



16 December 2019

PRESS SUMMARY

Miller and others (Appellants) v Ministry of Justice (Respondent)

[2019] UKSC 60

On appeal from: [2015] EWCA Civ 1368

JUSTICES: Lady Hale (President), Lord Reed (Deputy President), Lord Wilson, Lord Carnwath, Lady Arden

BACKGROUND TO THE APPEAL

This issue in this appeal is when time starts to run for a claim by a part-time judge to a pension under the Part-time Workers’ Directive (Directive 97/81), as applied by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) (“PTWR”). Regulation 5 of the PTWR provides that a part-time worker is entitled not to be treated by their employer less favourably than the employer treats a comparable full-time worker, either with regard to the terms of their contract or by being subject to any other detriment. Regulation 8 of the PTWR provides insofar as is relevant:

“(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months ... beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment the last of them ...

...

(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2) -

(a) where a term in a contract is less favourable, that treatment shall be treated, ..., as taking place on each day of the period during which the term is less favourable; ...”

The Appellants are four judges, each of whom has held one or more appointments as fee-paid-part-time judges, in some cases moving between such part-time and full-time salaried appointments. Judicial pensions, for those who are appointed on or after 31 March 1995, are provided for under the Judicial Pensions and Retirement Act 1993 (“the 1993 Act”). The basic concept in that Act is “qualifying judicial office” (section 1). The Appellants, so long as not being paid on a “salaried basis”, were excluded from the definition of “qualifying judicial office”, and therefore were excluded from rights to a pension.

The Appellants brought claims on the basis that they had been the subject of less favourable treatment in the provision to them of a judicial pension. Each lodged a claim with the Employment Tribunal more than three months after the end of a part-time appointment, and therefore out of time if that is the relevant date for regulation 8 of the PTWR, but within time if the relevant date is the date of retirement.

At first instance EJ Macmillan held that the three months started to run from the end of any part-time appointment, and thereby held that the claims were brought out of time. There has been no substantive judicial consideration of this issue before the Upper Tribunal and Court of Appeal, as the issue has been treated as subject to the appeal in *Ministry of Justice v O'Brien*. However, before the Supreme Court the issue is now understood as one of domestic law, and has been argued fully. The determinative question is: when did the less favourable treatment occur?

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Carnwath gives the sole judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

As judicial officers are not employed under a contract of employment, the PTWR must be construed in an artificial context. References to the “terms of a contract” can at best be applied by analogy. In determining this case, it must be borne in mind that the judicial pension scheme is not based upon individual appointments. Instead, regard must be had to the composite term “qualifying judicial office”, which may include a number of different appointments [31].

That special feature of the scheme must be taken into account when making the comparison between part-time and full-time judges called for by the PTWR, as it may be misleading or unfair to direct attention to the nature and timing of individual part-time appointments [32]. There is no reason why entitlement to pension should be governed by the varied combinations of fee-paid or salaried offices undertaken by different individual judges. This does not sit well with the aggregate approach provided for by the 1993 Act [33].

Regulation 5 of the PTWR makes clear that unfavourable treatment may relate to the terms of a contract or “any other detriment” resulting from an act or failure to act by the employer. By analogy, in the context of judicial pensions, a part-time judge may properly complain: (1) during their period of service that their terms of office do not include proper provision for a future pension; and, (2) at the point of retirement, that there has been a failure to make a proper pension available. The former does not exclude the latter [34]. This accords with case law, which indicates that the point of unequal treatment occurs at the time the pension falls to be paid, and accords with the common sense of the matter [35].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<https://supremecourt.uk/decided-cases/index.html>