6 February 2013

PRESS SUMMARY

O'Brien (Appellant) v Ministry of Justice (Formerly the Department for Constitutional Affairs) (Respondent) [2013] UKSC 6
On appeal from [2008] EWCA Civ 1448

JUSTICES: Lord Hope, Lord Walker, Lady Hale, Lord Clarke, and Lord Dyson

BACKGROUND TO THE APPEAL

This appeal raises questions of European Union law. These questions have their origins in an EU Framework Agreement on part-time work which was concluded in 1997. It was implemented by a Council Directive of the same year, which was extended to the United Kingdom in 1998. Directives are binding as to the result to be achieved, leaving only the choice of form and methods to the Member State. The Council Directive was transposed into UK law by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the "2000 Regulations"). In essence, the 2000 Regulations provide that a part-time worker has the right not to be treated by his employer less favourably than a comparable full-time worker **[2, 13 and 17]**.

Recorders are one of several types of part-time judge who are paid a fee for their work. Mr O'Brien is now a retired barrister. During his practice at the bar, he sat as a recorder from 1 March 1978 until 31 March 2005. Mr O'Brien claimed to be entitled to a pension in respect of his part-time non-salaried judicial work as a recorder on the same basis, adjusted *pro rata temporis*, as that paid to former full-time judges who had done the same or similar work. The then Department for Constitutional Affairs ("DCA") told him that he was not entitled to a judicial pension since the office of recorder was not a qualifying judicial office under the relevant UK legislation and because, under European law, he was an office-holder rather than a worker **[1 and 5]**.

Mr O'Brien began proceedings in the Employment Tribunal, claiming amongst other things that he was being discriminated against because he was a part-time worker. His claim was successful but the DCA (now the Ministry of Justice ("MoJ")) appealed successfully to the Employment Appeal Tribunal on the grounds that Mr O'Brien's claim was made after the relevant time limit. The Court of Appeal allowed Mr O'Brien's appeal on the time limit issue but directed the Employment Tribunal to dismiss his claim, since it found that judges were not "workers" under the 2000 Regulations **[6 and 7]**.

Mr O'Brien appealed to the Supreme Court which, in 2010, made a reference to the Court of Justice of the European Union ("CJEU") for a preliminary ruling. Because domestic law could not readily be disentangled from EU law on the issue, the Supreme Court preferred to express no concluded view on whether Mr O'Brien would qualify as a worker under the 2000 Regulations until it had received guidance from the CJEU. The CJEU issued its preliminary ruling, and the matter returned to the Supreme Court. The Supreme Court is obliged under section 3(1) of the European Communities Act 1972 to determine the questions of EU law in this case in accordance with the principles laid down in the CJEU's preliminary ruling **[1, 8 and 33]**.

As a result of the questions that were referred and of the CJEU's preliminary ruling in response to them, there were two issues before the Supreme Court: (1) whether the relationship between the MoJ and judges is substantially different from that between employers and those treated in national law as workers (the worker issue); and (2) whether the difference in treatment of recorders as compared to full-time or salaried judges for the purposes of access to the retirement pension scheme is justified by objective reasons (the objective justification issue). After a hearing in July 2012, the Supreme Court ruled that Mr O'Brien was a part-time worker within the meaning of the Framework Agreement. The parties were heard on the objective justification issue in November 2012. The judgment of the Supreme Court sets out the reasons for its ruling on the worker issue and its reasoning and conclusions on the objective justification issue **[10 – 12]**.

JUDGMENT

The Supreme Court unanimously allows Mr O'Brien's appeal. Recorders are in an employment relationship within the meaning of the Framework Agreement on part-time work and must be treated as "workers" for the purposes of the 2000 Regulations. No objective justification has been shown in this case for departing from the basic principle of paying a part-time worker the same as a full-time worker calculated on a *pro rata temporis* basis. Mr O'Brien is entitled to a pension on terms equivalent to those applicable to a circuit judge. The case will be remitted to the Employment Tribunal for the determination of the amount of the pension to which he is entitled. The judgment is given by Lord Hope and Lady Hale **[12, 42, 75 and 76]**.

REASONS FOR THE JUDGMENT

The CJEU stated that it was ultimately for the Supreme Court to decide the worker issue, but it set out a number of factors which the Supreme Court had to take into account, including that the term "worker" in the Framework Agreement is used to draw a distinction from a self-employed person, which distinction is part of the spirit of the Framework Agreement. In arriving at its ruling on the worker issue, and following the guidance from the CJEU, the Supreme Court took into account the following: (1) the character of the work that a recorder does in the public service differs from that of a self-employed person; (2) the rules for the appointment and removal of recorders, to which no self-employed person would subject himself; (3) the way recorders' work is organised for them, bearing in mind that, in common with all other part-time judges, recorders are expected to work during defined times and periods; and (4) recorders' entitlement to the same benefits during service, as appropriate, as full-time judges **[30 and 37]**.

Recorders are expected to observe the terms and conditions of their appointment, and they may be disciplined if they fail to do so. The very fact that most recorders are self-employed barristers or solicitors merely serves to underline the different character of their commitment to the public service when they undertake the office of recorder. As the CJEU made clear, the spirit and purpose of the Framework Agreement requires a distinction between "worker" and self-employed person. When taken together, the matters taken into account by the Supreme Court following the guidance of the CJEU really speak for themselves. In the case of part-time judges, the essential distinction between the employed and the self-employed can be drawn. The self-employed person has the comparative luxury of independence. Part-time judges are not free agents to work as and when they choose. They are not self-employed persons when working in that capacity **[38 – 40]**.

The Supreme Court follows the guidance given by the CJEU and the Advocate General (who presents an impartial opinion on the case to assist the CJEU) in relation to the objective justification issue. To give a greater reward to those who are thought to need it most or alternatively to those who make the greater contribution to the justice system may be legitimate aims for the MoJ. However, they ultimately amount to nothing more than blanket discriminations between the different classes of worker, which would undermine the basic principle of the Council Directive. The criteria adopted in relation to each of the MoJ's stated aims are not precise and transparent. In relation to the first aim, some part-timers will need pension provision as much as, if not more than, some of the full-timers. In relation to the second aim, the MoJ have failed to demonstrate that fee-paid part-timers, as a class, make a lesser contribution to the justice system than do full-timers, as a class. The proper approach to differential contributions is to make special payments for extra responsibilities. The argument also fails to take into account the benefits to the system in having a cadre of fee-paid part-timers who can be flexibly deployed to meet the changing demands upon it. The aim of recruiting a high quality judiciary is undoubtedly legitimate, but it applies to the part-time judiciary as much as it applies to the full-timers. Nor has it been shown that denying a pension to the part-timers has a significant effect upon the recruitment of full-timers **[71 – 73]**.

The MoJ's argument was essentially that if recorders receive a pension, then the pensions payable to circuit judges will have to be reduced. That is a pure budgetary consideration which depends upon the assumption that the present sums available for judicial pensions are fixed for all time. Of course there is not a bottomless fund of public money available and we are currently living in very difficult times. But the fundamental principles of equal treatment cannot depend upon how much money happens to be available in the public coffers at any one particular time or upon how the State chooses to allocate the funds available between the various responsibilities it undertakes. That argument would not avail a private employer and it should not avail the State in its capacity as an employer **[74]**.

References in square brackets are to paragraphs in the judgment

28 July 2010

PRESS SUMMARY

O'Brien (Appellant) v Ministry of Justice (Formerly the Department for Constitutional Affairs) (Respondent) [2010] UKSC 34
On appeal from the Court of Appeal [2008] EWCA Civ 1448

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lady Hale, Lord Clarke, Lord Dyson

BACKGROUND TO THE APPEAL

This appeal raises questions of European Law concerning the rights of part-time workers, as well as questions of domestic law about the status and terms of service of judges in England and Wales.

The Appellant, Mr O'Brien, is a barrister. On 1 March 1978, he was appointed by the Lord Chancellor's department as a recorder (a part-time judge) under the Courts Act 1971. Mr O'Brien had his appointment extended a number of times until he retired on 31 March 2005. He was remunerated, as were other recorders, by way of a fee paid for each day that he sat. Unlike full-time judges and part-time salaried judges, however, Mr O'Brien and other recorders were not given a pension upon retirement.

On 29 September 2005, Mr O'Brien commenced proceedings in the Employment Tribunal against the Respondent's predecessor, the Department of Constitutional Affairs, contending that, like the other types of judges, he was entitled to a pension. He relied on the terms of a European directive known as the Part-Time Workers Directive ('the Directive') and an associated pan-European Framework Agreement on part-time work ('the Framework Agreement'). This EU legislation sought to prevent part-time workers from being treated less favourably than their full-time equivalents. Clause 2 (1) of the Framework Agreement stated that the agreement applied to 'workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.' Regulation 17 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which transposed the EU legislation into UK law, sought to exclude daily fee-paid judges from the scope of the rights given.

Mr O'Brien argued that under EU law, there was an autonomous definition of 'workers having an employment contract or employment relationship' which did not depend on national law and that recorders fell within this definition. He further argued that even if this was not the case, recorders would be regarded under the English domestic law as having an employment contract or employment relationship and that the EU legislation did not grant national authorities the discretion to depart arbitrarily from the general position using a device such as regulation 17.

Mr O'Brien was successful in the Employment Tribunal. The Employment Appeal Tribunal allowed the Respondent's appeal against this decision on the grounds that Mr O'Brien's claim was out of time. The Court of Appeal allowed an appeal by the Appellant on the time limit issue, but directed the Employment Tribunal to dismiss Mr O'Brien's substantive claim. Mr O'Brien appealed to the Supreme Court.

Both Mr O'Brien and the Respondent contended in their primary submissions to the Court that the issues of European law contained in the appeal were clear in their favour. They argued, however, that if their primary submissions did not succeed, the Supreme Court should refer the questions of European law to be determined by the European Court of Justice ('the ECJ').

JUDGMENT

The Supreme Court unanimously referred the appeal to the ECJ. The Court asked the ECJ to consider two questions: (1) whether it was for national law to determine whether or not judges as a whole are 'workers who have an employment contract or employment relationship' within the meaning of clause 2 (1) of the Framework Agreement, or whether there was a European Community norm by which this matter must be determined and (2) If judges are workers who have an employment contract or employment relationship within the meaning of clause 2 (1), whether it was permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions.

REASONS FOR THE JUDGMENT

- The Court preferred to express no concluded view on the domestic law issue **[paragraph 27].**

- In relation to the European law issues, three points were clear. First, there was no single definition of 'worker' which held good for all the purposes of European law. Second, in contrast to the position under other directives, the effect of the Framework Agreement, read together with the Directive, was to make domestic law relevant to the interpretation of the expression 'worker'. Thirdly, however, domestic law was not to oust or 'trump' the principles underlying the EU legislation in such a way as to frustrate them. The underlying purpose of the legislation in protecting against discrimination must be respected [**paragraph 28].**

- The jurisprudence of the ECJ gave little guidance as to the extent of discretion afforded to member states as to the definition of 'worker'. It was not clear what sort of national law would fail to respect the principles underlying the EU legislation. Accordingly, the question would be referred to the ECJ for consideration **[paragraph 40]**.

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:
www.supremecourt.gov.uk/decided-cases/index.html