12 July 2017

PRESS SUMMARY

O'Brien (Appellant) v Ministry of Justice (Respondent) [2017] UKSC 46
On appeal from [2015] EWCA Civ 1000

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Reed, Lord Carnwath, Lord Hughes

BACKGROUND TO THE APPEAL

The Appellant, Mr O'Brien, is a retired self-employed barrister who also worked on a daily fee-paid basis as a part-time judge of the Crown Court between 1978 and 2005. At the material time domestic law entitled salaried judges (including part-time judges) to a pension based on their final year's salary and number of years' service, but made no pension provision for fee-paid part-time judges. Although employers were prevented from treating part-time workers less favourably than full time workers under Council Directive 97/81/EC ("the directive"), the Regulations which gave effect to the directive (the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) which came into force on 1 July 2000) expressly did not apply to fee-paid part-time judges.

Mr O'Brien brought proceedings against the Ministry of Justice claiming an entitlement to a judicial pension. The case reached the Supreme Court, which referred to the Court of Justice of the European Union (CJEU) the question of whether it was permissible for national law to draw a distinction between salaried and daily fee-paid judges for the purposes of pension provision. The CJEU held that it was not permissible, and the Supreme Court found that Mr O'Brien was therefore entitled under the directive and national law to a pension on terms equivalent to a comparable full-time judge. The Supreme Court then remitted the case to the Employment Tribunal to determine the amount of the pension to which Mr O'Brien was entitled. There the question arose whether, in calculating the amount of his pension, account should be taken of the whole of his service since the beginning of his appointment in 1978 (a period of 27 years), or only his service since 7 April 2000, the deadline for transposing the directive (a period of less than five years). The Employment Tribunal held that the calculation should take into account the whole of his service, but the Employment Appeal Tribunal held the contrary. The Court of Appeal upheld the decision of the Employment Appeal Tribunal. Mr O'Brien now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously decides to refer a question to the CJEU. The terms of the reference are set out by Lord Reed.

REASONS FOR THE JUDGMENT

The Supreme Court is not persuaded that the case of either appellant or respondent is clearly right and is therefore under a duty to refer the questions in issue to the CJEU.

As a matter of EU law when a new rule of law comes into force, it cannot apply to legal situations which have arisen and become definitive prior to that date, but can apply to the future effects of a situation which arose under the old law (*European Commission v Moravia Gas Storage AS* (Case C-596/13 P). This principle was applied in *Istituto Nazionale della Previdenza Sociale (INPS) v Bruno* (Joined Cases C-

395/08 and C-396/08), where it was held that periods of employment completed before the directive came into force should be taken into account in calculating whether an employee's length of service qualified for a pension. The entitlement to a pension (or lack thereof) based on periods of employment under the old law was not a situation which arose and became definitive at the time of the employment, but was a future effect of that employment. Mr O'Brien argues that under this line of reasoning, periods of employment before the directive entered into force are to be taken into account when applying the directive in situations which arise after it should have been transposed, not only in relation to qualification for a retirement pension (which the Ministry does not dispute), but also in relation to the quantification of that pension, where its quantification is based on the employee's length of service.

However, the CJEU has also treated occupational pensions as a deferred form of pay, the entitlement to which accrues continuously over the employee's service (*Ten Oever v Stichting Bedrijfspensionenfonds voor her Glazenwassers en Schoonmaakbedrijf* (Case C-109/91). In *Ten Oever* the Court referred to its judgment in *Barber v Guardian Royal Exchange Assurance Group judgment* (Case C-262/88) on the requirement for equal treatment of men and women in occupational pensions (pursuant to a different EU law provision), and held that such equal treatment could be claimed only in relation to benefits in respect of periods of employment subsequent to the date of the *Barber* judgment. The Ministry argued that following *Ten Oever* an occupational pension constitutes deferred pay for past work, and the worker's entitlement to that pension accrues and is fixed at the time of the work for which it constitutes pay; the entitlement is not determined when the person retires and the pension becomes payable. The EU law principle of non-retroactivity therefore prevents the right which accrued (or did not accrue) at the time of service from being affected retrospectively by a change in the law. On that basis, it is argued that Mr O'Brien's non-entitlement to a pension in respect of his first 22 years of service was definitively established before the directive entered into force.

In the context of these two approaches, the Supreme Court is inclined to think that the effect of the directive is that it is unlawful to discriminate against part-time workers when a retirement pension falls due for payment. The directive applies where the pension falls due for payment after the directive has entered into force. In so far as part of the period of service took place prior to the directive's entry into force, the directive applies to the future effects of that situation. However, the CJEU has not yet considered the argument that if, following the *Ten Oever* line of authority, an occupational pension is treated as deferred pay, the right to which is acquired at the time of the work to which the pay relates, then it follows from the general principle of non-retroactivity that the directive does not alter or affect rights acquired (or, in Mr O'Brien's case, not acquired) before it was brought into force, there being no provision in the directive which overrides that general principle. Although the majority of the court are inclined to think that *Ten Oever* was concerned with the exceptional *Barber* limitation, which does not arise in the present context, the correct approach does not appear to the Supreme Court to be sufficiently clear.

The following question is therefore referred to the CJEU: "Does Directive 97/81, and in particular clause 4 of the Framework Agreement annexed thereto concerning the principle of non-discrimination, require that periods of service prior to the deadline for transposing the Directive should be taken into account when calculating the amount of the retirement pension of a part-time worker, if they would be taken into account when calculating the pension of a comparable full-time worker?"

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:
http://supremecourt.uk/decided-cases/index.html