EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102481/2013

Held in Edinburgh on 6 November 2018

Employment Judge: Laura Doherty

Mr C McEachran	**Claimant** **Represented by:** **Mr Fairley - QC**
The Scottish Ministers	**Respondent** **Represented by:** **Mr McNeill - QC**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant and his comparators were employed by the respondent under the same type of contract for the purposes of The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the Regulations).

REASONS

1. The claimant presented a claim to the Employment Tribunal in March 2013, under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the Regulations). The basis of the claimant's claim under the Regulations is that he did not enjoy the same entitlement to pension as comparable full-time judicial office holders. The claimant contends that he was a part-time worker in accordance with the Regulations, and that he is entitled to compare himself with Lord McGhie, who served as President of the LTS and Chair of the Scottish Land Court from the 7th October 1996 until October 2014, and John Wright, who served as a full-time member of the LTS from January 2005 until 31st March 2014.

2. A preliminary issue was identified by the parties as to whether the claimant had a relevant comparator in terms of Regulation 2 (4) of the Regulations. A Preliminary Hearing was fixed to determine this issue. It emerged that in connection with this issue, a preliminary point required to be determined; that was whether the claimant and his chosen comparators were employed by the same employer under the same type of contract.

3. The Tribunal was satisfied that it was consistent with the overriding objective in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) to fix a Preliminary Hearing to determine this point. The issue before the Tribunal for the purposes of this PH, reflects the first limb of the test in section 2(4)(a)(i) of the Regulations i.e. whether the claimant and his comparators were employed by the same employer, under the same type of contract.

4. Mr Fairley QC appeared for the claimant, and Mr McNeill QC appeared for the respondent.

5. The Tribunal had statements from 5 witnesses.

6. The claimant gave evidence, and evidence was given on his behalf by his comparators, Lord McGhie, and John Wright QC.

7. For the respondent's, evidence was given by Jeff Owenson, the Senior Policy Officer in the Finance Pay Policy Team with the Scottish Government, and Steven Darcy, the Head of Strategy and Governance at the Judicial Office of the Scottish Courts and Tribunals Service (SCTS).

8. The parties agreed that for the purposes of this PH that witness evidence would not be heard orally, but that the witness statements would form the evidence in chief of the witnesses. There was no cross examination of the witnesses but the parties reserved their right to cross examine any witnesses at any future Hearings in this case.

9. The parties agreed a statement of facts and law, and they produced a Joint Bundle of Documents.

10. The Tribunal heard oral submissions from both parties, and they also helpfully provided written submissions.

Findings in Fact

The Claimant

11. Between 1968 and his retirement in 2013, the Claimant was a practicing member of the Faculty of Advocates. He was admitted as a member of the Faculty in 1968 and took silk in 1982.

12. On 11 January 1994, in exercise of the powers vested in him by section 6 of the Pensions Appeal Tribunals Act 1943 and the Schedule thereto, the then Lord President of the Court of Session, Lord Hope of Craighead, appointed the Claimant to be a Legal Chairman of the Pensions Appeal Tribunal for Scotland ("PATS") with immediate effect.

13. On 10 May 1995, Lord Hope appointed the Claimant to be the President of the Pensions Appeals Tribunal for Scotland ("PPATS") with immediate effect.

14. The Claimant retained the position of PPATS from 10 May 1995 until 13 January 2013 when he retired. The position of PPATS was, at all times between May 1995 and January 2013, a part-time one.

15. The Claimant carried out his judicial duties hearing appeals as PPATS from the premises of PATS, latterly at 126 George Street, Edinburgh. He sat in a judicial capacity for between 10 and 20 days per year as part of a Tribunal which determined war pensions appeals made under the 1943 Act. In addition, he performed interlocutory work and organized training and appraisals for PATS members. He was remunerated on a daily fee-paid basis.

16. In terms of The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order, 1999, ("the ToF Order") Article 2, Schedule 1, the functions of determining and paying remuneration to members of PATS,

including the Claimant, were transferred from HM Treasury to the Respondent with effect from 1 July 1999. Accordingly, from 1 July 1999 until January 2013, the Claimant was remunerated by the Respondent at a rate determined by the Respondent.

17. In terms of Article 5 and Schedule 4 of the ToF Order, non-statutory functions in relation to PATS, insofar as they were exercisable by a Minister of the Crown, were also transferred to the Respondent with effect from 1 July 1999.

John Wright QC

18. Between 1983 and 2004, John Nicolson Wright QC ("JW") was a practicing member of the Faculty of Advocates. He was admitted as a member of the Faculty in 1983 and took silk in 1996.

19. On 7 February 2001, in exercise of the powers conferred upon him by the Lands Tribunal Act 1949 the then Lord President of the Court of Session, Lord Rodger of Earlsferry appointed JW to be a member of the Lands Tribunal for Scotland ("LTS") with immediate effect. His terms and conditions were set out in a letter from the then Scottish Executive Justice Department dated 8 February 2001.

20. By letter dated 6 December 2004 (D 26), the then Scottish Executive Justice Department offered to make JW's membership of LTS a full-time post with effect from 1 January 2005. JW accepted that offer, and thereafter served as a full-time legal member of LTS from 12 January 2005 until his retirement on 31 March 2014.

21. JW carried out his judicial duties as a full-time member of LTS, latterly from 126 George Street, Edinburgh, where LTS was then located. That was where the administration of LTS was located. The move to premises at George St was at the behest of, and overseen by, the Scottish Executive.

22. JW's annual leave entitlement was prescribed by the Scottish Executive (D 26). The increase in his salary on becoming full time was confirmed to him by the Scottish Executive (D 26). It was the respondents who had responsibility

for the mechanics of paying his salary. It was his expectation, that should he have had to deal with sickness absence, then this would have been a matter for the Scottish Executive. Matters pertaining to travel, and subsistence were administered by the Scottish Executive, and they controlled travel and subsistence allowances.

23. JW was not aware of the UK government having anything to do with the administrative control, or the terms and conditions of his employment. He understood that his salary was paid by the Scottish Executive. This was in contrast to his experience of sitting as a Social Security Commissioner, in which capacity he dealt an area of law reserved by the UK Government. His experience was that this post was administered by the UK Government. JW always had in mind the concept of judicial independence, but his view was that to the extent that it could be said he had an employer in his role as a member of the Lands tribunal, then that was the Scottish Executive.

24. Between 1 July 1999 and 31 March 2014, the remuneration paid to members of LTS was determined by the Secretary of State, with the approval of the Treasury. Such remuneration was charged on the Scottish Consolidated Fund. Determination of his remuneration was a reserved matter in terms of the Scotland Act 1998, section 30 and Schedule 5, section L1. JW's entitlement to a pension was also a reserved matter in terms of section F3 of that Schedule. His entitlement to a pension emanates from the Judicial Pensions and Retirement Act 1993.

25. Between 1 July 1999 and 1 June 2009, LTS consisted of a President and such number of other members as the Lord President determined, appointed by the Lord President.

26. Between 1 June 2009 and 31 March 2014, the LTS consisted of a President and such number of other members as the Respondent determined, appointed by the Respondent. The Respondent did not issue any letter of re-appointment to JW with effect from 1 June 2009 or any other date.

Lord McGhie

27. Between 1969 and 1996, James Marshall McGhie QC ("JMM") was a practicing member of the Faculty of Advocates. He was admitted as a member of the Faculty in 1969 and took silk in 1983.

28. On 12 September 1996, in exercise of the powers conferred upon him by the Lands Tribunal Act 1949 the then Lord President of the Court of Session, Lord Hope of Craighead appointed JMM to be President of LTS with effect from 7 October 1996.

29. By Warrant of Appointment dated 29 August 1996, Her Majesty the Queen appointed JMM as a member and the Chairman of the Scottish Land Court with effect from 7 October 1996.

30. JMM served as President of LTS and Chair of the Scottish Land Court from 7 October 1996 until his retirement in October 2014.

31. JMM carried out his judicial duties as President of LTS and Chair of the Scottish Land Court, latterly from 126 George Street, Edinburgh, where the LTS and Scottish Land Court were then located.

32. Between his appointment on 7 October 1996 and his retirement in October 2014, the salary of JMM as Chair of the Scottish Land Court was determined by HM Treasury. The salary was charged out of the Scottish Consolidated Fund. Determination of his remuneration was a reserved matter in terms of the Scotland Act 1998, section 30 and Schedule 5, section L1. The relevant payroll function was performed by a third-party provider. His entitlement to a pension was also a reserved matter in terms of section F3 of Schedule 5. His entitlement to a pension emanates from the Judicial Pensions and Retirement Act 1993.

33. Between his appointment on 7 October 1996 and his retirement in October 2014, the salary of JMM as President of the LTS was determined by the Secretary of State, with the approval of the Treasury. Such remuneration was

charged on the Scottish Consolidated Fund. Determination of his remuneration was a reserved matter in terms of the Scotland Act 1998, section 30 and Schedule 5, section L1. The respondents had responsibility for the mechanics of paying his salary, and the relevant payroll function was performed by a third-party provider. His entitlement to a pension was also a reserved matter in terms of section F3 of Schedule 5. His entitlement to a pension emanates from the Judicial Pensions and Retirement Act 1993.

34. JMM did not think he had a contract and not aware of any 'administration' of his contract. No hours of work were stipulated, and no days of work were mentioned. He never heard any mention of holiday or sickness entitlement. His working pattern was flexible. He could take a day off without having to formally request it, however he never exceeded what he understood to be the holiday entitlement of a Court of Session Judge.

35. He did not consider he had an 'employer', however had he required to identify an employer, then this would have been the Scottish Government Justice Department, formerly Scottish Courts Administration. JMM had no dealings with any other body. He referred to them for any assistance he needed. His Warrant came through them. All correspondence about salary increases and the pension scheme addressed to him as Chairman, were from that Department.

36. JMM kept in close contact with Hamish Hamill, Director of Scottish Courts Administration and then David Stewart, who became Director of the Scottish Justice Department, over an issue about the status of one of the SLC members. The status point was heading towards litigation at the instance of a part time Member of the Land Court, and JMM helped broker a deal with the Scottish Justice Department to avoid this.

37. JMM dealt with David Stewart in relation to the appointment of members of both the SLC and the LTS. In later years David Stewart was significantly involved in the administrative process involved in the appointment to both the

L TS and the SL C members, with JMM. The Lord President retained responsibility for the appointment of LTS members.

38. JMM discussed staff issues with David Stewart. These included discussions about the ill health of a Tribunal Member, which led to a significant pay out to his widow.

39. David Stewart's Department was responsible for office administration of the office in which JMM carried out his judicial duties, including the provision of IT. His Department was responsible for the whole detail of the change of location of JMM's work from Grosvenor Crescent to George House, in around 2008.

The Scottish Consolidated Fund

40. The Scottish Consolidated Fund ("SCF") was established by section 64 of the Scotland Act, 1998. A certain amount of money is provided by the UK Government to the SC Fund, the Scottish Parliament votes on most of the expenditure come from that fund. The money for reserved judicial salaries in Scotland, which includes the comparators salaries, comes from that fund.

41. Payment out of the SCF is controlled by section 65 of the Scotland Act, 1998. A sum may be paid out of the SCF *inter alia* for meeting expenses of the Scottish Administration or for meeting expenditure payable out of the SCF under any enactment.

42. Section 2(10) of the Lands Tribunal Act 1949 provides that the remuneration of LTS shall be charged on the SCF. Paragraph 3(3) of Schedule 1 to the Scottish Land Court Act 1993 provides that the payment of salary to the Chairman of SLC is charged on the SCF. The remuneration of JW and JMM was therefore paid from the SCF under an enactment for the purposes of section 65(1)(a) of the Scotland Act 1998. Payment from the SCF for meeting expenses of the Scottish Administration where there is no such enactment is subject to the approval of the Scottish Parliament via the annual Budget (Scotland) Act, as provided for in section 65(1)(c) as read with section 65(2)

of the Scotland Act 1998. The claimant`s fees were payable from the SCF in terms of section 65(1)(c) of the Scotland Act 1998.

Note on Evidence

43. There was significant agreement on the facts, and the agreed statement of facts and law which was produced, forms the basis of the Tribunal's findings in fact.

44. The Tribunal was able to reach additional factual conclusions the on the basis of the uncontested evidence given in the witness statements.

Authorities

The Tribunal was referred to the following authorities**;**

Ministry of Justice v O'Brien (2013)1 WLT 522

Gilham v Ministry of Justice (2018) ICR 827

DEFRA v Robertson (2005) ICR 750

Matthews and others V Kent and Medway Towns Fire Authority and others (2006) ICR 365

Roddis v Sheffield Hallam University UKEAT/0299/17

Submissions

Claimant's Submissions

45. Mr Fairley began by taking the Tribunal to the question formulated for the purposes of this PH, which he submitted could be broken down into two issues, namely whether the claimant and his comparators were employed by the same employer, and if so, were they employed under the same type of contract; the issue of broadly similar work, or the issue of the time at which the alleged the unfavourable treatment took place did not arise for determination.

46. Mr Fairley firstly dealt with the decision in **Ministry of Justice v O'Brien (2013) ICR 499**. He acknowledged that the focus in **O'Brien** was not on the

identity of the employer, but on the distinction between a worker and a self-employed person. He submitted however that there were elements in the Judgment in **O'Brien** which could be helpful to the Tribunal in the task before it, and in particular he referred to the judgment of Lord Hope at paragraph 37, and the 3rd and 4th elements which he referred to as matters which could be taken into account; that included the way that work was organised and the expectation to work during defined times and periods, and the entitlement to the same benefits during service as appropriate, as Judges.

47. Mr Farley submitted clearly the identification of the employer of a worker requires a rather broader approach to be taken than in the case of an employee. It is conceded by the respondents that the claimant had been a worker, and it was also conceded by the respondents at the PH on the 9th of October that the comparators, Messrs Wright and McGhie were workers, and that workers must have an employer.

48. Mr Fairley dealt with the respondent's submissions as to the application of the case of **DEFRA v Robertson 2005 ICR 750**, and **Lawrence v Regent Office Care Limited**, and submitted that the respondent's argument is without merit. The respondent's position was that because in **DEFRA** the court looked at the source of inequality in terms and conditions, that was the way that you should identify an employer. This approach was misconceived. Common employment was established in **DEFRA**; the question was whether there was enough to establish a relevant comparator under Article 119 of the Treaty of Rome, now Article 141, for the purposes of an equal pay claim.

49. Mr Fairley submitted in terms of the Regulation 2(4)(a)(i) the question is whether the claimant and comparator were employed by the same employer, which is a different point. In view of that question **DEFRA** does not help.

50. Mr Fairley submitted that the respondent's whole argument focuses on pay and pension, and the fact that the respondents were not in control of those. The respondents however did not identify who the employer was, and it is not enough, looking at the totality of the picture, to focus in on these two elements,

particularly, when there is no attempt to identify who the comparators' employer was.

51. Mr Fairly also submitted that the case of **Gilham v Ministry of Justice (2018) ICR 827** relied upon by the respondents was equally unhelpful. This case was not concerned with the European concept of a worker and was relevant only for the purposes of domestic legislation, with the specific focus on protection of whistle-blowers in terms of the Employment Rights Act. Mr Fairley submitted that judicial office holders were in an unusual situation, but that did not prevent them being regarded as workers and therefore while it might not be easy, it has to be the case that their employer can be identified.

52. In that regard, Mr Fairley referred the Tribunal to the evidence of the comparators, Mr Wright, and Lord McGhie. In addition to the specific elements dealt with in particular by Mr Wright, weight should be attached to the view expressed by both witnesses to the effect that the respondents were their employer. Mr Fairley did not suggest that this was decisive, but considered against the totality of the picture, and in the absence of the respondents identifying an employer, significant weight should be attached to the views expressed by each witness. Mr Wright in paragraph 11 of his statement stated; *"I always have in mind the concept of judicial independence, however, to the extent that I could be said to have an employer, my view is that it would be the Scottish Executive".*

53. Lord McGhie at paragraph 17 stated; *"If I had to identify (sic) some "potential employer" it would have to be the Scottish Government Justice Department formerly the Scottish Courts Administration. I had no dealing with any other body. I referred to them for any assistance I needed. My warrant came through them. All correspondence about salary increases and pension came addressed to me as Chairman from that Department."*

54. Mr Fairley then dealt with the facts relied upon by the respondents to dispute their employer status. Those were the methods of employment, the responsibility for fixing salary levels, and statutory pension entitlement.

55. With regard to the method of employment, Mr Fairley submitted it was a common feature that appointments were made either by the Lord President or the Queen on the recommendation of the First Minister. That method of employment does not help to any extent in determining the identity of the employer for the purposes of the Regulations, and this could be illustrated by the position of the claimant, who in common with his comparators, was appointed by the Lord President. It was however a matter of agreement, that the claimant's employer was the respondent, not the Lord President.

56. Mr Wright and Mr McGhie expressly refuted any suggestion that the Lord President was their employer in respect of the LTS roles, and Lord McGhie did not regard the Queen as having been his employer as the Chair of the Scottish Land Court. Mr Fairley again submitted it was significant that the respondents failed to identify the comparators' employer.

57. In relation to determination of rates of pay it was accepted that the determination of the pay for the comparators were reserved matters, and thus out with the control of the respondent. Mr Fairley submitted however that the identity of the party which determines remuneration is not a reliable indicator of the identity of the employer, and he submitted a similar situation arises in the context of other forums of public sector employment, most notably the NHS where rates are fixed nationally and imposed upon local NHS employer boards/trusts.

58. Mr Fairley referred to the evidence of John Wright to the effect that his salary was paid to him by the respondents (paragraph 11 of his statement), and invited the Tribunal to accept that, no evidence of a contradictory position being advanced. Lord McGhie said he did not pay much attention to the identity of the party who paid his salary, but he understood it was paid from the Scottish Consolidated Fund, latterly paid by "Scottish Courts of Justice" (paragraph 12 of his statement). This was confirmed by Mr Darcy's statement, and he confirmed that prior to 2016, payment of salary due to

judicial office holders in the LTS and the Chair of the Scottish Land Court was made by the Scottish Ministers, albeit the rate of such salary was fixed by the UK Government (Paragraphs 10 and 11 of his statement).

59. It was agreed that the salaries of comparators and the fees paid to the claimant were all paid out of the Scottish Consolidated Fund pursuant to section 65 of the Scotland Act 1998. It was also an agreed fact that in common with the salaries to Wright and McGhie, the fees paid to the claimant were subject to third party approval, and in the case of the claimant, such approval required to come from the Scottish Parliament as his fees were an expense of the Scottish Administration. The third-party involvement in his entitlement to salary did not however prevent the respondents from being the claimant's employer. Mr Fairley submitted the identity of the party which fixed or approved rates of pay for the claimant and his comparator is accordingly unhelpful in identifying the employer for the purposes of the 2000 Regulations.

60. Mr Fairley then dealt with statutory pension provision. Both the comparators have a direct entitlement to a judicial pension under the Judicial Pension and Retirement Act 1993. The claimant appears not to enjoy that entitlement, and that is the reason why the claim has been brought. Mr Fairley submitted that legislative provision for public sector pensions entitlements did not assist in determining the identity of the employer, and he referred to other public sector employments such as the police and fire service, referring to the Police and Pension Regulations 1987 SI 25797, and the Firemen's Pension Scheme Order 1992 SI 19292, and submitted this never had any bearing upon the identity of the employers of police officers or fire fighters at local level.

61. The fact that the comparators were employed in roles which gave them an entitlement to pension under the 1993 Act did not assist in determining the identity of the employer. The 1993 Act provides pension entitlement to a variety of judicial office holders across a range of employers in Scotland, England, Wales and Ireland. Sheriffs and Court of Session Judges are not for example employed by the MoJ, whereas other English judicial office holders named in the 1993 Act are. In this connection Mr Fairley again

referred to the fact that the respondents did not suggest any other party was the employer of the comparators by virtue of the statutory pension arrangements in the 1993 Act.

62. Furthermore, Mr Fairley submitted that the respondents' witness, Mr Owenson, made it clear (paragraph 14 of his statement) that a decision whether or not to pay a pension to the claimant was one which was in the power of the respondent. How this might be done is not a concern of the claimant provided he is able to identify a relevant comparator under the Regulations. Mr Fairley accepted that the respondents could not amend the 1993 Act, but that did not assist them, if the claimant is able to bring himself within the ambit of the Regulations. The respondents in any event have the power to make pension provision, as confirmed by Mr Owenson.

63. Mr Fairley then dealt with the same type of contract and referred the Tribunal to the terms of Regulation 2(3) of the Regulations and two cases; **Matthews and others v Kent and Medway Towns Fire Authority (2006) ICR 365**, and **Roddis v Sheffield Hallam University UKEAT/0299/17** 26 March 2018. The principles outlined in Matthews, were neatly summarised by the EAT in **Roddis**, and Mr Fairley referred the Tribunal to those. These included that the contract cannot be treated as being of a different type from another just because the terms and conditions that it lays down are different, nor because an employer chooses to treat workers of a particular type differently; where a worker or his comparator are both employed under contracts that answer to the same description given in the same paragraph in Regulation 2(3), they are both to be regarded as employed under the same type of contract for the purposes of Regulation 2(4); in order to satisfy the requirements of Regulation 2(4)(a)(i), it is not necessary to go further and to find that both workers are employed under contracts that fit into one or other of the listed categories; the categories are designed to be mutually exclusive.

64. Mr Fairley submitted it was conceded that the claimant and his comparators were workers, and as such, the claimant and his comparator fall within Regulation 2(3)(c) and the same type of contract requirement is accordingly

met. For the reasons summarised in **Matthews** and **Roddis**, the comparators cannot be taken as falling within Regulation 2(3)(d). Regulation 3(2)(d) does not apply to a worker who already falls within 2 (3)(c). In any event, as was noted in **Roddis**, a contract cannot be treated as being of a different type simply because the terms and conditions that it lays down are different, nor because their employer chooses to treat workers of a particular type differently (Lord Hope paragraphs 6 to 11 and Baroness Hale paragraphs 34 to 37 of **Matthews**).

Respondent's Submissions

65. Mr McNeill for the respondents firstly took the Tribunal to the Regulations, drawing particular attention to Regulation 5(1). It was Mr McNeill's position that by his choice of comparators the claimant had not brought himself within Regulation 2(4)(a)(i).

66. Mr McNeill referred to the case of **O'Brien**, and in particular paragraphs 37 to 42. Drawing on this, he submitted the distinction as to whether someone is in an employment relationship is between those who work for themselves and those who work for others, regardless of the nature of the contract under which they are employed. Mr McNeill confirmed that Scottish Ministers accepted following **O'Brien**, that the claimant and his comparators are "workers" for the purposes of the Regulations. He submitted however that **O'Brien** was of little assistance in establishing the identity of the employer, as in **O'Brien**, the MoJ had accepted that they were equivalent to the employer.

67. Mr McNeill submitted that Judges are not workers for all the purposes of the Employment Rights Act 1996 (ERA) and he drew attention to the definition of worker in section 230 of the ERA, and the wording of that section.

68. In this connection Mr McNeill referred to the case of **Gilham v Ministry of Justice (2018) ICR 827** in which the Court of Appeal held that a District Judge was not a worker within the meaning of section 230(3) of the ERA but was an

office holder. Mr McNeill drew attention to paragraphs 48 to 53, 64 to 71 and 74 of the Judgment of Lord Justice Underhill in this connection. He submitted that the result of **Gilham** is that in terms of EU law and the Regulations a Judge is a worker when the distinction is drawn between worker and self-employed person, but in terms of domestic law, when the question is between employee or office holder, the Judge is an office holder, and in terms of domestic law there is no employer.

69. This, Mr McNeill submitted, chimed with the comparators' evidence. Lord McGhie's evidence was that he had never given any thought to the theoretical question of whether he might have had an employer, and that he regarded himself, as a Judge, as an office holder and not an employee. He also gave evidence to the effect that he was not aware of any administration of his contract and that he had no contract, no hours of work were stipulated, and no days were specified.

70. Mr Wright's evidence was that he always had in mind the concept of judicial independence, but *that to the extent that he could be said to have an employer*, his view was that it would be the Scottish Executive. This evidence was in Mr McNeill's submission, more powerful than the evidence relied upon by Mr Fairley, as to what they thought about the identity of their employer.

71. Mr McNeill submitted that Regulation 2(4)(a)(i) requires the identity of the same employer which has to be a legal person in a position analogous to an employer as understood in domestic law.

72. The Lord President appointed the claimant, but his working arrangements were administered by the Scottish Government and from the 1st July onwards his remuneration was determined by the Scottish Government. It was accepted the respondents were the claimant's employer.

73. Mr Wright was also appointed by the Lord President, and his terms of engagement were sent out by the Scottish Executive Justice Department, however his remuneration was determined by the Secretary of State with the

approval of the Treasury. Remuneration and pension were and are reserved matters. Mr McNeill submitted that the power to determine salary connotes the exercise of a unilateral public law power; the pension rights likewise derived from statute. Since these are reserved matters, the respondent has no lawful entitlement to determine them.

74. Lord McGhie was appointed to the Lands Tribunal by the Lord President and to the Lands Court by the Queen, on the recommendation of the Lord Advocate. He had no terms and conditions and nor was he aware of his employment being administered (paragraph 15 of his statement). As with Mr Wright however his salary was determined by the Secretary of State with the approval of HM Treasury and remuneration and pension were reserved matters. In relation to pay and pensions, in so far as the comparators are in as in any relationship which might be analogous to employment for the purposes of the 2000 Regulations, their relationship is not with the Scottish Ministers.

75. Mr McNeill submitted that there is an analogy with equal pay, which is an implementation of EU law. Where a claimant is a civil servant and an employee of the Crown, the bare fact that there was common employment was neither a necessary nor a sufficient basis for a comparison; it was necessary to consider in each case whether responsibility for the claimed inequality and the capacity to restore equal treatment could be traced to a single source (**DEFRA v Robertson (2005) ICR 750** and **Lawrence v Regent Office Care Ltd**- referred to in **DEFRA** paras 11 to 16).

76. The point of **DEFRA** was that it was not sufficient to identify a common employer. It was necessary to identify the legal person who was treating the claimant less favourably than the comparator, otherwise the claim would not come within the ambit of Article 141. Mr McNeil submitted an analogy could be drawn with Regulation 5 and a complaint of less favourable treatment. For the employer to be relevant, that has to be someone who is treating a part-time worker less favourably than they are treating the full-time worker. The claims were of less favourable treatment, and that ground of action only

makes sense if the one body is responsible for the differential in treatment. What the claimant is saying is that the Scottish Ministers treated him less well than a different decision-making body treated other judicial office holders. It cannot be said that the respondent treated the claimant less well than it treated the comparators, as the respondent did not treat the comparators in any way in relation to remuneration (including pension).

77. Mr McNeill then went on to deal with the "same type of contract". This he submitted was very much a secondary position for the respondents but in the event the Tribunal were to determine that the Scottish Ministers were the employers of the claimant and comparators, then they were employed under substantially different types of contract.

78. Mr McNeill also referred to the cases of **Matthews** and **Roddis** and acknowledged that no-one could come up with a type of contract that fell within the residual category identified in those cases. Mr McNeill submitted however that if the respondent is the employer in this case then the comparators are a *"description of a worker that it is reasonable for the employer to treat differently from other workers on the grounds that workers of that description have a different type of contract".*

79. He submitted it was reasonable for the respondents to treat the comparators differently as the respondent applies its own decision making processes and discretion to the level of remuneration to offer to Tribunal members including PPATS, whereas it has no direct discretion or decision making power in relation to remuneration, including pension, for the comparators.

Consideration

80. The question for the Tribunal at this PH, identified in the course of earlier Case Management was; *"are the claimant and his comparator employed by the same employer under the same type of contract".*

81. Regulation 5 of the Regulation states:

*"**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."

82. Regulation 2(4) states:

*"**(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) engaged by the same employer under the same type of contract, and

(ii) engaged in the same or broadly similar work having regard, where relevant a similar level of qualification, 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 to satisfy the requirement of sub-paragraph (a), works or is based in a different establishment and satisfies those requirements."

83. Regulation 1(2) states;

"employee" means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, work under a contract of employment.

'employer" in relation to any employee or worker means the person by whom the employee or worker is or (except where a provision of these Regulations otherwise requires, where the employment has ceased), was employed.

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

(a) a contract of employment; or

(b) any other contract, whether expressed or implied, and (if it is expressed) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

84. Following the decision in **O'Brien**, it is accepted by the respondents for the purposes of the Regulations that the claimant is a worker, and that they are his employer.

85. It is accepted by the respondents that the comparators are workers in terms of the Regulations. It is also accepted that a 'worker' in terms of the Regulations, requires to have an 'employer'. The respondents deny that they are the comparators employers for the reasons highlighted in Mr McNeill's submissions, but they do not seek to identify who their employer is.

86. The burden of establishing a relevant comparator, and hence one who has the same employer as the claimant, rests with the claimant.

87. The Tribunal began by considering what was said in **O'Brien** referred to by both parties. This case was concerned with the distinction to be made between the category of "worker" and that of a self-employed person. It was held in that case that a Recorder is not a self-employed person when working in that capacity but was in *"an employment relationship"* within the meaning of clause 2.1 of the Framework Agreement and should be treated as a "worker" for the purposes of the Regulations.

88. The claimant and the comparators all being 'workers' in terms of the Regulations, the question for the Tribunal is who is the 'employer', in the type of employment relationship identified in **O'Brien**.

89. **O'Brien** did not directly address the issue of the identity of the employer, but it did comment in the factors which might be present in the employment relationship it found to have existed in that case, and the Tribunal derived some assistance from this. The Tribunal considered paragraph 37 of the Judgment of Lord Hope and Baroness Hale in **O'Brien** in which they state:

> *"As narrated in para 11 above, the court was satisfied that it was unnecessary to remit the matter to the employment tribunal on the worker issue, and that it should confirm its provisional view expressed in para 27 of its judgment on the reference [2011] I CMLR 36. Nothing in the judgment of the Court of Justice [2012] ICR 955 is inconsistent with that provisional view, and much of the judgment supports it. Following the guidance that the Court of Justice provided in para 43 of its judgment (see para 30 above), account in arriving at this decision was taken of the following matters mentioned in paras 44-46: (i) the fact that the character of the work that a recorder does in the public service differs from that of a self-employed person; (ii) the rules for their appointment and removal, to which no self-employed person would subject himself; (iii) the way their work is organised for them, bearing in mind that recorders, in common with all other part-time judges, are expected to work during defined times and periods; (iv) their entitlement to the same benefits during service, as appropriate, as full-time judges."*
>
> The judgment goes on to quote Lady Hale in **Percy v Board of National Mission of the Church of Scotland (2006) a AC 28**.
>
> Paragraph 41;
>
> *'In paragraph 146 Lady Hale went on to say:*

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

90. What can be taken from **O'Brien** is that in attempting to identify the employer in an employment relationship which exists for the purposes of the Regulations, the Tribunal should take into account all the relevant elements, which include who decides the way in which the work is organised for the worker and who decides how their work should be put to service.

91. With that in mind, the Tribunal considered the facts of found established in this case.

92. Firstly, the claimant and his comparators were all appointed to their posts by the Lord President in exercise of statutory powers conferred upon him. Lord McGhie was also appointed by Warrant of Appointment, by Her Majesty the Queen on the recommendation of the Lord Advocate.

93. The identity of the person making those appointments is not a clear indicia of the identity of the employer in the context of judicial appointments, and the Tribunal did not understand that it was suggested by either party that it should be taken as such. The Tribunal however understood the respondents to rely on the fact that they were not responsible for the appointments as being a factor which pointed away from them being the employer.

94. While this is a matter which the Tribunal took into account, on balance it was not persuaded that it was a factor to which significant weight could be attached. As pointed out by Mr Fairly, the respondents accept they are the claimant's employer, notwithstanding that he was appointed by the Lord President. It would therefore be inconsistent to suggest that the respondents were not be the comparators employer, by virtue of the fact that they were appointed by the Lord President.

95. Notwithstanding the fact that Lord McGhie was free to organise his workload, that no hours of work were stipulated, that he had no formal holiday or sick leave entitlement, or that he could take days off without having to seek any formal permission, he required to provide his service, and he was paid for that. The elements he refers to may well explain why he did not think he think of himself as being in an employment relationship, or he had an employer, but they do not alter the fact that he was a 'worker' with an 'employer' for the purposes of the Regulations.

96. There were factors which pointed to the respondents being involved in the administration of Lord McGhie's service, albeit he did not consider he had a contract which was administered. It was the Scottish Government Justice Department who corresponded with him about pay and pension. They were responsible for the mechanics of paying him. In the performance of his duties he referred to them, and not to any other party, for assistance he needed. He was able to facilitate assistance for a Tribunal member who had suffered ill health through discussions with the Scottish Government Justice Department. That Department was significantly involved in the recruitment process for LTS and SCL members, albeit the Lord President retained overall control of appointments. Lord McGhie discussed staff matters with that Department. He helped broker a deal with the Scottish Government Justice Department which avoided litigation on the part of a part time Land Court Member. The Scottish Government Justice Department arranged for the provision of his office accommodation and IT to enable the performance of his duties. They implemented the change in the location of the premises where he performed his judicial role.

97. Mr Wright considered the respondents were responsible for the administration of his post, which was in contrast to his experience of the post he held as a Social Security Commissioner where he dealt with an area of law reserved to the UK government, and which post was administered by the UK Government.

98. It was the Justice Department (Judicial Appointment and Finance Division of the Scottish Executive) who wrote to Mr Wright to offer him a full-time post as a member of the LTS (D26). Mr Wright's increase in salary was confirmed by the Scottish Executive on becoming full-time, and his annual leave entitlement was decided by the Scottish Executive. Although Mr Wright did not have sickness absence, he expected that this would have been handled by the Scottish Executive. Matters pertaining to Mr Wright's travel and subsistence were administered by the Scottish Executive and they controlled his travel and subsistence allowances. The Scottish Executive instigated and oversaw a move from the premises in which Mr Wright carried out his duties, to 126 George Street, where both the claimant and Lord McGhee also worked.

99. The arrangement of office accommodation from which the work, (other than home working) was performed; the determination of where that accommodation was situated ; the provision of IT to carry out the work; involvement in recruitment; involvement in staff issues to the extent of resolving disputes ; involvement in the administration of pay; the control and administration of allowances payable in the performance of the duties; and the fact that the respondents were the only party to whom reference was made about administrative issues, are all indicia of the existence of an employment relationship in terms of the Regulations, in that they represent elements which are relevant to how the workers service was organised.

100. The Tribunal is supported in this conclusion in that albeit Lord McGhie did not consider himself to have an employer, he was able to express the view that had he required to identify a potential employer, it would have been the Scottish Executive. Mr Wright was in a similar position; his evidence was to the extent that it could be said he had an employer it was the Scottish

Executive. While the comparators may not have considered they were 'workers' for the purpose of EU derived rights it while in post, the fact that both comparators expressed this view, is an indicator of the extent to which the respondents were involved in the administration of their service.

101. The Tribunal then considered remuneration and pension.

102. There is no issue that the respondents have no control over the level of the comparators remuneration. That is a reserved mater and is entirely the preserve of the UK government. It is a matter over which the respondents have no say. Similarly, the respondents have no control over whether the comparators should be awarded a pension, and if so on what basis.

103. Remuneration paid to the comparators was paid from the SCF under an enactment for the purposes of section 65(1)(a) of the Scotland Act 1998. Payment from the SCF for meeting the expenses of the Scottish Administration where there is no such enactment, is subject to the approval of the Scottish Parliament, via the annual Budget (Scotland) Act, as provided for in section 65(1)(c) as read with section 65(2) of the Scotland Act 1998.

104. The claimant's fees were payable from SCF in terms of 65(1)(c) of the Scotland Act 1998.

105. The position is, as confirmed by Mr D'Arcy's evidence, that a certain amount of money is provided to the SCF by the UK government, and the Scottish Government votes on the expenditure from that fund. The money for reserved judicial salaries comes from the SCF.

106. The respondents therefore had the had the responsibility for the mechanics of paying the comparators remuneration, but that remuneration was fixed by HM Treasury.

107. The comparators also enjoyed a pension entitlement under the Judicial Pensions and Retirement Act 1993, and therefore it was not the respondents

who were responsible for the decision to award pension, or for the level of pension awarded.

108. The Tribunal then approached the question as to whether the claimant and his comparators had the same employer by weighing all the elements which it might relevantly be taken into account in order to arrive at its conclusion as to the identity of the comparators' employer.

109. In adopting this approach, the Tribunal considered Mr McNeill's submission as to the effect of **Gilham** with particular reference to the judgment of Langstaff LJ at paragraph 74 in which he stated;

> *"We are very aware that our decision that, subject to issue (B) and (C) which we consider below, the claimant is not a worker within the meaning of section 230(3) creates a distinction between those employment rights accorded to workers which derive purely from domestic law and those which derive from EU law, as established in O'Brien v The Ministry of Justice (Case-393/10(2012) ICR 955. And that may not appear to be a coherent or particularly satisfactory state of affairs. But the only way of avoiding the problem is to find that Judges work under a contract with the Lord Chancellor, and such a finding is not open to us on the conscientious application of the principles most recently expounded in Preston v President of the Methodist Conference (2013) ICR 833. If that is an anomaly it can only be remedied by Parliament.'*

110. Mr McNeill accepted that a distinction is drawn between those employment rights accorded to workers which derived purely from domestic law, and those which derived from EU law, as established in **O'Brien**, and this case is clearly concerned with the rights which derive from EU law.

111. The Tribunal is mindful in this case that in the event it is not satisfied that the respondents are the comparators employer then that is the end of the matter, and it does not have to go on to identify who their employer was.

112. However, the comparers are worker, and in an employer has to exist, (even though that may not be the respondents), and the entirety of the relevant matters has to be taken into account in seeking to identify their employer. The difficulties outlined in **Gilham** referred to by Mr McNeill, are not a basis on which to conclude there is no the employer, or that it is too difficult to identify an employer for the purposes of the 2000 Regulations.

113. The Tribunal also considered Mr McNeill's submission in relation to the analogy with equal pay, and in particular, what is to be taken from the case of **DEFRA v Robertson**. As highlighted by Mr Fairley in **DEFRA** it was not in issue that the claimant and her comparator were employed by a common employer. The question before this Tribunal, in terms of Regulation 2(4)(a)(i), was therefore not considered in **DEFRA**.

114. **DEFRA** was concerned with the application of section (1)(6) of the Equal Pay Act 1970. It was accepted that the claimants and the comparators had the same employer (the Crown), but it was not accepted that they were employed in the *same employment* or that they worked at the same establishment, or that they had *common terms and conditions of employment.*

115. Section 1(6) of the Equal Pay Act 1970 requires determination of whether the claimant and her comparator were employed at the same establishment, which include one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes. In **DEFRA**, in the context of considering if there were common terms and condition of employment, the court concluded that it was necessary to consider whether the terms and conditions of the claimant and comparator were traceable to a single source which had responsibility for the claimed inequality.

116. The fact that the remuneration for the comparators was fixed by HM Treasury, and that they enjoyed a statutory pension entitlement over which the respondents had no control, may be significant factors. However, in the

context of Regulation 2(4)(a)(i), the question is whether the claimant and his comparator were employed by the same employer under the same type of contract, not whether common terms and conditions of employment, which derive from the same source, were observed.

117. The tests in Section 1 (6) of the Equal Pay Act and the Regulations are therefore quite different. In order to bring himself within the scope of the Regulations a claimant has to identify a relevant comparator as defined by Regulation 2(4). If he succeeds in satisfying the test in Regulation 2 (4)(a)(i), he still has to overcome the hurdle of establishing that he is engaged in the same or broadly similar work as his comparator, and he also has to establish less favourable treatment in terms of Regulation 5. Such a claimant may then face a justification argument, where it may be that the source of the claimed inequality becomes relevant.

118. The Tribunal was not persuaded that the fact that the respondents did not fix the comparators rate of remuneration or determine his pension entitlement, were a sufficient basis on which to find they were not the comparators' employer for the purposes of the 2000 Regulations.

119. Rather, the Tribunal considered the correct approach was to take into account all the relevant elements and consider the totality of the picture which emerged from the facts found in order to answer the question before it.

120. The fact that the respondents did not fix the remuneration or pension (pension being deferred remuneration) of the comparators is clearly a significant factor which points away from the conclusion that they are the comparators employer.

121. That has to be weighed against the other factors which are indicative of the existence of an employment relationship between the respondents and the comparators.

122. The Tribunal attached significant weight to the fact that it was the respondents who had administrative responsibility for significant elements of the

comparators' service, including provision of office accommodation, determination of the location of the premises from where they worked, provision of IT, responsibility for the mechanics of paying them, and involvement in recruitment. In Mr Wright's case it attached significant weight to the fact that the respondents were responsible for his move from part-time to full-time work, the prescription of his annual leave, and control and administration of travel and subsistence allowances, and that he understood the respondents to be responsible for the administration of his post. The Tribunal attached significant weight to the fact that that Lord McGhie in the exercise of his duties, did not deal with anyone but the respondents, and that he was able to discuss with them what were effectively staff issues (a financial settlement for a colleague who suffered ill health, and a deal to avoid litigation at the instance of an aggrieved LT member), and attempt to resolve them.

123. The Tribunal had regard to the nature of the employment relationship between the worker and his employer as identified in **O'Brien** and the fact that the comparators, as workers, must have an identifiable employer. While it is not for the respondents to establish the identity of the comparators employer, it was not suggested that the factors which they relied upon to support their position they were not the comparators employer, were sufficient to identify who their employer actually was.

124. The Tribunal considered the elements in this case their entirety, and balancing those factors which are indicative of an employment relationship between the comparators and the respondents, against those which are not, the Tribunal was satisfied that, on balance, the weight which attached to the elements which supported the existence of that employment relationship, was greater than that which attached to those which pointed away from it, and it concluded that the respondents were the comparators' employer for the purposes of the 2000 Regulations.

Employed under the same type of contract?

125. Having reached the conclusion that the claimant and his comparators were employed by the same employer, the Tribunal went on to consider whether they were employed under the same type of contract.

126. Both parties were agreed that the relevant case law in this point is to be found in the cases of **Matthews and others v Kent and Medway Towns Fire Authority and others (2006) ICR 365,** and **Roddis v Sheffield Hallam University UKEAT/0299/17.**

127. The legislative provisions are to be found in Regulation 2(3) of the Regulations which provide at:

2 (3) 'For the purposes of paragraphs (1), (2) and (4), the following should be regarded as being employed under different types of contract –

(a) employees employed under a contract that is not a contract of apprenticeship;
(b) employees employed under a contract of apprenticeship;
(c) workers who are not employees;
(d) any other description of worker that it is reasonable for the employer to treat differently from other workers on the grounds that workers of that description have a different type of contract."

128. In **Roddis** at paragraph 18 of her Judgment in the EAT Lady Stacy set out the following propositions, which were agreed to be distilled from the case law, most notably **Matthews**:

- *Regulation 2(3) provides a comprehensive list of categories of different types of contract for the purposes of paragraphs 2(1), (2) and (4);*
- *The categories in Regulation 2(3) are broadly defined and, since the purpose of the Regulation is to provide a threshold to require a comparison of full and part-time workers to take place, the threshold is deliberately set not too high;*

- *A contract cannot be treated as being of a different type from another just because the terms and conditions that it lays down are different, nor because an employer chooses to treat workers of a particular type differently;*
- *Where a worker and his or her comparator are both employed under contracts that answer to the same description given in the same paragraph in Regulation 2(3), they are both to be regarded as employed under the same type of contract for the purposes of Regulation 2(4).*
- *In order to satisfy the requirements of Regulation 2(4)(a)(i), it is not necessary to go further than to find that both workers are employed under contracts that fit into one or other of the listed categories;*
- *The categories are designed to be mutually exclusive;*
- *The category in Regulation 2(3)(d) is a residual category. It refers to a description of worker who is different from those mentioned in categories (a) to (c) and does not apply to a worker who falls into one of those categories;*
- *An example of a description of worker who would fall within category (d) has yet to be identified. A zero-hours contract is not, of itself, a type of contract.*

129. Mr McNeill suggested that if the respondent was the employer, then the comparators fell within the residual category, and were of a description of worker that it was reasonable for the employer to treat differently from other workers on the ground that the workers of that description have a different type of contract. The reason for this was that it was reasonable for the respondents to treat the comparators differently as it applies its decision making processes and discretion as to the level of remuneration to offer to Tribunal members, including PATS, whereas it has no discretion or decision-making power in relation to remuneration including pension for comparators.

130. There was no issue here however that the claimant and his comparators are all workers for the purposes of the Regulations. That being the case the

Tribunal was satisfied that their contracts fall within the category of contract identified at Regulation 2 (3) (c). As stated in **Matthews**, the categories are designed to be mutually exclusive, and in order to satisfy the requirements of Regulation 2(4) (a) (i) it is not necessary to go further, and to find both workers are employed under contracts that fit into another of the list of categories.

131. In any event difference in treatment in terms of remuneration is an insufficient ground upon which to treat the contract under which the claimant was employed, as being of a different type to that under which the comparators were employed. As is made clear in **Matthews**, a contract cannot be treated as being different from another type of contract just because the terms and conditions laid down are different.

Further Procedure

132. Having reached this conclusion, the Tribunal considered it appropriate that this case should now proceed to a Preliminary Hearing, as was originally envisaged, to consider whether the claimant and his comparators are engaged in the same or broadly similar work, having regard where relevant to whether they have a similar level of qualification, skill and experience.

133. If either party has any objection to proceeding to such a PH, then this should be intimated within **14 days** of the date of promulgation of this decision.

134. Similarly, if either party considers that it is necessary to have a PH solely to consider case management before such a PH is fixed, then they should apply for this within **14 days** of the date of promulgation of this decision, failing which date listing stencils will be issued to the parties to enable the PH to be listed.

Employment Judge: Laura Doherty
Date of Judgment: 23 November 2018
Entered in register : 26 November 2018
and copied to parties