists which included both District Judge work and Deputy County Court Judge work.

56. It is clear that in the Belfast area the Crown Court (criminal) work is dealt with by either salaried County Court Judges or by those Deputy County Court Judges who are in fact retired salaried County Court Judges. There have been occasions in the past where His Honour Judge Burgess would have dealt with Crown Court matters as a Deputy County Court Judge. However that was very much an exception to the general practice.

57. Judge Brownlie produced a list for 25 April which was headed as a Deputy County Court Judge list. She would have had two separate lists: one a Deputy County Court Judge list and one a District Judge. That practice of having two lists had started about two years ago to gather evidence for this litigation. In practice she regarded them as a single mixed list. However, apart from this one example, no lists were provided to this tribunal, even at the stage when comparability was an agreed legal issue.

58. Judge Brownlie said in her evidence in chief that "*I continued to sit as a full-time District Judge*". Whether this statement reflects the reality of the situation is for the tribunal to determine.

Judge Keegan

59. Judge Keegan was originally appointed as a salaried Circuit Registrar on 23 April 1979. That post was renamed as District Judge. He remained in that post until 31 January 2012, on which date he retired.

60. Judge Keegan was separately appointed by the Lord Chancellor to the post of Deputy County Court Judge on 21 December 1979. That initial appointment was for a period of one year. That appointment was periodically renewed thereafter for three year periods and he continued to sit as a Deputy County Court Judge until 22 April 2012, some three months after he had retired as a salaried District Judge.

61. On each occasion when Judge Keegan's three year appointment as a Deputy County Court Judge was due to expire, he was asked:-

"Are you willing to be re-appointed for a further period of three years?"

Judge Keegan consented to the renewal of that appointment on each occasion. The offer and acceptance of each renewal was voluntary and not compulsory.

62. Judge Keegan sat as Court Registrar and then as District Judge in the Northern Circuit which comprised the two County Court Divisions of Londonderry and North Antrim.

63. Judge Keegan was appointed as a Deputy County Court Judge under a separate appointment, which was under different legislation and was effected by a separate warrant. The appointment started and finished at different times to the appointment as a salaried District Judge. It had also required periodic renewal. It also required a different and longer qualifying period of professional practice.

64. No record has been kept of the sitting days during which Judge Keegan exercised the role of Deputy County Court Judge. His evidence, which was not rebutted, and which the tribunal, in any event, accepts, was that for most of the relevant period from 1979 to 2012 he had exercised the role of Deputy County Court Judge on four out of five sitting days per week. During those days he had sat either wholly or partly as a Deputy County Court Judge.

65. Judge Keegan received no additional payment and accrued no additional pension entitlement for the days on which he had exercised the role of Deputy County Court Judge. He received his salary as a salaried District Judge with no enhancement to take account of work performed at the higher level.

66. Judge Keegan stated in his evidence in chief that: "In this role (District Judge) I was a full-time worker". Whether that statement reflects the reality of the situation is for the tribunal to determine.

67. Judge Keegan attended two meetings between the Lord Chancellor and Northern Ireland Court Registrars. The first took place on 24 March 1988. Judge Keegan was referred to the brief notes of the meeting which have been retained by the Lord Chancellor's Department. It is clear that several issues were discussed during that meeting. One such issue was the issue in the present case; ie the payment (or

non-payment) of Registrars for work as Deputy County Court Judges. While the notes simply recorded '*they accepted that no-one who holds a full-time judicial appointment has in fact ever been paid for sitting as a Deputy County Court Judge*', that is not recorded as either the response given to them or as a justification or explanation for the practice. It simply notes that the Court Registrars had accepted that that had been the practice. Judge Keegan had only an incomplete recollection of the meeting which had been some 29 years ago. However he was clear that any response which had been given by the Lord Chancellor had been '*vague*'.

The tribunal concludes that if a reasoned response had been given to the Circuit Registrars, it would have been recorded in the notes and it was not. It is therefore more likely than not that no reasoned response had been given during that meeting.

68. In the second meeting, in March 1990, the issue of payment for work as a Deputy County Court Judge had not been mentioned at all in the notes. The tribunal accepts Judge Keegan's evidence that that meeting had principally been focused on a particular pensions issue concerning an accrual span of 30 years rather than 20 years.

69. Both these meetings predated both the Directive and the 2000 Regulations. The issue of part-time worker discrimination would not have been considered.

Judge Collins

70. Judge Collins applied for appointment as a salaried District Judge in April 2000. No mention had been made in the advertisement for that post of any requirement for or the existence of a separate appointment as Deputy County Court Judge. Judge Collins applied for the post and received the application form together with five documents. One document, which was headed '*Guide for applicants – Appointment to the Office of District Judge*', made no reference at all to any separate appointment as a Deputy County Court Judge. Another document headed '*Eligibility and criteria for appointment as District Judge*' stated:-

> *"All District Judges may hold the concurrent post of Deputy County Court Judge."*

The use of the word "may" rather than "must" does not appear to be significant. The concurrent appointment happened as a matter of course.

A document headed '*Office of District Judge – Job description*' stated:-

> *"District Judges exercise County Court general jurisdiction and also hold the concurrent post of Deputy County Court Judge. The jurisdiction of the District Judge is summarised in the annex to this job description."*

In that annex headed '*Jurisdiction of a District Judge (Annex)*' it states that:-

> *"When sitting as County Court Judges, District Judges have the power of County Court Judges in all respects."*

It also states:-

> *"When sitting as Deputy County Court Judges, District Judges have a general civil jurisdiction of £15,000 and an equity jurisdiction of £45,000."*

71. When her application was successful, Judge Collins received terms and conditions of service as a salaried District Judge. Those terms and conditions did not mention any separate appointment as a Deputy County Court Judge or any requirement to undertake the work of a Deputy County Court Judge.

72. Judge Collins later received two separate warrants. One appointed her as a salaried District Judge and one appointed her as a Deputy County Court Judge, both with effect from 6 October 2000. These were separate appointments and made under two different Acts. The post of Deputy County Court Judge required a different and longer qualifying period of professional practice.

73. Judge Collins' appointment as a Deputy County Court Judge was periodically renewed at five yearly intervals. On each occasion she was asked whether she was willing to allow that appointment to be renewed. It was not suggested at any stage that the renewal was compulsory or that a non-renewal would have had any effect on her position as a salaried District Judge. For example, on 10 February 2005, Judge Collins received a letter which stated:-

> *"Your appointment as a Deputy County Court Judge expires on 5th of October 2005. May I take this opportunity on behalf of the Lord Chancellor, to thank you for your contribution to the work of the County Court. I would be grateful if you let me know if you wished to be re-considered for appointment when your present term of appointment expires."*

It is clear therefore that the offer and the acceptance of each renewal was voluntary and not compulsory.

74. Judge Collins is the assigned District Judge for the Eastern Circuit which comprises the two County Court Divisions of Ards and Craigavon.

75. No record has been kept of the sitting days during which Judge Collins exercised the role of Deputy County Court Judge. Her evidence, which was not rebutted, and which the tribunal, in any event, accepts was that when she sat as a Deputy County Court Judge, it was often the case that the entirety of the list was Deputy County Court Judge business. She stated this was particularly the case in the Division of Craigavon where there has been a backlog of criminal work which falls in practice to the assigned salaried County Court Judge. That leaves the bulk of the civil work at county court level to be dealt with by Deputy County Court Judges.

76. In early 2015, Judge Collins received another letter in relation to the periodic renewal of her employment as a Deputy County Court Judge. She sought clarification from the Lord Chief Justice as to whether or not this was compulsory matter. The Lord Chief Justice stated that renewal of the concurrent appointment as a Deputy County Court Judge was a matter of choice for her to make.

77. Judge Collins received an e-mail from the Senior Legal Officer in the Office of the Lord Chief Justice which stated:-

> *"I have been asked to provide advice on whether it is an automatic condition of your appointment as a District Judge (DJ) that you are obliged to sit as a Deputy County Court Judge (DCCJ). For these purposes I have considered two sources:*
>
> *(1) your terms and conditions of appointment (T&Cs) as a DJ; and*
>
> *(2) the statutory provisions governing your appointment and duties.*
>
> *(1) T&Cs*
>
> *Yours T&Cs for appointment as a DJ appear to create no contractual obligation to sit as a DCCJ. They are silent as to the DCCJ appointment and by way of reinforcement, your T&Cs as a DCCJ had been set out in a separate document –*
>
> *...*
>
> *(2) The statutory position*
>
> *The power to appoint a DJ (exercised now by NIJAC but at the time of your appointment by the Lord Chancellor) derives – from Section 70 of the Judicature Act (Northern Ireland) 1978 and Schedule 3 to same, Column 1 which lists the 'statutory offices' of which DJ is one. Nothing in the 1978 Act requires a DJ to discharge the functions of a DCCJ. ...*
>
> *Conclusion*
>
> *While an established policy has developed that means that, for a very understandable practical reasons, permanently appointed DJs also exercise the jurisdiction of a DCCJ, nothing in statute or contract appears to require them to accept the role of DCCJ."*

78. Judge Collins decided to allow the renewal of her appointment as a Deputy County Court Judge and was re-appointed on 6 October 2015. However she decided to stop sitting as a Deputy County Court Judge in the Division of Ards in order to establish that this was not a compulsory requirement of her post as a salaried District Judge. She continued to sit for two days per week in her other Division of Craigavon where she sits as a Deputy County Court Judge often with a full Deputy County Court Judge list.

79. Judge Collins accepted that she had stated in her evidence in chief that she was full-time as a District Judge and part-time as a Deputy County Court Judge. Whether that statement reflects the reality of the situation is for the tribunal to determine.

Judge Gilpin

80. Judge Gilpin was originally appointed as a salaried District Judge on 20 March 2012 and remains in office.

81. Judge Gilpin was separately appointed as a Deputy County Court Judge on 28 March 2012 for a renewable period of five years.

82. These were separate appointments made under two different Acts and effected by two separate Warrants. The post of Deputy County Court Judge required a different and longer qualifying period of professional practice.

83. On each occasion when Judge Gilpin's five year appointment as Deputy County Court Judge was due to expire, he was asked whether he was willing to be re-appointed for a further period of five years.

    Judge Gilpin consented to the renewal of that appointment on each occasion. The offer and the acceptance of each renewal was voluntary and not compulsory.

84. The advertisement inviting applications for the post of District Judge had stated in terms that:-

    > *"The successful applicant will also be appointed as a Deputy County Court Judge."*

    The same was stated in the application information booklet. The terms and conditions of appointment also provided that:-

    > *"It is an established policy that all DJs will also hold concurrently the post of Deputy County Court Judge."*

85. *Paragraph 4* of the terms and conditions of service stated:-

    > *"Full-time salaried judiciary receive no sitting fees for any fee-paid judicial offices held concurrently."*

86. Judge Gilpin was assigned by District Judge for the Northern Circuit comprising the County Court Divisions of Londonderry and Antrim. He was the only salaried District Judge for this Circuit. After the single jurisdiction came into force on 31 October 2016, Judge Gilpin continued to sit in the courthouses that had formally been part of the Northern Circuit. He also continued to sit as a Deputy County Court Judge in those locations.

87. Judge Gilpin's evidence, which was not rebutted and which the tribunal in any event accepts was that since appointment he has sat as a Deputy County Court Judge on a '*very regular basis*'. No records had been kept by the respondents of the days on which Judge Gilpin sat as a Deputy County Court Judge.

88. Judge Gilpin received no additional payment and accrued no additional pension entitlement for those days on which he sat as a Deputy County Court Judge. He received his District Judge salary with no enhancement for work performed at the higher level.

89. Judge Gilpin stated in his evidence in chief that: "*In this role, I am a full-time District Judge*". Whether or not that statement reflects the reality of the situation is for the tribunal to determine.

Judge Duncan

90. Judge Duncan was appointed as a salaried District Judge on 1 April 2014 and remains in office.

Judge Duncan was also appointed as a Deputy County Court Judge on 1 April 2014 for a fixed term period of five years subject to renewal.

91. These were separate appointments made under two different Acts and effected by two separate warrants. The post of Deputy County Court Judge required a different and longer qualifying period of professional practice.

92. The advertisement for the post of salaried District Judge had specified that the successful applicant would hold office concurrently with the office of Deputy County Court Judge.

93. The application information booklet had provided that it was an established policy that all District Judges would also hold concurrently the post of Deputy County Court Judge. The booklet had stated:-

> *"It is an established policy that all District Judges will also hold concurrently the post of Deputy Court Judge. The effect of this concurrent appointment is that individuals must meet the Deputy Court Judge requirement."*

94. The terms and conditions for appointment had provided that it was an established policy that all District Judges would also concurrently hold the post of Deputy County Court Judge.

95. Judge Duncan's appointment as a Deputy County Court Judge has not fallen for renewal yet. However, the booklet stated that:-

> *"At the time of renewal confirmation will be sought from the Deputy County Court Judge that he/she wishes to be considered for re-appointment."*

The booklet also stated that:-

> *"At the end of the initial five year appointment, renewal for a further five years will be considered by the Commission, subject to the individual's agreement ... ."*

It was therefore anticipated that in due course Judge Duncan will be asked in similar fashion to the other claimants for his consent to a renewal of his appointment as a Deputy County Court Judge. However, the offer and the acceptance of any such renewal will be voluntary and not compulsory.

96. Judge Duncan was assigned as District Judge for the Southern Circuit comprising the County Court Divisions for Fermanagh and Tyrone and Armagh and

South Down. He was the sole salaried District Judge for this Circuit. After the coming into force of the single jurisdiction on 31 October 2016 he continued to sit in the same courthouses as before in what comprised the old Southern Circuit.

97. He has sat and continues to sit as a Deputy County Court Judge in those courthouses. He describes this as being on a '*very regular basis*'. This evidence was not rebutted by the respondents and is, in any event, accepted by the tribunal.

98. No record has been kept of the sitting days during which Judge Duncan exercised the role of Deputy County Court Judge.

99. Judge Duncan received no additional payment and accrued no additional pension entitlement for the days in which he had exercised the role of Deputy County Court Judge. He received his salary as a salaried District Judge with no enhancement in respect of the work carried out at the higher level.

100. Judge Duncan stated in his evidence in chief that: "*In this role I am a full-time District Judge*". Whether or not this statement reflects the reality of the situation is for the tribunal to determine..

Relevant findings of fact

101. At the relevant times, each of the claimants was appointed under the 1978 Act to the post of District Judge. This was in each case a statutory appointment which was expressed to be full-time. It attracted a full-time salary determined by the Lord Chancellor with the concurrence of the Treasury.

102. At the relevant times, each claimant was separately appointed under the 1959 Act as a Deputy County Court Judge. This was in each case a statutory appointment for fixed terms of either three or five years. When each such fixed term expired, the appointment was renewed with the consent of the appointee.

103. Deputy County Court Judges are all appointed under Section 107 of the 1959 Act and, when sitting, have the same powers as a County Court Judge. In practice, they do not sit in the Crown Court which deals with serious criminal cases.

104. Deputy County Court Judges can be described as coming from the three distinct sources. Firstly, there are individuals, such as the claimants, who have been appointed as salaried District Judges or salaried Employment Judges and who also hold a concurrent fixed-term appointment as a Deputy County Court Judge. Secondly, there are retired salaried County Court Judges who sit for a period after their retirement as a Deputy County Court Judge. Thirdly, there are practising solicitors or barristers who sit from time to time as a Deputy County Court Judge.

105. Those Deputy County Court Judges who come from the second or third sources receive daily fee payments for the days when they sit as Deputy County Court Judges. They also accrue pension entitlement in respect of those days. Those Deputy County Court Judges, who come from the first source, such as the claimants, do not receive any payment related directly to their work as Deputy County Court Judges. They continue to receive the salary appropriate to their salaried appointment. They do not receive any additional payment for days

when they work as a Deputy County Court Judge and they do not accrue an additional pension entitlement in respect of those days.

106. The salary paid to the claimants in respect of their appointment as a District Judge is the salary payable to Judicial Group 7.

107. The salary paid to a full-time County Court Judge is higher: Judicial Group 6.1. This salary disregards the additional payment paid to those full-time County Court Judges who undertake Diplock trials (ie criminal trials without a jury).

108. One particular salaried County Court Judge has been doing predominantly civil work for approximately three years. He sits in Belfast. This situation was formalised when he was appointed earlier this year (2017) as the '*assigned*' Civil Judge. His Honour Judge McFarland (the presiding County Court Judge) gave evidence that the assigned Civil Judge spends at least 90% of his time doing civil work. His Honour Judge McFarland also stated that he does some Crown Court preliminary applications and some extradition work. However the tribunal was not given further details of how much of this non-civil work has actually been performed over the past three years by this Judge.

109. Judicial salaries, including the salary of a County Court Judge are revised annually by the Lord Chancellor following an annual report from the Senior Salaries Review Body. The revised figure for the annual salary for a County Court Judge is then divided by 218 to produce a daily fee which is then paid to those Deputy County Court Judges within Northern Ireland who come from the second or third sources described above.

110. The division of the County Court Judge salary by a divisor of 218 is a reflection of the number of sitting days expected of a County Court Judge in Northern Ireland. It takes account of local bank and public holidays and annual leave.

The divisor is not affected by the nature of the work which might be undertaken by an individual Deputy County Court Judge from time to time. It remains the same whether the particular Deputy County Court Judge is a retired County Court Judge sitting in a murder trial as a Deputy County Court Judge or whether he is a practising solicitor sitting as a Deputy County Court Judge dealing with a civil bill valued at less than £30,000.00.

111. The respondents' witnesses in cross-examination accepted that the daily fee is fixed in this way because the work of a Deputy County Court Judge is accepted as comparable with the work of a County Court Judge. The respondents have now conceded this point.

The tribunal, in any event, accepts that this is correct. If it were the case that the work of a Deputy County Court Judge or indeed of an assigned Civil Judge, was deemed to be not comparable to those County Court Judges who also sit from time to time in the Crown Court, that would have been reflected in the pay rates payable in each of those examples, either in respect of the salary of the assigned Civil Judge or in respect of the daily fee to be paid to Deputy County Court Judges where they did specific types of work.

112. There is no specific provision under Section 107(7) of the 1959 Act providing that a different rate of remuneration (or no remuneration at all) should be paid to a Deputy County Court Judge who concurrently holds a salaried appointment as a District Judge or as another type of judicial office holder. The legislation appears to contemplate a single rate of remuneration which is to be paid to any Deputy County Court Judge, irrespective of the way in which he was appointed and irrespective of the nature of the County Court Judge work in which he is engaged. However, in the circumstances of these claims, the tribunal has no jurisdiction to determine any public law claim, any claim of breach of contract or any claim for an unauthorised deduction from wages. There are no such claims in any event.

113. Judge Brownlie stated in cross-examination that a colleague of hers holds separate appointments as a Deputy County Court Judge and as a Deputy District Judge. When this colleague sits to deal with a mixed list comprising both Deputy County Court Judge work and Deputy District Judge work, he receives payment at the higher rate; ie at the rate and daily fee appropriate to a Deputy County Court Judge. This evidence was given on the first day of a two day hearing and was not rebutted or even challenged by the respondents. The tribunal therefore accepts that this evidence is correct and that there is a practice, that where work comprises both categories, the daily fee is paid at the higher rate.

114. The tribunal would have expected in a case of this nature, and given the extensive case-management undertaken, that the factual background underlying the claims and responses would have been largely or completely agreed between the parties; that it would have been free from doubt and dispute. Indeed, the skeleton argument on behalf of the claimants indicated at paragraph 3 that there was '*little if any dispute of fact in this case*'.

115. However the tribunal has been disappointed in this regard. Indeed it seems clear, having heard the evidence given by the claimants and on behalf of the respondents that the respondents had been significantly unaware of what work the claimants have actually performed when sitting as Deputy County Court Judges. This is surprising since the tribunal would have expected that the witness statements brought forward in this matter would have been carefully prepared and that the details would have been checked. The tribunal has only been shown one daily list which was produced by Judge Brownlie in the course of cross-examination. The tribunal had been very much left to fall back on the individual evidence of the claimants and of the respondents' witnesses without the benefit of what surely would have been available, ie the actual lists identifying the work undertaken by the individual claimants when sitting from time to time in their respective areas, perhaps over an agreed period. The tribunal has also not heard any evidence from the listing clerks directly responsible for preparing those lists and for allocating work to the claimants. Apart from the claimants, the listing clerks appear to be the only potential witnesses who would have a detailed knowledge of the work actually undertaken by the claimants when sitting as Deputy County Court Judges.

116. While the second agreed legal issue has now, somewhat belatedly, been conceded by the respondents, Mr Allen QC indicated that he might return to this concession, or the timing of this concession, in relation to another application. Therefore, while these matters may not now be strictly relevant to the two remaining agreed legal issues, the tribunal should record its conclusions while memories are fresh.

117. As one example of confusion about work actually undertaken by the claimants as Deputy County Court Judges, His Honour Judge McFarland provided a witness statement in which he stated *at Paragraph 6*:-

> *"I cannot speak as to the historic position, but in Belfast now, it would be rare for a District Judge to sit as a Deputy County Court Judge."*
>
> *[Tribunal's emphasis]*

Mr Peter Luney, the Acting Chief Executive of the Northern Ireland Courts and Tribunals Service had said in his witness statement *at Paragraph 30* that:-

> *"Presiding District Judge Brownlie has sat as a Deputy County Court Judge but because of the volume of District Judge work in Belfast and the number of available County Court Judges, is not required to do so."*

On the basis of these two witness statements, the tribunal was therefore left with the clear impression that Judge Brownlie rarely did Deputy County Court Judge work and that she was not required to do any such work. Judge Brownlie gave evidence that, after the practice of allocating civil work to the County Court Judge who is now the assigned Civil Judge, she dealt with a fewer number of County Court Judge cases than before, ie fewer than before three years ago. However, her evidence was clear that she still sits regularly as a Deputy County Court Judge on between three to four days per week and that this work was given to her by the listing clerks as a matter of course. Judge Brownlie sits in the Laganbank Court Centre where His Honour Judge McFarland also sits. It is therefore remarkable that this degree of misunderstanding had arisen. Judge Brownlie had provided a supplementary witness statement in which she had addressed directly the witness statement of Mr Luney which at that stage had been provided by the respondents. His Honour Judge McFarland accepted that, when he was preparing his own witness statement, a copy of Judge Brownlie's supplementary witness statement had been sent to him but that he '*had not really read it*'.

118. The evidence of Judge Brownlie was first put to Mr Luney in cross-examination. Mr Luney accepted that he was not in a position to dispute the evidence of Judge Brownlie. Later, His Honour Judge McFarland, in cross-examination, stated that he also was not in a position to disagree with Judge Brownlie's evidence and that he accepted what she had said.

119. There were other areas of confusion. Mr Luney stated, for example, that committal civil bills and medical negligence civil bills are not listed before Deputy County Court Judges. That was presumably a statement made either directly from his own pre-existing knowledge or after research into these matters. However, it was clear from the evidence of the claimants that such civil bills are listed before Deputy County Court Judges.

120. Mr Luney, in the course of his cross-examination, suggested repeatedly that there were written documents or directions which were used by listing clerks to decide which type of cases could properly be allocated to Deputy County Court Judges. He stated:-

> *"(Listing clerks) operate written parameters for this."*

"(The allocation of work) reflects the various documents we have which listing officers would be familiar with."

"That (listing) reflects the various directions and documents we have which the listing officers would be familiar with in listing business."

"(Accepting that he was not in a position to dispute Judge Brownlie's evidence) where she says she has done work which falls outside defined categories."

"We have documents which set out different categories."

"We have tried to determine where they (the documents) are drawn from ... (I) know they came from the Lord Chief Justice's office."

121. There was therefore clear and repeated evidence that '*documents*' or '*written parameters*' or '*directions*' were used by listing clerks to allocate business to Deputy County Court Judges. The tribunal would have thought that such documents would have been the first documents to be disclosed in the course of any proper discovery process and that such documents would have formed a major part of the witness statements produced by the respondents in this matter. However they were instead raised obliquely in the course of cross-examination. The Vice President directed that they should be produced by 2.00 pm on the second day. They had been referred to by Mr Luney in the course of the early part of the morning of the second day. Since Laganbank was just down the road and since listing clerks were said to have ready access to these documents and to have applied them in the course of their duties, that did not seem to the tribunal to be a particularly onerous requirement. In any event, the respondents did not object to that direction and did not seek any extension of time.

122. The only document which was produced in response to this direction was a document entitled:-

"Deputy County Court Judge

Judicial job description."

123. That document appears to the tribunal to be a standard document which would have been produced in an appointment process for Deputy County Court Judges. Given the financial limits contained within it, it appears to be a document which would have been produced in a recent appointment process. That would have been an appointment process conducted through the Northern Ireland Judicial Appointments Commission (NIJAC). The document does not seem to be the type of document or direction described by Mr Luney or the type of document which would have been available to listing clerks in their day-to-day duties. It seems to be a document of the type produced by NIJAC. Furthermore, the evidence from Mr Luney had referred to documents and directions (plural). We have seen none of this and we should have done.

124. While it is clearly the case that listing clerks who directly allocate work on a daily or weekly basis to County Court Judges and to Deputy County Court Judges operate under the supervision of the Presiding County Court Judge, His Honour Judge

McFarland, and of individual County Judges, it also seems clear from the evidence that such Judges are often not fully aware of what work Deputy County Court Judges actually perform. That lack of awareness extends to the Northern Ireland Courts and Tribunal Service. It seems clear that the day-to-day allocation of work falls to the listing clerks, subject to whatever understandings or documents or directions might exist. The tribunal again stresses that we were shown no such documents or directions and that no listing clerk was called to give evidence to explain how this system actually works in practice rather than in theory.

125. The rather late concession in relation to the second agreed legal issue (comparability) removes the relevance of this evidence, except to the extent that it may be relevant should there be any further application.

DECISION

126. Before turning to the two agreed legal issues which remain for determination by the tribunal, some other matters should be addressed.

Fixed Term Workers Directive

127. The appointments of the claimants as Deputy County Court Judges are, prima facie, employment relationships where the end of the relationship is determined by reaching a specific date for the purposes of Clauses 3 and 4 of the Framework Agreement annexed to Directive 1999/70/EC.

128. No claim is before the tribunal in respect of that Directive, or in respect of the domestic implementing legislation. The respondents indicated in their skeleton argument, without rebuttal, that any such claim had been abandoned.

129. This tribunal is a statutory tribunal with no inherent jurisdiction and its jurisdiction is strictly limited to the claims properly brought before it. This decision will therefore deal only with the claims brought before it in respect of part-time status.

Community Charter of the Fundamental Social Rights of Workers

130. In his oral submission on 19 May 2017, Mr Allen QC introduced into argument the Community Charter of the Fundamental Social Rights of Workers. He argued that the tribunal should take this Charter into account in the present case.

131. The Charter was made under Article 117 of the Treaty of Rome. That Article refers to improved working conditions for workers.

The Charter sets out an agreement between the then member states in 1989 to adopt a particular declaration. Mr Allen QC referred to Title 1 of that declaration. Article 5 of Title 1 stated:

> *"All employment shall be fairly remunerated. To this effect, in accordance with arrangements applying in each country:*
>
> - *workers shall be assured of an equitable wage, ie a wage sufficient to enable them to have a decent standard of living;*

- *workers subject to employment other than an open-ended full-time contract shall receive an equitable reference wage;"*

[Tribunal's emphasis]

Article 7 of Title 1 stated:

> *"The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organisation of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work."* *[Tribunal's emphasis]*

132. Title 2 of the declaration dealt with the implementation of the Charter. In Article 28, in particular, it indicated that legislative measures would be forthcoming on the part of the Commission.

133. If the Charter had remained as a simple agreement on the part of certain Heads of State it would have little effect. The European Parliament had in 1989 called for the Charter to be adopted as a binding instrument but it had been adopted only as a '*solemn declaration*'. It was initially adopted by only 11 out of 12 Member States and there are no prizes for guessing which of the 12 Member States in 1989 failed to sign the Charter. However, the Part-time Workers Directive issued in December 1997 and in paragraph 3 of the preamble, it referred to Article 7 of Title 1 of the Charter. The UK Government had eventually acceded to the Charter in the same year.

134. The consolidated version of the Treaty of the European Union (2016) states in the preamble that the Member States confirm:

> *"their attachment to fundamental social rights as defined in – the 1989 Community Charter of the Fundamental Social Rights of Workers."*

135. In entirely unrelated litigation, which concerned the planting of vineyards, the ECJ considered the importance of such fundamental rights in ***Liselotte Hauer v Land Rheinland-Pfalz [1979] ECR 3727***. The ECJ stated at paragraph 15 that:

> *"The Court also emphasised in the judgment cited, and later in the judgment of 14 May 1974, **Nold [1974] ECR 491**, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognised by the constitutions of those states are unacceptable in the Community; … "*

136. The assistance that can be derived from the wording of the Charter is limited since its contents are largely repeated in the terms of the Directive. However, it nevertheless emphasises that workers who are engaged on a part-time arrangement or on other than an open-ended full-time contract, should receive what is termed an *'equitable reference wage*'. That can only be regarded as emphasising

the entitlement of part-time workers to pro rata payments based on time actually spent engaged in the part-time activity.

Scope of the Part-time Workers Directive

137. In his oral closing submissions on behalf of the respondents, Mr Bourne QC took the tribunal through several recitals and several paragraphs in the preamble to the Directive before turning to the words of the Directive itself and the words of the Framework Agreement. He argued that the Directive, properly construed, was not intended to, and did not, assist workers who were on traditional open-ended contracts. He further argued that a significant part of the purpose of the Directive was equality, particularly gender equality, and economic growth.

138. He stated:

> *"You will see where I am going with all of this – all of this means work for people who for one reason or another do not, one assumes cannot, work full-time."*

He went on to argue that the claimants have a traditional form of contract in which they commit themselves to work for the full working week. He argued that they fell within the traditional model of employment relationship, whereas the Directive was targeted at flexible and non-traditional models of employment relationship. He stated:

> *"This is all about people who can't or don't (work full-time)."*

139. This argument was obviously based on the premise that the claimants were in a full-time employment relationship as salaried District Judges and that they were simply redeployed from time to time on other work within that single employment relationship when they were working as Deputy County Court Judges. The argument put forward by Mr Bourne QC was therefore based on the premise that the claimants were in a single employment relationship and that they did not in fact have two separate and distinct employment relationships. The two concurrent appointments as District Judge and Deputy County Court Judge were made under separate legislation, effected by separate and different warrants, and involved two entirely separate areas of work distinguished by both financial limits and by particular categories of work. They required two different qualifying periods of professional practice. The tribunal does not accept that these two separate and distinct appointments can properly be viewed as a single employment relationship or as a single appointment.

140. In any event, the primary thrust of the argument on behalf of the respondents in this respect was that the Directive and by extension the Regulations, were not to be directed at those who enjoyed, on the respondents' argument, an open-ended traditional form of employment relationship. It follows from that that the respondents' argument is that the Directive and the Regulations do not cover those who happen to have both what can be regarded as a traditional open-ended full-time employment relationship and, separately, a part-time relationship with the same employer. The example was used in the course of argument of someone who worked for Asda and had a part-time employment relationship as a till operator for three days but had a part-time job for the other two days in a standard working

week sweeping the car park. That employee had been engaged in two separate contracts in the same working week for the same employer. The tribunal concludes that that worker would have two part-time contracts or employment relationships, rather than a single contract or employment relationship.

141. The tribunal has carefully considered all the various parts of the Directive to which it has been referred by Mr Bourne QC. Nowhere in any of that is there any restriction of the type suggested by Mr Bourne QC. In the tribunal's view, it cannot be argued that the Directive and the Regulations do not apply to those who happen to have both a full-time and a part-time employment relationship with the same employer and, a fortiori, that they do not apply to those who have two part-time relationships with the same employer. It cannot be argued that they apply only to those who do not or cannot hold a full-time post or who are '*at the margins'*.

142. Some of the references and comments made by Mr Bourne QC in this respect came close to suggesting that the Directive, and by extension the Regulations, applied only where issues of equality, particularly gender equality arose or where issues of economic benefit arose. However, those suggestions were tentative at best and in any event the tribunal does not accept that the Directive is in any way restricted in that manner.

Section 107(7) of the 1959 Act

143. Mr Allen QC raised points in relation to the wording of Section 107(7) of the 1959 Act which related to the appointment and remuneration of Deputy County Court Judges. He argued that this sub section contained a mandatory requirement to pay fees and allowances to every Deputy County Court Judge. It did not provide for any differential payment or varying rates of payment to different County Court Judges. It also provided that any fees or allowances should be determined by the Lord Chancellor with the concurrence of the Treasury.

144. It seems clear from the evidence that there had been no separate or distinct determination of any fee or allowance payable to a Deputy County Court Judge within Northern Ireland by the Lord Chancellor or that there had been any concurrence expressed by the Treasury.

145. The claimants accept that the legality or otherwise of the respondent's actions in terms of Section 107(7) is a matter strictly outside the limited jurisdiction of this tribunal. It is perhaps a matter more amenable to the prerogative remedy of judicial review.

146. As set out at Paragraph 40 of this decision, the specific and single exclusion of Resident Magistrates does raise the presumption that this exclusion was meant to be the only exclusion.

Ferris v Ministry of Justice

147. Mr Bourne QC relied, in both his oral and written submissions, on a decision given by an Employment Judge in London in 2016 in the case of ***Ferris v Ministry of Justice (2201374/2007)***. In that case the claimant was a salaried Employment Judge (equivalent in terms of judicial grade to the present claimants) who also held an appointment as a Recorder. In England, a Recorder is the equivalent of a

Deputy County Court Judge in this jurisdiction. A Recorder would sit from time to time doing the work of a Circuit Judge which, in England, is the equivalent of a County Court Judge and he would exercise the same powers as a Circuit Judge.

148. In that case, the Employment Judge issued a preliminary decision striking out the claim brought by Mr Ferris on the basis that the claim had no reasonable prospect of success. It involved two different periods of time. In the first, he had been a salaried full-time Employment Judge who sat from time to time as a Recorder. In the second, shorter, period he had reduced his salaried appointment as an Employment Judge to 90%. When sitting as a Recorder, other than in the second period and at times outside of his 90% commitment as an Employment Judge, his pension had accrued at the lower rate.

149. Mr Ferris made no distinction between the two periods of time: he focused on the periods of time when, during either his 100% or 90% appointment as a salaried Employment Judge he had "acted up" as a Recorder.

After his appointment as a salaried Employment Judge had reduced to 90%, any time in the remaining 10% spent sitting as a Recorder accrued pension at the higher rate and was irrelevant to his claim.

150. Employment Judge MacMillan disagreed. He decided that Mr Ferris's position was different after his salaried appointment as an Employment Judge had reduced to 90%. In his view he had been a full-time worker previously as an Employment Judge and a part-time worker subsequently. Employment Judge McMillan focused on the terms of the salaried appointment rather than on how it worked in practice and on the time spent as a Recorder. It may even be that the times spent by the claimant in that case as a Recorder were minimal or at any rate so intermittent as to leave the position effectively unchanged. It may not have been, as Mr Bourne QC argued, '*on all fours with the present cases'* where as a matter of consistent and sustained practice significant periods of every working week were spent on County Court work or on mixed County Court and District Judge work. The very brief decision provides no findings of fact in this respect.

151. The first point to note is that the decision is not in any sense binding for this tribunal. It is a preliminary decision of a single Employment Judge sitting alone in a different jurisdiction. It is not even in any real sense persuasive. Employment Judge MacMillan is obviously an experienced and senior Employment Judge. Nevertheless, this was a preliminary decision given in circumstances where, in this jurisdiction, it is highly improbable that a preliminary hearing would have been held to determine such a matter. Furthermore, this was an Employment Judge sitting alone without the benefit of a panel. It was also a hearing which appears to have been conducted over the telephone. It also appears to have been a hearing where no sworn evidence was given or was relied on. Very little has been recorded as findings of fact. The decision appears to have been based solely on competing submissions which appear to have been given in the course of the telephone conversation. The submission put forward by the respondents also appears to have been that it was <u>not</u> a claim based on part-time status. The Employment Judge, when summarising the submissions of the respondents, stated:

"This is not a claim based on part-time status but seems to be a challenge to the fact that no additional remuneration is paid for other judicial work undertaken pursuant to his salaried appointment."

The precise nature of the claim is therefore difficult to discern but it appears to have been a claim related solely to pension accrual and not to both salary entitlement and pension accrual as in the present cases. The Employment Judge recorded this as '*noteworthy*'. The Employment Judge treated the two periods differently, even though the claim seems to have been precisely the same in both. The claimant had been claiming in respect of periods during his salaried Employment Judge appointment when he had sat as a Recorder. It does not seem to have mattered that during one period it had been part of a 100% appointment and in the latter period part of a 90% appointment. In relation to the latter period, he determined that the correct comparator was that of 100% Employment Judge who had also sat as a Recorder. That with respect does not seem to be correct. The correct comparator for both periods would have been a Circuit Judge.

152. It was not helpful in determining either of the two agreed legal issues left to this tribunal that so much time and discussion was taken up in analysing a decision which cannot be regarded as significantly persuasive.

Whether the Directive prohibits discrimination between different types of part-time worker?

153. Both parties referred at length to a decision of the European Court of Justice in ***INPS v Bruno*** and ***INPS v Lotti [2010] IRLR 890***. Both sides suggested that it supported their argument.

154. This case involved four members of an airline cabin staff whose pension was administered by the social security organisation, INPS. They were engaged in what was described as '*vertical-cyclical part-time arrangements*'. In other words they were contracted to work only during certain weeks or certain weeks of the year on full or reduced hours. The Court held that that had been the only form of part-time work open to them and it had been in fact the '*sole form of part-time work offered to Alitalia cabin crew*'.

155. In that particular case the INPS calculated the qualifying period for pension entitlement by a reference to actual periods in service. It therefore conferred an advantage on full-time workers because it simply calculated the full calendar period of employment, without identifying whether the full-time worker had actually been working or not during that period. In respect of the vertical-cyclical part-time workers, they were accorded credit solely for the weeks or months in which they were actually contracted to work.

156. The ECJ determined that the relevant provision infringed the principle of non-discrimination laid down in Clause 4 of the Framework Agreement attached to the Directive. It had introduced a difference in treatment between the part-time workers and the full-time workers.

157. Three questions had been referred to the ECJ. Their decision answered the first two questions. The third question essentially asked whether Clause 4 of the Framework Agreement prohibited discrimination between different forms of

part-time work. The ECJ declined to answer that question since it was no longer necessary given the answers to the first two questions and given that the ECJ had concluded that no other form of part-time work was available to the relevant workers.

158. The issues raised in the third question in the ***Bruno*** case are potentially relevant to the present cases in that fees are currently paid to and pension is currently accrued in respect of other Deputy County Court Judges who fall within the second or third sources described earlier in this decision. However, as noted above, that question was not answered.

159. The respondents in the present cases argue that the fact that part-time workers are paid and accorded pension benefits is evidence that the fourth question, the '*causation*' or '*reason why*' question, must be answered in favour of the respondents. They argue that because some Deputy Court Judges are treated pro rata temporis in the same way as a County Court Judge, the respondents' actions in relation to other Deputy County Court Judges cannot be on the ground of part-time status.

160. The best that can be said about this ECJ decision is that it is non-conclusive. It specifically refuses to answer the relevant question and little of use to the present cases can be derived from this decision.

161. The Advocate General's Opinion does deal with the issue of different types of treatment being afforded to different types of part-time workers. That opinion is not however in any sense binding and it must also be noted that the dispute which led to the referral was described by the Commission as legally and factually ill-defined. The Advocate General agreed that the details provided had been '*incomplete and equivocal*' and '*sparse*'. It seems, however, to be the case that there was only one type of part-time work in this case; that afforded to the claimants. At Paragraph 67 of the decision, the ECJ stated:-

> *" … it is apparent from the proceedings before the Court that vertical-cyclical part-time work is the sole form of part-time work available to Alitalia cabin crew … ."*

162. The issue relating to the treatment of different types of part-time worker also raised its head in ***Sharma***. In that case, one of the ten claimants was a different type of part-time worker, described as a "fractionalised" worker. The respondents raised an argument that because the offending treatment had not been afforded to all part-time workers, it could not have been afforded on the ground of part-time status. That is analogous to the argument advanced by the respondents in the present case.

163. At Paragraph 49, the EAT said:-

> *"Can it really be said that because only some part-timers are selected for the less favourable treatment, the Directive (and by extension, the Regulations) are not intended to be applicable?"*

At Paragraph 50, the EAT continued:-

> *"In our judgment, it is inconceivable that the Directive was not intended to outlaw such treatment (subject to justification) and we have no doubt whatsoever that it would inevitably be construed by the ECJ to do so. Any other conclusion would wholly undermine the very purpose of the Directive. The fact that not all part-timers are treated adversely does not mean that those who are, cannot take proceedings for discrimination, if being part time is a reason for their adverse treatment".*

164. The tribunal agrees with the EAT in ***Sharma*** in that respect. It is also notable that the fact that salaried part-time judges were more favourably treated than fee paid part-time Judges did not assist the respondents in the ***O'Brien*** litigation. It is therefore unclear why the respondents in the present case have argued that differential treatment between different categories of potential part-time workers means or tends to mean that the less favourable treatment could not have been on the ground of part-time worker status.

165. Mr Allen QC, after the oral submissions hearing had concluded, alerted the tribunal to a decision of the Supreme Court which had issued on 24 May; ***R (Coll) v Secretary of State for Justice [2017] UKSC40***. That decision has reached the same conclusion. It states at Paragraph 30:-

> *"Furthermore, it cannot be a requirement of direct discrimination that all the people who share a particular protected characteristic must suffer the less favourable treatment complained of. It is not necessary to show, for example, that an employer always discriminates against women: it is enough to show that he did so in this case."*

Carl v University of Sheffield

166. While the Directive requires that any alleged discrimination should be '*solely because'* of part-time status, the domestic regulations, both in Great Britain and in Northern Ireland, are less demanding; they require that the alleged discrimination is '*on the ground that the worker is a part-time worker*'.

167. There is however a clear divergence between Scottish and English authority on the correct interpretation to be placed on the wording of the domestic regulations.

168. In the Scottish jurisdiction, there are the decisions of the Court of Session in ***McMenemy v Capita Business Services Ltd [2007] IRLR 400*** and the Scottish EAT decision in ***Gibson v Scottish Ambulance Service [EATS/0052/04]***. The former decision concluded that part-time status must be the sole reason for the alleged discrimination. The latter decision did not specifically address this issue but did not disagree with it.

169. In the English jurisdiction, there are the two decisions of the EAT in ***Carl v University of Sheffield [2009] ICR 1286*** and ***Sharma v Manchester City Council [2008] ICR 623***. Both decisions concluded that part-time status need not be the only cause of the alleged discrimination; but it must be the effective and predominant cause.

170. The question now falls to be determined in a third legal jurisdiction; Northern Ireland. There cannot be any automatic assumption that the English case law would be preferred over the Scottish case law in such a situation; or vice versa. Yet the argument before this tribunal centred on the ***Carl*** decision alone; even though the Inner House of the Court of Session outranks the EAT. It might have been better if both sides of the current dispute had been opened fully to the tribunal before it had to determine which approach (if either) it preferred.

171. The ***Gibson*** case in the Scottish jurisdiction had been determined first. In that case the employment tribunal, in a majority decision, had concluded that the proper test to apply was whether or not the alleged discrimination had been solely because of the claimant's status as a part-time worker. On appeal to the Scottish EAT, the claimant advanced the argument that the appropriate test was to ask the question:-

> *"What would be the position but for the part-time status of that worker?"*

The claimant argued that the "but for" test was appropriate given the decision of the House of Lords in ***James v Eastleigh Borough Council [1990] IRLR 288.*** The employers argued that the '*but for'* test was now out of date given the comments of Lord Browne-Wilkinson in ***Nagarajan v London Regional Transport [1999] IRLR 572*** and the comments of Lord Nicholls in ***Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830*** where he stated:-

> *"The phrases 'on racial grounds' and 'by reason that' denote a different exercise: "Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

The claimant therefore argued for an objective "but for" test. The employer argued for a subjective "by reason that" test. Furthermore, the senior counsel acting on behalf of the employer argued that the word "solely" should be written in to the domestic regulations because that word had originated in the Directive and that the regulation should be construed against the background of the Directive.

172. The Scottish EAT concluded that the approach set out in ***Khan*** was correct. It was therefore necessary to look at the intention behind the alleged discrimination and the '*but for'* test was rejected. They did not separately and specifically conclude that the word '*solely*' should be read into the domestic regulation although that had been an argument advanced by the respondent.

173. The decision in ***McMenemy*** had been determined next. In that case, an employment tribunal had dismissed a claim of part-time worker discrimination on the ground that the alleged discrimination had not taken place because of the worker's part-time status but because he did not work on a Monday. The Scottish Employment Appeal Tribunal dismissed Mr McMenemy's appeal and Mr McMenemy then appealed to the Court of Session.

174. At the hearing of the appeal both parties agreed that the 2000 Regulations should be construed consistently with the Directive and that they should be given a purposive construction. It was not suggested by either party that the

2000 Regulations went further than the Directive in conferring protection on part-time workers. The Court of Session concluded that the legislation required that they should consider whether there was a causative connection between the alleged discrimination and the worker's part-time status. The Court of Session concluded that this '*necessitates inquiry into the employer's intention in so treating the part-time worker'*. The Court of Session agreed with the approach taken by the Scottish Employment Appeal Tribunal in Gibson in rejecting the '*but for*' test. The Court of Session determined:-

> *"The next question is whether this less favourable treatment was solely because the appellant was a part-time worker. This, as we have discussed, requires examination of the respondent's intention: Did they intend to treat him less favourably, for the sole reason that he was a part-time worker? It is clear to us that the employment tribunal and the Employment Appeal Tribunal gave the correct answer to this question. On examination of the facts, the reason why the appellant received less favourable treatment than did a comparable full-time worker was through the accident of his having agreed with the respondents that he would not work with them on Mondays or Tuesdays. It is at this point that it becomes legitimate to consider hypothetical situations, in order to test the true intention of the respondents. It is clear on the evidence that, in accordance with the respondent's policy on public holidays, if a full-time member of the appellant's team worked fixed shifts from Tuesday to Saturday, he would not receive the benefit of statutory holidays which fell on Mondays".*

175. The next case that was determined was ***Sharma***. The English EAT in that case determined that the decision in ***Gibson*** should not be followed. It does not appear that the decision of the Court of Session in ***McMenemy*** had been opened to the EAT and it certainly is not referred to in the course of their decision.

176. In the ***Sharma*** case, the employment tribunal had concluded that the reason for the alleged discrimination was not, or at least not solely, because of the workers' part-time status. The English EAT analysed the two different approaches adopted in ***James*** and in ***Khan***; ie whether it would be appropriate to adopt the '*but for'* test or the '*reason why*' test.

177. The EAT in ***Sharma*** concluded that:-

> *"In our judgement, the reference to 'solely' in the European Directive is simply intending to focus on the fact that discrimination against a part-timer must be because he or she is a part-timer and not for some independent reason."*

178. The EAT further stated:-

> *"In our judgment, once it is found that the part-timer is treated less favourably than a comparator full-timer and being a part-timer is one of the reasons, that will suffice to trigger the Regulations."*

179. The EAT went on to refer to a second ground of appeal which was whether or not the tribunal ought to have applied the '*but for*' test rather than the '*reason why*' test. Since it had already reached a conclusion in favour of the claimant (appellants), it

declined to explore this issue further. It concluded that, whichever of the two tests were to be applied, it could not be legitimate for the employers to contend in that case that there was a separate reason which was independent of the worker's part-time status.

180. That said, the EAT went on to consider the facts in ***James*** and stated:-

> *"It would make nonsense of the protection afforded to part-timers if the employer could successfully allege that differentiating between them and full-timers on the basis of the terms exclusively attributed to them was not discriminating against them on the basis that they were part-time. Take the case of an employer who does not give sick pay to part-timers but does to comparable full-timers. He would surely not be allowed to say that the basis of the distinction is the term of the contract, the part-timer not having the right to sick pay when the full-timer does. Of course, in principle, the different treatment may be justifiable, but if the Council were correct in this argument, it would mean that the regulations would not be engaged at all and the issue of justification would not even arise."*

181. The fourth and final case in this area which fell to be determined was ***Carl***. In the ***Carl*** case, the employment tribunal had concluded, inter alia, that the claimant's part-time status had to be the sole cause of the alleged discrimination.

182. The English EAT therefore was directly focused on the different decisions in ***Sharma***, ***Gibson*** and ***McMenemy***.

183. The EAT determined that the employment tribunal had erred in law in holding that Mrs Carl's part-time status had to be the sole cause of the alleged discrimination. It concluded that part-time work must be the effective and predominant cause of the alleged discrimination. It need not however be the only cause of that alleged discrimination. It concluded that ***Sharma*** should be followed but not ***Gibson*** or ***McMenemy***.

184. The EAT referred to the ***Khan*** decision but noted that that decision was concerned with different wording, ie '*by reason that*' which appeared in victimisation provisions relating to race discrimination. It pointed out that the different expression '*on the ground of*' appeared in the Sex Discrimination Act and elsewhere in the Race Relations Act. It referred to the decision of ***O'Neill v Saint Thomas Moore School [1996] IRLR 372*** which stated:-

> *"The basic question is: what, out of the whole complex of facts before the tribunal is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained of?"*
>
> *"The approach to causation is further qualified by the principle that the event or factor alleged to be causative of the matter complained of need not be the only or even the main cause of the result complained of, although it must provide more than just the occasion for the result complained of."*
>
> *"It is enough if it is an effective cause".*

185. The EAT stated that:

> *"Thus, applying the approach in **O'Neill**, it is enough if her part-time workers status is an effective cause, albeit not the sole cause, of the less favourable treatment of which the complaint is made."*

186. When considering the conflict between the competing authorities in this matter, it is worthwhile noting that the remarks of the EAT in relation to causation in ***Carl*** were, strictly speaking, obiter since it had determined the appeal on entirely separate grounds, ie on the ground of whether or not an actual comparator was required. The EAT stated specifically at the end of its judgement that:-

> *"It also follows that it is unnecessary for us to consider the effect of the employment tribunal's misdirection on the causation issue."*

Therefore, while the EAT in ***Carl*** was clear that the employment tribunal had applied the causation test wrongly, that was not part of the ratio decidendi of the EAT.

187. That said, the different descriptions of the correct causative test which are used throughout the competing authorities are somewhat confusing and tend to add to rather than diminish the uncertainty in this area. The EAT in ***Carl***, indicated that part-time work must be the effective and predominant cause of the less favourable treatment. When referring to ***O'Neill*** with approval it stated at Paragraph 26:

> *"Thus in that case the Employment Appeal Tribunal held the claimant's dismissal was on the ground of her pregnancy. It need not be only on that ground. It may not even be mainly on that ground*." *[Tribunal's emphasis]*

The EAT went on to state at Paragraph 28:

> *"Thus, applying the approach in **O'Neill**, it is enough if her part-time workers status is an effective cause, albeit not the sole cause, of the less favourable treatment of which the complaint is made." [Tribunal's emphasis]*

Therefore in the body of the judgement, the EAT puts forward the proposition that it is enough if it is simply '*an effective cause'* rather than the '*effective and predominant*' cause.

188. Furthermore the EAT in ***Carl*** when approving of the decision of the EAT in ***Sharma*** at paragraph 35 note that it had held that it was enough that the fact of being a part-timer is '*one of*' the reasons for the treatment (tribunal's emphasis). That was indicated to be in line with the ***O'Neill*** decision. However at Paragraph 42, still approving of the decision in ***Sharma***, it held again that it must be '*the effective and predominant cause'*. *[Tribunal's emphasis]*

189. Therefore the obiter remarks on causation in ***Carl*** appear to fluctuate from requiring that it be '*an effective cause*', to '*the effective and predominant cause*', to '*the real or efficient cause*', to '*not even being mainly on that ground*', to '*because she is a part-timer and not for some other independent reason*' or '*one of the reasons*'. A consistent interpretation of the causative test does not appear and therefore little assistance is provided in that decision.

190. In the ***O'Neill*** case, the decision confusingly put forward three different tests:-

(1) 'the effective and predominant cause';

(2) '*the real or efficient cause*'; and

(3) an effective cause.

Sometimes, moving away from the plain words of a statutory provision, with multiple attempts at paraphrasing that provision, does not assist.

191. It is clear that the 2000 regulations in Northern Ireland were made under the Employment Relations (Northern Ireland) Order 1999 and not under the European Communities Act 1972. It is also clear that the terms of the Directive in any event permit the domestic state to provide more generous protection than that provided in the Directive. There therefore can be no question of the interpretation of '*on the ground that'* being constrained by European law. The phrase, as it appears in the 2000 Regulations, must be given its ordinary meaning consistent with any binding authority, if such can be found. Since a definite decision appears to have been made to differentiate the wording in the 2000 Regulations from that contained within the Directive, due weight must be applied to the more generous wording.

192. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11***, the House of Lords considered an appeal from the Northern Ireland Court of Appeal. That appeal concerned, inter alia, the correct interpretation to be placed upon the provision in the Sex Discrimination (Northern Ireland) Order 1976 which required that the alleged discrimination should be '*on the ground of her sex*'. That provision is similarly worded to the parallel provision in the 2000 Regulations which requires that the alleged discrimination is '*on the ground that the worker is a part-time worker*'.

193. It is important to remember in all of this that the provisions commonly applicable to other forms of alleged discrimination and which relate to the shifting burden of proof, do not have any application in relation to alleged part-time worker discrimination. The tribunal is therefore taken back to older approaches when considering whether any admitted unfavourable treatment amounts to direct discrimination and in other words whether it had been "on the ground of" part-time worker status.

194. The House of Lords stated at Paragraph 55:-

> *"Claims brought under the legislation about discrimination presents special problems of proof for applicants, as Lord Browne-Wilkinson pointed out in* ***Zafar v Glasgow City Council [1998] IRLR36****, 38 - 39, Paragraph 16. As he said in that case, those who discriminate on grounds of race or gender do not in general advertise their prejudices. They may indeed not even be aware of them. It is unusual to find direct evidence of an intention to discriminate. So the outcome in a case of this kind would usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. In* ***Nagarajan v London Regional Transport [2000] 1 AC 501****, 511A - B, Lord Nicholls of Birkenhead said that, save in obvious cases, this*

question will call for some consideration of the mental processes of the alleged discriminator:-

> *'Treatment favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.'*

The House of Lords went on to state at Paragraph 62:-

> *"But one must bear in mind the fact, which Lord Browne-Wilkinson alluded to in* ***Zafar v Glasgow City Council*** *that men in his position do not advertise their prejudices and may indeed not be aware of them. Lowry LCJ was making the same point in* ***Wallace v South Eastern Education & Library Board [1980] IRLR 193*** *when he said:-*
>
> > *'Only rarely would direct evidence be available of discrimination on the ground of sex; one is much more often left to infer discrimination from the circumstances. If this could not be done the object of the legislation would be largely defeated so long as the authority alleged to be guilty of discrimination made no expressly discriminatory statements'."*

195. It seems to this tribunal that while ***Shamoon*** considered discrimination on the ground of gender, much the same could be said of discrimination on the ground of part-time status. It may in particular be the case that those who discriminate on the ground of part-time status are unaware that they are doing this if they are simply maintaining a longstanding administrative practice.

196. The current divergence between Scotland and England which is illustrated by the four cases referred to above needs to be considered in this jurisdiction. It seems clear that the Scottish decisions are wrong in that they unreasonably restrict the meaning of the 2000 Regulations (the GB analogous version) by reference to the Directive. The remarks in ***Carl*** were obiter and did not, in any event, present a consistent interpretation of the causative test. The EAT in ***Sharma*** was not referred to ***McMenemy*** and it did not go on to consider the '*but for'* test advanced in the present cases by Mr Allen QC. The plain wording of the legislative provision, ie the wording of the 2000 Regulations must be paramount. That requires consideration of the phrase '*on the ground that*'.

197. In ***R v Governing Body of JFS and the Admissions Appeal Panel of JFS & Others [2010] IRLR 136***, the Supreme Court considered a vexed case which involved the refusal on the part of a Jewish school to admit a pupil whose father was a Jew but whose mother was a former Roman Catholic who had converted to Judaism under the auspices of a non-orthodox synagogue. The school was not satisfied that the mother's conversion to Judaism was in accordance with Orthodox standards. The pupil's father brought a claim alleging unlawful race discrimination. He submitted that the application of the matrilineal test discriminated against the child on the grounds of his ethnic origins. One of the issues in the case was the correct approach to the analogous causation test in the Race Relations Act.

198. In a sense, this case raised similar issues to those raised in the ***O'Neill*** case. In that case, a pregnant unmarried teacher had been dismissed by a Roman Catholic school. The school argued that she had not been dismissed on the ground of her sex (pregnancy) but because of the religious ethos of the school. In ***JFS***, the school argued that the claimant had not been refused admission because of his ethnic origins but because of the religious ethos of the school. In both cases, the road to unlawful discrimination was paved with good intentions.

199. Lord Kerr stated at Paragraph 113:-

> *"These questions focus attention on the problematical issue of what is meant by discrimination <u>on racial grounds</u>. As Lord Hope has observed, the opinions in cases such as **R v Birmingham City Council, Ex parte Equal Opportunities Commission [1999] IRLR 173** and **James v Eastleigh Borough Council [1990] IRLR 288** tended to dismiss as irrelevant any consideration of the subjective reasons for the alleged discriminator having acted as he did unless it was clear that the racial or sex discrimination was overt. A benign motivation on the part of the person alleged to have been guilty of discrimination did not divest the less favourable treatment of its discriminatory character if he was acting on prohibited grounds.*
>
> *Later cases have recognised that where the reasons for the less favourable treatment are not immediately apparent, an examination of why the discriminator acted as he did may be appropriate. In **Nagarajan v London Transport** [1999] IRLR 572, 575, Lord Nicholls of Birkenhead, having identified the crucial question as 'why did this complainant receive less favourable treatment', said this:-*
>
> > *'Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator'.*
>
> *It is, I believe, important to determine which mental processes Lord Nicholls had in mind in making this statement. It appears to me that he was referring to those mental processes that are engaged when the discriminator decides to treat an individual less favourably for a particular reason or on a particular basis. That reason or the basis for acting may be one that is consciously formed or it may operate on the discriminator's subconscious. In my opinion Lord Nicholls was <u>not</u> referring to the mental processes involved in the alleged discriminator deciding to act as he did. This much, I believe, is clear from a later passage of his opinion, at Page 575 where he said:-*
>
> > *'The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred'.*
>
> *The latter passage points clearly to the need to recognise the distinction between, on the one hand, the grounds for the decision (what was the basis on which it was taken) and on the other, what motivated the decision-maker to make that decision. The need for segregation of these two aspects, vital*

to a proper identification of the grounds on which the decision was made, is well illustrated, in my view, by the circumstances of this case. The school refused entry to M because an essential part of the required ethnic make-up was missing in his case. The reason they took the decision on those grounds was a religious one – OCR had said that M was not a Jew. But the reason that he was not a Jew was because of his ethnic origins, or more pertinently, his lack of the requisite ethnic origins.

The basis for the decision, therefore, or the grounds on which it was taken, was M's lack of Jewishness. What motivated the school to approach the question of admission in this way was, no doubt, its desire to attract students who were recognised as Jewish by OCR and that may properly be characterised as a religious aspiration but I am firmly of the view that the basis that underlay it (in other words, the grounds on which it was taken) was that M did not have the necessary matrilineal connection in his ethnic origin. The conclusion appears to me to be inescapable from Lord Nicholls' analysis of the two aspects of decision making and to chime well with a later passage in his speech where he said:-

> *'Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign'.*

In the present case, the reason why the school refused M admission was, if not benign, at least perfectly understandable in the religious context. But that says nothing to the point. The decision was made on grounds which the 1976 Act has decreed are racial."

200. In the same decision, Lady Hale analysed the case law and in particular the ***Birmingham City Council*** case, the ***James*** case and the ***Nagarajan*** case. She went on to state at Paragraph 62:-

"However, Lord Nicholls had earlier pointed out that there are in truth two different sorts of 'why' question, one relevant and one irrelevant. The irrelevant one is the discriminator's motive, intention, reason or purpose. The relevant one is what caused him to act as he did. In some cases, this is absolutely plain. The facts are not in dispute. The girls in Birmingham were denied grammar school places, when the boys with the same marks got them, simply because they were girls. The husband in ***James*** *was charged admission to the pool, when his wife was not, simply because he was a man. This is what Lord Goff was referring to as 'the application of a gender-based criterion'.*

But, as Lord Goff pointed out, there are also cases where a choice has been made because of an applicant's sex or race. As Lord Nicholls put it in ***Nagarajan****, 'in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases,*

answering the crucial question will call for some consideration of the mental processes of the alleged discriminator'. In ***James****, Lord Bridge was 'not to be taken as saying that the discriminator's state of mind was irrelevant when answering the crucial, anterior question: why did the complainant receive less favourable treatment?'*

The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of 'anterior' enquiry, into what caused the treatment in question, is also plain. It is that which is also explained by Lord Phillips, Lord Kerr and Lord Clarke. There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else – usually, in job applications, that elusive quality known as 'merit'. But nevertheless the discriminator may consciously or unconsciously be making his selections on the ground of race or sex. He may not realise that he is doing so, but that is what he is in fact doing. As Lord Nicholls went on to say in ***Nagarajan****, 'An employer may genuinely believe that the reason why he rejected an applicant has nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did - conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(a)'.*

This case is not in that category. There is absolutely no doubt about why the school acted as it did. We do not have to ask whether they were consciously or unconsciously treating some people who saw themselves as Jewish less favourably than others. Everything was totally conscious and totally transparent. M was rejected because he was not considered to be Jewish according to the criteria adopted by the Office of the Chief Rabbi. We do not need to look into the mind of a Chief Rabbi to know why he acted as he did. If the criterion he adopted was, as in ***Birmingham*** *or* ***James****, in reality ethnicity-based, it matters not whether he was adopting it because of a sincerely held religious belief. No-one doubts that he is honestly and sincerely trying to do what he believes his religion demands of him. But that is his motive for applying a criterion which he applies and that is irrelevant. The question is whether his criterion is ethnically based."*

201. The difficulty in the present cases is that discrimination or less favourable treatment on the grounds of part-time worker status is potentially objectively justifiable. There is an obvious danger of conflating the '*reason why*' or '*causation*' question with the entirely separate question of "objective justification" by confusing cause with motive. That is particularly important in cases, such as the present cases, where the respondents do not wish to argue objective justification. In the tribunal's view the proper question in relation to the former is what Lady Hale has described, paraphrasing, as what caused the respondents to act as they did. On the argument advanced by the claimants, the fourth agreed legal issue has to be answered in

their favour on the basis that it was their part-time status as Deputy County Court Judges which caused the respondents to act as they did.

202. The question therefore is not a simple and straightforward application of the '*but for'* test as advanced at one point by the claimants. The situation is a little more nuanced than that. The EAT dealt with this issue in some detail in the case of ***Amnesty International v Ahmed [UKEAT/447/08/ZT]*** in 2009.

203. That case concerned an employee of Amnesty who was of Sudanese origin. She was not appointed to the post of researcher in Sudan because her Sudanese origin, given the politics of that particular region, which would have caused practical difficulties. She alleged unlawful discrimination '*on racial grounds*' contrary to the Race Relations Act 1976. The EAT dealt with the '*reason why*' question, ie the fourth agreed legal issue remaining for determination in the present case. When considering the findings of the tribunal at Paragraph 24(3) the EAT concluded that the alleged discrimination did not have to be for the "sole" reason of racial grounds. It said:-

> *"As the Tribunal itself correctly points out in paragraph 49, it is enough for the purpose of liability that the Claimant's ethnic origins should have been a significant part of the reason for the treatment complained of."*

It is notable that the EAT did not specifically adopt the term '*predominant*'. It endorsed the term '*significant'* which equates to '*effective*'.

204. In a lengthy and detailed decision the EAT dealt with the decisions in ***Shamoon***, ***James***, ***Nagarajan*** and ***Birmingham City Council***. It stated:-

> *"31. It seems that the relationship between the approaches taken in **James v Eastleigh** on the one hand and **Nagarajan** (as further explained in **Khan**) on the other is still regarded by some tribunals and practitioners as problematic. We do not ourselves believe that there is a real difficulty provided due attention is paid to the form of the alleged discrimination with which the House of Lords was concerned in both cases.*
>
> *32. To begin at the beginning. The basic question in a direct discrimination case is what is or are the 'ground' or 'grounds' for the treatment complained of. That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see, eg Article 3.2(a) of Directive EU/2000/43 ('the Race Directive'). There is however no difference between that formulation and asking what was the 'reason' that the act complained of was done, which is the language used in the victimisation provisions (eg Section 2(1) of the 1976 Act): see per Lord Nicholls in **Nagarajan** at Page 512 D - E (also, to the same effect, Lord Steyn at Page 521 C - D).*
>
> *33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises*

puts up a sign saying 'no blacks admitted', race is, necessarily, the ground on which (or the reason why) a black person is excluded. ***James v Eastleigh*** *is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the Council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The Council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at Page 772 C - D), 'gender based'. In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The 'ground' of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in* ***James v Eastleigh*** *decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.*

34. But that is not the only kind of case. In other cases – of which ***Nagarajan*** *is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, <u>not</u> his motive: just as much as in the kind of case considered in* ***James –v- Eastleigh****, a benign motive is irrelevant." [Tribunal's emphasis]*

205. When an appellate body chides lesser mortals such as practitioners and tribunals and states that there is '*no real difficulty'* in a particular matter, that may not be always entirely accurate; particularly where the statement is part of a lengthy discussion of the case-law. However, the first issue to be determined by the tribunal when considering the second legal issue is to determine whether the unfavourable treatment (conceded) in the present cases is in the first category of decisions (***James***) or in the second category of decisions (***Nagarajan***). The second issue is to apply the test as outlined in ***Ahmed*** and the cases referred to above.

<u>Questions for the tribunal</u>

1. <u>Whether the claimants were part-time workers in their capacities as Deputy County Court Judges?</u>

206. This question is not directed towards ascertaining the express terms of the appointments held by the claimants as Deputy County Court Judges or even, for that matter, as District Judges. The question asks whether the claimants when

acting or working as Deputy County Court Judges were part-time workers for the purposes of the Directive? It is therefore not a question of whether or not the appointments as Deputy County Court Judge held by each of the claimants expressly attracted either the Directive or the Regulations; or whether the appointments described the Deputy County Court Judge posts as 'part-time'; clearly they did not. There is no specific provision in these appointments which identifies the appointments as part-time appointments. Similarly the question does not ask whether the individual appointments held by the claimants as District Judge were expressed to be full-time appointments; it seems clear that they were. The question asks whether the claimants were part-time workers when they performed the work of Deputy County Court Judges.

207. Having heard the evidence in this case, and having considered the terms of the concessions, the tribunal must address the reality of the situation and must apply that reality to the wording of the Directive and the Regulations. The fact that the claimants' appointments as District Judges were expressed to be full-time appointments is not determinative of the question.

208. In the ***O'Brien*** litigation, the respondents took a similar position when they were arguing that fee-paid Judges were, in reality, self-employed. At Paragraph 36 of the decision of the Supreme Court ***[2013] 1 WLR 322***, the respondents emphasis on '*reality*' as opposed to the express terms of the appointment was summarised in the following way:-

> *"He (Mr Cavanagh QC) 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 Supreme Court at Paragraph 38, while accepting that the terms and conditions of a recorder did not "give a true picture of the reality of the work that is done by a recorder," emphasised that it was looking at the reality of the situation and not just the form:-

> *"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."*

209. Historically it has been a settled policy on the part of the respondents (and their predecessors) to expect salaried District Judges to work for part of the working week as Deputy County Court Judges, exercising the separate jurisdiction of a County Court Judge. Whether or not it had been openly expressed, and clearly understood, in relation to the earlier appointments such as the appointment of Judge Keegan, is not to the point. The policy and practice applied by the respondent has always been clear and consistent in respect of each of the claimants. While the statutory appointment as a District Judge in each case has been expressed to be a full-time appointment, the reality, in respect of each claimant, is that after their appointment, each claimant worked, and was expected to work, for significant parts of their working week as a Deputy County Court Judge.

210. The respondents nevertheless seek to argue that the claimants were, at all times, full-time District Judges. They argue that the claimants have full-time appointments

under statute as District Judges and that they had described themselves (in the view of the tribunal, inaccurately) as full-time District Judges or full-time workers. The respondents argue that since they are *full-time*' District Judges, they cannot be part-time Deputy County Court Judges. They argue that the claimants are in a single employment relationship with the respondents and that they are, from time to time, redeployed within that relationship to '*act up*' or '*sit up*' as Deputy County Court Judges. They argue that there is only one working week during which both activities are undertaken; it is not a case of District Judges working as Deputy County Court Judges at the weekend or in night courts.

211. The Crime and Courts Act 2013 does not apply in this jurisdiction. There is no analogous legislation. Judges are not statutorily redeployed in Northern Ireland within the terms of their original appointment. In the present cases, these were separate appointments under separate legislation. There is nothing in the 1978 Act which allows a District Judge to sit as a Deputy County Court Judge. That requires a separate appointment under the 1959 Act.

212. Reality must intrude at some point into all of this. The respondents have operated a system whereby persons holding appointments as District Judges, which are expressed to be full-time appointments, are expected to work as Deputy County Court Judges during parts of the same working week. The respondents cannot then rationally argue that those duties carried out as a Deputy County Court Judge, in some way, do not exist or that they fall to be disregarded, simply because they are carried out in the same working week as the duties of a salaried District Judge. Furthermore, it is simply wrong to describe someone as '*full-time*' in one job if they work for part of the same working week in a separate job. A worker is either '*full-time*' or part-time in relation to a particular post. If he works for less than the full week in one post, he is not full-time in that post. .

213. However, it is not just a matter of the ordinary meanings of '*full-time*' and '*part-time*'. Clause 3.1 of the Framework Agreement provides that a worker is a part-time worker if he works for less than the hours of a comparable full-time worker. In the present case, it is clear that the claimants, as Deputy County Court Judges work for less hours in that post than their accepted comparators, salaried County Court Judges. The reality is that the claimants have worked for part of each week or part of almost each week, as a District Judge and for part of each week or part of almost each week as a Deputy County Court Judge. Therefore the claimants have worked part-time as a District Judge and part-time as a Deputy County Court Judge. The proportions have of course varied from week to week in accordance with business demands.

214. The tribunal therefore unanimously concludes that the claimants were part-time workers for the purposes of the Directive when they worked as Deputy County Court Judges.

2. <u>Is the less favourable treatment on grounds of part-time status?</u>

215. The tribunal has concluded that the claimants were part-time workers when they performed duties as Deputy County Court Judges. The respondents have conceded that the claimants were treated less favourably than a comparable worker; a salaried County Court Judge who was clearly a full-time worker within the terms of the Directive. Since the Directive does not allow for a hypothetical

comparator, that concession must relate to all County Court Judges or to a specific County Court Judge (or Judges). The claimants have been less favourably treated both in terms of pay and in terms of pension accrual than the comparable full-time worker. Objective justification is not going to be argued by the respondent even though they were clear that they were not making a concession as such in relation to that point.

216. The remaining question of causation is the sole remaining argument put forward by the respondents against the background of what the Supreme Court in ***O'Brien*** described at Paragraph 75 as:-

> *" … The basic principle of remunerating part-timers pro rata temporis".*

The Charter also described this as the need to secure '*an equitable reference wage*' for part-time workers. That was a '*fundamental right*'.

217. Advocate General Kokott in the ***O'Brien*** decision ***[2012] 2CMLR 25*** emphasised that position in his Opinion at Paragraphs 43, 45 and 46. In that opinion he was stating that excluding the holders of judicial office from the Regulations was on purely formal grounds and not justified in terms of the Directive. The same could be said for the exclusion of those who hold a different, lesser paid, judicial appointment.

218. Regulation 8(6) provides that it is for the employer to '*identify*' the ground for the less favourable treatment. It uses the word '*identify*' rather than the word '*prove*', but the provision suggests that, to some extent at least, the onus of proof in relation to the fourth agreed legal issue falls on the respondents.

219. The tribunal has to bear in mind that basic principle and the purpose of the Directive. It should not allow an argument in relation to motive to creep in the back door under the guise of a causation argument. It should also not allow a longstanding administrative practice to disguise what may in reality be a longstanding policy of unlawful discrimination. For example, the EAT in ***Komeng v Sandwell Metropolitan Borough Council [2011] EQLR 1053*** determined that employment tribunals need to take particular care when accepting an explanation for any less favourable treatment. In that particular case the reason given was one of generally poor administration. The EAT pointed out that such a reason could mask real disadvantage to a particular individual on prohibited grounds.

220. The subject of causation in this context has been the subject of lengthy judicial comments. Some less useful than others. However, in this situation, the tribunal concludes that the starting point should be the words of the relevant statutory provision, ie the 2000 Regulations:-

> *"The treatment is on the ground that the worker is a part-time worker."*

221. The fact that the Directive required that the alleged discrimination should be <u>solely</u> because of part-time status cannot restrict the interpretation of the words "on the ground that" in the Regulations. Paragraph 21 of the preamble to the Directive permits each Member State to "introduce more favourable provisions". The Supreme Court in ***United States of America v Nolan [2015] UKSC 63*** determined that where a Directive allows a Member State to go further than the

Directive requires, there is no imperative to achieve a '*conforming'* interpretation. In any event, the Regulations were made under the Employment Relations (Northern Ireland) Order 1999 and not under the European Communities Act 1972.

222. Much of the case law in this area is confusing. The decision in ***Carl,*** on which argument before this tribunal centred, is obiter in relation to causation and in any event puts forward multiple attempts at paraphrasing the wording of the relevant statutory provision. The tribunal concludes that the appropriate decisions on which to base consideration of causation should be the decision of the Supreme Court in ***JFS*** and the decision of the EAT in ***Ahmed***.

223. In ***JFS***, Lord Kerr pointed to the need to distinguish between, on the one hand, the ground or grounds for the decision and, on the other hand, the motive for that decision. The former is relevant to causation; the latter is not.

224. Again in ***JFS***, Lady Hale described the two different types of '*why*' questions; one relevant and one irrelevant. She also distinguished between two different types of case. One was where the unlawful discrimination was obvious. That was the type of case shown in the ***James*** decision. The other type of case is where the unlawful discrimination is not so obvious; as in ***Nagarajan***.

The second type of case will require a consideration of the evidence to assess what inferences can properly be drawn by the tribunal. However in neither case is motive relevant. Only the ground (or if further paraphrasing is to be permitted) the cause or the trigger of the unfavourable treatment is relevant.

225. The EAT in ***Ahmed*** added yet another paraphrasing of the analogous statutory test:-

"A significant part of the reason for the treatment complained of."

226. That said, the approach taken by the EAT in Paragraph 31 onwards in their decision is in line with ***JFS*** and draws attention to the two different types of cases; one exemplified by ***James*** and one exemplified by ***Nagarajan.***

227. In the present case, the tribunal concludes that this is the first type of case. As in ***James***, there is a superficial difficulty. ***James*** examined a policy which provided that pensioners could use facilities without charge and therefore, the policy, on its face, was gender neutral and non-discriminatory. However, as pointed out in ***Ahmed***, the policy really meant that women could use the facilities free of charge at 60 but men had to wait until 65.

In the present case, the settled policy is that holders of a lesser paid "full-time" salaried judicial office do not receive additional payment for "working up" at a higher level. Removing the smoke and mirrors, that really means that a significant sub-category of part-time workers are excluded from equal treatment. It is their part-time status as Deputy County Court Judges which causes or triggers the unfavourable treatment and nothing else. Linking the unfavourable treatment to the fact that they are paid at the lower rate applicable to another effectively part-time post simply obscures the issue.

As indicated by Lady Hale in ***JFS***, Paragraph 62, the crucial questions which must be asked by the tribunal in the present cases are:-

> *"Why did the claimants received the less favourable treatment?*
>
> *Was it on grounds of part-time status?"*

They were treated differently and less favourably because of their position as salaried District Judges who held concurrent appointments as Deputy County Court Judges. They were part-time workers in both positions and it was that part-time status which differentiated them from County Court Judges.

228. The fact that some other part-time workers are better treated than the claimants does not alter the position. This decision has already discussed the relevant case law and the tribunal adopts the reasoning on this point in ***Sharma*** and in the recent decision of the Supreme Court in ***Coll***. .

229. If the tribunal is incorrect in determining that the present case falls within the first category; ie a ***James*** type case, the tribunal would still conclude that the less favourable treatment was on the grounds of part-time status.

230. Even if the present case did fall within the second category of case (***Nagarajan*** case), the motive behind the ground, cause or trigger would still be irrelevant. While the motive may have been operational efficiency or simply maintaining a longstanding administrative practice, it is clear from the evidence given that the ground on which the claimants received less favourable treatment in terms of pay and in terms of pension accrual was their position as part-time Deputy County Court Judges. Even if it were necessary to infer a cause that was not immediately obvious, as in ***Nagarajan*** etc, the tribunal can only conclude that the decision to pay the claimants as Deputy County Court Judges at the lower rate applicable to their different part-time post as District Judges was because of, or caused by, or on the ground of their part-time status as Deputy County Court Judges and as District Judges.

231. In his cross-examination Mr Coll was asked to contemplate a situation in which a full-time salaried County Court Judge commenced long term sick leave in circumstances where his return could not be anticipated for some months if not years. He was asked, in effect, if a Deputy County Court Judge, who was asked to '*act up*' for perhaps a possible two year stint, would not receive a full-time salary. His answers became somewhat evasive. He would have to seek legal advice. He would have to speak to the Lord Chief Justice. He then accepted that in that situation, the Deputy County Court Judge would receive a full salary. It therefore seems beyond argument that the reason the claimants do not receive payment and pension accrual appropriate to the level of work, on which they are engaged on a part-time basis, is that part-time basis.

232. The tribunal therefore concludes that, for the purposes of the Directive and of the 2000 Regulations, the claimants were subject to less favourable treatment on the ground of their part-time status.

Summary

233. The tribunal concludes that the respondents unlawfully discriminated against the claimants in respect of pay and pension accrual contrary to the Directive and to the Regulations.

234. The tribunal will contact the representatives of the parties to arrange a remedy hearing. If there is to be an appeal in relation to liability, this seems to be the type of case where it would be appropriate to stay any such remedy hearing pending the outcome of that appeal. If an appeal is to be lodged the tribunal should be notified directly as soon as possible.

Vice President

Date and place of hearing: **26 – 27 April 2017; and**
19 May 2017 at Belfast

Date decision recorded in register and issued to parties:

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL
CASE REFERENCE NUMBERS 540/12 IT, 636/12 IT, 1214/12 IT, 1910/12 IT and 1953/12 IT

BETWEEN:

WILLIAM KENNETH DUNCAN, RUTH COLLINS, HILARY KEEGAN, ISOBEL MARGARET BROWNLIE & PHILIP NIGEL GILPIN
Claimants

-and-

MINISTRY OF JUSTICE & DEPARTMENT OF JUSTICE
Respondents

OPENING SKELETON ARGUMENT ON BEHALF OF THE RESPONDENTS

Introduction

1. The Claimants' claims arise from their appointments as District Judge and concurrent appointments as Deputy County Court Judge.

2. Each asserts that, in their capacity as a Deputy County Court Judge, they are a part-time worker within the meaning of Regulation 2(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 ("the PTWR") and have been subjected to less favourable treatment than a comparable full-time worker, in that they do not receive payment and accrue pension entitlements in respect of their sittings as Deputy County Court Judges at the same rate as salaried County Court Judges.

3. For the avoidance of doubt, the Claimants have abandoned any claim for breach of contract and for less favourable treatment under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern

Ireland) 2002.[1]

4. The agreed legal and factual issues are contained at pages 32 - 38 of the trial bundle. Further, it has been agreed between the parties that each application to the Industrial Tribunal will initially proceed on the question of liability only.

5. Accordingly the Industrial Tribunal is being asked to decide the following questions for each Claimant:
   (1) Is the Claimant a part-time worker within the meaning of the PTWR?
   (2) If so, is any person, in relation to each Claimant, a comparable full-time worker within the meaning of the PTWR?
   (3) If so, has any Claimant been treated by the Respondent(s) less favourably than it treats a comparable full-time worker?
   (4) If so, is such treatment on the ground that the Claimant is a part-time worker?

   A "no" answer to any one of these questions will defeat the claim(s).

6. Although the Claimants' day-to-day working relationship is with the DOJ, the MOJ has indicated that it will accept liability if any of these claims succeed.

Background

7. From the 1970s it has been practice in this jurisdiction for a District Judge to be concurrently appointed as a Deputy County Court Judge. This is required to achieve a high level of operational efficiency in the management of County Court lists.

8. For the timeline of Judicial appointments for each Claimant (including appointment as Circuit / District Judge), see the following:
   (1) Hilary Keegan (1979 - 2012) - Pages 229 -230 of the trial bundle

[1] In a letter dated 28 March 2017 the Claimants confirmed that their claims are under the PTWR.

(2) Isobel Brownlie (1997 - Present) - Appointed Deputy District Judge on 6th July 1993. Further, see pages 280 - 282 of the trial bundle.
(3) Ruth Collins (2000 - present) - Page 299 of the trial bundle.
(4) Kenneth Duncan (2014 - present) - Page 346 of the trial bundle.
(5) Philip Gilpin (2012 - present) - Page 396 of the trial bundle

9. The Respondents assert that such a practice or policy of concurrent appointment has been understood and accepted by each Claimant. The eligibility criteria applied in the recruitment process for appointment to District Judge (Claimants Brownlie and Collins) stated:

"All District Judges also hold the concurrent post of Deputy County Court Judge ….." (page 263 of the trial bundle).

10. In the more recent appointment processes involving Claimants Gilpin and Duncan, the requirement for a District Judge also to sit as a Deputy County Court Judge is now expressly stated in the application documentation and terms and conditions of office. Such stated representations include:

(1) Advertisement for the office of District Judge

"NIJAC is inviting applications for the office of District Judge, which will be held concurrently with the office of Deputy County Court Judge…."
(page 347 of the trial bundle)

(2) Applicant Information Booklet

"District Judges are expected to sit as Deputy County Court Judges…."
(page 402 of the trial bundle).

"To be eligible for the office of District Judge (and the associated appointment as a Deputy Court Judge) …."
(page 402 of the trial bundle)

(3) District Judge (Judicial Job Description)

"District Judges exercise County Court general jurisdiction and also hold the concurrent post of Deputy County Court Judge….."
(page 409 of the trial bundle)

(4) Terms and conditions of Appointment - District Judge

"it is an established policy that all District Judges will also hold concurrently the post of Deputy County Court Judge….."
(page 414 of the trial bundle).

11. As a Full-time District Judge, each Claimant receives remuneration and pension entitlements as a full-time judicial officer holder. Any concurrent appointment as a Deputy County Court Judge does not impact on these.

12. Further, in order to be appointed concurrently as a Deputy County Court Judge, a District Judge is not required to make a separate application or to compete in an open competition for this role. Appointments as Deputy County Court Judges are renewed every 5 years.

Question 1: are the Claimants part-time workers?

13. The PTWR are applicable to Judges who for this purpose are "workers": *O'Brien v MOJ* [2013] 1 WLR 522. This is despite the fact that (according to current case law) Judges are not "*employed*": *Gilham v MOJ* [2017] IRLR 23, [2017] ICR 404.

14. Regulation 2 of the PTWR provides:

(1) A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.

(2) A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker.

15. It is clear in particular from regulation 2(2) that each worker who works for an "employer" is either a full-time worker or a part-time worker.

16. The Respondents "employ" (subject as above) both types of workers as Judges.

Many Judges are part-time workers who occupy fee-paid roles and are paid a fee for each sitting day. Some Judges are part-time workers who are engaged on a salaried basis, e.g. some District Judges and Circuit Judges in England work for fewer than 5 days per week and receive an annual salary and pension benefits on a pro rata basis. Most salaried Judges are full-time workers who are paid the full salary and pension benefits for their salaried office.

17. The Claimants are immediately recognisable as full-time workers. Their salaried office of District Judge requires them to work full-time and they are paid a full-time salary and pension benefits. Therefore they are not part-time workers for the purpose of the PTWR.

18. That simple analysis is undisturbed by the fact that the Claimants also hold concurrent appointments as Deputy County Court Judges. Those appointments enable these full-time workers to be deployed to DCCJ work whenever necessary, which helps the administration of the Courts and reduces the need for fee-paid Judges to cover County Court sitting days. The extra appointment does not convert these full-time Judges into part-time workers.

Question 2: Is any person, in relation to each Claimant, a comparable full-time worker within the meaning of the PTWR?

19. Regulation 2(4) of the PTWR provides:

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

(a) both workers are:

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

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

(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the

requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

20. Under the PTWR a real comparator is required. There is no provision for a hypothetical comparator: *Carl -v- University of Sheffield* [2009] IRLR 616, EAT.

21. The Respondents accept that a County Court Judge and a District Judge who sits as a DCCJ are employed by the same employer and are based at the same establishment, and that they are employed under the same type of contract on the basis that both are salaried Judges.

22. The Respondents do not, however, accept that a County Court Judge and a District Judge (who sits as a Deputy County Court Judge) are engaged in the "*same or broadly similar*" work.

23. The House of Lords considered the question of when there is a full-time comparable worker in *Matthews v Kent and Medway Towns Fire Authority* [2006] UKHL 8, [2006] ICR 365. Lord Hope summarised the test to be applied at paragraphs 14-15 and there is further helpful analysis by Lady Hale at paragraphs 43-44. Detailed reference will be made to these paragraphs in written and oral closing submissions. In summary, the law requires a careful examination of both the similarities and the differences between the work done by Claimants and by those who are put forward as potential comparators. It is necessary to focus on the work which the individuals actually do, not on what they could theoretically do (Lord Hope, paragraph 15).

24. It seems that the Claimants do not seek to argue that a District Judge and a County Court Judge do the same or broadly similar work. Instead they argue that their work as Deputy County Court Judges (ignoring their other work as District Judges) is comparable with that of County Court Judges.

25. The Tribunal is respectfully referred to the witness statements dealing with the similarities and differences between the work done by the Claimants as

Deputy County Court Judges and the work done by County Court Judges. Particular assistance may be gained from the statement given by Judge McFarland who is presently the Recorder of Belfast and Presiding County Court Judge.

26. There are some clear similarities between the respective Judges' work because the function of Deputy County Court Judges is, after all, to do some of the work of County Court Judges.

27. Equally clearly their work is not "*the same*".

28. The witness statements explain that Deputy County Court Judges are drawn from different sources. Some, like the Claimants, are appointed concurrently to that office when appointed as full-time District Judges. Others are practising or retired solicitors or barristers who are appointed on a fee-paid part-time basis. Others are retired County Court Judges, also appointed on a fee-paid part-time basis. The witness statements explain what work is allocated to these different individuals in practice.

29. It can be seen that those such as the Claimants who are concurrently appointed as District Judges generally do not deal, in their DCCJ capacity, with Crown Court criminal business, County Court criminal business, appeals from the Adult or Youth Magistrates Court, appeals from the Magistrates Domestic Proceedings or Family Proceedings Courts, applications to the County Court/Family Care or applications under relevant licensing, registrations of clubs and Betting Gaming Lotteries and Amusements legislation.

30. The Respondents submit that the differences are ample to prevent the work of the Claimants and of County Court Judges from being "*broadly similar*" for the purposes of the PTWR.

31. Therefore, even if the Claimants could somehow be treated as part-time workers so that their DCCJ work is viewed in isolation, they cannot rely on County Court Judges as comparators under the PTWR.

Question 3: Has any Claimant been treated by the Respondent(s) less favourably than it treats a comparable full-time worker?

32. It is agreed that a County Court Judge earns more, per day, than a District Judge (whether sitting as a DJ or as a DCCJ). That is the less favourable treatment on which the Claimants rely. It is however incorrect to suggest that the Claimants are not paid for their work as DCCJs. They receive their full-time salary and pension benefits in return for all of their work including their DCCJ work.

Question 4: Is the less favourable treatment on the ground that the Claimant is a part-time worker?

33. The material parts of regulation 5 of the PTWR provide:

> *(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, …*

34. Applying reg 5(2)(a), it is therefore necessary to ask: when the Claimants spend a day sitting as Deputy County Court Judges, why do they earn less than County Court Judges? If the answer is anything other than their (alleged) part-time status, the claims must fail.

35. It should be noted that the question is not whether the difference in treatment is desirable, or fair, or whether the reason for the difference is a good reason[2]. This point is made because the Claimants clearly feel a sense of grievance, but their claims in this Tribunal cannot succeed unless part-time

[2] Indeed, reg 5(2)(b) provides a separate defence of objective justification for any prima facie discrimination, but that defence is not relied on in this litigation.

status is the reason for the different treatment.

36. It is respectfully submitted that the real reason for the less favourable treatment is obvious. It is that the Claimants hold, and are paid their salary for, the full-time office of District Judge, and not the more senior office of County Court Judge. For that reason, however they are deployed, they are paid the salary which attaches to their full-time office. See also the witness statements of Peter Luney and Alistair Cook.

37. The lack of any connection with part-time status can be seen by comparing the Claimants with those Deputy County Court Judges who are in fact part-time i.e. the fee-paid Judges who also work (or worked) as barristers or solicitors or who are retired County Court Judges. Their daily fee is based on 1/220th of Judicial Salary Group 6.1 which is the salary group for County Court Judges in NI[3]. Thus part-time status actually ensures equal treatment with the full-time holders of the office of County Court Judge. The Claimants are denied that level of fee, not because they are part-time workers but because they are full-time workers who already receive a salary in return for their full-time office.

Conclusion

38. The Claimants therefore fall at the hurdle of question 1. Alternatively they fall at the hurdle of question 2. Alternatively they fall at the hurdle of question 4.

39. It is hoped that these concise submissions will help to focus the issues. Further legal and factual arguments will of course be contained in closing submissions.

CHARLES BOURNE QC
BARRY MULQUEEN

[3] Note that County Court Judges in NI are paid the Judicial Salary Group 5 so long as they are required to carry out significantly different work to their counter parts elsewhere in UK (Diplock Trials).

19 April 2017

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND FAIR EMPLOYMENT TRIBUNAL
CASE REFERENCE NUMBERS 540/12 IT, 636/12 IT,
1214/12 IT, 1910/12 IT and 1953/12 IT

BETWEEN:

WILLIAM KENNETH DUNCAN, RUTH COLLINS, HILARY KEEGAN, ISOBEL MARGARET BROWNLIE
& PHILIP NIGEL GILPIN
Claimants

-and-

MINISTRY OF JUSTICE & DEPARTMENT OF JUSTICE
Respondents

LIST OF AUTHORITIES

Legislation

1. Council Directive 97/81 EC of 15th December 1997 concerning the Framework Agreement on part-time work

2. Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000

Legal Authorities

1. O'Brien v MOJ [2013] 1 WLR 522.
2. Gilham v MOJ [2017] IRLR 23, [2017] ICR 404
3. Matthews -v- Kent & Medway Towns Fire Authority [2006] UKHL 8
4. Carl -v- University of Sheffield [2009] IRLR 616, EAT

IN THE INDUSTIAL TRIBUNAL

Case References
1910/12, 630/12, 1214/12, 540/12 & 1953/12

Between

1. KENNETH DUNCAN (540/12)
2. RUTH COLLINS (1214/12)
3. HILARY KEEGAN (1910/12)
4. ISOBEL BROWNLIE (656/12)
5. PHILIP GILPIN (1953/12)

Claimants

And

THE MINISTRY OF JUSTICE
AND
THE DEPARTMENT OF JUSTICE

Respondents

--

OPENING SKELETON ARGUMENT OF COUNSEL FOR THE APPLICANTS

--

Note: Page references are to the Bundle unless otherwise indicated.

Introduction

1. This is the Opening Skeleton Argument of counsel for the five Claimants listed above (the Judges).

2. The basis of these Complaints lies in a single extraordinary fact:

> *The Respondents, despite both being departments of state whose main purpose is the delivery of justice, refuse to pay the Claimants when they work as Deputy County Court Judges at the same rate as their full – time County Court Judge colleagues.*

3. There is very little if any dispute of fact in this case. The core facts for this case are as follows:

   a. It is not in issue that all the Judges were appointed as District Judges (DJs);

(3) A judge may, in accordance with such directions, sit as a judge for any division.

(4) Subject to sub-sections (2) and (3), the Lord Chief Justice shall assign one or more judges to each division and may from time to time vary any such assignment.

(5) The judge, or (if more than one) one of the judges, assigned to the division which is or includes—

(a) the area of the city of Belfast shall be styled the Recorder of Belfast;

(b) the area of the city of Londonderry shall be styled the Recorder of Londonderry.

(6) In this Act "judge" means a county court judge, that is to say a judge appointed under this section.

13. Provision for payment of such judges is made by section 106 CCA which says –

106 Salaries and allowances of judges.

(1) There shall be paid to each judge such salary as may be determined by the Lord Chancellor with the consent of the Treasury.

(2) The salary payable to any judge shall begin from the date on which the judge takes the required oath or makes the required affirmation and declaration].

(3) The Lord Chancellor with the approval of the Treasury] may allow to any judge, for the purpose of defraying his travelling and subsistence expenses, such sum as appears reasonable.

(4)Sums payable under subsection (3) are to be paid by the Department of Justice.

14. For a long time now, ordinary CCJs have been, and are, paid[6] in accordance with salaries fixed for judicial salary group 6.1.[7]

District Judges

15. Secondly the office of DJ, to which each of the Claimants has been appointed is also a statutory office replacing the office of Registrar.

16. The relevant provisions are now found defined in section 70 of, and schedule 3 to, the Judicature (Northern Ireland) Act 1978 (JA), which now[8] says as follows –

> **70 Appointment and qualification of statutory officers.**
>
> (1) Appointments to the offices listed in column 1 of Schedule 3 shall be made by the Northern Ireland Judicial Appointments Commission after consultation with the Lord Chief Justice; and persons holding such offices are in this Act referred to as "statutory officers".
>
> (1A)The Lord Chief Justice must be consulted before a determination (or a revision of a determination) is made under Part 3 of Schedule 3 to the Justice (Northern Ireland) Act 2002 in relation to statutory officers.
>
> (1B)The terms and conditions of service for statutory officers are to be determined by the Lord Chancellor with the concurrence of the Treasury.
>
> (1C)Any salary or other amounts payable under subsection (1B) shall be paid by the Department of Justice.
>
> (2)Subject to subsection (3), a person shall not be qualified for appointment to any of the offices listed in column 1 of Schedule 3 unless he is—
>
> (a) a barrister or solicitor who has at least the number of years' standing specified in relation to that office in column 3 of that Schedule; or
>
> (b)the holder of any other office so listed.

[6] For the latest publication of these fees see "MINISTRY OF JUSTICE JUDICIAL SALARIES FROM 1 APRIL 2016" which can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518055/moj-judicial-salaries-1 april 2016.pdf

[7] By way of point of reference the Chairmen, Industrial Tribunals And Fair Employment Tribunal (N I) are in judicial salary group 7.

[8] See fn 9.

(3)In exceptional circumstances, where it appears to the Commission that a suitable appointment cannot be made in accordance with the provisions of subsection (2) and Schedule 3, it may, notwithstanding those provisions, after consultation with the Lord Chief Justice, appoint any barrister, solicitor or other person whom it considers to be suitable for appointment having regard to his knowledge and experience.

(4)Without prejudice to section 68, the functions of the holder of each office listed in column 1 of Schedule 3 shall include the functions specified in relation to that office in column 4 of that Schedule (being functions heretofore exercised by the holder of the office or offices so specified) and accordingly—

(a)for a reference in any statutory provision relating to those functions to any office listed in column 4 of Schedule 3 or to the holder of any such office there shall be substituted a reference to the appropriate corresponding office listed in column 1 of that Schedule or to the holder of that office, as the case may be; and

(b) the offices specified in column 4 of Schedule 3 are hereby abolished.

(5)The Department of Justice may by order made after consultation with the Lord Chief Justice at any time modify Schedule 3 by:—

(a) removing any office and any entry relating thereto from that Schedule;

(b) adding any office and any entry relating thereto to that Schedule;

(c) amending the title of any office or amending any entry relating to any office in that Schedule.

(6)An order under subsection (5) may make provision for any incidental, consequential, transitional or supplementary matters for which it appears to the Department of Justice to be necessary or expedient for the purpose of the order to provide and may amend or repeal any statutory provision (including any provision of this Act) so far as may be necessary or expedient in consequence of the order.

...

SCHEDULE 3
STATUTORY OFFICES

1. Office	Persons qualified		4. Functions heretofore exercised by the holder of the office of—
	2. Description	3. Standing	

(3) Subject to subsection (4), the Commission may, with the agreement of a deputy judge and the Department of Justice, from time to time extend, for such period as it thinks appropriate, the term for which the deputy judge is appointed.

(4) Neither the initial term for which a deputy judge is appointed nor any extension of that term under subsection (3) shall be such as to continue his appointment as a deputy judge after the day on which he attains the age of seventy; but this subsection is subject to section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993 (power to authorise continuance in office up to the age of 75).

(5) A deputy judge shall, while he is so acting, have the like authority, jurisdiction, powers and privileges as a judge in all respects and a reference in any statutory provision to, or which is to be construed as a reference to, a county court judge shall, for the purposes of or in relation to any proceedings in a county court, be construed as including a reference to a deputy judge appointed under this section.

(6) Where the hearing of any proceedings duly commenced before any deputy judge is adjourned or judgment is reserved therein, that deputy judge shall, notwithstanding anything in sub-section (2) or (4), have power to resume the hearing and determine the proceedings or, as the case may be, to deliver the judgment so reserved.

(7) The Department of Justice shall pay to every deputy judge, except a resident magistrate, such remuneration and allowances as the Lord Chancellor may, with the concurrence of the Treasury, determine.

20. It will be seen from this section that –

a. Whatever may be the practice in any court as to the deployment of a DCCJ, a judge appointed under this section has entirely co-ordinate "authority, jurisdiction, powers and privileges" of a CCJ: section 107(5); and

b. The Lord Chancellor (LC) is to determine the remuneration for the work of a DCCJ and they "shall" be paid the remuneration so determined: section 107(7).

21. In fact contrary to what might be supposed, there is no official publication of the MOJ, DOJ, LC or Treasury, setting out any salary group for DCCJs.[11] None has been disclosed by the Respondents. The only document that has been disclosed by the Respondents is a set of three tables which are in the Bundle at p. 468 (the last page).

22. This shows that a DCCJ is to be paid from the 1st April 2016 £606.85 per day.[12] None of the Respondents witnesses explain exactly what is the basis for this payment rate, however it happens to be exactly 1/220th of the annual salary of a judge in salary bracket 6.1 (£133,506) from that date. It has hitherto been argued that a normal civil service year consists of 220 days after allowing for holidays etc. [13]

23. Accordingly the *exact* administrative basis on which it is admitted that those DCCJs who are not also holders of the office of DJ are paid *pro rata temporis* to a CCJ is simply not known.

24. That is not to say that it is wrong to do so. Quite the contrary; they – like these Judges - have an unarguable case to be paid at such rate for exactly the same reason as these Judges do and indeed for the same reason that Mr O'Brien succeeded in his litigation.[14]

25. By contrast, the MOJ has issued publications which show that in Great Britain, Deputy Circuit Judges are paid fees on a daily basis at the same rate as a Recorder which is also *pro rata temporis* to the salary of a Circuit Judge.[15] This payment is made on the basis of 1/210th of the full-time salary for each day

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[11] That Counsel for the Judges has found.

[12] Other figures for other Deputy posts are included in the tables and the table also give information for earlier years.

[13] The preceding figures are believed to be similarly calculated. It is not in fact accepted that this is the right daily fee for two reasons: firstly the divisor should be 1/210 and not 1/220 (see [25] below, secondly in Northern Ireland CCJs are paid a temporary supplement for the time being over and above that for this judicial salary band because of the work in the Diplock courts: see note iv to the official publication from the MOJ.

[14] There is an outstanding moot point as to whether the LC is susceptible to legal challenge for failing to make any such direction or decision under section 107(7).

[15] For the latest publication of these fees see "MINISTRY OF JUSTICE JUDICIAL FEES FROM 1 APRIL 2016" which can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518053/moj-judicial-fees-1-april-2016.pdf

following the unappealed ruling of Employment Judge MacMillan[16] that this is the correct divisor to be applied

The right to equal treatment for part – time workers

26. It is perfectly obvious from the Judges' witness statements and from their associated documents setting out their appointments and re-appointments that they are appointed full – time to the office of DJ and only to work *ad hoc* as a DCCJ.

27. Indeed it is obvious from the gerundive "Deputy" before the title County Court Judge that they are not expected to work full time as a CCJ. Nor, as the evidence already filed consistently shows, in any case, do they do so.

28. It is thus beyond argument from their terms of appointment and the associated documents that

    a. their work under the title DCCJ exercising the jurisdiction of a CCJ is part-time and has never been full – time, and

    b. such work is undertaken deputising for a CCJ and in the exercise of the CCJ's jurisdiction over the cause or matter before them.

29. It is the Claimants' case that this treatment is unlawful on several counts.[17] Of principal significance for this litigation, it is a blatant breach of their rights under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000[18] (PTWR), which are to be interpreted so

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[16] See his Judgment dated the 19th August 2013, corrected on the 10th October 2013, in *O'Brien v. MOJ*. It is submitted that this is the appropriate divisor and that therefore the DCCJs in Northern Ireland who have been paid in accordance with the tables at p. 468 have been consistently underpaid and their pensions under – calculated.

[17] The Respondents are given fair warning that the Claimants reserve all their rights to pursue their claims for equal and fair treatment according to law in other ways should this case not be resolved in their favour.

[18] Northern Ireland Statutory Instrument 2000 No. 219, see http://www.legislation.gov.uk/nisr/2000/219/regulation/15/made

as to conform to the Part Time Workers Directive[19] (PTWD) (as extended to the United Kingdom[20]).

30. It is now well known that the PTWR have to be interpreted and applied in accordance with the judgment of the Supreme Court given on the 6 February 2013 in *O'Brien v. Ministry of Justice (O'Brien SC1)*,[21] and the judgment of the Court of Justice of the European Union (CJEU) in the same case that preceded the SC judgment.[22]

31. The IT will be asked to read these cases at the outset. It will be seen from these that the MOJ (and the predecessor departments) had sought to argue that Judges were not workers within the meaning of the PTWD so that the cognate Regulations to the PTWR could not be relied on. *O'Brien SC1* concluded that argument decisively in favour of all judges including the Judges in this litigation.

32. It will also be seen how the MOJ sought to justify under the cognate PTWR and the PTWD the refusal to pension these part-time judges. The IT is therefore asked to note how the SC has decisively rejected arguments based on the convenience to the state based on the work that a part-time judge does when not engaged in the work under scrutiny. It was absolutely nothing to the point that Mr O'Brien, a Recorder, or the Immigration Judges who had intervened in *O'Brien SC1*, were able to undertake other work when not working as a Recorder or as an Immigration Judge.

33. In this case the Respondents, no doubt having taken on board just how difficult it is to justify this kind of unequal treatment, have not pleaded any justification under the PTWD or PTWR for this treatment. This is not surprising since there could be no possible justification for the state to deliver justice on the cheap in this way.

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[19] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC; see http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997L0081&from=EN

[20] By Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland.

[21] [2013] UKSC 6; [2013] 1 W.L.R. 522; [2013] 2 All E.R. 1; [2013] I.C.R. 499; [2013] I.R.L.R. 315; [2013] Pens. L.R. 129; Times, February 22, 2013; see http://www.bailii.org/uk/cases/UKSC/2013/6.html

[22] See U:C:2012:110; [2012] 2 C.M.L.R. 25; [2012] All E.R. (EC) 757; [2012] I.C.R. 955; [2012] I.R.L.R. 421

34. Yet they both insist on persisting in maintaining this underpayment.[23] So what is defence do they seek to advance to these claims?

The Respondents' defence

35. First it seems that they seek to argue that when acting as a DCCJ a DJ is not a part-time worker. This is fanciful. The offices are quite separate as a matter of statute. The Respondents may seek to elide them in the terms and conditions that they have sought to impose but while it may be administratively convenient to do this it simply does not respect the fact that they are two entirely separate judicial offices. So called "custom and practice" makes not the slightest difference in law.[24] Indeed it is an abuse which is not to be tolerated to seek to circumvent the terms of the PTWD and PTWR in this way.

36. Secondly in some way it is said that the work of a DCCJ and a CCJ is not comparable.[25] This is both fanciful in fact and contrary to law as set out above in the provisions describing the powers and jurisdiction of the DCCJ as being entirely coordinate to that of a CCJ.

37. Moreover as noted above the Respondents admit that they pay some DCCJs on a basis *pro rata temporis* to CCJs, being retired CCJs who return to work as DCCJs and other fee – paid DCCJs. If they are paid *pro rata temporis* to a CCJ there can be no argument that these Judges are not undertaking comparable work.

38. Thirdly it is denied that there is any less favourable treatment. This too is entirely fanciful. Less money for the same work is obviously less favourable treatment.

39. Overall the Respondents have pleaded they do not accept[26] –

> ...that justice and equity require that for each day on which they sat as a [DCCJ] the Claimants should be paid the difference between (i) the daily rate payable to a [DJ] and (ii) the daily rate paid to [CCJs].

[23] See Statement of Agreed Facts and Issues at p.36.
[24] See the Statement of Facts and Issues at p.33.
[25] See the Statement of Facts and Issues at p.34.
[26] See Statement of Agreed Facts and Issues at p.37.

40. "Why not?" it may be asked. There is no substantive answer advanced by the Respondents. This litigation should never have reached the IT. The Respondents should have long since faced up to their obligations – at least since the judgment of the SC in *O'Brien SC1*.

41. The Judges have a clear and unambiguous right to

Conclusion

46. It is submitted that the IT should have no difficulty at all in recognising that this is a long-term and grave injustice to the Judges. No judge wishes ever to have to litigate with the state. It is not ordinarily seemly to do so. Yet eventually if the state abuses its power and does not face up to its legal obligations a judge is entitled as any other to make a claim.

47. That is the position for these Judges and the now seek the IT's assistance in the face of such unjustified intransigence from the Respondents.

ROBIN ALLEN QC
ADRIAN COLMER BL

19 April 2017

IN THE INDUSTIAL TRIBUNAL

Case References

(Noel Kelly Vice-President,
Dr Carol Ackah, and Fiona Cummins)

1910/12, 630/12,
1214/12, 540/12 & 1953/12

Between

1. KENNETH DUNCAN (540/12)
2. RUTH COLLINS (1214/12)
3. HILARY KEEGAN (1910/12)
4. ISOBEL BROWNLIE (656/12)
5. PHILIP GILPIN (1953/12)

Claimants

And

THE MINISTRY OF JUSTICE
AND
THE DEPARTMENT OF JUSTICE

Respondents

--

CLOSING SUBMISSIONS FOR THE CLAIMANTS

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Notes:

1. The same abbreviations are used in these Closing Submissions as have been used in the Judges' two Opening submissions.
2. The Judges' first Opening is referred to as J1; the Supplementary Opening Submissions are referred to as J2; and the Respondents' Opening Submissions are now referred to as MOJ1, in anticipation that there may be further written submissions from the Respondents.
3. Any other new abbreviations are found below in () immediately following the word or phrase to which they refer.
4. References to the Composite Bundle of Authorities are to the tab numbers followed by the page number; thus "Auths Tab 6/1" is a reference to the first page of Tab 6 of the Authorities Bundle where section 102 of the County Courts Act (Northern Ireland) 1959 can be found.
5. References to the Statement Bundle are given as Statement p.1 etc.
6. References to the Trial Bundle are given as simple page numbers, as before.
7. When referring to witnesses judicial titles have been omitted for brevity; no disrespect is thereby intended.

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The Part-Time Workers Directive 4

When the Claimant Judges work as DCCJs, are they PT workers for the purposes of the PTWR? and PTWR? 4

Introduction

1. These are the closing submissions for the Claimants following the hearing of the evidence by the Industrial Tribunal on the 26th and 27th April 2017.

2. In summary it is submitted that there are no substantial issues of fact that arise as between the Judges' evidence and the witnesses called by the Respondents, and that all the evidence supports the Judges' claims. It is clear from the cross – examination of the Respondents' witnesses, that despite what has been said in the Respondents' pleadings and Opening submissions, the Respondents have not contradicted the Judges' case that -
   a. they work part-time (PT) as Deputy County Court Judges (DCCJs),
   b. when they do so, they undertake comparable work to full-time (FT) County Court Judges (CCJs),
   c. because they are not paid *pro rata temporis* at the same rate as CCJs are paid, they are less favourably treated than CCJs (and indeed other DCCJs), and
   d. this less favourable treatment is because the Respondents have a policy of refusing to pay these DCCJs the same pay, day for day, as FT CCJs (and indeed DCCJs who are also in practice as barristers, solicitors and retired CCJs).

3. The issues that divide the parties on these matters have recently been narrowed, because at 13:33pm on Friday the 5th May 2017 Charles Bourne QC (CB) leading counsel for the Respondents, emailed Robin Allen QC (RA) leading counsel for the Judges, to say –

> I now have instructions to communicate a concession on the comparator issue, as below. My instructing solicitors will be writing to yours in the same terms but in view of the approaching deadline for written subs I wanted to tell you directly.
>
> Having considered the evidence given at the recent hearing, the Respondents concede that if the Claimants are successful on the issue of part-time status, then a CCJ does work which is broadly similar to that of a DCCJ and therefore can be used as a comparator, and (as already agreed) does receive more favourable treatment in the form of higher pay and pension. However part-time status and the reason for less favourable treatment remain in issue.

4. These concessions were inevitable from the moment this case was started by the first Judge. They are of course welcomed by the Judges (and no doubt will also be by the IT) in that they narrow the issues that the IT has to decide.

5. For the moment, the Judges forbear to pass further detailed comment about the timeliness, and further consequence, of these concessions. The moment for that will be after the IT's decision on liability.

The Part-Time Workers Directive

6. The IT is reminded that in the Supplementary Opening Submissions on behalf of the Claimants (J2), the obligation of the IT to construe the Part-Time Workers Regulations (PTWR) (Auths Tab 3) consistently with the Part-Time Workers Directive (PTWD) (Auths Tab 1) was set out. It was also asserted that the Judges could rely directly on the terms of the PTWD to the extent that the UK had not fully transposed the PTWD into domestic law following the *O'Brien* litigation.

7. It will also be recalled that CB, leading counsel for the Respondents, indicated at the commencement of the hearing on the 26th April 2017 that this was agreed.

When the Claimant Judges work as DCCJs, are they PT workers for the purposes of the PTWD and PTWR?

8. It is submitted that this is now the first question that the IT will have to decide.

9. The precise wording of this question is emphasised. The question is <u>*not*</u> whether the Judges are PT workers when working as DJs.

The law

10. It will be recalled that in J2 it was submitted to the IT, for the Judges, that –
    a. Those parts of the text of the PTWR that are based on a contractual assessment, are not apt to deal with the relationship that these Judges have with the state.
    b. This is because their relationship with the state is not contractual; it is a particular kind of employment relationship called a "judicial office".
    c. Accordingly the relevant provisions of the PTWD concerning the definition of a PT worker have to be construed and applied.

d. Clause 3 of the Framework Agreement attached to the PTWD requires that the question whether the Judges were PT workers be addressed in a composite assessment of the relative positions of the work done by the FT CCJs and the work done by the Judges as DCCJs.

11. That assessment was never difficult in this case, but as of last week, it has now been made simpler by the concession made by the Respondents that –

"...a CCJ does work which is broadly similar to that of a DCCJ and therefore can be used as a comparator..."

12. The need for a composite assessment derives from the fact that the definitions of a PT worker and a comparable FT worker are inter-dependent, as Clause 3 of the Framework Agreement (FA)[1] (see Auths Tab 1 at p. L14/13) makes clear thus –

Clause 3: Definitions

For the purpose of this agreement:

1. The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

2. The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.

Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

13. Applying those two Sub-clauses to this case it will be seen that the question of fact for the IT to address is thus -

[1] Attached to the PTWD and in force as part of the PTWD.

Are the hours of work that the Judges undertake as DCCJs less than the normal hours of work of the CCJs?

14. This is quite different from the Respondents' submission on this issue, which the IT will find at MOJ1 [17], and which says –

> The Claimants are immediately recognisable as full-time workers. Their salaried office of District Judge requires them to work full-time and they are paid a full-time salary and pension benefits. Therefore they are not part-time workers for the purpose of the PTWR.

15. The Respondents' submission simply misses the point of the PTWD. The question is not whether they do judging work on say an 8 hours a day 5 day a week basis. The case is concerned with a particular kind of work done by these Judges in accordance with a particular statutory appointment that they have as DCCJs, which work is jurisdictionally different from, and more significant legally, than the work that they do under a different statutory appointment as DJs.

16. In short to resolve the question whether the Judges are PT workers, it would be an error of law for the IT to look to what the Judges do when they are ***not*** working as DCCJs, because that is simply not the issue in the case.

17. What is in issue in this case, is the proper description of their work ***as DCCJs***. As to this they are either PT or FT.

18. As a matter of fact (as to which see further below) it is plain that they are not FT, and indeed are not wanted by the Respondents to be as much as the evidence (as the appointment of HHJ Devlin shows; see p. 474 of the Bundle for instance).

19. Accordingly they must be PT. It is really not very difficult to see that this is the right conclusion!

20. It will be readily seen therefore that there is no legal basis for the Respondents' submission. This is entirely clear from Clause 3 which places the focus on an assessment of the time engaged by these Judges on work that is comparable to

that of the FT comparable workers (i.e. CCJs) and not on some other work that is irrelevant to the comparable worker's job.

The factual analysis

21. As noted above the factual answer to this question is not even remotely difficult. It does not require a detailed assessment of hours worked "calculated on a weekly basis or on average over a period of employment of up to one year". Nevertheless for convenience the IT is now reminded shortly of that evidence.

22. All the Judges have given evidence that they did not work as DCCJs to the same extent as the FT CCJs. They would sometimes do whole days as DCCJs and sometimes have mixed lists. None of them were cross-examined to the contrary; as to their statements see –
    a. The statement of Hilary Keegan at [9] "approximately 4 days a week": Statement Bundle p.4;
    b. The first statement of Isobel Brownlie at [13] "regularly sat": Statement Bundle p.11;
    c. The second statement of Isobel Brownlie passim: Statement Bundle p. 41 and ff.;
    d. The statement of Ruth Collins at [25] "a frequent, regular, if not daily basis, as have my other colleagues...": Statement Bundle p. 19;
    e. The statement of Ken Duncan at [8] "...provided I ensured that the District Judge business had been attended to I will be available to also assist with the dispatch of county court judge business...I continue to sit in this [DCCJ] capacity in the courthouses that were formally part of the Southern Circuit. In this role I am a part-time County Court Judge.": Statement Bundle pp. 27 – 28;
    f. The statement of Philip Gilpin to like effect to that of Ken Duncan at [8]: Statement Bundle pp. 35 – 36.

23. So it is submitted that this question admits of only one answer. Applying Clause 3 PTWD, compared to admittedly comparable CCJs, these Judges are PT workers when working as DCCJs. The IT is asked to so hold.

Is the less favourable treatment of these Judges by the Respondents in not paying them pro rata temporis the same as a CCJ "on the ground that [they are] part-time worker[s]"?

24. CB's email makes it clear that the only other issue that the Respondents now maintain is what he summarily calls "the reason for the less favourable treatment".

25. As to this it is submitted first that all experienced lawyers know that to ask what is the reason for something is a context specific question. A philosopher might argue that the reason for one event may be a prior event, and the reason for that a still further event – *ad infinitum*. The law does not take an overly philosophical view of such questions.

26. Rather a question, posed in a legal context, as to what is the reason for something, has to be answered with an eye to the purpose for asking that question. That is why the precise question posed by the legislation must be examined within the context of the legislation to be applied.

27. In this case the purpose is not in doubt. It is to secure the equal treatment of PT and FT workers when undertaking the same type of work. That equal treatment includes, and indeed is focussed on, the pay for the work. Such equal treatment is required by law; indeed the text of the PTWD makes it clear why it is so important. The equal treatment of PT and FT workers is necessary to facilitate the increase on a proper basis of PT work without abuse.

28. Although this is a case about Judges, it is worth bearing in mind that the less favourable treatment of workers of all kinds has in the past been commonplace. Bad employers have come up with all sorts of specious arguments to explain that the relative underpayment of such PT workers is not because they are PT or is otherwise justified. The PTWD requires courts and tribunals to cut through such historic arguments and to establish the equal treatment rule as a reality.

The Law

29. That is why, in this case, the starting point is to recall that it is not in issue that, given that the Judges are PT workers who undertake work that is comparable to FT CCJs, they have the right pursuant to Regulation 5 of the PTWR (Auths Tab 3/5) –

> (1) ... 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.

30. Secondly, it must be borne in mind that it is ***admitted*** by the Respondents that there is such less favourable treatment. Thus the email noted above expressly states that it is admitted that –

> ...[a comparable CCJJ does receive more favourable treatment in the form of higher pay and pension...

31. The question that remains therefore is whether the Respondents can deny the Judges the right to equal treatment by reference to Sub - regulation 5(2)(a) which states –

> (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,* ...(italics added for emphasis)

32. It is trite law that in discrimination legislation the phrase "on the ground that" is the same as "because".

33. That provision is not to be considered in isolation; there are two further legal directions which must be borne in mind when seeking to answer this question.

34. Firstly Sub-regulation 5(2)(b) states –

> (2) The right conferred by paragraph (1) applies only if— ... (b)the treatment is not justified on objective grounds.

35. As to this, in MOJ1 it was expressly conceded by the Respondents that this treatment is not justified. The Respondents could hardly argue otherwise given that the LC apparently specifically states (without express reservation or qualification) that as a generality DCCJs are to be paid at rates which are a given

fraction of the CCJ's pay: see the table at p. 468 in the Bundle, and see also p. 470B.

36. This makes it all the more surprising that the Respondents persist in seeking to argue that their treatment of these Judges is not "on the ground that" they are part-time workers. If it is not justified to pay them less it is very surprising indeed that they should seek to suggest that there is a basis for avoiding liability under the PTWR and PTWD.

37. Secondly, in addressing that question, the IT is asked to note that the PTWR add at Regulation 5(3) that -

> (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.

38. It is not suggested by the Respondents that the *pro rata* principle is inappropriate. Nor could it be since – as noted above - they actually promulgate a pay rate for another class of DCCJs that is calculated *pro rata* to that of a CCJ. The Respondents simply refuse to apply it to these Judges on the basis of custom and practice.

39. The Respondents' sole argument on this issue is to say that the Judges have a separate judicial office as a DJ which, it is argued, is held FT, and that the reason that the Judges are not paid anything for the work that they do as DCCJs is that they are paid at a lower, but FT, rate for the office of DJ which they hold concurrently

40. Yet of course the uncontroversial facts are that these Judges
    a. Do not even (in practice[2]) work FT as DJs;
    b. Have never been expected to do so[3]; and
    c. Have always been expected to do a mix of work, PT as DJs and PT as DCCJs, as the demand requires.

Vhile their appointments were as full time DJs they have all from the start (or in the case of Isobel Brownlie d Hilary Keegan, from an early stage in their careers as judges) been required to work partly as DCCJs and so uld not at the same time work all their hours in the court house as DJs.
ee previous fn.

41. So the Respondents' argument is *firstly* incorrect in point of analysis.

42. *Secondly* it is irrelevant to the legal question that this IT has to answer. The question posed by Regulation 5 is ***not:*** why are the Judges paid at the rate of a DJ? It is ***not*** whether they have been paid while working as a DCCJ *pro rata* to the pay for a DJ. The question is why have they as PT workers not been paid *pro rata* to the pay of a FT CCJ.

43. In short the right question this IT must ask, is clear from the text of the Regulation, in particular Regulation 5(3) -

> *Why are these Judges not paid pro rata to the rate of a CCJ when they are undertaking the work of a CCJ?*

The factual analysis

44. It is submitted that the answer to this question has always been clear, though it is plainly one which the Respondents' main witness, Mr Cooke, found embarrassing to admit, until under cross-examination he had to.

45. It is obvious that, whether they held the title of DCCJ or CCJ, if these Judges were working FT as CCJs, they would be paid as CCJs, ***so the reason that they are not so paid is because they are not working FT.***

46. The IT are reminded of a key part of the cross-examination of Mr Cooke –

RA CCJ is ill, off for two years with cancer, what would you do?
AC I would advise LC; would need to advise the LC; look into it; need to get legal advice; perhaps be temporarily promoted
RA These are weasel words
AC It's a matter I'd need to consider
RA What's the difficulty?
AC Would need to speak to LCJ; seek legal advice; primary post as DJ; paying them a rate for a certain length of time; things I would need to consider that I may not be aware of; I haven't thought about it before today
RA The reason they are not paid as a CCJ is because they do not hold the title CCJ

AC It is because they have a full-time appointment

RA That is just a mantra

AC I can't think of any reason why they wouldn't be paid for that post

NK There is a common principle

AC If DCCJ was asked to sit as CCJ for 2 years, in all likelihood they would be paid

RA What's the difference? Two years at 60%

AC It's the policy, the terms of the appointment as the DJ

RA The policy acknowledges that they are doing it, but says they not receive any remuneration; it is implicit

AC I suppose that it is

47. It is no answer to the case to say that it is custom and practice or policy not to pay a judge at a rate *pro rata temporis* to a comparable judge when undertaking the same work on a PT basis. Custom and practice or policy are no defence to claim under the PTWR/PTWD.

48. If an employer were able to defend a claim by a PT worker to equal pay *pro rata temporis* on the basis that it was always, or historically, the policy of the employer not do so, then the law would have no effect whatsoever. Equal treatment would be denied in every case because every employer would be able to avoid liability on the basis that they had such a policy.

49. Every employer would be able to say that we do not pay the PT'ers *pro rata* to the FT'ers because that is just the way things are in our place of work! On that basis the PTWD and PTWR would both be a dead letter.

INPS v Bruno

50. Finally the IT is reminded that in J2 it was pointed out that in Case C-395/08 *Istituto Nazionale della Previdenza Sociale (INPS) v Bruno* [2010] I.R.L.R. 890 (see the last Tab in the bundle containing J2) that unequal treatment as between two classes of PT cabin staff working in Italian airline was precluded by the PTWD

unless objectively justified: see the Operative Part of the Judgment at p.55 of that Tab). Accordingly these Judges are entitled to equal treatment with the non-DJ DCCJs (the barristers, solicitors and QCs) who are it has been shown are paid *pro rata* to CCJs.

Conclusion

51. The Respondents' case is not even threadbare; there is just a hole where there should be an argument: it has no basis whatsoever.

52. The IT is asked to find the Respondents liable to the Judges and to give directions for the assessment of quantum and the formulating of a suitable remedy in relation to their pension entitlements.

ROBIN ALLEN QC
ADRIAN COLMER BL

8th May 2017

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND FAIR EMPLOYMENT TRIBUNAL
CASE REFERENCE NUMBERS 540/12 IT, 636/12 IT,
1214/12 IT, 1910/12 IT and 1953/12 IT

BETWEEN:

WILLIAM KENNETH DUNCAN, RUTH COLLINS, HILARY KEEGAN, ISOBEL MARGARET BROWNLIE & PHILIP NIGEL GILPIN

Claimants

-and-

MINISTRY OF JUSTICE & DEPARTMENT OF JUSTICE

Respondents

CLOSING SUBMISSIONS ON BEHALF OF THE RESPONDENTS

INTRODUCTION

1. Our opening written submissions explained that the Claimants must obtain affirmative answers to all of these 4 questions[4]:

i. Are they part-time workers?

ii. Do they have a full-time comparator?

iii. Are they treated less favourably than the comparator?

iv. Is the less favourable treatment on grounds of part-time status?

2. The opening submissions also explained that if the Claimants succeed on questions 1 and 2, then question 3 is conceded, because a County Court Judge (CCJ) is paid more per day than a Deputy County Court Judge (DCCJ).

3. Following the hearing of 25-26 April, the issues have been narrowed still further because the Respondents have also conceded question 2, in these terms:

> **Having considered the evidence given at the recent hearing, the Respondents concede that if the Claimants are successful on the issue of part-time status, then a CCJ does work which is broadly similar to that of a DCCJ and therefore can be used as a comparator, and (as already agreed) does receive more favourable treatment in the form of higher pay and pension. However part-time status and the reason for less favourable treatment remain in issue.**

4. Therefore only two questions remain to be decided by this Tribunal:

[4] A fifth question would arise if the Respondents contended that any discrimination is objectively justified, but that contention is not made in these claims.

- Are the Claimants part-time workers?
- If so, do they receive the less favourable treatment by reason of part-time status or for some other reason?

5. Where possible we try to avoid repeating the opening submissions upon which the Respondents continue to rely.

WHAT IS A PART-TIME WORKER?

6. It is agreed that the PTWR are to be interpreted in conformity with the PTWD, and therefore with the Framework Agreement annexed to the PTWD.

7. Clause 1 of the Framework Agreement states its purpose:

> **(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.**

8. The recitals to the PTWD say more about the purpose. See in particular recitals (3)-(12). The aim is to improve and harmonise working conditions for those in "*forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work*". Recital (12) shows that these are viewed as "*flexible forms of work*".

9. Each of these types of work is a binary concept. In other words, in a workplace each individual's contract (or other arrangement) is either full-time or part-time, either fixed term or open ended, either temporary or permanent, and either seasonal or year-round. This Directive is concerned with protecting the part-time worker. It is not concerned with protecting the full-time worker.

10. Recital (16) provides that where terms are not specifically defined in the Framework Agreement, Member States may define them in accordance with national law and practice so long as these definitions respect the content of the Framework Agreement.

11. Clause 3 of the Framework Agreement contains these key definitions:

For the purpose of this agreement –

1. **The term "part-time worker" refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.**

2. **The term "comparable full-time worker" means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.**

Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

(emphasis added)

12. Two important points must be noted. First, a part-time worker is defined not in the abstract but by comparison with a specific full-time worker. Second, the words "*in the same establishment*" show that the comparison is to be made in a single establishment, or workplace.

13. This means that in that establishment, a worker will be part-time or full-time but cannot be both.

14. That is consistent with the policy of the Directive, which is to protect those flexible forms of work which are not the traditional model of full-time, permanent, year-round and open-ended. A full-time worker (in any establishment) does not need, and does not get, the protection of this Directive.

15. It should however be noted that a worker can be full-time in one establishment and part-time in another, e.g. by working an ordinary week in an office and then working evening or weekend shifts in a restaurant – "moonlighting". If the restaurant owner discriminates against his part-time workers, he cannot mount a defence by saying that the moonlighting worker also has a full-time job in some other establishment.

16. There is a third important point about clause 3 of the Framework Agreement. It does not define "full-time" – even though the definition of part-time is defined by a comparison with full-time hours. Applying recital (16), the UK is left free to define "full-time" so long as it respects the content of the Directive.

17. Reg 2 of the PTWR (set out in paragraph 14 of our written opening) is faithful to those provisions. It begins by defining full-time – i.e. by filling the gap left by the Directive, as the UK was left free to do. A worker is full-time if he or she "*having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker*".

18. That definition entirely respects the content of the Directive. The reference to custom and practice simply recognises that different workplaces work in different ways, so that "full-time" may refer to one working pattern in one place and a somewhat different working pattern in another. This cannot be used as an avoidance provision because a Tribunal can always refer to the Directive to resolve ambiguity.

19. Meanwhile, under both PTWR and Directive, a person whose working time is less than full-time is a part-time worker.

FINDINGS OF FACT: PART-TIME WORKER

20. The Tribunal is respectfully invited to make the findings numbered below:

(1) The Claimants as District Judges are full-time workers

21. This is (or should be) common ground. See their opening submissions at paragraph 26, and their witness statements[5].

22. It does not matter that they do not have contracts. The PTWD also applies to an "employment relationship"[6] such as theirs.

23. This full-time relationship means that the DOJ is entitled to require their services during the whole of the normal judicial working week. See the letter sent to Ms Brownlie, at pages 268-269: "*The appointment of a District Judge is a full-time one and the courts have first claim on the whole of a District Judge's time*". The commitment

[5] Keegan para 6; Brownlie (1) paras 10, 11, 12; Collins 21; Duncan 7; Gilpin 7.
[6] Framework Agreement clause 2.1.

was expressed in different ways over time. Initially the DJ terms and conditions did not specify a required number of days work but instead identified a quantity of leave which was allowed at particular times[7]. Then, from at least August 2011, there was a stated expectation of a minimum number of sitting days[8].

(2) **The DCCJ sitting takes place during each Claimant's ordinary working hours, not at some different time**

24. This is (or should be) common ground. Each Claimant accepted it in oral evidence.

25. That is why this situation is different from moonlighting, where a person has one job during one set of hours and a second job during a different set of hours: see paragraph 16 above. These Claimants, however, each have just one set of working hours.

(3) The Respondents' policy is to give all District Judges concurrent appointments as DCCJs for operational efficiency

26. The appointments as DJ and DCCJ are concurrent, as noted by many documents e.g. pages 304, 309, 314, 353, 363, 368, 414 and 450.

27. The reason for this practice of concurrent appointments is also well documented. It may suffice to look at pages 278 and 279, dating from 1997 and referring back to the 1970s, emphasising operational efficiency. In plain English it is helpful for DJs to be able to wear the "hat" of CCJ when needed, avoiding the administrative and financial burdens of arranging for fee-paid DCCJs to cover many sitting days.

(4) **There are separate warrants of appointment because this is a legal requirement, not for any other reason**

28. A particular feature of judicial work is that most jurisdictions cannot be exercised other than by a person holding the relevant appointment.

[7] Keegan p 253, Brownlie 273, Collins 324.
[8] Duncan 372, Gilpin 418.

29. Contrast other jobs, e.g. where an accountant might be asked to undertake a management function one day a week, or a waiter might be asked to help in the kitchen on certain occasions, but no special appointment is needed.

30. In this case the power to sit as a judge of the County Court arises from the County Courts Act (Northern Ireland) 1959 sections 102 (CCJs) and 107 (DCCJ). It does not arise from an appointment as DJ under the Judicature (Northern Ireland) Act 1978.

31. That is the simple reason why, for the Respondents to achieve the desired operational efficiency, separate formal appointments – two "hats" – are needed.

32. There is no such requirement in relation to other activities of a DJ. See, for example, the 2013 job description which refers at page 364 to committee work and service on other legal bodies (and see also page 449). Those activities are not the discharge of the DJ's statutory jurisdiction, but they can be discharged without separate appointment simply because there is no legal obstacle to their discharge. Again, compare the accountant or the waiter.

33. Nobody would suggest that DJs cease to be DJs, and instead have some other employment relationship, on days when they carry out committee work or participate in training events. No more does a full-time accountant turn into a part-time manager when asked to discharge a management function.

34. Nor do DJs cease to be DJs, and switch to a different employment relationship, during the hours or days when they sit as DCCJs. This is recognised, for example, in the 2000 DJ job description (page 316) which explains that "*When sitting as DCCJs, DJs have the powers of CCJs in all respects*". At those times, the reality is that each Claimant is a full-time DJ who is wearing the DCCJ hat. To re-cast this as a part-time employment relationship is a distortion of reality.

CASE LAW

35. This Tribunal may be assisted by a judgment of the Employment Tribunal in London in *Ferris v MOJ* (Employment Judge Macmillan, 5 August 2016), although the decision of course is not binding.

36. The premise of the claim in *Ferris* was materially the same as in these claims. A salaried Employment Judge (EJ) had a separate appointment allowing him to sit from time to time as a Recorder i.e. as a fee-paid judge exercising the jurisdiction of a Circuit Judge (who may sit in a Crown Court or a County Court). However, for this work he received nothing in addition to his EJ salary and pension which were at a rate lower than the daily rate for a Circuit Judge. Like these Claimants, he claimed that during the sitting in question he was a part-time worker, that his full-time comparator was a Circuit Judge and that he received less favourable treatment than a Circuit Judge in the form of the lower rate of reward[9].

37. A complicating feature of the claim was that Mr Ferris ceased to work full-time on 1 January 2015, going down to a 90% commitment. So there was a brief period at the end of the time covered by the claim in which he was definitely a part-time worker because he was a part-time EJ. Judge Macmillan dealt separately with the periods before and after this change. For the period before the change, *Ferris* is indistinguishable from the present claims.

38. Striking out the claim, Judge Macmillan decided that Mr Ferris was not a part-time worker during the period when he was a full-time EJ (paragraph 7):

> **… The definition of full-time worker in reg 3(1) is clear. In my judgment it is simply unarguable that Mr Ferris was anything other than a full-time worker for the period prior to 1 January 2015. He was paid wholly by reference to the time he worked, namely an annual salary, and in his own skeleton argument he describes as a witness statement, he refers to himself as having been "appointed a full time salaried Employment Judge" on the 1 June 2011. Judges holding such instruments of appointment are universally regarded by both appointers and appointees as being full-time. It is equally unarguable in my judgment that the fact that he sits as a Recorder not by virtue of a statutory or similar deployment but by virtue of holding a separate appointment, has any bearing on the matter. The separate appointment merely makes him eligible to sit as a Recorder and has no relevance for the question of his status for the purposes of the PTWR. It is noteworthy that Mr Ferris has not brought a claim in respect of the difference between his daily salary as an Employment Judge and the Recorder's daily sitting. He was at all times up to 1 January 2015 clearly and unarguably identifiable as a full-time worker. The disputed contention for the period prior to the 1st of January 2015 simply cannot succeed.**

39. The judgment goes on to deal with the period when Mr Ferris was a salaried part-time EJ. There is a slightly more complicated analysis at paragraphs 8-9 of who is the relevant comparator if the claim is based on <u>that</u> part-time working (i.e. as an EJ),

[9] For reasons not known to us, the complaint was directed at the rate of pension rather than pay.

which is not material for present purposes. However paragraph 9 contains important comments about judges sitting in different roles:

> **… I do not accept that the true comparator is a Circuit Judge as that requires the artificial separation of Mr Ferris's two judicial roles when for all terms and conditions purposes they are one. Properly understood, he does not cease to be a salaried (albeit 90%) Employment Judge on a day when, within his commitment to HMCTS of 198 days, he sits as a Recorder. He remains a salaried (90%) Employment Judge throughout but he just happens to be sitting in another jurisdiction on certain days …**

CONCLUSION ON THE ISSUE OF PART-TIME WORKING

40. An attentive reading of the Claimants' two sets of opening submissions reveals a lack of attention paid to the wording of either the PTWR or the Directive, and in particular a lack of any explanation of how, applying the relevant legislation, the Claimants can be both full-time and part-time during the same working time.

41. This Tribunal is respectfully invited to decide, like the ET in *Ferris*, that a salaried full-time judge is a full-time worker and therefore cannot be a part-time worker. It has been convenient for the Respondents to deploy the Claimants to sit as CCJs for part of their time, and they had to be given a separate legal "hat" in order to do so. However at all material times, they were full-time salaried DJs, and that fact did not cease when they heard CCJ cases, any more than it did when they attended training or committees.

THE LAW RELATING TO "REASON WHY"

42. If a Claimant establishes part-time status and identifies a full-time comparator in relation to whom he or she receives less favourable treatment, the final question is always whether the difference of treatment is on grounds of part-time status.

43. On this issue it does not help the Claimants to look to the Directive. Under the Directive this requirement is imposed in very stark terms. Clause 4 of the Framework Agreement states the 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 <u>solely because they work part time</u> unless different treatment is justified on objective grounds.**
>
> **2. Where appropriate, the principle of pro rata temporis shall apply.**

(emphasis added)

44. However the PTWR may be more favourable to workers in this respect by not reproducing the word "solely". See reg 5:

> **(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—**
>
> **(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, …**

45. The effect of case law is that, for a claim to succeed, part-time status must be the "*effective and predominant cause*" of the treatment: see *Carl v University of Sheffield* [2009] IRLR 616, EAT at para 42 per Judge Peter Clark (the discussion is at paras 24-42 where the EAT follows its own decision in *Sharma v Manchester City Council* [2008] IRLR 336, EAT).

46. Identifying the reason is a question of fact and depends on the evidence.

47. It should be remembered that the Claimants claim parity with full-time salaried CJs. However, they are full-time salaried DJs. As Peter Luney of the DOJ points out (witness statement para 32) these are different offices with different salaries. Because they are full-time salaried DJs, the Claimants receive their DJ salary at all times, even when "sitting up" as DCCJs.

48. It is the MOJ which determines the Claimants' terms and conditions (Alastair Cook para 5). Mr Cook at his paragraph 13 explains that the MOJ's policy also applies in England and Wales, giving the example of DJs sitting as Recorders. This Tribunal has been told by the Bar that the practice is applied consistently in other analogous situations e.g. Circuit Judges sitting as Deputy High Court Judges or High Court Judges sitting in the Court of Appeal.

49. In cross examination it was repeatedly put to Mr Cook that DJs sitting as DCCJs do not get a CCJ's salary because (inter alia) they are not full-time CCJs. That may be true, but it does not mean that their working hours are the reason for the differential

pay arrangements. The reason for the lower pay is the holding of a salaried appointment which commands a lower salary. A full-time CCJ will get a CCJ's salary and a full-time DJ will get a DJ's salary, regardless of whether they also do some sitting in another jurisdiction.

50. There is not much documentary evidence on this issue but such as it is, it makes no connection with part-time status:

i. The DJ terms and conditions dated August 2011 provide at paragraph 4 (page 415) that "*full-time salaried judiciary receive no sitting fees for any fee paid judicial offices held concurrently*". That sentence alone demonstrates that a person receives no sitting fee because they are "*full-time salaried*".

ii. An email in June 2011 relating to the terms and conditions states that "*judicial officers receive no additional remuneration for their duties at that level*", the word "additional" indicating that the issue is the fact that the officers in question are already remunerated i.e. via their salary.

iii. In 2012 the Lord Chancellor writes to the Chief Justice (461-2), following up a concern raised by Judge Gilpin. The reply is based on a departmental submission (464-5). The submission and letter contain a reference to judges competing for part-time roles which is erroneous as regards the DJs in Northern Ireland. However the relevant policy is national, not specific to Northern Ireland. The submission and letter state the key point of the national policy: "*on any day that a salaried judge carries out fee paid duties, they are already being remunerated as a judge for their primary, salaried role*". Once again, the issue is the fact of a salary and is not about working time.

51. Nor is there any documentary evidence of any potential claimant ever believing that any part-time nature of their DCCJ work was the reason for the policy. On the contrary:

i. In 1988 the then Registrars accepted that "*no-one who holds a full-time judicial appointment has in fact ever been paid for sitting as a Deputy …*", the problem thus being the holding of a full-time appointment, not the carrying out of any part-time work.

ii. When Judge Gilpin raised the issue with the Chief Justice in June 2012, the stated concern was clearly that the DJs were losing out by comparison not

with full-timers but with part-time fee-paid DCCJs: see pages 461 and 427 and, to similar effect as recently as 2016, Mr Gilpin's email on 429.

52. The Claimant is left with the argument that the DJs' work as DCCJs only occupies part of their time and therefore this policy (when applied to DCCJs) will always produce a differential between them and the full-time CCJs. That may be true but again, it simply does not mean that working time is the reason for the difference.

53. Whilst the claims are based on the comparison between DJs (sitting as DCCJs) and CCJs, the reason for the DJs' treatment (favourable or unfavourable) is illuminated by making a comparison between them and the other two groups of fee-paid DCCJs – lawyers and retired CCJs who sit part-time as DCCJs. Those other groups receive the more favourable treatment despite being part-time. This makes it very hard to believe that the reason for the less favourable treatment is part-time status. Instead, there is only one possible reason why the DJ-DCCJs receive less than their fee-paid colleagues: the fact that they hold a full-time salaried appointment as DJs.

54. The Claimants somehow have to argue that their level of pay is explained by part-time status when they are compared with CCJs, but that that same level of pay is explained by something completely different when they are compared with their fellow DCCJs. Again, this is a departure from reality.

55. The Claimants' only answer to this point is to cite the CJEU case of *INPS v Bruno* [2010] IRLR 890 (their "supplementary opening submissions" para 55), though without referring to any passage on which they rely.

56. *Bruno* involved the calculation of pensions for airline cabin crew. It did not involve the amount of pension per se, but instead concerned the calculation of the period of service necessary to earn a pension: see the first question set out at Judgment para 56. The cabin crew were "vertical cyclical" part-time workers, meaning that they worked a period on (e.g. a week) and a period off. Qualification for a pension depended on their length of service. National provisions meant that only their "on" periods were counted. The point being made by the Claimants is that the cabin crew were

compared with "horizontal cyclical" workers who worked for part of every week, and for whom every week therefore counted towards qualifying for a pension.

57. Unfortunately *Bruno* is difficult to follow because the parties failed to identify the relevant facts (see Advocate General paras 55-68). The A-G formed an opinion of the case based on differential treatment of the two types of part-time workers (vertical and horizontal). However the Court expressed no view on that question (Judgment paras 82-83), instead finding that the pension qualifying method treated part-time workers less favourably than full-time workers (Judgment paras 61-68, which also appear to state that the airline did not actually have any horizontal part-time workers).

58. The Claimants' point, overall, seems to be that if there was discrimination against the vertical part-time workers, the employer could not escape liability by pointing to a lack of discrimination against horizontal part-time workers.

59. In principle that is correct. If part-time worker A suffers discrimination on ground of part-time status, it is no defence to say that part-time worker B does not. But that begs the question of whether the discrimination against A was in fact by reason of part-time status or was for some other reason. In *Bruno*, the vertical workers lost out because of their working time pattern, which was a part-time working pattern. That conclusion was unaffected by the fact that those with a different part-time working pattern (horizontal) did not lose out. Working time was clearly and obviously the problem – in contrast with the present claims.

CONCLUSION

60. The Tribunal is respectfully invited to find as a fact that the reason why the Claimants are paid less than full-time CCJs is the fact that they hold a less senior salaried full-time appointment, and not the fact (if found by the Tribunal on question 1) that they work part-time.

61. For all of the above reasons on both questions, the Tribunal is respectfully invited to dismiss the claims.

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8 May 2017