THE INDUSTRIAL TRIBUNALS

CASE REF: 5222/18

CLAIMANT: **Catherine Ruth Lavery**

RESPONDENT: **Department for Communities**

DECISION

The unanimous decision of the tribunal is that the part of the claim alleging part-time worker discrimination in relation to travelling expenses and subsistence allowances is dismissed. The part of the claim alleging part-time discrimination in relation to car parking expenses is upheld. Compensation of £76 is awarded.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr Michael McKeown**
Mr Roger McKnight

APPEARANCES:

The claimant appeared in person and was unrepresented.

The respondent was represented by Mr Aidan Sands, Barrister-at-Law, instructed by the Departmental Solicitor's Office.

Background

1. The claimant was appointed as a fee-paid legally qualified member (LQM) of the Appeals Service on 5 June 1985. This post is more commonly described as a Chair of a Social Security Appeal Tribunal.

2. The respondent is the Department currently responsible for the Appeals Service.

3. The claimant retired from her post on 30 November 2018 but concluded some cases after her retirement. She last sat on 4 January 2019.

4. Before 2000, the claimant had been paid all travelling expenses, parking expenses and subsistence payments wherever she had been working throughout Northern Ireland. Those expenses had been calculated from her home address to the individual hearing centre.

5. The fee and expenses system was changed in 2000. There had been no objection to the changes from the claimant in 2000 or at any stage subsequently up to 2016.

6. From 2000, each fee-paid LQM was assigned to one of two work centres, either Belfast or Omagh. The centre closest to each fee-paid LQM's home address was chosen as their assigned centre. From that date, travelling expenses were no longer paid from their home address to their assigned centre. Parking expenses were not paid at their assigned centre and subsistence allowances were not paid in respect of time spent at the assigned centre. If the claimant worked at hearing centres other than her assigned centre, such expenses were paid.

7. The claimant had lived in Lisburn until May 2016. Her assigned work centre throughout that period had been Belfast. She had worked for the majority of her time in Belfast but had also worked on certain days in other hearing centres. She had not claimed travelling expenses from Lisburn to Belfast, and she did not claim subsistence allowances or parking expenses when working in the Belfast centre in the period from 2000 until 2016.

8. In May 2016 she moved her home address to Portballintrae. Her assigned work centre remained as Belfast. Belfast was closer to her new home address than the alternative work centre, Omagh. She continued to work for the majority of her time in Belfast. When she worked in Belfast she was not paid travelling expenses from her home in Portballintrae to her assigned centre. She was not paid subsistence allowances or parking expenses. When she worked at centres other than her assigned centre, she claimed and was paid travelling expenses, subsistence allowances and parking expenses.

9. The claimant sought payment of travelling expenses, subsistence allowances and parking expenses from May 2016 when working in her assigned work centre in Belfast. That was refused.

10. She lodged a claim in the tribunal on 8 February 2018, alleging unlawful discrimination contrary to the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 ("the Regulations"). She identified Ms Fitzpatrick, the only full-time salaried LQM (apart from the President, Mr Duffy) as her comparator.

Procedure

11. A Case Management Discussion was held on 25 January 2019.

12. At that Case Management Discussion, directions were given in relation to the interlocutory procedure and the use of the witness statement procedure. Witness statements were to be exchanged in advance of the hearing. A time table for the exchange of witness statements was specified. It was made clear to the parties in the record of the CMD that written supplementary witness statements would only be permitted "with leave of the tribunal where good cause is shown."" At the hearing each witness was to swear or affirm to tell the truth and would then adopt their witness statement as their entire evidence in chief. At that point it was intended that each witness would move immediately to cross-examination and re-examination.

13. On 13 May 2019, the claimant served a supplementary statement in response to the respondent's statements without obtaining prior leave from the tribunal. In the event, that additional witness statement was allowed into evidence and the respondent was given the opportunity of additional oral evidence in chief to deal with matters raised by that supplementary witness statement. The respondent only adduced additional oral evidence in chief from one witness.

14. The tribunal first sat on 15 and 16 May 2019. The claimant gave evidence on her own behalf. The respondent called two witnesses; Ms Louise Ward-Hunter and Mr Jeff Glass; both were employees of the respondent.

15. At the start of the second day on 16 May 2019, before submissions commenced, the claimant sought to introduce in evidence a letter from the respondent to her which had been marked "without prejudice". The claimant argued that this letter would be relevant to whether the named comparator was a proper comparator for the purposes of the Regulations. This application was made even though the evidence for the claimant and for the respondent had closed and even though the time limit for the exchange of discoverable documentation had obviously expired. It was also made despite the clear "without prejudice" endorsement on that letter. The claimant was unable to explain why her application to introduce that letter into evidence at such a late stage, and despite the "without prejudice" endorsement, should be allowed. The claimant stated that she had been unaware that such an endorsement on correspondence attracted privilege.

    The respondent stated that it was not prepared to waive the privilege attached to that letter and that it was surprised that the application had been made at that late stage and in that manner.

16. The tribunal ruled that the letter would not be admitted into evidence and the application made by the claimant was refused.

17. The claimant argued that she had been unaware until the first day of the hearing that the respondent would seek to argue that the individual which she had named as her comparator for the purposes of this case was not a proper comparator for the purposes of the Regulations. She appeared to have made an unwarranted assumption that the respondent would concede this matter because it had conceded a time limitation point and because it had conceded an argument about the definition of "worker". She had also relied on the approach taken by a different respondent to different litigation in relation to a different judicial post; (the ***O'Brien*** litigation). It was however clear that in the present case, the question of the comparator was in the statement of legal issues and that, at that point in time, there had been no concession in relation to that issue by the respondent in this case.

18. Therefore the issues remaining for determination in this matter at the conclusion of the hearing on 16 May 2019 were:-

    (i) whether the named comparator, Ms Fitzpatrick, was a proper comparator for the purposes of Regulation 2(4) of the Regulations.

    (ii) If so, whether the claimant had been treated less favourably than the comparator for the purposes of Regulation 5(1) of the Regulations?

(iii) If so, whether that unfavourable treatment had been on the ground that the claimant had been a part-time worker for the purposes of Regulation 5(2)(a) of the Regulations?

The respondent did not put forward any objective justification argument for the purposes of Regulation 5(2)(b) of the Regulations.

19. The first day of the hearing was 15 May 2019. The evidence was completed on that day. Submissions were heard on the second day of the hearing. Following those oral submissions, the panel met to consider its decision. A further panel meeting was held on 24 May 2019. On the basis of the evidence provided and on the basis of submissions made at that point, the tribunal was unable to reach a satisfactory decision.

20. The parties were advised in the following terms:-

"(i) The tribunal has considered the evidence and the submissions put forward by the parties in the matter. It has concluded that neither party has put forward either evidence or submissions which are sufficient to enable the tribunal to exercise its role properly in relation to the three issues which remain for determination namely:

(a) whether the named comparator was a proper comparator for the purposes of Regulation 2(4) of the Regulations?

(b) If so, whether the claimant had been treated less favourably than the comparator for the purpose of Regulation 5(1) of the Regulations?

(c) If so, whether that unfavourable treatment had been on the ground that the claimant had been a part-time worker for the purposes of Regulation (5(2)(a) of the Regulations?

(ii) The tribunal has therefore reluctantly concluded that the matter must be reconvened to hear further submissions and, if appropriate, further evidence. If further evidence is to be provided by either party, signed and dated witness statements should be exchanged *by first class post or by email* ***no later than 5.00 pm on 28 June 2019*** and lodged by the respondent's solicitor in the tribunal ***five*** days before the reconvened hearing.

(iii) In relation to the first issue, the submissions made by both parties were solely concerned with the part of the test contained in Regulation 2(4)(a)(ii) – the "broadly comparable work" test. Neither party produced detailed evidence of the type of work undertaken by the claimant or by the comparator. The complexity of cases was not identified or compared. The percentages of time spent on interlocutory work, training, appraisal or management duties were not identified (as in ***Moultrie)*** or compared. No evidence was called from the person who allocated cases or other duties. No evidence was given by the named comparator. No timetables or listing sheets were produced. The claimant attached expenses sheets to her statement

but these expenses sheets and the abbreviations therein were not explained. The witnesses called by the respondent were not involved in job allocation and had only intermittently visited Cleaver House or other hearing centres. The claimant's own evidence lacked detail. The tribunal is obliged to compare the work actually done and is not in a position to do that. Both parties are equally deficient in the evidence provided. Given the overriding objective, the tribunal is not prepared to determine this point solely on the onus of proof.

(iv) No concession was made in relation to the first part of the test in Regulation 2(4)(a)(i) – "the same type of contract" and no submission was made by either party in relation to this point. A concession had been made in entirely different circumstances in ***Keegan***, but in that litigation the claimants had held District Judge appointments which were open-ended. In the present case, the claimant held a fixed term contract and the named comparator an open-ended contract.

In the present case the following questions need to be addressed:-

(a) Is Regulation 2(4)(a)(i) conceded?

(b) If not, in what sub-paragraph of Regulation 2(3) are the claimant and the named comparator to be located? Are they to be located in the same sub-paragraph? If so, with what effect? Are they to be located in different sub-paragraphs? If so, with what effect? Are those sub-paragraphs mutually exclusive?

(c) What is the relevance of ***Roddis*** and ***Wippel*** which concerned a different type of comparison – between zero hours contracts and full-time contracts?

(d) What is the relevance, if any, of the normal or semi-automatic renewal of fee-paid LQM contracts?

(e) What is the relevance, if any, of the Fixed Term Workers Directive?

(f) Are the contracts of the claimant and the comparator the same type of contract? If not, why not?

(v) In relation to the second issue:-

(i) Has flexibility ever been exercised in relation to the named comparator? If so, when and how? Has there been any detriment?

(ii) Are parking expenses incurred by the tribunal in the assigned work centre part of the claim? These were not mentioned in submission by either party. Was there less favourable treatment in this regard?

(iii) If, as argued by the claimant, the less favourable treatment was the allocation of Belfast as the designated work centre for the claimant, how does that differ from the allocation of Belfast as the designated work centre for the named comparator?

(vi) A CMD will be listed to fix the date for the reconvened hearing and to issue other Directions as necessary. That can be conducted by telephone conference call. Please ensure a current telephone number is given to the tribunal."

21. A further telephone conference Case Management Discussion was held on 7 June 2019.

At that Case Management Discussion, Mr Sands BL clarified that the Part-Time Workers Regulation had been amended to remove the reference to fixed term contracts. The respondent was not now contesting (but not expressly conceding) that the claimant and the comparator did broadly comparable work for the purposes of Regulation 2(4). He stated:-

> *"The claimant is saying that she is broadly comparable and the Department is not calling evidence to say she is not."*

Mr Sands BL further stated that the sole issue was now whether the claimant had been less favourably treated on the ground that she had been a part-time worker.

22. A further hearing was listed for 7 August 2019 to hear further evidence as required and further submissions. At that hearing, Mr Sands BL clarified that two issues remained for argument:

(i) Had there been less favourable treatment for the purposes of the Regulations in relation to travelling expenses, subsistence allowances and parking expenses?

(ii) If so, had that less favourable treatment been on the ground of part-time worker status?

Relevant Law

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 ('the 2000 Regulations') as amended by the 2002 Regulations (2002 No 286)

23. Regulation 2(1) (2) and (3) 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."

(3) For the purposes of paragraph (1), (2) and (4) the following shall 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 works on the ground that workers of that description have a different type of contract.

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."

24. 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."

25. 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."

"**<u>A Comparable Full-Time Worker" – Regulation 2(4)(a)(i) and (ii)</u>**

26. The decision of the ECJ in ***Wippel v Peek and Cloppenburg [2005] IRLR 211*** was a decision on unique facts. In that case a zero hours worker effectively sought full pay for the maximum number of hours she could have in theory, although not in practice, worked for her employer. The ECJ concluded that the zero hours contract was a contract of employment. However it concluded that there had been, on the facts of that case, no comparable full-time worker to that zero hours worker for the purposes of the Framework Directive. It stated:- (698, 964.9)

"The prohibition on discrimination enunciated in those provisions is merely a particular expression of the principle of equality, under which comparable situations may not be treated differently unless the difference is objectively justified. <u>That principle can only apply to persons in comparable situations</u>. (Tribunal's emphasis)

In the present case, there was no full-time worker comparable to a part-time employee working according to need, such as the applicant, within the meaning of the Framework Agreement, which defines a "comparable full-time worker" as a worker having "the same type of employment contract or relationship". A full-time worker works under a contract which fixes a working week, the organisation of the working week and salary, and which requires him to work for the whole working time thus determined without the possibility of refusing that work, even if the worker cannot or does not wish to do it. Under those circumstances, the employment relationship differed as to subject matter and basis from that of a worker such as the applicant".

> *"62. In the circumstances of the main proceedings, there is therefore no full-time worker comparable to Ms Wippel within the meaning of the Framework Agreement attached to Directive 97/81. It follows that a contract of part-time employment according to need which makes provision for neither the length of the weekly working time nor the organisation of working time does not result in a less favourable treatment within the meaning of Clause 4 of the Framework Agreement."*

Therefore for the purposes of the Framework Directive, the decision of the ECJ focussed on the comparability, or non-comparability, of a zero hours contract with a full-time contract. The Regulations also require at Regulation 2(4) that both the claimant and the comparator are employed "under the same type of contract".

27. In the EAT decision of ***Roddis v Sheffield Hallam University [2018] UKEAT 0299,*** the EAT concluded that an Employment Tribunal had erred in law in concluding that the ***Wippel*** decision had obliged them to conclude that a lecturer on a zero hours contract had not been employed under the same type of contract as a lecturer on a full-time contract for the purposes of the Regulations. The EAT further concluded that the Employment Tribunal had erred in law in failing to take into account the decision of the Court of Appeal in ***Matthews v Kent and Medway Towns Fire Authority [2005] ICR 84*** and the decision of the House of Lords in that case ***[2006] ICR 365.*** It also concluded that the Employment Tribunal had failed to adequately explain its conclusion in relation to ***Wippel.***

28. The EAT in ***Roddis*** concluded that the claim in the ***Roddis*** case was "not clearly outrageous", as in the ***Wippel*** case. In any event, the Regulations could go further than the Framework Directive. It therefore concluded that the Employment Tribunal had erred in law in concluding that the type of contract that the comparator had (full-time contract) was of a different type to that of the claimant (a zero hours contract). It stated:-

> *"(22) The categories in 2(3) are defined broadly in a way that allows for a wide variety of different terms and conditions within each category to enable a comparison to be made between full and part-time workers. If a part-time worker's hours of work were seen as a distinctive feature of dissimilarity compared to that of a full-time worker, it would defeat the purpose of the legislation. It cannot be that a zero hours contract of itself constitutes a different type of contract for the purposes of Regulation 2, since the consequence would be that an employee on a zero hours contract would never be able to compare him or herself to a full-time worker, when the purpose of the Regulations is to enable comparisons to be made and for unjustified less favourable treatment on grounds of part-time worker status to be prohibited. It would be self-defeating."*

29. The EAT also concluded:-

> *"(18) The following propositions are 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) (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 a worker who would fall within category (d) has yet to be identified. A zero hours contract is not, of itself, a type of contract."*

30. The House of Lords in ***Matthews and Others v Kent and Medway Towns Fire Authority and Others [2006] UKHL8*** stated:-

> *"3. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. As she explains, regulation 2(4) sets out the conditions that must be satisfied in order to determine whether a full-time worker with whom a part-time worker seeks to be compared is a comparable full-time worker. Among other things, both workers must be employed by the same employer "under the same type of contract": regulation 2(4)(a)(i). And they must both be engaged "in the same or broadly similar work" having regard, where relevant, to whether they have a similar level of qualification, skills and experience: regulation 2(4)(a)(ii).*
>
> *4. Directions as to the situations in which full-time and part-time workers are to be regarded as being employed under different types of*

contract for the purposes of regulation 2(4) are given in regulation 2(3). A list is given in paragraphs (a) to (e) of five kinds of employee or worker whose contracts are to be regarded as of a different type. It follows that, where both workers are employed under contracts that answer to the description given in the same paragraph, they are both to be regarded as employed under the same type of contract for the purposes of regulation 2(4). They are workers as between, assuming that the other requirements of regulation 2(4) are satisfied, it is not permissible for the employer to discriminate unless he can justify this on objective grounds under regulation 5(2)(b).

5. *It is agreed that retained fire fighters and whole-time fire fighters are both employed under a contract that is neither for a fixed term nor a contract of apprenticeship. This is a type of contract of the kind described in paragraph (a). There is however one other paragraph in regulation 2(3) that has to be considered. Paragraph (f) adds to the list:-*

> *"any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract."*

There is a difference of opinion among your Lordships as to whether the Court of Appeal were right to hold that retained fire fighters were employees of the type described in paragraph (a), not workers of the description given in paragraph (f). The question is one of construction. What does paragraph (f) mean, when its words are construed according to their ordinary meaning in the context of the regulation read as a whole, having regard to the purpose of the regulation? This is a question of general public importance too. The answer that is given to it will affect all part-time workers who seek the protection of the Less Favourable Treatment Regulations, not just retained fire fighters.

6. *It is convenient to look first at the purpose of regulation 2(3). As its opening words make clear, its function is to provide a definition of what are to be regarded as different types of contract for the purposes of paragraphs (1), (2) and (4) of the regulation, all of which direct attention to the question whether workers are employed by the employer under the same type of contract. Clause 3.2 of the Framework Agreement annexed to Council Directive 97/81/EC defines the term "comparable full-time worker" for the purposes of the agreement as 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. This is the clause in the Framework Agreement to which regulation 2(4) gives effect.*

7. *There is no separate definition in clause 3 of the Framework Agreement of what is meant by the expression "the same type of*

contract". But one can derive from the way clause 3(2) is framed that the question whether a full-time worker is employed under the same type of contract as a part-time worker is to be approached broadly, having regard to the purpose of the agreement set out in clause 1. This is to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work, 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. The use of the word "type" fits in with this approach. When one thinks of a type of person or a type of car, for example, one looks for a broad characteristic that separates one type from another. One ignores the many variations and differences within each type and looks instead for something that brings them all together within the same category. An over-precise view as to what makes one type of contract different from another would tend to undermine the purpose of the agreement.

8. *The wording of the first five paragraphs of regulation 2(3) adopts this approach. The descriptions that are given here are broad. They do not suggest that a contract can be treated as being of a different type from another just because the terms and conditions that it lays down are different. Nor do they suggest that a contract can be treated as being of a different type just because the employer chooses to treat workers of a particular type differently. The underlying purpose seems to be to ensure that it is not left to the employer to decide whether or not to treat persons falling within the same category differently. On the contrary he is not permitted to discriminate between them if they fall within the same category, assuming that the other parts of regulation 2(4) are satisfied, unless he can justify the different treatment on objective grounds under regulation 5(2). By listing the various categories in the way it does, it suggests that all that one needs to do in order to satisfy the requirements of regulation 2(4)(a)(i) is to find that both workers are employed under contracts that fit into one or other of the five listed categories. The question is whether paragraph (f) departs from this approach. Does it add something new, or does it require one to revisit the previous categories?*

9. *In my opinion the wording of paragraph (f) suggests that it is adding something new. In its opening words it refers to "any other description of worker" [my emphasis]. These words, on their own, seem to indicate that we are being asked here to examine a type of worker who is different from any of those previously mentioned. It then goes on to qualify the opening words. But it does so in a way that does not take anything away from the initial impression that we are dealing here with a type of worker, or perhaps various types of workers, who are different from those previously mentioned.*

10. *Paragraph (f) tells us that we are dealing now with any other description of worker that it is reasonable for the employer to treat differently from other workers, "on the ground that workers of that description have a different type of contract." It is the fact that they have a type of contract which is different from other types of contract*

that enables the employer to treat them differently, if it is reasonable for him to do so. This wording also permits workers of several different descriptions to be treated differently from each other on this ground under this paragraph. It is the fact that they have a different type of contract, not that the terms and conditions of their employment are different, that enables the employer to treat them differently from other workers. The breadth of the meaning to be given to the expression "type of contract" is indicated by the categories mentioned in the preceding paragraphs, which are defined broadly in a way that allows for a wide variety of different terms and conditions within each category. This protects the part-time worker from terms and conditions that treat him less favourably in comparison with those that apply to full-time workers in the same category unless the difference of treatment can be objectively justified.

11. Everyone agrees that it is difficult to think of a type of contract which is different from those mentioned elsewhere in the list. But I do not think that this prevents paragraph (f) from being treated as adding something new to the list which will not be reached if a worker falls into one or other of the previous categories. It is sufficient to say, to give it some meaning, that it is there to fill any gaps that may have been left, as a long stop or residual category. The list as a whole makes it unnecessary to carry out the kind of fact-finding exercise that my noble and learned friend Lord Mance envisages. Its purpose, after all, is simply to identify in a broad and simple fashion the types of contract that enable workers to be treated as comparable workers for the purpose of applying the less favourable treatment rules that Part II of the Regulations identifies.

12. For these reasons, and those given by Baroness Hale with which I entirely agree, I would hold that the Court of Appeal were right on this point. This makes it necessary to consider whether the other part of the definition in regulation 2(4)(a)(ii) is also satisfied. Are retained fire fighters and whole-time fire fighters engaged in "the same or broadly similar work", having regard to whether they have a similar level of qualification, skills and experience?

31. Regulation 2(4)(a)(ii) of the Regulations requires that the claimant and the comparator should have been "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience".

32. In ***Matthews v Kent and Medway Fire Authority [2006] IRLR 376,*** the House of Lords considered whether retained firefighters could be properly compared with full-time firefighters for the purposes of the equivalent GB Regulations. Lord Hope stated:-

"14. The wording of Reg 2(4)(a)(ii) identifies the matters that must be enquired into. One must look at the work that both the full-time worker and the part-time worker are engaged in. One must then ask oneself whether it is the same work or, if not, whether it is broadly similar. To answer these questions one must look at the whole of the work that

these kinds of worker are each engaged in. Nothing that forms part of their work should be left out of account in the assessment. Regard must also be had to the question whether they have a similar level of qualifications, skills and experience when judging whether work which at first sight appears to the same or broadly similar does indeed satisfied this test. But this question must be directed to the whole of the work that the two workers are actually engaged in, not to some other work for which they may be qualified but does not form part of that work.

15. It is important to appreciate that it is the work on which the workers are actually engaged at the time that is the subject matter of the comparison. So the question whether they have a similar level of qualification, skills and experience is relevant only insofar as it bears on that exercise. Examination of these characteristics may help to show that they are each contributing something different to work that appears to be the same or broadly similar, with the result that their situations are not truly comparable. But the fact that they may fit them to do other work that they are not engaged in, in the event of promotion for example, would not be relevant."

33. Baroness Hale stated:-

"43 The sole question for the tribunal at this stage of the inquiry is whether the work on which the full-time and part-time workers are engaged is "the same or broadly similar". I do not accept the applicant's argument, put at its highest, that this involves looking at the similarities and ignoring any differences. The work which they do must be looked at as a whole, taking into account both similarities and differences. But the question is not whether it is different but whether it is the same or broadly similar. The question has also to be approached in the context of Regulations which are inviting a comparison between two types of workers whose work will almost inevitably be different to some extent.

44. In making that assessment, the extent to which the work that they do is exactly the same must be of great importance. If a large component of their work is exactly the same, the question is whether any differences are of such importance as to prevent their work being regarded overall as "the same or broadly similar". It is easy to imagine workplaces where both full-time and part-timers do the same work, but the full-timers have extra activities with which to fill their time. This should not prevent their work being regarded as the same or broadly similar overall. Also of great importance in this assessment is the importance of the same work which they do to the work of the enterprise as a whole. It is easy to imagine workplaces where the full-timers do the more important work and the part-timers are brought in to do the more peripheral tasks; the fact that they both do some of the same work would not mean that their work was the same or broadly similar. It is equally easy to imagine workplaces where the full-timers and part-timers spend much of their time on the core activity of the enterprise; judging in the Courts or complaints handling

in an Ombudsman's office spring to mind. The fact that the full-timers do some extra tasks would not prevent their work being the same or broadly similar. In other words in answering that question particular weigh should be given to the extent to which their work is in fact the same and the importance of that work to the enterprise as a whole. Otherwise one runs the risk of giving too much weight to differences which are the almost inevitable result of one worker working full-time and another working less than full-time."

At paragraph 37, Baroness Hale stated:-

"Nor am I unduly troubled by the decision of the European Court of Justice in Wippel -v- Peek and Cloppenburg Gmbh and Co KG [2005] ICR1604. The claim in that case, to be paid on the basis of the maximum number of hours the worker could have been asked to work, when she was under no obligation to do any work at all, was clearly outrageous. It is not surprising that the Court found that her "work when asked and if you please" arrangement was not the same type of relationship as those with whom she worked to be compared."

34. In ***Moultrie v Ministry of Justice [2015] IRLR 264,*** the EAT considered whether fee-paid medical members of tribunals could properly compare themselves to full-time salaried regional medical members of those tribunals. The main issue was whether the part-timers were engaged in "the same or broadly similar work" under Regulation 2(4) of the GB Regulations as the full-time workers.

In that case the ET had determined that the part-timers had spent 100% of their time on judicial work determining appeals. Full-timers had spent only 85% of their time. The remainder of their time had been spent on appraisal, recruitment training and other tasks which were not in practice typically allocated to part-timers. The tribunal concluded that the full-timers had not been engaged on work which was broadly similar to that of the part-timers. The full-timers had occupied a new role which was qualitatively different from that of part-timers. The decision focused on that issue rather than on whether the claimant and comparator had been engaged on the same type of contract.

35. The EAT concluded that the ET had been entitled to reach that conclusion on the facts before it.

The EAT concluded that it was not determinative that the work carried out by the part-timers was to a significant extent identical to that carried out by the full-timers or that that work was of importance to the organisation as a whole. While important and while particular weight had to be attached to those factors, the question remained as to whether or not the remaining differences between the part-timers and the full-timers where of such importance as to prevent the work being regarded as broadly similar. The Employment Tribunal had been entitled to conclude that the additional tasks which in the main fell to full-time workers meant that the two roles could not be described as broadly similar.

36. The EAT in ***Roddis*** usefully stated the position in relation to the onus of proof. It stated:-

> *"10. In outline terms, in order to succeed in a claim of this type under the Part-Time Workers Regulations, a Claimant must first establish that he or she is a part-time worker as defined and then identify an actual full-time worker comparator. [Tribunal emphasis] She or he must then establish that they have been less favourably treated as regards either the terms of his or her contract or by being subject to any other detriment, and satisfy the Tribunal that the identified less favourable treatment is on the grounds that the claimant worker is part-time. If, and only if, all those elements are established, [Tribunal emphasis] does the onus then shift to the employer to show that there is an objective justification for the less favourable treatment."*

Therefore the initial onus of proof is on the claimant to establish that the identified comparator is a proper comparator for the purposes of Regulation 2(4)(a)(i) and (ii).

Treated Less Favourably – Regulation 5(1)

37. Regulation 5(1) provide that a part-time worker should not be treated less favourably than a full-time worker as regards the terms of her contract or by being subject to any detriment.

A detriment occurs if a reasonable employee would or might take the view that they had been disadvantaged in the circumstances in which they had to work – ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003 UKHL 11].***

"**On the Ground That" – Regulation 5(2)(a)**

38. In ***R v Governing Body of JFS and the Admissions Appeal Panel of JFS & Others [2010] IRLR 136***, the Supreme Court considered 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.

39. Lord Kerr stated at Paragraph 113:-

> *"These questions focus attention on the problematical issue of what is meant by discrimination on racial grounds. 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."

40. 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."*

41. The difficulty in the present case 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 respondent does 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 respondent to act as it did.

42. The EAT dealt with this issue in some detail in the case of ***Amnesty International v Ahmed [UKEAT/447/08/ZT]*** in 2009.

43. 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. 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."

44. 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."*

There are therefore two types of cases; one where the criteria applied is so obviously discriminatory; eg "no blacks" or "no part-timers" that that is an end of the matter, and one where the discriminatory motivation is not so obvious and the ground of, or the trigger for, the action must be analysed.

Relevant Findings of Fact

45. The claimant was appointed as a fee-paid LQM on 5 June 1986. That was a contract for a fixed term which was renewed periodically thereafter. The comparator named by the claimant was appointed as a full-time salaried LQM on an open-ended contract in 2009.

46. The claimant was resident in Lisburn at that time and was assigned to Belfast as her assigned work centre. She worked for the majority of her time in Belfast although she did from time to time work in other centres throughout Northern Ireland.

47. The claimant claimed for and was paid travelling expenses, subsistence allowances and parking expenses, whether working in Belfast or elsewhere in Northern Ireland, from her initial appointment in 1986 up to 3 April 2000.

48. Fees, expenses and allowances for panel members, including fee-paid LQMs, were restructured with effect from 3 April 2000 in both Great Britain and in Northern Ireland.

49. On 17 February 2000, the Finance Director of the Appeals Service notified the President of the Appeals Tribunal of the changes which had been authorised by the relevant Department and by the Secretary of State. That letter explained the purpose of the restructuring exercise:-

"The purpose of the new fee structure is to:

- *recognise the professionalism of persons appointed to the panel by providing for all panel members to be paid;*

- *provide a rationalised and consistent approach to fees by subsuming some fees and allowances, which had previously been paid separately."*

50. There were several changes in the fees and expenses structure. However insofar as is relevant to the present case, travelling expenses between the fee-paid LQM's home address and their assigned work centre, together with subsistence allowances and parking expenses while working at that assigned centre, were subsumed in the new daily fee. The fee-paid LQM would still be able to claim for travelling expenses, subsistence allowances and parking expenses when working at a centre other than their assigned centre.

51. The daily fee was increased as part of that restructuring exercise from 3 April 2000 by 15% to take account of the restructuring of fees and expenses. That 15%

increase was separate from and additional to a 2.5% inflation increase paid at the same time.

52. It is important to note that the effect of the restructuring and in particular the effect of the removal of the travelling expenses and subsistence allowance in respect of work at the assigned centre had been to ensure parity with full-time judicial office-holders and with administrative staff (civil servants). That had been the regime which had applied to full-time judicial officeholders and administration staff before 2000.

53. The letter of 17 February 2000 stated:-

> *"The restructuring of the fees also impacts on the way travel and subsistence allowances will be paid from April 2000. To achieve a consistent approach and comply with Inland Revenue principles on travel and subsistence, part-time panel members claims will align with those for Administrative staff and Full-Time Judicial Officers."*

54. On 31 March 2000, a circular issued to all fee-paid panel members including the claimant. It stated:-

> *"I should mention that there will be a radical change in fees and arrangements for travelling expenses after April 1. Details are not yet finalised but in general terms the effect will be that travel expenses will be restricted to payments similar to those made to civil servants. Therefore payments will not be made for such expenses where the members of the tribunal are travelling to a centre where they normally sit. Expenses to other centres will also be restricted, depending on the proximity of that centre to the normal centre and the point of commencement of the journey. However the sittings fee will be increased substantially, partly to reflect the new travel and other expenses changes. The reason for the change is partly driven by the view of the Inland Revenue that not all the payments in the past were not taxable. The new system will therefore transfer part of the payments to taxable fee income while bringing non-taxable expenses payments into line with other occupations."*

55. Therefore from April 2000, travel expenses in relation to work at hearing centres other than the assigned centre, were restricted in the following way.

In relation to travel to a hearing centre other than the assigned centre for that LQM, expenses would be paid for the shorter of two journeys; either the journey between the home and the hearing centre, or the journey between the assigned centre and the hearing centre.

56. In December 2000, a letter from the Appeals Service issued to all panel members reiterating the changes. It referred to the fact that the daily fee had been increased by 15% to take account of the changes contained within the restructuring exercise. It stressed that fee-paid panel members, including the claimant, were being aligned with the full-time judicial office-holders.

57. As with the full-time judicial office-holders, an assigned work centre would be identified. With fee-paid panel members, including the claimant, the assigned

centre would be either Omagh or Belfast; whichever was closer to their home address. The position in relation to the full-time judicial office-holders was more arbitrary. Their assigned work centre was to be Belfast, wherever their home address was in Northern Ireland. That has disadvantaged the current President whose home address is in the North West. He is not paid travelling expenses for his lengthy daily commute, in the manner now argued for by the claimant.

58. A new set of terms and conditions of service for fee-paid panel members issued in July 2000. The claimant was required to be available (but not to work) for 56 sessions (half days) per year. There was however no obligation on the Appeals Service to offer any particular number of sessions. It would have been entitled to offer no sessions at all. The claimant also accepted in cross-examination that she and any fee-paid LQM could refuse any session that had been offered. She had been obliged only to be available for 56 sessions per year. Given that many fee-paid LQMs were still in practice as lawyers, that is hardly surprising. Equally many other LQMs, such as the claimant, held other appointments which might from time to time have conflicted with sessions offered by the Appeals Service.

59. The terms and conditions of service of a full-time LQM were obviously different. Those terms and conditions allowed for sick absence and for maternity pay. Notably they stated:-

> *"The Lord Chancellor regards appointment to the Bench as being for life. Any offer of appointment is therefore made on the understanding that the appointee will not return to practice."*

The contract of a full-time LQM, including that of the comparator, was, subject only to the current retirement age of 70, open-ended.

There was no contractual entitlement to either a car parking space or to parking expenses at their assigned work centre in Belfast. A car parking space was however provided in that centre for the President and the full-time comparator.

60. On 1 May 2016, the claimant moved home from Lisburn to Portballintrae. Her assigned work centre remained Belfast. That work centre was closer to her home address than to Omagh. The majority of her tribunal work remained in Belfast.

61. The claimant argued at that point, for the first time, that she should be paid travelling expenses from her home to her assigned work centre in Belfast. She stated:-

> *"I am a legally qualified chair of the Appeals Service. I have recently (from May 1) moved from Lisburn to live in Portballintrae. I understand that under current policy, I am not entitled to my expenses for travel to Belfast, as it is treated as my base. I find this unacceptable given the distance and cost of travel. I would be grateful if you would forward me a copy of the relevant policy. The following points occur to me as a basis for challenging the policy. It is out of line with the rules applied to other tribunals. I know from my own experience that actual distance travelled is the basis for expenses paid to members of a Mental Health Review Tribunal throughout the jurisdiction. There is no rational basis for dividing the jurisdiction into two areas, for the*

purpose of allocating expenses. There is no rational basis for treating any members as based in Belfast where there are a number of hearing centres and no facilities of any kind of work to be carried out there. The policy operates unfairly. A member travelling from Lurgan to Belfast can claim travel and car parking expenses, but although travelling a much greater distance I cannot. I also wonder if the policy has been equality proofed."

62. The claimant did not allege part-time worker discrimination at this point. She regarded the position as unfair given the distance from Portballintrae to Belfast. That move to Portballintrae had been a matter of personal choice. For the previous 16 years she had travelled from Lisburn to Belfast (approximately 18 miles daily) without claiming travelling expenses, subsistence or parking expenses; all without complaint.

63. The respondent refused the request.

The claimant pursued the matter further in an email of 25 August 2016.

64. The claimant in that email again did not raise any allegation of part-time worker discrimination. Instead, she argued again that the policy was irrational and unreasonable in relation to travel expenses and she queried the designation of assigned work centres as either Belfast or Omagh. She referred to the number of tribunal sessions in different centres and stated:-

"These figures illustrate that if there is a sound basis for dividing the jurisdiction between two venues, it should be Belfast and Londonderry. If that were the case my primary venue on the basis of proximity would naturally be Derry, and therefore I would receive expenses for travel to Belfast."

65. She further stated:-

"It is in this context that I question whether this policy has been equality proofed. The answer I received previously in relation to this was not convincing. Can you be sure that there is not an unequal impact in terms of religious belief?"

66. She further stated:-

"I am unaware of any other tribunal system, which divides the jurisdiction. The proper basis for awarding expenses is travel from home to the venue. The Department of Justice have informed me that in six out of ten tribunal systems, travel is paid from home to venue and in the other four, from home to the tribunal centre."

67. On 17 May 2017, the Department refused to reconsider the matter. It referred to the 2001 and 2013 terms and conditions of service for fee-paid LQMs. It stated that each panel member was allocated to either Belfast or Omagh as his or her assigned centre and that no expenses were payable for travel, subsistence or parking in connection with attendance at an assigned work centre. It stated that the standard fee for a session included a notional amount to cover these costs.

That said, it is clear that that standard fee was paid for both work at the assigned centre and for work at other centres; at centres where travelling and other expenses were not paid and at centres where travelling and other expenses were paid. It is therefore difficult to understand how the standard fee included a notional amount for travelling and other expenses.

68. On 8 June 2017, the claimant in an email asked for update. Again she did not raise any question of alleged part-time worker discrimination. On June 16 2017 the claimant emailed again indicating that in her belief the current policy was "unreasonable and unfair in this application." She indicated that she was intending to proceed to judicial review. However again there was no mention of part-time worker discrimination. She did not seek to draw any comparison between herself, or other fee-paid LQMs, and either the President or the one full-time LQM.

69. On 22 August 2017, the claimant wrote again to the Department. She stated that she enclosed "a skeleton of my reasons why I am asking you to reconsider the application of the current policy in my case. The obvious next step for me is to bring a judicial review in relation to the decision to refuse my reasonable expenses.

70. In the attached "skeleton" she raised several points. Those were:

(i) That she had no recollection of agreeing to the policy. (Even though she had been content to operate that policy for a period of 16 years during which she had accepted renewal of her appointment on several occasions).

(ii) That there was no justification for allocating fee-paid panel members to either Belfast or Omagh.

(iii) That the allocation was irrational and unreasonable and did not reflect the pattern of where hearings were conducted.

(iv) That if there were to be two centres, the two centres should be Belfast and Londonderry.

(v) That there was a possibility of adverse impact in terms of religious belief.

(vi) That fee-paid panel members have no office base. They work from home.

(vii) That no other tribunal system divides the jurisdiction between two work centres in this way.

(viii) That the proper basis for awarding expenses is travel from home to the actual work centre.

71. Again, the claimant did not raise any issue of part-time worker discrimination and did not seek to draw any comparison between herself and other fee-paid LQMs and either the President or the one full-time LQM.

72. That request to reconsider the policy was not accepted by the Department.

73. On 9 October 2017, the claimant emailed the Department again. The claimant stated:-

"It is misconceived to compare the fee-paid members with administrative staff. We do not have a base, work from home and travel to a variety of venues where we have no storage or preparation facilities. It is misconceived also to compare us with full-time legal members. [Tribunal's emphasis] We do not have a permanent base, as is referred to in their terms and conditions and we have no parking or other facilities."

74. Even though the claimant in that email stated that it was inappropriate to compare fee-paid LQMs with the full-time LQMs, she went on to argue that any uplift in fees must be considered in the light of decisions of the European Court, (which were unidentified), which had concluded that fee paid LQMs were underpaid in comparison to full-time LQMs. It is unclear whether the claimant was at that point raising the issue of alleged part-time worker discrimination for the first time.

75. The respondent Department conducted a review into this issue which was completed on or around 16 November 2017. It concluded that the relevant policy had been applied in relation to the claimant and that the operation of the policy had been fair and rational. It did not address any allegation of part-time worker discrimination.

The claimant argued that the Department had not consulted her or other fee-paid LQMs in the course of the review. That failure might be surprising but it is not directly relevant to the issues which are before the tribunal. This is not a judicial review.

76. On 7 January 2018, the claimant wrote to the Department in what she described as an "pre-action protocol for judicial review". She alleged that the potential judicial review concerned a decision not to pay travel and other work-related expenses. She described the policy as "irrational and unreasonable and unfair". She criticised the decision to divide the jurisdiction into two work centres in Belfast and Omagh. She stated that that was not done in any other tribunal and that it did not reflect the pattern of tribunal work. She stated that "the norm" was to pay expenses from the panel member's home to the individual hearing centre. She stated that if there were to be two centres, the two centres should be Belfast and Londonderry.

She compared the position of a fee-paid panel member allocated to Belfast with the position of a fee-paid member allocated to Omagh, comparing the respective positions of two part-timers. She did not compare the position of part-timers and full-timers.

She stated there were no storage or working facilities for LQMs at any hearing centre. She stated that there was the potential that the policy was indirectly discriminatory but she did not specify the basis on which she alleged that it might be discriminatory. Her previous explicit references were to the possibility of discrimination on the grounds of religious belief and not on the ground of part-time worker status.

77. The DSO replied on behalf of the respondent on 26 January 2018. It set out the history of the restructuring of fees and expenses in 2000 and stated that travel expenses from home to the assigned work centre were included in the daily fee. It denied that the policy was either irrational or unreasonable. It also stated that the

complaint was not amenable to judicial review because there was no public law element. Furthermore the pre-action protocol had not identified any group which would be adversely affected by the policy for the purposes of Section 75 of the Northern Ireland Act 1998.

DECISION

First Issue – Whether a proper Comparator had been identified – Regulation 2(4)(a)

78. It is important to remember that the comparator issue under Regulation 2(4)(a) had not been conceded at any stage by the respondent in the present case until the CMD on 12 June 2019. Even then, Mr Sands BL indicated only that at the resumed hearing on 7 August 2019, he did not intend to call evidence to rebut the claimant's evidence. He did not expressly concede the point. This matter therefore remained in contention throughout. The tribunal heard detailed evidence on 15 and 16 May 2019 about the types of work undertaken by the claimant and her comparators. Although the claimant appears to have concluded before the initial hearing that either it had been conceded or that it would be conceded, the claimant did not draw the tribunal to any such indication of a concession or actual concession at that stage. This was entirely different to the position in ***Keegan and Others v Ministry of Justice and another,*** [www.employmenttribunalsni.gov.uk] where a specific and clear concession on this issue had been made by the respondents, and which, of course, involved entirely different claimants and entirely different comparators; each employed on contracts which were different from the contracts in the present case.

79. During the relevant period, there was a President in the Appeals Service (currently Mr Duffy), one full-time salaried LQM (currently Ms Fitzpatrick) and approximately sixty fee-paid LQMs. In the course of her evidence and indeed in the interlocutory process, the claimant had named Ms Fitzpatrick, the full-time salaried LQM, as her only comparator.

80. Regulation 2(4)(a) sets out two criteria. Firstly (a)(i) requires that both the claimant and the comparator are employed by the same employer under the same type of contract. Secondly (a)(ii) requires that both the full-time comparator and the part-time claimant are engaged in the same or broadly similar work, having regard, where relevant, to whether they have a similar level of qualifications, skills and experience. Qualifications, skills and experience are not relevant to this second question in the present case. The questions in relation to this first issue are therefore whether the claimant and comparator had been employed under the same type of contract and, if so, whether the work of the named comparator and that of the claimant had been the same or broadly similar for the purposes of Regulation 2(4).

    It is unfortunate that these entirely separate issues were not separately addressed by either party in the course of the original hearing on 16 and 16 May 2019 or during the resumed Hearing on 7 August 2019.

81. The claim brought by the claimant is in respect of the period from 1 May 2016 when she moved her home address from Lisburn to Portballintrae, and 4 January 2019 when she last worked in the Appeals Service on a date after she had retired. The comparator that she has named throughout this period is Ms Fitzpatrick.

Ms Fitzpatrick appears to have been appointed in or around 2009 and was in place throughout the relevant period.

82. The terms of the respective contracts held by the claimant and by her named comparator are relevant only to the first question above and are not determinative in relation to the second question; whether they were engaged in the same or broadly similar work. That second question would ordinarily require a detailed analysis of the work actually undertaken by both the claimant and by her comparator during the relevant period.

The validity of the named comparator has not been expressly conceded by the respondent. The onus of proof in this respect lies on the claimant and it has to be determined by the tribunal.

83. In relation to the first question Regulation (24(a)(i)), the claimant and her named comparator had both been engaged by the respondent under the same category for the purposes of Regulation 2(3)(c). The distinction between fixed term and open ended contracts, following amendment, is no longer relevant.

84. The tribunal concludes in the present case that the claimant and her agreed comparator had been engaged for the same type of contract for the purposes of Regulation 2(4)(a)(i). They were workers and not employees. The only relevant distinction is that of fee paid or part-time status. In the context of the Regulation that cannot be regarded as an adequate distinction.

85. Turning to the second part of the text in Regulation 2(4)(a)(ii), the House of Lords stated in **Matthews v Kent and Medway Fire Authority [2006] IRLR 367** that:-

> *"15. It is important to appreciate that it is the work on which the workers are actually engaged at the time that is the subject matter of the comparison."*

It went on to state:-

> *"43. The work which they do must be looked at as a whole, taking into account both similarities and differences."*

86. Despite that, the tribunal has not been provided with the necessary and relevant information. There are no statistics, such as those produced in ***Moultrie*** at tribunal level, which set out the percentages of time spent by either the claimant or her named comparator in relation to the different types of work performed by either. In ***Moultrie***, the issue hinged on 15% of the work done by the full-time comparator which differed from that undertaken by the part-time claimant. In the present case the tribunal is left with the unsupported assertions of the claimant, together with a set of expenses claims which are difficult to understand. There was little by way of direct rebuttal evidence. The obvious witnesses in this respect were Mr Duffy and Ms Fitzpatrick but they have not been called by either party.

87. The claimant in her evidence during the first hearing asserted that she had been allocated complicated cases, including cases which raised European points of law. However the tribunal was not shown any statistics in relation to the alleged

allocation of more complicated cases and those cases where neither identified nor explained.

88. Mr Glass of the respondent Department stated in evidence that the comparator had been expected to preside in test cases and in cases of usual difficulty requiring extensive preparation. He stated that the comparator had heard complex cases which had to be reheard following a successful appeal to the Commissioner and also those appeals which require special sitting arrangements including most out of centre hearings. He also stated that the comparator took the lead in certain jurisdictions specified by the President. He stated those jurisdictions at present included benefit appeals, medical aspects of industrial injury, disabled benefits, tax credits, overpayments, including those involved in associated criminal proceedings, recovery of benefits from personal injury compensation, recovery of hospital and ambulance charges from compensation vaccine damage claims and child support.

89. Mr Glass did not state in evidence that the claimant had been assigned complicated cases or cases involving points of European law.

90. The claimant did not cross-examine Mr Glass in relation to his evidence on this point and did not put to Mr Glass in cross-examination that she had also dealt with complicated cases.

91. The claimant also asserted in evidence that she had done interlocutory work and that she had been involved in training. No details were provided to the tribunal which would have enabled to the tribunal to assess the amount of interlocutory work performed by the claimant or indeed the amount of training duties performed by the claimant. The tribunal was not able to therefore to draw any comparison between what she stated had been her work and the work of her named comparator. The tribunal was not drawn to any part of the fee expenses claims in respect of such work. Having examined those claims, there appeared to be few claims in respect of interlocutory work or training work.

92. Mr Glass in his evidence indicated that there are a large number of procedural issues connected with the progressing of appeals. He stated that the comparator, in co-operation with the President and the fee-paid legal members shared responsibility for such matters so as to provide a service to the public. There was again no indication of percentages or of the amount of time spent by either the claimant or the comparator in relation to interlocutory matters. He stated that the comparator had been required to play a leading role in judicial training. He stated she had been expected to identify training needs and to plan and deliver travel modules. Again no details was given to enable the percentage of time spent to be identified.

93. Mr Glass stated that the comparator had been required to assess the performance of fee-paid legal members, to provide references, and to undertake an essential role as a member of judicial management team and to attend monthly meetings in that respect.

94. Again the claimant chose not to cross-examine Mr Glass in relation to this evidence. Equally the respondent did not cross-examine the claimant in relation to her evidence in relation to the type of work she alleged she did.

95. Neither party had produced the necessary statistical or empirical evidence at the first hearing to enable the tribunal to approach this question properly. It is simply not satisfactory for the claimant to assert that she has been given complicated work but not to provide full details of that work. It is again simply not satisfactory for the claimant to assert that she has been given interlocutory work again without providing the details of that work and without in particular providing sufficient details to enable a proper comparison to be drawn between the work performed by her and the work performed by her comparator. It is equally not satisfactory for the claimant to allege that she had been engaged in training but not to give the necessary details to enable that necessary comparison to be drawn.

Equally it is not satisfactory for the respondent to fail to provide the necessary and detailed evidence in relation to the work conducted by the comparator and indeed conducted by the claimant in respect of complicated work, interlocutory proceedings and training. It is equally not satisfactory that the respondent gave very little information in relation to management or appraisal duties. It is notable that neither the President who had allocated work to both the claimant and the comparator, Ms Fitzpatrick, who could have given detailed evidence on at least the work which she had herself conducted in the relevant period, were called to give evidence by the respondent or indeed, for that matter, by the claimant.

96. Nevertheless, on the balance of probabilities the tribunal concludes that the claimant and her named comparator had been engaged on broadly similar work during the relevant period for the purposes of Regulation 2(4)(a)(ii). In the absence of any effective rebuttal evidence from the respondent, the tribunal has to accept the evidence of the claimant.

Second Issue – Less Favourable Treatment Regulation 5(1)

97. The alleged less favourable treatment relates to three areas of the contract; firstly travel expenses, secondly subsistence allowances and thirdly parking expenses.

98. In relation to travel expenses, the claimant was not paid expenses in relation to her trip from her home address to her assigned work centre. In relation to trips to work centres other than her assigned work centre, she had been paid expenses for the lesser of the journey between her home address and the work centre or the journey between the assigned work centre and the actual work centre. The latter restriction on travelling expenses would have had a significant effect on the claimant's claims for travelling expenses when engaged in or at tribunal centres other than her assigned work centre. However the argument before the tribunal centred exclusively on the claimant's journeys between her home address and her assigned work centre. There was no argument and no evidence in relation to any alleged less favourable treatment in respect of trips to other work centres.

99. During the relevant period, the claimant lived in Portballintrae and her named comparator had lived the Belfast area, although some distance away from her assigned work centre. The claimant had much further to travel from her home address to her assigned work centre than her comparator. However that does not appear to the tribunal to be the issue. Both appear to have been treated in exactly the same manner in respect of travelling expenses. Both had been unable to claim for travelling expenses between their home address and the address of their assigned work centre. Both had been entitled to claim travelling expenses, in

exactly the same way and subject to the same restrictions, in respect of trips to other work centres within Northern Ireland.

100. It is also notable that the President had not been named as a comparator by the claimant. The President had nevertheless been a full-time judicial officeholder. He had been one of only two such full-time officeholders; the other one had been the named comparator, Ms Fitzpatrick. The President in the relevant period had resided in the North West of the Province. He had not been paid expenses and could not have claimed expenses for his daily commute from his home address to the address of his assigned work centre in Belfast on four days a week or in respect of his commute to the Omagh work centre on one other day per week. As with the named comparator, Ms Fitzpatrick, the President had been treated in exactly the same way as the claimant in this respect.

101. The claimant in evidence and in her submission seemed primarily concerned at the Department's decision, as a matter of policy, that there should be two assigned work centres; one in Omagh and one in Belfast, and at the decision to allocate fee-paid LQMs to the work centre closest to their home address. She put forward an argument, before the tribunal, that the Department should have allowed fee-paid LQMs to have their home addresses as their designated work centres. That however would have resulted in fee-paid LQMs being treated better than both full-time LQMs ie better than either the President or Ms Fitzpatrick. Both those individuals had been allocated the Belfast work centre as their assigned work centre irrespective of their home address; either at the time of that appointment or at any time subsequently. That was a particularly arbitrary decision and; they were not given the benefit of any consideration as to which of the two work centres had been closer to their home address. That decision had been of particular detriment to the President.

102. The claimant also suggested an argument that a different work centre should have been chosen instead of Omagh; ie Londonderry. She argued that the Londonderry centre dealt with more hearings. It would have been a more logical choice. She had previously argued that the choice of Omagh might have been indirectly discriminatory on grounds of religious belief.

103. It is notable that the claimant had been content with the Department's decision to designate Omagh and Belfast as the two assigned work centres, and to allocate fee-paid LQMs to the work centre closest to their home address, for approximately sixteen years while she lived in Lisburn until the 1 May 2016. On that date she had moved to Portballintrae. It was at that point, and only at that point, that the claimant sought to challenge that long standing decision. That had been a decision which had been clear, open and known to the claimant. The claimant's appointment had been renewed on several occasions during those sixteen years and she had accepted the renewal of that appointment on those terms. It is also notable that no other fee-paid LQM has raised any complaint in this respect.

104. It is clear from the evidence that, in relation to travelling expenses, the claimant, and indeed all fee-paid LQMs, had been treated identically to the two full-time judicial officeholders, including the named comparator. There has therefore been no less favourable treatment in respect of travelling expenses. The financial impact of this treatment may differ from individual to individual but the treatment afforded to each individual is exactly the same. Both the claimant and the President had

lengthy commutes to work which did not attract travelling expenses. The named comparator had a much shorter commute but again that shorter commute did not attract travelling expenses. All were treated exactly the same.

The decision to identify, as the assigned work centre for fee paid LQMs, the centre closer to their home address had been more generous than the decision in relation to full-time LQMs, including the named comparator. For full-time LQMs, an arbitrary designation of Belfast had been made, irrespective of their home address.

105. The same applies to subsistence allowances. Neither the claimant, her comparator, the President or indeed any other fee-paid LQM had been entitled to claim subsistence allowance while working in their assigned work centre. The claimant had been treated in exactly the same way as her comparator under the policy and there had been no less favourable treatment.

106. The remaining issue is that of parking expenses. It seems clear from the evidence that both the President and the full-time LQM had parking spaces provided at their assigned work centre. The claimant and the other fee-paid LQMs, were not entitled to claim for parking expenses while working at their assigned work centre.

107. It is clear that the full-time comparator had been differently and better treated in respect of parking expenses. She had been allocated a parking space and the claimant had had to locate and to pay for a commercial parking space, on those occasions when she did not use public transport.

108. The cost of that commercial parking space has been identified as £76; a figure which has not been challenged by the respondent.

109. The provision of an allocated parking space is not a contractual entitlement. It is nevertheless something which has been afforded to the comparator, on a non-contractual basis, since her appointment. As far as the claimant is concerned, parking passes to a commercial car park had been available on a first come, first served basis until 2011 approximately.

110. The non-provision of parking or parking expenses has to be regarded as a detriment for the purposes of Regulation 5(1)(b).

111. Objective justification was not argued by the respondent. The tribunal therefore concludes that there had been less favourable treatment in relation to parking expenses.

Third Issue – 'On the Ground of' – Regulation 5(2)(a)

112. Causation must be established for the purposes of Regulation 5(2)(a) before there is any legal liability. It is not enough that the claimant was a part-time worker and that she had been treated less favourably (at least in relation to parking expenses) than a comparable full-time worker. The EAT stated in ***Engel v Ministry of Justice [2017] ICR 277*** that:-

> *"The Directive was concerned to provide a remedy for those who were treated in a less favourable manner than comparable full-time workers "solely because they work part-time". While the language of the 2000 Regulations is*

wider, their purpose is the same. – the purpose of the legislation is not to redress any and all injustices that may exist: it is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time workers".

113. In the present case, the distinction between those who did have to pay for parking at their assigned work centre, and those who did not, is clear. The part-time workers had to pay and the full-time workers did not. The motivation behind that distinction is irrelevant. This is the type of case where the 'trigger' is clear and where, if less favourable treatment is established, and if objective justification is not argued, direct discrimination on the prohibited ground is established.

114. This is a "criterion case", rather than a "reason why" case. The EAT determined in ***Interserve FM Ltd v Tuleikyte [2017] IRLR 615:***

"The fundamental question in a direct discrimination case is: what were the reasons or grounds for the impugned treatment? The question is fact and context sensitive and gives rise in broad terms to two types of cases that have been identified in the authorities. These are on the one hand 'criterion cases' and on the other "reason why" cases."

The EAT referred to the JFS decision (above) and stated:

"In criterion cases, where the criterion is inherently based on or indissociably linked to the protected characteristic, it or its application constitutes the reasons or grounds for the treatment complained of, and there is no need to look further –".

115. In the present case, the respondent argued that the daily fee payable to the claimant at her assigned work centre contained an element attributable to parking expenses. That element was not quantified. In any event, it is clear that the same daily fee was paid to the claimant when she worked at tribunal centres other than her assigned centre and where parking expenses were paid. If the daily fee included an element in respect of parking expenses, it is difficult to understand why parking expenses would be paid in other locations.

116. This is not a case, as in ***Engel*** (above); where rules had arisen haphazardly and where they had been created by different sponsoring Departments. The rules, and the distinction in relation to car parking had been created in 2000. While some car parking passes had been provided, dependent on availability, to fee paid LQMs at some time in past, the distinction had always been clear since 2000. Full-time workers did not have to pay for car parking; part-time workers did.

117. The tribunal is satisfied that causation has been established. In the absence of any argument in relation to objective justification, direct discrimination has been established.

118. Only one area of potential part-time worker discrimination remains for consideration under Regulation 5(2)(a); that of parking expenses. There had been no less favourable treatment in relation to either travelling expenses or subsistence allowance.

Remedy

119. The loss in respect of parking expenses is £76.00. That amount is awarded.

120. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Vice President:

Date and place of hearing: 15 and 16 May 2019, Belfast.

Date decision recorded in register and issued to parties: