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EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		***Respondents***
Mr R Dodds & Others	**AND**	(1) Ministry of Justice (2) Lord Chancellor

HELD AT: **London Central** **ON:** 27-29 September 2021
1 and 4-6 October 2021 (Reserved decision)

BEFORE: Employment Judge S J Williams (sitting alone)

Representation:

For the Claimants: Mr R Allen QC, with Chesca Lord, of Counsel

For the Respondents: Mr A Allen QC, with Alexander Line, of Counsel

JUDGMENT

The judgment of the tribunal is that the complaints of Mr Barker, Ms George, Mr Everall and Mr Atherton succeed. The claim of Mr Field fails.

REASONS

Introduction

1 The five claimants in these proceedings have been selected as samples representative of a larger number of judges at various levels in the judiciary who have brought similar complaints. The five claimants are each salaried in their respective judicial offices. Pursuant to differing arrangements, they each sit from time to time in judicial capacities remunerated, on a substantive basis, at a higher level than their respective salaries. The claimants do not receive any additional remuneration for so doing. The term ‘sitting-up’, whilst it has no statutory or other authority, will be used in this judgment as a convenient way of referring to the circumstances just described.

2 By their complaints to this tribunal pursuant to regulation 8 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR), the claimants claim that, when they 'sit-up', they are part-time workers, and that the respondents have infringed their right not to be treated less favourably than comparable full-time workers by failing to remunerate them at the level appropriate to the higher judicial capacity in which they sit.

3 Mr Robin Allen adduced the evidence of the five claimants, Simon Barker, Ian Atherton, Jane George, Patrick Field and Mark Everall. Mr Andrew Allen adduced the evidence of Clement Goldstone, Simon Masterson and Sir Brian Leveson. All witnesses gave their evidence in chief from written statements and were cross-examined. Counsel for both parties produced extensive written opening and closing submissions on which they elaborated orally. Because time for closing submissions on the final day was short, leave was given to counsel to submit further written supplementary submissions. Mr Robin Allen submitted an undated Response to Factual Assertions in the Respondents' Closing Submissions; Mr Andrew Allen submitted a Reply to that document dated 15 October 2021; and Mr Robin Allen submitted the Claimants' Last Word dated 22 October 2021. The tribunal was provided with a trial bundle containing pages 1-2369, a supplementary bundle containing pages 1-239, and a bundle of authorities.

4 With the exception of Sir Brian Leveson, it was agreed than honorific titles would not be used during the hearing. This judgment will follow the same practice.

5 This hearing was concerned with liability only. The parties have consented to the case being heard and decided by an employment judge sitting alone.

The Facts

Personal circumstances of the claimants

6 The professional circumstances of the claimants fall into three distinct categories. In summary, Simon Barker, Jane George and Mark Everall are, or were at material times, circuit judges or senior circuit judges authorised pursuant to section 9 (1) of the Senior Courts Act 1981 (SCA) to act as judges of the High Court. Patrick Field is a circuit judge authorised pursuant to section 9 (1) SCA to act as a judge of the Court of Appeal (Criminal Division) (CACD). The term 'section 9 judge' will be used to describe a judge authorised pursuant to section 9 (1). Ian Atherton was at material times a district judge who also held the appointment of recorder pursuant to section 21 (1) of the Courts Act 1971 (CA).

7 Mr Barker was appointed on 27 October 2010 as a Specialist Senior Circuit Judge to the Birmingham Civil and Family Justice Centre; he retired in October 2020. Pursuant to an authorisation under section 9 (1) SCA, he acted as a judge of the High Court both at his base court and in London, sitting in both the Chancery and Queen's Bench Divisions. His salary was that of a

senior circuit judge. He described his as a full-time, 100% appointment as specialist circuit judge, with a section 9 authorisation. From the outset of his appointment he was authorised pursuant to section 9.

8 Mr Barker also sat in the Upper Tribunal Immigration and Asylum Chamber (UTIAC) and, from about 2013, UTIAC boxwork, of which there was a large backlog, predominated over High Court work. Two of his colleagues with section 9 authorisations were salaried part-time at 70%, with the result that he did more of the High Court work in Birmingham than they. In addition to work at his base court he sat 30 days per annum in the Chancery Division in London. He estimated that 80-85% of his work at Birmingham was High Court work and 15-20% was county court or UTIAC. Whilst these statistics caused some surprise, there was no direct challenge to Mr Barker's evidence, which I accept. He accepted that section 9 judges did not do the most serious cases, which would be designated Category A, but he estimated that those amounted to no more than 10% in London; in Birmingham they would be only 1-2% of the High Court work. That evidence was not challenged. Mr Barker accepted that there is out-of-court work which High Court judges do and section 9 judges do not.

9 Ms George was appointed as a salaried circuit judge on 22 October 2014 to sit at Northampton and Leicester. Pursuant to an authorisation under section 9 (1) SCA, she acts as a judge of the High Court sitting in family cases at her base court in Leicester. With effect from 3 December 2018 she became the Designated Family Judge for Leicestershire. Her salary is that of a circuit judge, save for a leadership allowance which is not relevant to this case. She was pleased to be given section 9 authorisation as it meant a greater range of work was available to her. Over 4-5 years she has done approximately 60-70 days per annum on section 9 work, not necessarily all day. If she did not have a section 9 authorisation it would be difficult for the court at Leicester to function. Describing her work, she said that she sat as a judge full-time in family work for 210 days per annum, and thought of herself as a county court judge sitting part of the time as a High Court judge. Section 9 work is a step up from Ms George's usual county court work

10 Most family cases are now started in the Family Court. A few reserved jurisdictions, which were detailed by Sir Brian Leveson, must be started in the Family Division of the High Court. These are such cases as the most serious public law cases, financial remedies exceeding £10 million, radicalisation cases, surrogacy and withdrawal of medical treatment. Ms George accepted these would be dealt with only by substantive High Court judges, and that they did work outside court which she was not asked to do.

11 Mr Everall was a salaried circuit judge who was appointed on 10 April 2006 to sit at Luton County Court. For part of the year he sat in the Principal Registry of the Family Division in London. Between 2012 and 2014 his base court was Reading County Court, and from 2014 until his retirement on 3 June 2020 he sat at the Central Family Court in the Financial Remedy Unit in London. Prior to his appointment as a circuit judge he sat as a deputy judge of the High Court pursuant to section 9 (4) SCA; for those sittings he was paid a

per diem rate based on a High Court judge's salary. Whilst a circuit judge and pursuant to an authorisation under section 9 (1) SCA he acted as a judge of the High Court sitting in family cases at his base courts and in London. His salary was that of a circuit judge. He described himself as a full-time salaried circuit judge throughout. The time he spent on High Court work reduced over time; he estimated 1-5 times per month.

12 Mr Everall was inclined to think that Sir Brian Leveson's lack of personal knowledge of family work had led him to underestimate the seriousness of the work of section 9 judges and to overstate the demarcation between theirs and the work of a High Court judge. What are the 'serious' and 'most serious' cases is a matter of judgment; whilst there may have been occasional borderline cases, or even exceptions, I accept there were clear categories of family case, described by Sir Brian, which a section 9 judge would rarely, if ever, do.

13 The make-up of the work done by Mr Barker, Ms George and Mr Everall varied from day to day and week to week, as did the balance between their work as circuit judges and as High Court judges. The findings of fact relating to their work and that of the other two claimants are intended to give a fair overall picture of their work patterns and workloads, rather than to catalogue each individual variation.

14 Mr Field is a salaried circuit judge who was appointed on 16 July 2012 and sits in Manchester Crown Court. Pursuant to an authorisation under section 9(1) SCA given in 2017, he acts as a judge of the Court of Appeal (Criminal Division) (CACD) for approximately 15 days per annum. He described himself as a full-time judge with two aspects to his work: spending part of his time as a circuit judge and part of his time as a judge of the CACD. His section 9 authorisation is restricted to the CACD; he never sits in the civil division of the Court of Appeal, nor in the High Court. His salary is that of a circuit judge.

15 Though the constitution of a particular court may vary, when the court includes a section 9 judge the CACD generally comprises a Lord or Lady Justice of appeal, a High Court judge (serving or retired) and the section 9 judge. A High Court judge sitting in the CACD will also sit pursuant to section 9 SCA. When deliberating on an appeal, all members of the CACD have an equal role in the making of the judgment. There are, however, significant differences in the ambit of work in the CACD which may be undertaken by a section 9 circuit judge and by more senior judges, including High Court judges. Section 9 circuit judges are not permitted to sit on certain categories of appeal, they do not consider paper applications for leave to appeal, they do not preside over the court, they do not ordinarily give judgment on substantive appeals against conviction but may do so on renewed, oral applications for leave and they do not generally write the judgment of the court. Whilst a court might include two High Court judges, it would never include two circuit judges. It was accepted that some High Court judges who sit in the CACD have little experience of criminal law.

16 Mr Atherton was appointed a district judge in 2000 to sit in the Leeds Combined Court Centre. In 2002 he was appointed a recorder and sat between 15 and 30 days per annum, usually in the Crown Court. On rare occasions he was asked to help out by sitting as a recorder in the county court. From 2011 he opted to become salaried part-time in his role as a district judge and reduced his sitting in that capacity to 90%. Thereafter Mr Atherton sat as a recorder partly during the 90% of time for which he was salaried as a district judge, and partly during the 10% of time for which was not salaried. When the days on which he sat as a recorder in the Crown Court coincided with the 90% of time for which he was salaried he received no additional remuneration; conversely, when he sat as a recorder during the remaining 10% of the time, for which he was not salaried, he received a daily fee based on the salary of a circuit judge. This arrangement was sanctioned by Judicial Office. He retired from the salaried office of district judge in 2019, but continues to sit as a recorder and deputy district judge.

General findings

17 There was argument in cross examination and submissions about the nature of the work done by section 9 judges acting as judges of the High Court. It is clear to me – it might even be thought self-evident – that such work is properly categorised as High Court work. If that were not so, it would be dealt with by a circuit judge and no section 9 authorisation would be required. It follows also that if there were no section 9 judges then, under present arrangements, such work would have to be done by High Court judges.

18 The purpose of section 9 SCA is to facilitate assistance with judicial business. There was some tension between the respondents' witnesses concerning the extent of that assistance. Mr Masterson said such assistance was expected to be not substantial, an exceptional feature of the judge's work. However, Sir Brian Leveson stated that the High Court had operated in recent times persistently below its statutory complement of judges. There are currently some 110 High Court judges compared with 416 section 9 (1) and 112 section 9 (4) judges. At the same time, both the volume and complexity of the workload of the High Court has increased. One result is that the system has relied increasingly, and now relies very heavily, on section 9 judges to do a very substantial part of High Court sittings. Whilst there was some lack of clarity between various sets of data placed before me, Lord Woolf noted in 2000 that in the previous 12 months the total number of sitting days by section 9 judges in the three divisions of the High Court was 2,301. Further, it was not in dispute that in 2005 section 9 judges did approximately 45% of High Court sitting days. The evidence suggested strongly that those figures have increased rather than decreased in recent years.

19 A second result is that the practice of allocating to section 9 judges work of lower complexity and importance, as Sir Brian Leveson described it, cannot, as he also acknowledged, always be maintained; work which would otherwise have been allocated to a High Court judge is heard by section 9 judges. Sir Brian said that that 'sometimes' happened; in the cases of Mr

Barker and Ms George, it clearly happened more frequently than that word suggests.

20 The work of the High Court, like any other court, embraces a broad spectrum, judged against a range of criteria, such as complexity in legal or evidential terms, monetary value, public profile and importance, length of hearing, the effect of the decision on other people and probably other criteria too. There is no doubt that the three section 9 judges who sit up in the High Court from whom I heard undertake at times very serious cases in their particular jurisdictions. All also agreed that there was High Court work at the most serious, upper end of the spectrum that they were never, and never would be, asked to do as section 9 judges. Such work would only ever be dealt with by substantive High Court judges. Whilst no precise figures were put before me, on the evidence I heard I was satisfied that this category of work, designated Category A in the civil courts, formed a small portion of the overall volume of High Court work. I saw no reason not to accept as typical Mr Barker's estimate for the Chancery Division of no more than 10% in London and very much less in provincial centres such as Birmingham. At the other end of the spectrum, Category C cases, normally one-day hearings not raising novel or difficult points might be tried by a master or district judge. Between those two extremes there are cases designated Category B which form the bulk of the work done by section 9 judges. As to the nature and seriousness of the work done respectively by High Court judges and section 9 judges, I accept that in that middle ground, predominantly represented by Category B cases, there is, to adopt Sir Brian Leveson's phrase, 'an enormous overlap.' In provincial trial centres visiting High Court judges who had capacity in their lists would hear Category B cases; but otherwise, and more commonly, such cases would be heard by a section 9 judge. The evidence of the shortage of High Court judges reinforces that conclusion.

21 The demarcation between work suitable to be dealt with by circuit judges, section 9 judges and substantive High Court judges is necessarily to a very significant extent a matter of judgment. The distinction between county court and High Court work was aptly described as a curve, not a step. That is particularly so in relation to family work where, in addition to the Family Division of the High Court, cases in the Family Court itself may be dealt with by judges at all levels of the judiciary. In the Queen's Bench and Chancery divisions also, judgments have to be made about the appropriate level of judge to hear a particular case. Where there is any doubt, those decisions are normally referred to the relevant liaison or supervising judge, who in any event must authorise a judge to act pursuant to section 9. Such decisions have to be made currently in the context of the shortage of High Court judges and of the consequent increasing dependency of the system on section 9 judges described above.

22 Whilst the findings in the foregoing paragraph apply to the work of the county court and the High Court, the same is not true of the Crown Court and the CACD, nor of the work of a district judge and a recorder in the Crown Court. In the latter two cases the demarcation is clear and sharp. Mr Field's work in the CACD is fundamentally different from his work in the Crown Court;

and Mr Atherton's work as a recorder is fundamentally different from his work as a district judge. In those cases there is no overlap.

23 The interlocutory work, commonly referred to as boxwork, done by section 9 judges acting as judges of the High Court is mixed as between county court and High Court work. Accordingly, no record is currently kept and no statistics are available concerning the respective volume of each or the time spent on each by section 9 judges.

24 I heard some evidence, necessarily largely speculative in nature, concerning the difficulties, both perceived and practical, that might arise if circuit judges were paid at a higher rate when they sat in their section 9 capacity. If those same circuit judges were responsible for allocating cases to be heard by themselves or colleagues, as section 9 judges, it might be thought that a conflict of interest would arise because judges in that position might be influenced improperly by financial considerations when making such decisions. To a greater or lesser extent, the claimants accepted that such a perception might arise and would need to be guarded against. Whilst it is not for this tribunal to propose procedures, I was satisfied that, if necessary, appropriate checks could be put in place to guard against any such perception. In like vein, I was satisfied that, if necessary, appropriate systems could be devised to determine how much of a judge's time was spent on county court and how much on section 9 work.

25 Beyond court work itself, it was accepted by the four claimants who were section 9 judges that substantive High Court judges undertake a variety of other duties which they as section 9 judges were not asked to perform. Sir Brian Leveson itemised this non-court work at paragraph 84 a-k of his witness statement, about which there was no significant disagreement.

26 By contrast with judges authorised pursuant to section 9 (1) SCA, a judge appointed pursuant to section 9 (4) to be a deputy judge of the High Court is paid a fee *pro rata temporis* based on the salary of a High Court judge. Section 9 (4) judges do not routinely do boxwork, though they may do so if their list goes short. In so far as any distinction between the work of the two could be drawn, it is the work of the section 9 (1) judge which is therefore somewhat heavier.

27 A section 9 authorisation gives a judge the opportunity to undertake work at High Court level, which, as well as being more demanding, is more rewarding from a professional point of view. In the event that such a judge applied for appointment to the High Court bench, the experience of having done such work would enable an applicant to provide examples of competency. The appointment of deputy High Court judges under section 9 (4) was seen as a potential move towards appointment to the High Court bench. Similarly, sitting as a recorder would enhance the prospects of a district judge who wished to apply for the circuit bench.

28 The terms and conditions on which circuit judges are appointed have been updated from time to time. The most recent version to which I was

referred, that of October 2019, provides, at paragraph 37, that circuit judges are required 'to devote at least 210 days in each year, and perhaps more, to the business of the courts'. The terms and conditions on which district judges are appointed have been similarly updated. The most recent version to which I was referred, that of December 2009, provides, at paragraph 37, that district judges are required 'to devote 215 days in each year to judicial business', and at paragraph 81, that a district judge appointed as a recorder 'will be expected to sit for a minimum of 15 days a year in that capacity and ..... [that] [n]o extra remuneration in addition to his/her salary as a district judge may be claimed in these circumstances.'

29 Whether a circuit judge who was also a section 9 judge, and who opted for salaried part-time working, might act as a judge of the High Court during their non-salaried time, and claim remuneration at the higher rate based on a High Court judge's salary, remained a moot point in evidence and submissions. Sir Brian Leveson said that he would not have authorised such a practice. As noted above, however, Mr Atherton did sit in the Crown Court during his non-salaried time, apparently with official approval.

30 High Court judges are paid no more than their normal salary when they sit in the Court of Appeal, and no less when they sit in the Crown Court. Similarly, circuit judges are paid no less if they sit in a lower-paid jurisdiction such as the coroner's court.

The Law

31 The Courts Act 1971 provides

21 Appointment of Recorders

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

32 The Senior Courts Act 1981 provides

9 Assistance for transaction of judicial business

(1) A person within any entry in column 1 of the following Table may..... at any time, at the request of the appropriate authority act –
(a) as a judge of a relevant court specified in the request.....
(Entry 5 in the Table provides that a circuit judge is competent to act in the High Court and the Court of Appeal.)

(2) ....

(3) The person to whom a request is made under subsection (1) must comply ...

(4) The Lord Chief Justice ... may appoint a person qualified for appointment as a puisne judge of the High Court to be a deputy judge of the High Court...

(5) Every person while acting under this section shall, subject to subsection (6) ....., be treated for all purposes as, and accordingly may perform any of the functions of, a judge of the court in which he is acting.

(6) A person shall not by virtue of subsection (5) – be treated as a judge of the court in which he is acting for the purposes of ... any statutory provision relating to (iii) the remuneration, allowances or pension of such judges.

33 I have been referred to and considered Council Directive 97/81/EC and the annexed Framework Agreement on Part-time Work. The Framework Agreement has been transposed into UK law by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR), which provide

2 Meaning of full-time, part-time and comparable worker

(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) .....

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

(a) both workers are –

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

(ii) engaged in the same or broadly similar work ...

5 Less favourable treatment of part-time workers

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

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

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

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

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

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

6 Right to receive a written statement of reasons for less favourable treatment

(1) If a worker who considers that his employer may have treated him in a manner which infringes a right conferred on him by regulation 5 requests in writing from his employer a written statement giving particulars of the reasons for the treatment, the worker is entitled to be provided with such a statement within twenty-one days of his request.

8 Complaints to employment tribunals etc

(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.

It is common ground that the terms ‘worker’, ‘employer’ and ‘contract’ must be read by analogy as applying to the circumstances of the claimants and the respondents. It is noteworthy that, while the Framework Agreement requires that the less favourable treatment should be ‘solely because’ of the part-time status, the PTWR require, somewhat more generously, that it be ‘on the ground that the worker is a part-time worker’.

Issues

34 The tribunal was provided at the outset with an agreed list of generic issues to which I shall refer below in the section dealing with my conclusions.

Submissions

35 I received written submissions from both counsel totalling in excess of 200 pages. I summarise here only very briefly counsel’s oral submissions. Mr Andrew Allen submitted that the case was not about fair pay; fairness could be relevant only to objective justification. It was important to consider the issues sequentially and not elide them, as he said Mr Robin Allen was doing.

A claimant had to point to a full-time comparator, which was fatal to Mr Field's claim. The differences between the work of section 9 judges and High Court judges placed the two groups apart such that they were not comparable; their work was not identical. The description by the claimants of their own work was relevant. The claimants' section 9 authorisations depended on their appointments as circuit judges. The claimants were full-time judges and were in each case paid in accordance with their substantive salary. The respondents did not seek to justify the claimants' treatment on cost alone. The respondents' did not rely on the suggestion of conflict of interest as a fourth limb of their justification argument. Apart from the omission of the word 'solely' there was no relevant distinction to be drawn between the PTWD and the PTWR.

36 Mr Robin Allen submitted that the PTWR were the last link in a chain stretching through the PTWD, the community charter and back to the principle of non-discrimination. Fairness of pay was relevant not in a general sense, but it was so in the context of part-time working. It was appropriate to consider part-time status and comparability together; they were interlocked. A full-time worker was someone who worked more hours than a part-time worker. The case of **Matthews** concerning regulation 2 was helpful but not determinative. This tribunal should take the same approach as the Northern Ireland Industrial Tribunal took in **Keegan** where the respondents' appeal was abandoned and dismissed. That case, in which the issues were extremely similar, deserved respect; the respondents did not there argue justification. The respondents sought to put 'blue water' between section 9 (1) and 9 (4) judges, but they clearly valued the latter in the same way as High Court judges. The respondents' attempt to deny a comparison between section 9 (1) judges and High Court judges collapsed when one looked at section 9 (4) judges. The SSRB had the principle of not subdividing a post, which was fundamental to the claimants' case. The argument that the claimants remained circuit judges when acting as High Court judges was not consistent with section 9 (5) SCA; they were acting in a different capacity. Section 9 (6) was trumped by the PTWR. The PTWR cannot be avoided by saying that the claimants agreed to the treatment by accepting their terms and conditions. The 'business of the courts' and 'judicial business' had to be construed in the context of the particular office held. In relation to **Moultrie,** the respondents acknowledge that a section 9 (4) judge's work is comparable to a High Court judge's. **Barton** was doubtful because there was no reference to clause 3 of the Framework Agreement and no reference to **Bruno and Pettini**. Regulation 2 (2) did not properly transpose clause 3 of the Framework Agreement. Any High Court judge sitting more hours than Mr Field could be a comparator.

37 The proper question under regulation 5 was not why the claimants were paid as they were, but why they were not paid on a no less favourable basis than their comparators, i.e. why they were not paid more. One had to ask what the situation would have been if the part-time worker had been full-time. It was inconceivable that the respondents could have refused to pay at the higher rate a claimant who acted full-time as a High Court judge. Mr Masterson gave the rationale that the situation was expected to be exceptional. On the question of justification, if you haven't thought about the

justification before applying the policy you will not have tested the alternatives. The respondents had taken an 'ostrich-like' approach to the implications of **Keegan**, notwithstanding that their counsel had recognised them.

38 As will appear from my conclusions below, I was referred to a number of authorities. I was invited by Mr Robin Allen to have particular regard to the case of **Keegan** decided by the Northern Ireland Industrial Tribunal in 2017 on comparable, though not identical facts. Mr Andrew Allen on the other hand urged on me the arguments that **Keegan** was decided on different facts, was not binding on this tribunal and was, in any event, wrongly decided. I accept the first two arguments of Mr Andrew Allen. As to his third argument I express no view. I have considered **Keegan**, but have not relied on it as an authority when reaching my decision. Rather, I have attempted to identify the relevant facts in the cases before me and to apply to those facts the law as I understand it to be.

Discussion and conclusions

39 I bear in mind when considering these five complaints that whilst there are similarities between some of them, there are also significant differences between their facts. They do not necessarily stand or fall together, and must be considered individually.

40 The claimants consider that their work as judges of the High Court, the CACD or as a recorder should be treated by the respondents as a part-time job and paid at a higher rate than what I will term their 'base' salary. They argue that the work they do when acting as judges of the High Court, the CACD or as a recorder is higher status, higher value work which ought to be reflected in higher pay. They argue that the respondents are getting the work done 'on the cheap' and that the respondents' pay structure is otherwise anomalous. These complaints must be judged solely by reference to the criteria set out in the PTWR. These are not claims of equal pay, nor can they be founded on general principles of fairness or on an objection to an allegedly arbitrary or anomalous pay regime. To succeed under the Regulations, the claimants must establish that they are part-time workers as there defined who have received less favourable treatment on the ground of their part-time status.

41 It is clear from the way in which the agreed generic issues are framed, that the PTWR require a number of questions to be considered sequentially. The answer to a question is frequently determined to a significant extent by the way in which the question is formulated. I have therefore had to consider how each of the questions posed by the regulations should be correctly formulated. With the above matters in mind I turn now to consider the complaints using the framework of the agreed generic issues.

Issue 1 Are or were the claimants part-time workers within the meaning of the PTWD?

42 Stripped of its subordinate clause and phrase, regulation 2 (2) PTWD defines a part-time worker as one who is 'not identifiable as a full-time worker'. Mr Robin Allen is right therefore to say that the definition of part-time worker itself involves a comparison between a full- and a part-time worker. That is so even before one moves on to consider, under regulation 2(4), the comparability of the work done by the claimants and their comparators.

43 The regulation specifies two matters, and only two matters, which must be considered in order to determine whether a worker is 'not identifiable as a full-time worker': (1) pay wholly or partly by reference to time worked, and (2 the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract. Notably, the regulation does not include any such phrase as 'in all the circumstances of the case.' The tribunal's consideration is therefore restricted to the two matters identified in regulation 2.

44 There is nothing to prevent a worker from being both a full-time and a part-time worker; many workers are. In a typical industrial context a worker may have a full-time job during the normal working day, working, say, 37 hours per week as a check-out operator, and another job, for the same or a different employer, working evening shifts in a warehouse. Similarly, a worker may have two part-time jobs. In those circumstances, the demarcation between the two jobs is usually clear. In this case the full-time and the alleged part-time work are both done for the same employer; moreover, in three of the cases there is a fluidity between what may be thought of as the 'core' county court work and the alleged part-time work in the High Court, such that on some days, when the judge's list is mixed, no very clear demarcation line is drawn between the two. The latter point is not true of Mr Atherton's and Mr Field's cases; their work as recorder and judge of the CACD respectively is done discretely on separate days and in a different place. In their cases there are no mixed lists.

45 A further complication is that in all five instant cases the alleged part-time work is done during hours which would otherwise (i.e. if there were no 'part-time' work to be done) form part of the hours for which each claimant was paid a salary. Regulations 2 (1) and (2) contemplate that a worker must be identifiable either as a full-time or a part-time worker. That must be so, in my judgment, at any point in time under consideration. Thus where a judge works in two separate jurisdictions, if it is right to say that he/she is working part-time in one jurisdiction, he/she cannot be working full-time in another jurisdiction during the self-same hours. For instance, when Mr Barker acts as a judge of the High Court, or Mr Atherton sits as a recorder, they are not at exactly the same time sitting as a circuit judge or district judge. Therefore, if it is right to say that each claimant works part-time in one jurisdiction, he/she must necessarily be working *pro tanto* less than full-time, therefore part-time, in the other also. I cannot see that it is possible, consistent with the meaning of regulation 2 (1)-(2) for a worker to be **both** full-time **and** part-time during exactly **the same** period of time.

46 On the respondents' analysis there is no need for any demarcation because, so it is argued, the section 9 duties and the recorder's duties fall within the salaried time. There is only one 'employment', it is salaried and all duties performed are part and parcel of the judicial business to which the claimants are required to devote their working time.

47 On the claimants' analysis, however, it is necessary to split the work done by each claimant into (1) the 'core' duties of a salaried circuit judge or district judge (which, at the extremes, occupied Mr Atherton for approximately 90% of his working time, and Mr Barker for 15-20% of his working time), and (2) the duties which each claimant is said to perform as a part-time worker in the High Court, CACD or Crown Court. The necessity for such a split was acknowledged in evidence by the claimants, who considered the means by which the different working time might be measured, recorded or accounted for, for example by filling in timesheets, by paying the higher rate for any day on which some of the 'higher' duties were performed, etc. The precise method by which such accounting could be done is not relevant here, but the need for such a split on the claimants' case was clear to the claimants, as it is to me. The claimants' analysis leads logically to the conclusion that the claimants are not full-time circuit judges or district judges, but part-time in that role also.

48 In order to answer the question posed by Issue 1 it has been necessary for me to decide what period of time it is appropriate to consider. The respondents' analysis looks at the claimants' working time as a whole, as a year of 210 or 215 days for which they each receive their base salary and do whatever work can properly be asked of them. For example, Mr Andrew Allen says (Opening Submissions paragraph 41), '[Mr Athertons'] recorder sittings fell within his salaried time, during which time he was a full-time worker ..... Any suggestion that he was a part-time worker in relation to his recorder sittings in this period is inconsistent with the reality of the situation ...' The like argument is made in relation to the circuit judge claimants also.

49 The claimants' analysis, by contrast, focuses attention on the period of time during which the alleged part-time work is done. For example, Mr Robin Allen says (Closing Submissions, paragraph 35), '[Mr Atherton's] appointment as a recorder was free-standing and not in any way a consequence of his appointment as a DJ', and at paragraph 46, Mr Atherton's 'statutory appointment as a DJ though originally expressed to be [full-time] was changed by his appointment as a recorder...'

50 In the industrial example given above, in order to determine whether the hypothetical worker is a part-time worker when working evenings in the warehouse, it is in my judgment obviously necessary to focus on the time when he does that job, and to answer the questions posed by regulation 2 (1)-(2) with specific reference to that time and that job. It does not assist the analysis to look at how the worker fills the rest of his working time, for example doing daytime shifts on the check-out. In Mr Atherton's case the way in which he fills the rest of his working time, has varied. He was firstly a district judge salaried at 100%, then reduced to 90%, then retired as a district judge; during all of those periods he also did the work of a recorder for approximately

20 days a year in the Crown Court. It seems to me that, in order to determine whether Mr Atherton meets the definition of a part-time worker when sitting as a recorder, I have to ask the relevant questions specifically in relation to the time he spends performing the duties of a recorder. And the same is true *mutatis mutandis* also in relation to the other four claimants.

51 The Courts Act 1971, at section 21, states that qualified persons may be appointed as recorders 'to act as part-time judges of the Crown Court'. I do not, however, think that that statutory description of the office of a recorder is determinative of the question I am considering. The question is not whether recorders hold a part-time appointment (which by statute they clearly do), but rather whether Mr Atherton, when sitting as a recorder, is a part-time worker as defined by regulation 2 (1)-(2). Since his retirement, the respondents accept that Mr Atherton, when sitting as a recorder, is a part-time worker. There has been no material change in the work of a recorder during all the time Mr Atherton has performed it, nor in the number of days he spends performing it. The only change has been in how he spends the rest of his working time: salaried 100%, then salaried 90%, then retired.

52 A barrister may be appointed to the office of recorder and sit as a part-time judge of the Crown Court, where he is acknowledged by the respondent to be a part-time worker. If that barrister is then appointed as a district judge, and continues to sit as a recorder, then, on the respondents' analysis, he must cease to be a part-time worker when sitting as a recorder. I ask myself by what mechanism that could happen; to which the respondents' answer is, because he has become salaried in a different judicial role. However, I can see no support in the Regulations for the proposition that the part-time status of a worker is, or may be, dependent on what the worker does outside the alleged part-time working hours.

53 All the circuit judge claimants described themselves as full-time circuit judges; they were paid 100% of the circuit judge's salary. Mr Atherton described himself as a full-time district judge until 2011 when he became salaried part-time at 90%. That reduction in Mr Atherton's salaried time is not relevant to the present consideration; his claim relates to his recorder sittings during his salaried time, whether 100% or 90%. Nevertheless, as I noted above, it is perfectly clear on the evidence that none of the five claimants spent 100% of their time on the 'core' duties of a circuit judge or district judge. It is therefore not accurate to describe the claimants as full-time circuit judges or a full-time district judge when they spend significant portions of their working time performing duties entirely separate from their 'core' duties. That must be obvious to the respondents; it was they who authorised, or appointed, the claimants to do other duties besides their 'core' duties. The way in which the claimants describe themselves may have some relevance to a consideration of the 'custom and practice' of the employer under regulation 2 (1)-(2), but cannot *per se* be determinative of the issue. It is the custom and practice of *the employer* upon which the regulation focuses.

54 Some aspects of the respondents' custom and practice are clearly established in evidence. The practice of authorising circuit judges pursuant to

section 9 (1) to act as judges of the High Court was widespread; it was the respondents' practice to rely heavily on section 9 (1) and section 9 (4) judges, as evidenced by their doing approximately 50% of High Court sittings in recent years. The latter were regarded by the respondents as part-time workers. When they acted as judges of the High Court, there was no material distinction between the work done by section 9 (1) judges and section 9 (4) judges, save that the latter did fewer out-of-court duties. There was, therefore, in my judgment no basis for the respondents' distinction between the latter as part-time workers and the former as not so. Neither were identifiable – nor were they identified by the respondents – as full-time workers when acting as judges of the High Court. In so far as the distinction was based on the former receiving a salary, and the latter not, they received that salary – the same base salary as circuit judges with no section 9 authorisation – for performing the 'core' duties of the respective roles to which they were appointed. In relation to recorders, section 21 CA establishes the statutory position that recorders are part-time judges of the Crown Court. To the extent that it may be relevant to a consideration of the respondents' custom and practice, I reject the possibility that the respondents' custom and practice is in conflict with the statutory description.

55 In answer to questions 1-3 posed in the agreed list of generic issues, and based on the analysis set out above, I set out my conclusions on the matters required to be considered under regulation 2 (1)-(2). Firstly, there was no argument before me on the question of the basis on which the claimants were paid. In each case the claimants' terms and conditions of service require or required them to devote a certain number of days per year to judicial business or to the business of the courts. If a claimant opted to work a fraction of those hours which was less than 100%, he/she was paid *pro rata temporis* less. Within the stipulated number of days the hours actually worked by a judge might, and in most cases almost certainly did, vary, but his/her salary did not. The claimants are, or were, therefore all paid in part by reference to the time they work or worked.

56 On the second matter, I find that, having regard to the custom and practice of the respondents in relation to workers employed by them under the same type of contract as the claimants, each claimant was 'not identifiable as a full-time worker' when he/she acted respectively as a judge of the High Court, of the CACD or as a recorder. In those respective capacities, therefore, they were each part-time workers.

57 On the question posed at 2 (ii) of the agreed list of generic issues, the position of High Court judges sitting in the CACD was not explored in depth before me. Sir Brian Leveson said, and I note from the statute, that High Court judges may be authorised to sit in the CACD pursuant to section 9 (1). I take that to be analogous to the basis on which circuit judges such as Mr Field were so authorised. However, I was not taken to the terms and conditions of High Court judges and therefore refrain from making a definitive finding on the question posed. However, for reasons which appear below, this does not ultimately affect the outcome.

Issue 2 Are High Court judges comparable full-time workers in relation to circuit judges acting as judges of the High Court or the CACD?

58 The respondents now concede that in relation to a recorder a full-time circuit judge is a comparable full-time worker; accordingly I so find. In relation to the circuit judge claimants the argument before me was centred on regulation 2 (4) (a) (ii), and the question whether the work of the claimants and their comparators was 'the same or broadly similar'.

59 In **Matthews v Kent Fire Authority [2006] ICR 365** Baroness Hale said, at paragraph 43 on page 379:

> '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"..... 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. That question has also to be approached in the context of Regulations which are inviting a comparison between two types of worker whose work will almost inevitably be different to some extent."

And at paragraph 44 she continued:

> '..... the extent to which the work that they do is *exactly the same* must be of great importance. If a large component of the 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 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 weight should be given to the extent to which their work is in fact the same and to 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.'

60 In **Moultrie v Ministry of Justice [2015] IRLR 264**, the EAT (Lewis J), considering **Matthews,** said at paragraph 29:

> 'It is not the case that whenever a large component of the work of the two groups is the same, and is of importance, it necessarily follows that the work is broadly similar.'

61 There is no doubt, and it was not the subject of argument before me, that, as in **Moultrie** so in the instant case, the work done by section 9 judges and by recorders is of the highest importance to the business of the respondents. It is clear also on the evidence before me that a very large part of the work done by section 9 judges is not distinguishable from the work done by High Court judges; the former do approximately 50% of High Court sittings. In the absence of section 9 judges that work would necessarily have to be done by High Court judges. The differences between the two are essentially twofold. Firstly, the very weightiest, most valuable and most important cases are reserved in all divisions of the High Court for substantive High Court judges. All four circuit judge claimants acknowledged that High Court judges did work, both in the High Court and CACD, which they would not be asked to do. Secondly, substantive High Court judges are required to undertake a variety of duties outside their court work which, once again, section 9 judges are not required to do. These duties in many cases require a level of seniority and experience: for example leadership and management, mentoring and career guidance, training and recruitment. Sir Brian Leveson's evidence concerning the differences, both in court and outside, between the work of High Court judges and section 9 judges was subject to very little challenge and I accept it. Unlike **Moultrie,** the evidence before me does not enable me to apportion percentages to the differences and similarities between the two.

62 Baroness Hale posed the question thus: '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". I am satisfied, consistently with all the evidence I heard, that a large part of the work of section 9 judges is exactly the same as that of substantive High Court judges. I therefore turn to the second limb of the question posed by Baroness Hale. I find that there is a logical difficulty in the respondents' position. Deputy judges of the High Court appointed under section 9 (4) are paid a daily rate equivalent *pro rata* to the salary of a High Court judge. That is, in my judgment, an implicit acknowledgement by the respondents that while there are some differences between the work of the two, they are not of such importance as to prevent their work from being regarded overall as 'the same or broadly similar'. In monetary terms the respondents value the two equally. If the work of a section 9 (4) judge is 'the same or broadly similar' to that of a High Court judge, such that the two are paid the same *per diem*, then on what basis can it be said that the work of a section 9 (1) judge is not so also? The more so as section 9 (1) judges undertake additional functions, such as boxwork, rarely asked of section 9 (4) judges. Thus, by their treatment of section 9 (4) judges, the respondents demonstrate that they do not consider those differences between section 9 judges and High Court judges, which I have accepted from Sir Brian Leveson's evidence, as being of such importance as to prevent their work from being regarded overall as 'the same or broadly similar'. In my judgment, on the evidence before me, the respondents are right to adopt that position. It would be contrary to the evidence to suggest – adopting Baroness Hale's terminology – that section 9 judges are brought in to do 'the more peripheral tasks.'

63 In answer to question 4 posed in the agreed list of generic issues, I find that the work of full-time High Court judges is not the same as that of circuit judges acting as judges, or deputy judges, of the High Court, pursuant to authorisation under section 9 (1) or appointment under section 9 (4) SCA. However, the differences between the work of full-time High Court judges and that of both categories of section 9 judges are not of such importance as to prevent their work from being regarded overall as 'broadly similar'. I am therefore satisfied that a High Court judge is a comparable full-time worker for Mr Barker, Ms George and Mr Everall when they acted as judges of the High Court pursuant to their section 9 authorisation.

64 The position of a circuit judge sitting in the CACD is different. Mr Field relies on a comparison between himself when sitting in the CACD and a High Court judge when also sitting in the CACD. He does not compare his work with that of a High Court judge in general. He accepts that there is a wide variation between his work in the CACD, circumscribed in the ways outlined earlier in this judgment, and the wide range of work carried out by a High Court judge. Mr Field is therefore constrained to compare his part-time work with that of a High Court judge only when the latter sits in the CACD. As I stated above, I can make no finding on whether a High Court judge sitting in the CACD is a part-time worker. But on either view, Mr Field's claim encounters a problem.

65 If a High Court judge sitting in the CACD is not a part-time worker then he is a full-time worker. But Mr Field acknowledges that the work of a full-time High Court judge is not an appropriate comparator for him. I agree; sitting in the CACD is one relatively small part of the work done by a High Court judge. It is not 'the same or broadly similar' to the work of a section 9 circuit judge sitting in the CACD. On the other hand, if a High Court judge sitting in the CACD is a part-time worker then he/she does not fulfil the criterion in regulations 2 (4) and 5 (1) that comparison must be between the claimant, a part-time worker, and a 'comparable full-time worker'.

66 Mr Robin Allen argues that under the PTWR or the PTWD a part-time worker claimant may compare himself with another part-time worker provided the latter works more hours than the former. I cannot accept that argument. In **Advocate General for Scotland v Barton [2016] IRLR 210** Lady Smith affirmed, at paragraph 32, '..... the PTWR do not provide protection for workers against less favourable treatment when compared to part-time workers who are not full-time but work longer hours than they do.' In the earlier case of **Bruno and Pettini** (joined cases C-395/08 and C-396/08) **[2010] IRLR 890**, also relied on by Mr Robin Allen, the ECJ was specifically asked, at paragraphs 82-3, whether the Framework Agreement had to be interpreted as prohibiting discrimination between different forms of part-time work. In view of the answers it had given to the other two questions posed, the court said that it was unnecessary to answer that question. Nor can I find support for Mr Allen's argument in clause 3 of the Framework Agreement. It appears to me, therefore, that the legal position is as set out in the Regulations, and as confirmed in **Barton**.

67 If I am wrong about that matter I would in any event find that the work of Mr Field and that of a High Court judge sitting in the CACD are, for the reasons already set out, not the same or broadly similar. In answer to question 5 posed in the agreed list of generic issues, in my judgment, and for the reasons stated, a High Court judge, whether full-time or when sitting part-time in the CACD, is not a comparable full-time worker for Mr Field when sitting in the CACD pursuant to his section 9 authorisation.

Issue 3 Was the less favourable treatment of the claimants on the ground that they were part-time workers?

68 It is conceded by the respondents that each claimant was treated less favourably than his/her proposed comparator by being paid at a circuit judge's or district judge's rate when doing work for which a full-time High Court judge or circuit judge would be paid more. I consider here whether that less favourable treatment was on the ground that each was a part-time worker, bearing in mind both regulation 8 (6) and the more generous wording of regulation 5, namely the omission of the word 'solely'. Notwithstanding Scottish authority to the contrary, I consider that this tribunal is bound to follow the EAT in **Sharma v Manchester City Council [2008] ICR 623** and **Carl v University of Sheffield [2009] ICR 1286**, such that the claimants must show that part-time status was the 'effective and predominant cause' of the less favourable treatment.

69 In the case of a section 9 (4) judge sitting as a deputy High Court judge, and acknowledged by the respondents to be a part-time worker, the respondents pay a daily rate based on the salary of a High Court judge. In the case of a section 9 (1) judge they do not. There is no requirement that all who share a characteristic have to suffer the same less favourable treatment: **R (Coll) v Secretary of State for Justice [2017] UKSC 40**. Thus the fact that some part-time judges, those appointed under section 9 (4), were not treated less favourably does not mean others, those authorised under section 9 (1), were not also. The comparison here is not between section 9 (1) and section 9 (4) judges, but between the claimants and their comparators. The fact that section 9 (1) judges are less favourably treated and section 9 (4) judges are not is relevant only in so far as it may shed light on the question under consideration: namely whether the less favourable treatment of the claimants than their comparators was on the ground of part-time status.

70 There were two strands to Mr Masterson's evidence about the respondents' policy relevant to these claims. Firstly, the policy was to pay at the full High Court rate where the section 9 judge held no other salaried appointment. Thus section 9 (4) judges, who are ordinarily practitioners and not in receipt of a judicial salary, receive a daily rate for their High Court sittings based on a High Court judge's salary. By contrast, section 9 (1) judges are paid their substantive salary and receive no extra remuneration for 'sitting up'. The rationale for this policy, Mr Masterson said, was that section 9 sittings were 'not expected to be substantial, in the sense that they will be an exceptional feature to the judge's mainstay work.' Mr Masterson was asked to

consider the hypothetical possibility – which he could not imagine ever arising in practice – that a section 9 (1) judge might spend 100% of his/her time doing High Court work. Despite the rationale above, he said that in such circumstances the policy would be unchanged: only the substantive salary would be paid. A section 9 (1) authorisation was dependent, said Mr Masterson, on the judge's appointment as a salaried circuit judge. He acknowledged that the office of recorder was a separate appointment.

71 The second strand in Mr Masterson's evidence related to the comparability of the work: section 9 judges, he said, echoing the evidence of Sir Brian Leveson, were paid less than their comparators because they did not carry out all of the functions of a High Court judge. The respondents would distinguish between, on the one hand, the situation in which someone acted up temporarily in the full sense, that is to say by doing all of the duties of a more highly paid position, in which case the higher salary would be paid for the relevant period, and, on the other hand, the situation of section 9 judges, who did not perform all of the functions of a High Court Judge.

72 I was unable to reconcile the two strands in Mr Masterson's evidence. Neither section 9 (1) nor section 9 (4) judges perform all of the functions of a High Court judge. The work of a section 9 (4) judge is not materially distinguishable from that of a section 9 (1) judge (any distinction there may be suggests that the section 9 (1) judge's work is more rather less demanding); that proposition was not challenged. The respondents value a section 9 (4) judge's work the same, in monetary terms, as a High Court judge's. How, therefore, can it be said that a comparison of their work explains the difference in payment between the claimant section 9 judges and their comparators? I find that the respondents' treatment of section 9 (4) judges undermines their argument that the claimants acting as judges of the High Court are paid differently because they do not perform all the functions of a High Court judge. The respondents' evaluation of the work done by a section 9 (1) judge compared with that of a substantive High Court judge could not therefore satisfactorily explain the pay differential between them.

73 The evidence of Mr Barker, Ms George and Mr Everall demonstrated that section 9 work was very far from exceptional. In Mr Barker's case it *was* the mainstay of his work, and in Ms George's case it was a very substantial part. I concluded that the respondents' policy on the payment of section 9 (1) judges was based not on a comparison of their work with that of a substantive High Court judge, nor on whether that work was either 'exceptional' or a 'mainstay', but on whether the section 9 judge did, or did not, simultaneously hold a salaried judicial office. That was consistent with the way in which all four circuit judge claimants, and *mutatis mutandis* Mr Atherton also, were paid. Additionally, Mr Atherton gave evidence that he was aware of a salaried crown prosecutor who received no extra remuneration for sitting as a recorder.

74 This conclusion was reinforced by correspondence between Mr Atherton and the respondents in which Mr Atherton sought, pursuant to regulation 6, an explanation for the policy as it related to him, and requested a

statement of reasons for his less favourable treatment. He received responses reaffirming the respondents' policy that salaried judges receive no additional payment for sitting in another judicial capacity, and confirming that he would be paid a full fee for sittings undertaken in his non-salaried time.

75 Mr Andrew Allen elaborated this line of argument in his Closing Submissions (paragraph 106). The claimants were paid as they were because 'they hold full-time salaried offices, in relation to which they were required to devote their working time to the business of the courts ... The respondents are entitled ... to deploy the claimants into different courts ... [and] ... they continued to be salaried circuit judges and their work under section 9 forms part of their salaried work.' This argument did not depend on a distinction between the duties of section 9 (1) judges and High Court judges, but simply on the former holding some other salaried office. The same argument was applied by analogy to Mr Atherton.

76 Here too, it is necessary to consider how the relevant question should be formulated. Mr Robin Allen urged me to ask not why the claimants were paid as they were, but rather to ask why they were less favourably treated than their comparators. To that question, he suggested, there was one and only one obvious answer. A full-time High Court judge was paid more for doing work comparable to that of the section 9 judges because he was full-time; a full-time circuit judge was paid more for doing work comparable to that of a recorder because he was full-time. If one asks, Mr Allen suggested, what would have been the position if the claimants worked full-time in the High Court or Crown Court, again the answer would be obvious. The reason for their less favourable treatment was therefore their part-time status.

77 I do not think Mr Andrew Allen can be right to say that the work of a section 9 judge when acting as a judge of the High Court forms part of his/her salaried work. Section 9 (5) SCA provides that, except for the purposes of remuneration, such a judge shall 'be treated for all purposes as ... a judge of the court in which he is acting.' That seems to me to be inconsistent with Mr Allen's argument. The salaried work of a circuit judge is the 'core' work which he/she performs in the Crown Court or county court in accordance with the terms and conditions of their appointment and for which they receive their base salary. Without more, such a judge will never be requested to sit part-time in the High Court. But section 9 authorised judges may be so 'requested' by the Lord Chief Justice or his nominee at any time and, if so requested, 'must comply'. And at the times when they are so requested I have found above that they are not doing the 'core' work for which a circuit judge is salaried, but rather work which is broadly similar to a High Court judge's work. If one asks, as the regulation requires, on what ground they are not paid the respondents' rate for that High Court work, it cannot, in my judgment, be a satisfactory answer to say, because for the rest of their time they are paid a salary for doing other work which is different. The same reasoning applies by analogy to Mr Atherton whom the respondents have appointed to sit part-time in the Crown Court. If the claimants sat full-time in the High Court or Crown Court respectively, they would obviously be paid at the relevant higher rate.

The reason why they are not so paid is because they do so part-time and not full-time.

78 In so far as the respondents' ground for treating the claimants less favourably was based on a policy decision, a matter to which Mr Masterson returned numerous times in his evidence – I do not think that assists the respondents. Policy considerations relating, for example, to cost or ease of administration, may be a motive for less favourable treatment; but I am not concerned at this stage with the respondents' motives, but rather with identifying why the claimants received less favourable treatment and whether it was on the ground of part-time status: per Lady Hale in **R v Governing Body of JFS and the Admissions Appeal Panel of JFS & Others [2010] IRLR 136.** It cannot in any event be legitimate to have a policy which results in discrimination contrary to the Regulations.

79 For the reasons set out above I cannot find that the reason for the less favourable treatment of the claimants is explained either by a distinction between their duties and those of their comparators, or by the fact of their being salaried when performing different work. In answer to question 8 posed in the agreed list of generic issues, I find that the less favourable treatment suffered by Mr Barker, Ms George, Mr Everall and Mr Atherton was on the ground that they were part-time workers.

Issue 4 Is the less favourable treatment of the claimants justified on objective grounds consistently with the PTWR and the PTWD?

80 The respondents rely on the aims of

(i) Fair and flexible deployment of judges to courts and tribunals whose office-holders may be paid at rates which are different (higher or lower) from theirs;

(ii) Fair allocation of resources; and

(iii) Reflecting the difference in hierarchy and the differences in full-time roles as between different judicial roles.

81 It was common ground that if the claimants were successful the respondents, or government, would have to take some corrective measures. Mr Andrew Allen (Closing Submissions paragraph 118ff.) identified three possibilities: (1) recruit more High Court judges; (2) increase the work of existing High Court judges at the cost of increased waiting times; (3) reorganise jurisdictional boundaries between the county court and High Court. A fourth possibility, touched on by Mr Allen in paragraph 119 is to pay section 9 (1) judges for the High Court work they do, either on a detailed time basis, or by a daily rate, or by a lump sum. It is not for this tribunal to propose such corrective measures, but to examine whether any of the matters put forward constitutes objective justification.

82 In **O'Brien v Ministry of Justice [2012] ICR 955** the CJEU said, at paragraph 64 'the concept "objective grounds" ... must be understood as not permitting a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm ... that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose'. In **Ministry of Justice v O'Brien [2013] ICR 499** the Supreme Court added, at paragraph 45, that 'it is not enough for a member state to provide for the difference in treatment in its law (or enforceable collective agreement)'. In my judgment the same applies to the terms and conditions of employment on which a worker is engaged; thus, it is not enough for the respondents to point to the claimants' terms and conditions if those contain unlawfully discriminatory provisions. The SC also restated, at paragraph 45, in slightly differing terms, 'the familiar principles applicable to objective justification: the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and be reasonably necessary to do so.' At paragraph 48 the SC said 'the court is likely to treat with greater respect a justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted ... it is difficult for the ministry to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at the time.'

83 As expressed by Mr Andrew Allen (Closing Submissions paragraph 115) the respondents' policy is that 'salaried judicial office-holders are paid at their salaried rate for work undertaken in their salaried time.' It is that policy and practice which the respondents seek to justify; and for that justification they rely on the three matters set out above.

84 Mr Masterson's evidence was that the respondents' policy had evolved over time. It seems probable that it dates at least as far back as the SCA 1981. There was no evidence before me that the respondents had revisited or reconsidered its policy in the light of the PTWD or of the PTWR. I had the strong impression that practices, for example the difference in pay between section 9 (1) and 9 (4) judges, had grown up over time with no subsequent thought being given to the rationale for them. When Mr Atherton asked for an explanation of his pay as a recorder he received a restatement of the policy. I could only take Mr Masterson's evidence that he had not read the judgment in **Keegan**, and that he was told by a civil servant that it was not relevant, as indicative of the respondents' lack of concern about the questions raised. It is clear, however, that the respondents' counsel in **Keegan** thought that decision was relevant also to England and Wales.

85 The practice of paying the claimants their base salary even when they were acting part-time in another, higher paid role certainly solved the problem, in the cases of Mr Barker, Ms George and Mr Everall, of working out how much time they spent on High Court work. But no thought was given to whether that problem inevitably arose and, if so, to any other way in which it might be solved. In the cases of Field and Atherton the problem of recording

time spent in the part-time role did not arise. Furthermore, although it was the subject of considerable cross examination, it is not explicitly one of the three matters relied on by the respondents as objective grounds for justification. On that basis I cannot find that the solution of the problem was a legitimate aim, nor, if it was, that payment of base salary only was a reasonably necessary means to solve it.

86 Turning to the first of the three matters relied on, fair and flexible deployment of judges, this is elaborated in Mr Andrew Allen's closing submissions (paragraph 117 (i)). I have no difficulty in finding, and the claimants accepted, that 'fair and flexible' deployment of judges is a legitimate aim, or genuine need, of the respondents. The claimants sat in varying locations and in various courts, within the scope of their 'core' duties; for example Mr Atherton occasionally sat as a recorder in the county court though he primarily sat in crime; and when requested pursuant to section 9 the circuit judge claimants complied with those requests. The position of Mr Barker, Ms George and Mr Everall might possibly be different if, in Mr Masterson's words, such sittings had been 'an exceptional feature to the judge's mainstay work'; if, for example, on isolated occasions a judge were asked to take over a list to 'fill a gap'. But the evidence here is very far from that position: section 9 High Court work was a regular and intrinsic part of their routine, in Mr Barker's case it *was* the mainstay. And in Mr Field's and Mr Atherton's case their part-time role was a planned part of their working schedule. Giving due weight to both limbs of 'fair and flexible', I cannot find on the evidence before me that the respondents' policy of deployment was both 'flexible' and 'fair'. Further, there was no evidence that the policy of paying the claimants only their base salary was either a suitable or a reasonably necessary means of achieving the aim of fair and flexible deployment. It could not seriously be suggested that the claimants would have been any less flexible if they had been paid the High Court or circuit judge's rate.

87 Turning to the second matter relied on, this is elaborated in Mr Allen's closing submissions (paragraph 117 (ii)). As a bald statement, I do not find it contentious that resources should be allocated fairly, or that office-holders should be paid in accordance with their terms and conditions for the work they undertake within their salaried time. What this statement does not touch on is what should happen when a judge is appointed to, or required to comply with a request that he/she undertake sittings which are outside those terms and conditions, and can be undertaken only pursuant to a further appointment or authorisation above and beyond those terms and conditions. Here also, if the requirement to sit at a higher level were a rare occurrence for Mr Barker, Ms George and Mr Everall, or if it were voluntary, the position might be different. But it is both routine and compulsory. Whilst fair allocation of resources is, I find, a legitimate aim, or genuine need, I cannot find that such aim is furthered by requiring a judge, as part of his/her routine work, to sit at a higher level than that to which he/she was appointed and not paying him/her appropriately for such work. It might be thought that fair allocation of resources required exactly the opposite.

88 The respondents assert that the 'contention that judges should be paid at a rate which reflects the level of work done during a particular period of time would, on a wider basis, have significant financial and administrative consequences'. This statement is at one level self-evident, and at another surprising. Self-evidently, paying any worker the rate for the job costs more than paying the worker less. It is surprising to hear the respondents submit that not paying the rate for the job is a component part of the fair allocation of resources. Less favourable treatment of part-time workers cannot be justified simply on the basis of saving cost. Furthermore, there was no evidence before me of the level of costs to which this part of the respondents' submissions is directed.

89 The third matter relied on by the respondents (Mr Allen's closing submissions paragraph 117 (iii)) is on its face also not contentious. The differences in the judicial hierarchy as between full-time roles are already reflected in the differences in pay attributable to those roles; and that no doubt does assist in attracting the best candidates for more senior roles. It is not at all clear, however, how it is said that that aim is advanced by differentiating in pay terms between judges who perform the same or broadly similar work. I find that the respondents' policy is not a suitable means, nor is it necessary, to achieve the stated aim.

90 In answer to question 9 posed in the agreed list of generic issues I find that the less favourable treatment of the claimants is not justified on objective grounds.

Conclusion

91 My findings in summary are as follows.

1 When, pursuant to their authorisations under section 9 (1) of the SCA 1981, Mr Barker, Ms George and Mr Everall act or acted as judges of the High Court, and Mr Field acts as a judge of the CACD, and when Mr Atherton sits as a recorder, they are or were each part-time workers within the meaning of regulation 2 (2) PTWR.

2 In relation to Mr Barker, Ms George and Mr Everall, a full-time High Court judge is a comparable full-time worker, and in relation to Mr Atherton a full-time circuit judge is a comparable full time-worker within the meaning of regulation 2 (4) PTWR. In relation to Mr Field a High Court judge, whether full-time or part-time, is not a comparable full-time worker within the meaning of that regulation.

3 Mr Barker, Ms George, Mr Everall and Mr Atherton were each treated less favourably than a comparable full-time worker on the ground that they were each part-time workers, contrary to regulation 5 (1) PTWR. Mr Field was not treated less favourably than a comparable full-time worker.

4 The less favourable treatment of Mr Barker, Ms George, Mr Everall and Mr Atherton is or was not justified on objective grounds.

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EMPLOYMENT JUDGE WILLIAMS

14 December 2021 London Central

JUDGMENT AND REASONS SENT TO THE PARTIES

16 December 2021

Date Sent to the Parties

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For the Tribunal Office