EMPLOYMENT TRIBUNALS

Claimants: Mr G Bardwell and Miss J E Hinds

Respondent: Ministry of Justice

Preliminary Hearing at: London Central **On:** 16,17,18 and 19 May 2016
Reserved judgment 20 and 22 May 2016

Employment Judge: Mr J Macmillan (sitting alone)

Representation:
Claimants: Mr Saul Margo of Counsel

Respondent: Ms Rachel Kamm of Counsel

RESERVED JUDGMENT

1. The claimants' work as ticketed members of the Criminal Injuries Compensation Appeal Panel and the First-tier Tribunal (Social Entitlement Chamber) was broadly similar to the work of the Tax Judges of the First-tier Tribunal (Tax Chamber) and of District Judges (civil).

2. The respondent's contention that the less favourable treatment of the claimants in the matter of pension provisions and in relation to certain monetary payments and entitlements was objectively justified is dismissed.

3. The claimants' complaint that they have been less favourably treated than their comparators in the matter of the daily sitting fee is dismissed.

4. The claimants' complaint that they have been less favourably treated than their comparators in the matter of decision writing fees is dismissed on withdrawal by the claimants

REASONS

Background and issues

1. Mr Bardwell and Miss Hinds are former fee paid non-legal adjudicators of the Criminal Injuries Compensation Tribunal (CICT) (a technically inaccurate description which I will use only in this introductory section) who were ticketed to chair hearings of that tribunal. Apart from a complaint relating to holiday pay which is also brought under the Working Time Regulations 1998, they bring these proceedings under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) complaining, principally, of the failure to provide them with a pension but also of less favourable treatment with regard to a number of aspects of their remuneration. The claim is therefore part of the large scale multiple litigation concerning the exclusion of fee paid judges from the Judicial Pension Scheme arising out of ***O'Brien v. MoJ*** [2013] UKSC 6. There are four similar claims brought by other non-legal adjudicators who are or were ticketed to chair hearings and those claims are stayed behind Mr Bardwell's and Miss Hinds' claims which have been designated as lead cases for the purposes of rule 36 of the Employment Tribunals Rules of Procedure 2013.

2. It was originally intended that this hearing should resolve all of the issues between the parties which ranged from whether the claimants have a comparable full time worker for the purposes of the PTWR to detailed questions of remedy should I answer that question in the affirmative. The issues in the case are as follows:

(1) Is the work done by the claimants in their capacity as a fee paid ticketed non-legal adjudicator of the CICT the same as or broadly similar to that done by one or more holders of full time salaried judicial office? There being no salaried adjudicators in CICT the claimants have been obliged to name salaried judges in other jurisdictions as their potential comparators. The original list of six comparators narrowed at an early stage to two – District Judges (civil) and judges of the First-tier Tribunal (Tax Chamber).

(2) If the answer to question (1) is that the work of the claimants is the same as or broadly similar to that of their comparators, was the respondent nonetheless objectively justified in excluding them from entitlement to a pension and providing them with less favourable terms and conditions?

(3) If the answer to question (1) is yes and to question (2) no, the claimants then claim equality of treatment with their comparators in the matter of pension entitlement, the daily sitting fee, the fee for attendance at training days, the fee paid for decision writing, the payment of London Weighting, entitlement to sick pay and to holiday pay.

3. The claims only relate to that period of the claimants' service from the date on which they became ticketed to chair hearings but are made in respect of the whole of their service after that date whether or not a day's sitting involved them chairing a hearing.

4. Following discussions between the parties the number of live issues has decreased markedly. For the respondent, Ms Kamm accepts that she cannot

succeed before me on the issue of objective justification which is pleaded in the same way in these proceedings as it has been, unsuccessfully, pleaded by the respondent in several earlier cases in this series. If I find in favour of the claimants on the comparator issue she therefore invites me to dismiss the contention that any less favourable treatment was objectively justified but she reserves the right to take the point on appeal. As I have previously given my reasons for rejecting the respondent's contentions on objective justification I do not propose to repeat them here.

5. For the claimants, Mr Margo takes a similar view with regard to the claim in respect of the daily sitting fee which he accepts will fail before me because of my holdings in earlier cases in the series on the so called 'reason why' point: that the explanation for the difference in treatment was not the part-time status of the claimants but the historical background – the different points from which various tribunals started their journey into the First-tier Tribunal. The claim in respect of decision writing fees is not pursued at all and I am invited to dismiss it. The holiday pay claim is limited to a claim under reg 14 of the Working Time Regulations for holiday pay accrued but untaken in the claimants' last year of service and is likely to be resolved between the parties as is the claim for London weighting where more work needs to be done to establish whether the criteria for qualifying for the weighting have been met by any of the claimants. The claim in respect of sick pay is conceded subject to the claimants establishing that they have a comparator and, on an individual basis, that a claimant met the criteria for entitlement to sick pay which I laid down in ***Miller and others v. MoJ*** in respect of any past period of sickness absence. The respondent also concedes entitlement to a full days fee for attending training subject only to the claimant succeeding on the comparator issue and the parties have agreed the nature of the pension arrangements to which the claimants would be entitled if the comparator issue is resolved in their favour. There are thus no live issues concerning whether the treatment of the claimants was less favourable than that afforded their comparator.

6. The only issue now for me to determine is whether the claimants were engaged on work which was the same as or broadly similar to that of either of their comparators. In closing submissions it became clear that even on this issues the gap between the parties had narrowed considerably to whether the frequency with which the claimants chaired hearings was sufficiently great to demonstrate broad similarity of work, Ms Kamm conceding that, given the nature of the work which they did, had they done it with sufficient frequency their work would have been broadly similar to that of their comparators. She did not attempt to quantify what the qualifying threshold of frequency might be, contenting herself with submitting that the level of frequency established by the evidence coupled with the fact that the claimants had no appellate function and did not undertake interlocutory work, meant that it was not reached. Although the point of difference between the parties is narrow resolving it is by no means straightforward.

7. There is what appears at first sight to be a simplifying factor. Although the claimants do not have a salaried comparator within their own jurisdiction, they work alongside fee paid, legally qualified adjudicators who routinely chair

hearings. Those colleagues are now designated as judges of the First-tier Tribunal. Several of them commenced ***O'Brien*** claims which the respondent has conceded. This gives rise to the very uncomfortable possibility of an outcome of these proceedings being a finding that while the work of the claimants is the same as the work of their legally qualified colleagues it is not broadly similar to the work of their comparators. From such an outcome it would follow that the concession to the judges was (at least as a matter of pure law) wrongly made. But, as Ms Kamm points out, there were important policy considerations in play in that decision, principally the perceived need to harmonise terms among tribunal judges, and the respondent cannot be bound in these proceedings by a concession made in other proceedings. That must be right. Ms Kamm confirmed that whatever the outcome of these proceedings the concession made in favour of the judges would not be withdrawn. However, while their legally qualified colleagues clearly cannot be the claimants' comparators as they are not full timers and the PTWR requires the comparison to be between part-timers and full-timers, it is tempting to assume that the short answer to the comparator question is to determine whether the work of the claimants is the same as that of their legally qualified colleagues and if so that it must follow that their work is at least broadly similar to whichever salaried judicial office prompted the respondent to make the concession in their colleagues' claims. But Mr Margo expressly invites me not to go down that route and he is clearly right to do so. The comparison to be made is between the claimants and their comparators direct. Mr Margo submits that I should still make the comparison between the claimants and their legally qualified colleagues but only for the purpose of determining where the claimants fit into the hierarchy of their own jurisdiction as only then can the comparison with the Tax Judges be made.

8. I propose to depart from my usual order when writing decisions by making my findings of fact before setting out the law. There are no disputes about the latter and few about the former, they being mostly confined to nuances. The difficulty comes in applying the law to the facts. The exercise of comparing the work of judges in one jurisdiction with the work of judges in another jurisdiction for the purpose of determining broad similarity is one which I have undertaken some 19 times in the course of this litigation and the basis on which I have done so is now well established. However many of the features of the CICT are unique and an expansion or at least further exploration of the established position may therefore be necessary. For the claimants I have heard evidence from both claimants, from Ms Lesley Clare whose claim is stayed behind the lead claims, and from two former principal judges (the function of both but only the title of the latter) of the jurisdiction, Mr Roger Goodier and Mr Anthony Summers. For the respondent I heard evidence from the present Principal Judge, Judge Sehba Storey and I have taken as read witness statements prepared by District Judge Margaret Langley, Judge Colin Bishopp the President of the First-tier Tribunal (Tax Chamber), and Mr Jason Latham a senior civil servant, all of whom have given evidence to me on previous occasions. I have received very helpful opening and closing skeleton arguments from both Mr Margo and Ms Kamm and I am grateful to them as always for their skilful and succinct conduct of the proceedings.

The facts

9. I have already made detailed findings of fact about both comparator groups in previous hearings which I repeat below. In ***Edge and others v. MoJ and another*** (case numbers 3102415/2011 and others) paras 40 – 43 I considered the position of Tax Judges while in ***Thompson, Barran and Burton v. MoJ and another*** (case number 2204105/20134 and others) at paragraphs 24 and 25 I considered the role of District Judges (civil). I am not invited to depart from those findings but I have made four small additions to them, two in respect of Tax Judges arising from the statement prepared for these proceedings by Judge Bishopp and two in respect of District Judges. I have inserted the first in square brackets into para 41 of my previous findings. The second is that although it is possible for two Tax Judges to sit together and therefore for one of them not to be the chair of the panel, this has only been possible since 2009, arises on average possibly twice a year across the whole jurisdiction and there have been no instances of it since February 2015. The third is that District Judges (civil) sit alone for at least 95% of the time and never as a wing member. The fourth is that although District Judges act as a permission filter for appeals they do so for a very small proportion of their time, Judge Langley's estimation being 1%.

Tax Chamber judges

40. Judge Colin Bishopp the President of the Tax Chamber gave evidence about the work of the salaried tax judge and I accept all that he said. The Tax Chamber has jurisdiction over appeals concerning a wide range of taxes, duties and levies administered by HM Revenue and Customs. It also hears appeals relating to money laundering, from the National Crime Agency when it has assumed revenue functions, from decisions relating to seized goods and in respect of MPs expenses. Salaried judges normally hear only the most complex appeals such as those involving sophisticated transactions, where substantial sums are at stake, or which involve novel points of law of difficulty. The sums in issue frequently run into hundreds of millions of pounds.

41. There are currently five salaried judges and 24 fee paid judges who only sit at First-tier Tribunal level and five Upper Tribunal judges who can and do sit at First-tier Tribunal level. This however is an historical anomaly arising from the appointments which those judges held prior to being transferred in to the new Chamber and any newly appointed salaried judge will only be eligible to sit at First-tier level. I therefore propose to make the comparison with the claimants on the basis that salaried judges in this Chamber are exclusively First-tier Tribunal judges. Between 90 and 95% of the typical salaried judges time is taken up with hearings and preparation for hearings, decision writing, case management and dealing with applications for permission to appeal. [On average a Tax Judge is likely to deal with only about one application for permission to appeal per month]. Unlike the District Tribunal Judges they have no power to review a decision as part of this process or to remit it back for reconsideration: they may only grant or refuse the application for permission.

42. Although Judge Bishopp said that the salaried judges take on tasks which are the responsibility of the President the time commitment for the average judge is not great. For example they might spend one day a year doing appraisals. They make a contribution of some sort to each of the 4 member training days a year but by far the bulk of the training work is done by a designated lead training judge. They act as 'sounding boards' for fee paid judges and members but Judge Bishopp estimates that this takes up less than an hour a week. One judge acts as liaison with the staff which perhaps takes up 3 hours a week, another sits on a diversity committee and another on an IT committee, the commitment in both cases being no more than a meeting every two or three months in the late afternoon with the associated reading and reporting. All the judges attend internal meetings of the Chamber but the commitment would be no more

than 1½ days a year. They spend perhaps half an hour a week attending other meetings of one sort or another. Judge Bishopp said that because of the small pool of judges each one takes the lead on some issue or other but the only such role that appeared to have any significant time commitment was training. In recent times the salaried judges have played no part in recruitment exercises and it seems there is no plan to involve them in the future.

43. Judge Bishopp was asked to comment on the similarities and differences between the roles of valuer member, valuer chair and tax judge from an examination of their job descriptions. He was doubtful whether the roles of the valuer chair and the tax judge were directly comparable but apart from the frequency of inspections in the Property Chamber which suggested that the function of that tribunal differed from that of the Tax Chamber, he was able to point only to the fact that in the latter the application of the law is the province of the judge. He equated the work of the valuer member with that of the non-legal member of the Tax Chamber.

District Judges (civil)

24. I heard evidence from District Judge Margaret Langley. It is no criticism of Judge Langley that after her evidence I was not at all clear what the average or paradigm District Judge does when he or she is not doing judicial work, nor for how long in an average week they spend doing it. I suspect that that is in the nature of the role. Of the twelve bullet points in the District Judges' job description under the heading 'Management and other Judicial and Public Duties' six begin with the words 'Some District Judges' and three with the words 'Many District Judges'. There is a ticketing system for District Judges and not all are ticketed to hear all classes of work. In smaller courts the staff are in charge of management aspects with a greater or lesser degree of consultation with the District judiciary while in central London where Judge Langley sits there are monthly management meetings involving Circuit Judges, District Judges and senior managers. The average or paradigm judge seems therefore not to exist!

25. Judge Langley gave me quite a detailed estimation of how her time is spent on various tasks but I have aggregated the different elements of judicial work together. She estimates that she spends 76% of her time on judicial work as a District Judge and 7% sitting in other jurisdictions, a total of 83%. Of the remaining 17% nearly half (8%) of her time is spent on one of her special responsibilities as a designated judicial tutor for the Judicial College. She estimates that only about 10% of District Judges are tutor judges. The remainder of her time is spent in liaising with court staff, attending internal HMCTS meetings, attending and preparing for meetings of judicial representative bodies and other miscellaneous bits and pieces. She no longer acts as an appraiser but perhaps a quarter of District Judges do although usually only for a few years. She now spends a very small amount of time mentoring but most District Judges will be a mentor at some point in their careers.

Criminal Injuries Compensation adjudicators

10. An explanatory glossary of terms applicable to this jurisdiction might be helpful as it has a number of features which set it apart from, at least, every other tribunal I have encountered during these hearings. The Chairman was the title given to the principal judge of the jurisdiction prior to its absorption into the Social Entitlement Chamber of the First-tier Tribunal (FTT) on the 3rd November 2008 when it became the Criminal Injuries Compensation Division of that Chamber. The 'Chairman' was formerly the head of the Criminal Injuries Compensation Appeals Panel (CICAP) which came into existence on the 1st of April 1996 to replace the old Criminal Injuries Compensation Board, CICAP being a Non-Departmental Public Body sponsored by the Home Office. I will use the acronym CICAP to describe the jurisdiction both before and after its transfer into the FTT.

11. CICAP was established by the Criminal Injuries Compensation Act 1995

which replaced both the Criminal Injuries Compensation Board, which had only lawyer members, and the system which it administered. Under the CICB compensation was at large and reflected the civil common law approach to the assessment of damages. The new system was tariff based with a minimum award of £1,000 (any lesser injury being regarded as de minimis) and a maximum of £500,000. The system was enshrined in a series of statutory Schemes beginning with the 1996 Scheme, currently the 2012 Scheme. Appeals from decisions concerning both entitlement to compensation and amount made by claims officers of the Criminal Injuries Compensation Authority were to be heard by adjudicators who were appointed as members of CICAP (the Act sec 5(1)(b); 1996 Scheme para 2). The Scheme provided for a single adjudicator to hear appeals on time points and for a 'Panel' of at least two adjudicators to hear full appeals. The identity of the single adjudicator and the composition of the Panel were matters for the Chairman, himself one of the adjudicators. Other than on one point, the Act and the Scheme are silent on all the issues one usually associates with the creation of a new jurisdiction: composition of tribunals, qualifications and experience necessary for appointment as a judicial member, qualifications and experience necessary for appointment as a specialist or lay member. The exception is in the transitional arrangements made for hearing cases transferred from CICB which had to be heard by a legally qualified adjudicator.

12. Prior to its transfer to the FTT although CICAP had three different kinds of member – legally qualified, medical and lay or specialist - this seems to be rooted purely in policy, there being no legislative requirement to appoint members of those or indeed any other kind. All were appointed on the same instrument of appointment and all received the same remuneration. The legal members were always expected to chair hearings but early in CICAPs existence non-lawyer adjudicators were also ticketed to sit as chairs. Mr Bardwell was appointed as an adjudicator in January 1997 and had been ticketed to chair hearings before the end of the century although the precise date cannot be established. I will call lawyer adjudicators judges and non-legal members who were ticketed, ticketed members. The great majority of ticketed members were drawn from the ranks of the specialist member there being only two or three ticketed medical members. There appears to have been some sort of process, albeit with minimal formality, in determining who would be ticketed as not all who expressed an interest were appointed. Proof of suitability had to be offered, training was given and in Miss Hinds' case at least, she was observed by an experienced colleague during a sitting week who reported on her suitability for appointment. Miss Hinds was appointed as an adjudicator on the 6th of September 2000 and was ticketed in the summer of 2005. Both she and Mr Bardwell retired in February 2015 but Ms Kamm accepts that there have been no material changes in the role of ticketed member since that date. In consequence a finding in favour of the claimants in these proceedings is not restricted to the periods of time which the lead claimants served as ticketed members.

13. Not only was there no requirement for a judge to chair a Panel there was no requirement for a judge even to be a member of the Panel and Panel sittings without a judge, for example where the judge has had to recuse herself because of an unexpected conflict or had become ill, have happened from time to time.

The aim of successive Chairmen has been that the Panel should always be as balanced as possible with a judge, a specialist member who may or may not be ticketed, and a medical member who was very unlikely to be ticketed. Currently less than one third of the specialist members are ticketed to chair. That seems likely to be lower than the historical average given that no new non-legal members have been ticketed to chair hearings for some time. There was a brief period of time when the administration decided that it would be a useful economy to appoint only two person Panels but this quickly proved to be counter-productive because of the absence from the Scheme of any provision for a member of a Panel to have a casting vote. In the event of a disagreement between the members of a two person Panel therefore the appeal had to be re-heard.

14. Hearings are normally listed in blocks of 5 days with each day being split into half day sessions, the first on Monday afternoon and the last on Friday morning giving 8 sessions in total. There may be as many as three appeals in each session, more in the earlier years. CICAP's Good Practice Guide and Bench Book lay down the ground rules for all hearings. All Panel members are expected to prepare with equal assiduity (reading in may take 3 or 4 days in total) as they may well not know in advance which cases they will be chairing. Either before or at the start of the week the judge is expected to check which if any other member of the Panel is ticketed to chair hearings and to discuss allocation of chairing responsibility for the week, taking account the nature of the cases and experience. It was often felt to be advantageous, for example for a female adjudicator to chair a hearing where the appellant was a female victim of a sexual offence. The rule of thumb appeared to be that where, as was very often, indeed nearly always, the case, there was only one ticketed member, the judge would chair the Monday afternoon session, Tuesday, Wednesday and Thursday would be split equally and Friday was more likely than not to be chaired by the judge. That gave the ticketed member roughly 40% of the hearings to chair, a figure which both Mr Margo and Ms Kamm agreed had to be adjusted downward very slightly to reflect the rare but by no means unheard of occasion when the chairing workload had to be split three ways, counter balanced by the even rarer occasions when the ticketed member had to step in to chair a hearing previously allocated to a judge. Both parties agree therefore that taken overall the proportion of an average ticketed member's sitting days when they acted as chair was pretty close to but just below 40%.

15. Judge Storey contended that the judge had the final say over who chaired which sessions. That seems to me to significantly overstate the judge's role even if only by implication. The judge only has this role it seems because the role falls to the person first named on the list of Panel members for the week and the person first named is, by custom and practice, the judge. A clear picture emerges from the evidence of the division of chairing responsibility being almost entirely a non-event if I may put it like that, done briefly and amicably over a sandwich on the Monday lunch time. The Good Practice Guide is clear: "Rotate the chair and share the load during a week unless, atypically, there are reasons not to do so." Any suggestion, which I am sure Judge Storey did not intend, of the ticketed member having to live off the scraps from the judge's table would be simply false. Indeed, one judge who attempted to operate in that way incurred the displeasure

of Mr Summers and had his attention firmly drawn to the Good Practice Guide.

16. Judge Storey's claim in her witness statement that 'Although there was nothing set down in writing, I am clear that the overall responsibility for the fair and proficient running of the hearing remains with the legal member/judge, even when a ticketed member is sitting in the chair' was roundly rejected by all of the claimant's witnesses. If it was the case, it would be contrary to the Good Practice Guide which asserts 'Once allocated, let the Hearing Panel Chairman get on with the job of chairing for the case or session unless support is sought.' But I am satisfied that it is not the case and when pressed about this point in evidence Judge Storey's real claim was significantly weaker. Just as the medical member might be more inclined to intervene if she felt that the other Panel members were misunderstanding the medical evidence, so the judge might intervene if procedural fairness was in jeopardy, but he would be doing so in his role as a lawyer not in his role as judge. Judge Storey also accepted a proposition which I put to her that this idea that the judge retained some sort of overall responsibility was a modern phenomenon and a mere cultural one at that, seeping over into CICAP from the other jurisdictions in the FTT and from the ever increasing number of judge's appointed to other Chambers or other divisions of the Social Entitlement Chamber who were cross ticketed to sit in CICAP. Moreover this is very largely a theoretical responsibility to the extent that it exists at all as Judge Storey accepted that the occasions when intervention is necessary are extremely rare; she could only remember it happening once in Panels of which she was a member.. In fact any member might intervene – for example if the chairman had not spotted something untoward going on – intervention being done as inconspicuously as possible by the discreet passing of a note to the chair.

17. All members are expected to play an equal part in the post hearing deliberation which is led by the person who chaired the hearing, irrespective of their personal status. However, what 'leading' means in this context is spelled out by the 2012 edition of the Good Practice Guide:

> Best practice is normally for the Presiding Member to hold back from any initial decisive lead and to encourage full participation to bring out any differing views and perspective. The most effective Presiding Members adopt a facilitative role, ensuring that each relevant issues (*sic*) is thoroughly explored before a conclusion is reached

Similarly the Presiding Member is supposed to facilitate rather than lead the pre-hearing discussions. All are expected to have an equally firm grasp of the law, at least in understanding how the Criminal Injuries Compensation Scheme works, and all are provided with the same text books and similar materials. The chair is also required to complete the decision template which includes summary reasons for the Panel's decision and which is handed to the appellant normally before they leave the tribunal. The chair is responsible for drafting extended reasons if they are requested but these must be approved by all members of the Panel, and may or may not (before the relatively recent advent of the duty judge system which I discuss below) have been delegated the task of calculating the remedy due to a successful appellant after a hearing dealing solely with entitlement for which the Panel would make case management orders. It is therefore clear that in the matter of chairing hearings the role of the ticketed member is identical to that of the judge.

18. The transfer to the First-tier Tribunal brought several changes of title, some important changes in respect of terms and conditions but none in respect of process. The judges became transferred in Judges of the First-tier Tribunal under sec 31(2) of the Tribunals, Courts and Enforcement Act 2007 and the specialist and medical members, whether ticketed or not, became transferred in other members of the FTT. The Chairman became the Principal Judge of the Division. There was a strong desire among all the adjudicators it seems for the old ethos to prevail and representations were successfully made to the Senior Salaries Review Body that they should recommend that all members of CICAP should continue to be paid the same fees. The government however rejected that recommendation and, in the interests of harmonising judicial term and conditions, put the judges into salary group 7 of the judicial pay scale, a significant increase (albeit a phased one) which the ticketed members accepted and without exception continued to perform the chairing role for the lower fee.

19. The new Tribunal system created by the 2007 Act is led by a Senior President, the first incumbent of that office being Lord Justice Carnwath (as he then was). The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (2008 SI 2835) which came into effect on the 3rd November 2008, was made under para 15 of Schedule 4 to the 2007 Act which requires the Lord Chancellor to make orders determining the number of members of the FTT before whom every matter falling to be determined by the FTT is to be heard. Art 2 of the Order provides:

Number of members of the First-tier Tribunal

2.—(1) The number of members of the tribunal who are to decide any matter that falls to be decided by the First-tier Tribunal must be determined by the Senior President of Tribunals in accordance with paragraph (2).

(2) The Senior President of Tribunals must have regard to—

(a) where the matter which falls to be decided by the tribunal fell to a tribunal in a list in Schedule 6 to the Tribunals, Courts and Enforcement Act 2007 before its functions were transferred by order under section 30(1) of that Act, any provision made by or under any enactment for determining the number of members of that tribunal; and

(b) the need for members of tribunals to have particular expertise, skills or knowledge.

20. Pursuant to that article (albeit somewhat prematurely it appears) the Senior President issued a Practice Statement on the 30th October 2008 concerning the composition of CICAP tribunals which so far as material provides:

3. Any matter that falls to be decided by the Tribunal at a hearing must be decided by two or three members each of whom is either a judge or a (*sic*) other member who has any of the qualifications set out in ... the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008.

4. Where more than one member of the Tribunal is to decide the matter, the 'presiding member' for the purposes of article 7 of the 2008 [Composition] Order must be selected by the Chamber President or Principal Judge for criminal injuries compensation cases.

5. Any matter decided by the Tribunal otherwise than at a hearing must be decided by either one judge or one other member who has any of the qualifications set out in paragraph 3 above. The judge or member must be selected by the Chamber President of (*sic*) Principal Judge for criminal injuries compensation cases.

21. All CICAP specialist and medical members of course satisfied the conditions laid down by the 2008 Qualifications Order. The version of the Good Practice Guide from which I have quoted above at paragraphs 14 and 15 is the June 2008 edition. The current edition is from 2012 and contains identical wording apart from the immaterial omission of the words 'Rotate the chair and' before the word 'share'. Paragraph 24 of the 2011 edition of the Bench Book sets out the composition of the tribunal exactly as I have described it above, and para 32 confirms the long held position that in deliberations on all questions of fact and determination of issues at hearing, all members of CICAP tribunals are equal. Plus ça change therefore, at least so far as hearings and chairing were concerned. There has been one change on which Ms Kamm particularly relies which relates to interlocutory work. The FTT Rules of Procedure gave CICAP an opportunity to manage cases that it had not previously had both proactively and reactively. It was decided by Mr Goodier and maintained by Mr Summers and Judge Storey, that this interlocutory work would only be done by volunteer judges although it is common ground that the ticketed members were equally eligible to do the work and Judge Storey was in no doubt that they would be perfectly capable of doing it. The work is done at two administration centres in London and Glasgow and there is enough work to require at least one duty judge every day. The computation of compensation formerly reserved to one of the members of the original Panel is now generally regarded as a duty judge matter.

22. It seems to be common ground that the claimants and their ticketed member colleagues spent over 90% of their time serving the tribunal in hearing appeals and dealing with everything relating to hearings from sitting to writing the final extended reasons. In the remainder of their time they undertook mentoring and appraisals – in this jurisdiction any member from any background can mentor or appraise any other member; developing the appraisal system; developing, delivering and attending training; drafting the Good Practice Guide and the Bench Book; and sitting on boards and committees including the FTT Procedure Committee. Among the training which the claimants attended was one on advanced judicial skills where most of the other delegates were legally qualified.

23. Finally, neither judges nor ticketed members in CICAP have any role to play in granting or refusing permission to appeal.

The law

24. Because of the level of agreement between the parties I need say very little about the provisions of the PTWR. More detailed expositions have been given in earlier cases in this litigation and I adopt what I have previously said. Regulation 5 creates the right of a part-time worker not to be less favourably treated than a "comparable full-time worker", that concept being defined by reg 2(4). To be comparable, the full timer and the part timer must fulfil three conditions two of which are conceded as applying in this case. The third is that they must be engaged in the same or broadly similar work. Once the existence of the comparable full-timer is established, the part-timer has the right not to be less favourably treated as regards the terms of their contract or by being subjected to any other detriment if, and only if, the reason for the treatment is their part-time status and the treatment is not objectively justified.

25. Whether the work of two judicial officer holders is the same or broadly similar can be a difficult question particularly if, as here, they sit in very different jurisdictions. The method by which the question is to be approached is not in doubt. The starting point is ***Matthews and others v. Kent and Medway Towns Fire Authority and others*** [2006] UKHL 8; [2006] ICR 365. Two lengthy passages from the speeches of Lord Hope and Baroness Hale at paragraphs 14 and 15 and 43 and 44 respectively are relied upon by both parties.

14. The wording of regulation 2(4)(a)(ii) identifies the matters that must be inquired into. One must look at the work that both the full-time worker and the part-time worker are engaged in. One must then ask oneself whether it is the same work or, if not, whether it is broadly similar. To answer these questions one must look at the whole of the work that these kinds of workers are each engaged in. Nothing that forms part of their work should be left out of account in the assessment. Regard must also be had to the question whether they have a similar level of qualification, skills and experience when judging whether work which at first sight appears to be the same or broadly similar does indeed satisfy this test. But this question must be directed to the whole of the work that the two kinds of worker are actually engaged in, not to some other work for which they may be qualified but does not form part of that work.

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

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

44. In making that assessment, the extent to which the work that they do is exactly the same must be of great importance. **If a large component of their work is exactly the same, the question is whether any differences are of such importance as to prevent their work being regarded overall as 'the same or broadly similar'.** It is easy to imagine workplaces where both full- and part-timers do the same work, but the full-timers have extra activities with which to fill their time. This should not prevent their work being regarded as the same or broadly similar overall. **Also of great importance in this assessment is the importance of the same work which they do to the work of the enterprise as a whole.** It is easy to imagine workplaces where the full-timers do the more important work and the part-timers are brought in to do the more peripheral tasks: the fact that they both do some of the same work would not mean that their work was the same or broadly similar. **It is equally easy to imagine workplaces where the full-timers and part-timers spend much of their time on the core activity of the enterprise: judging in the courts or complaints-handling in an ombudsman's office spring to mind. The fact that the full-timers do some extra tasks would not prevent their work being the same or broadly similar.** In other words, in answering that question particular 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. [emphasis added]

26. I have applied those tests in several earlier decisions in this series and both Mr Margo and Ms Kamm rely on passages from some of those judgments. In ***Edge v. MoJ*** I considered what might make two different kinds of judicial work not 'broadly similar':

57. .... It is not sufficient that there are differences in the roles which are not attributable to the fact that one works part-time and the other full-time, that is merely a sine qua non. In order for work not to be broadly similar, to adopt Mr Bourne's [counsel for the MoJ] phraseology, those differences must give the full-timer's role a significance to the enterprise which marks him or her out from the part timer. This is a rather more elegant way of expressing what I said in paragraph 46 of ***Moultrie***: are the similarities between the roles trumped by the importance of the differences, given the importance to the organisation of those parts of the role which are the same?

27. The approach which I had adopted in ***Moultrie and others v. MoJ*** was approved by the Employment Appeal Tribunal (UKEAT/0239/14), see paragraph 29 in particular:

The only basis on which the Appellants' submission [that I had incorrectly applied *Matthews*] could be correct would be if the approach in *Matthews* meant that once a large component of the work was the same, and once that work was recognised as being important, then the two groups had to be engaged in the same or broadly similar work. But that is not what *Matthews* decides. Indeed, it is clear that particular weight must be given to those factors and then the question becomes whether the remaining differences are of such importance to prevent the work being regarded as broadly similar. 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.

28. In ***Thompson, Barran and Burton v. MoJ*** I had to consider the comparability of judicial roles across jurisdictions where both roles included an important management element:

22. Two roles are broadly similar if the post holders operate at a roughly similar level in the tribunal's hierarchy – as part of a regional management/leadership team ... between the regional leader and the rank and file judiciary – and have as part of their day to day function management and leadership roles at regional level which are of broadly equal importance to the enterprise as a whole. Following *Edge* it then becomes not only unnecessary but impermissible to drill down further and look at the components of the various roles and the percentage of the working week spent on them. It would be necessary to do so if it was contended that the VP's [Vice Presidents of the Residential Property Tribunal Service] non-judicial work was of less importance to the enterprise of the MoJ than the non-judicial work of their comparators but there is no such contention.

29. Returning to ***Edge,*** in that case I established the important principle that when comparing judicial roles across jurisdictions which are both at the same level it is impermissible to bring into the equation the nature of the cases heard in the two jurisdictions and any differences in their procedure. I went on to hold that Valuer Chairs of the Residential Property Tribunal Service were engaged on broadly similar work to that of Tax Judges, a decision which was not appealed. There was a feature of the work of the Valuer Chairs which has echoes in this case, namely that they also sat as wing members. But the problem that arises

here was avoided in ***Edge*** because the Valuer Chairs held separate appointments as Chairs and Members and in the latter capacity their claims failed. In ***McGrath v. MoJ*** I held that the roles of wing members in the Employment Tribunal were not broadly similar to that of Employment Judges, in fact the two roles were very different and not interchangeable. Appeals against that decision failed.

30. In ***Edge*** I dealt with the effect on the comparison exercise of the comparator group possessing an appellate jurisdiction which the claimant group did not possess. I held (paragraph 66) that the fact that District Tribunal Judges in the Social Entitlement Chamber had something very close to an appellate jurisdiction in respect of cases heard by fee paid judges in the districts for which they are responsible was an important factor in making their work not broadly similar to that of the Valuer Chairs, but (paragraph 68) in the case of Tax Judges, merely acting as a permission filter – only having the power to give or refuse permission to appeal – was not sufficiently important to displace the overall appearance of broad similarity arising from the proportion of their work that was identical.

The submissions

- **the respondents**

31. Ms Kamm submits that as the claimants hold a single appointment which covers the days when they do not sit as chairs as well as the days when they do, I must consider the totality of their work. This case falls somewhere between the kinds of comparisons done in the previous cases. There is however still a key difference between what the claimants do and what their comparators do which is the amount of time they spend chairing a hearing. In the case of both comparators it is very significantly higher than the 40% of the ticketed members – at least double. The respondent accepts that chairing a hearing in CICAP is what she describes as 'classic chairing' but by itself that is insufficient to get the claimants home. Both comparators also have a role as a permission filter for appeals and both do interlocutory work, neither of which the claimants do. Neither comparator sits (or virtually never sits) as a wing member which the ticketed member does for over 60% of their time. Additionally, in recent times there has been a move towards judges undertaking a supervisory role when sitting as the wing member as CICAP integrates with other FTT jurisdictions.

32. The factors which the tribunal must take into account are the extent to which the work of the claimants and the comparator groups are exactly the same; whether the differences are qualitative and the relative importance of the work; whether the people in the claimants' role and people in the comparators' roles have similar levels of qualification, skills and experience (focusing on how this is relevant to the difference between the work done by the two groups); and whether the similarities between the roles are more important than the differences. Ms Kamm does not deny that even when the claimants aren't chairing a hearing they are still engaged in judicial work but this label doesn't take them anywhere. The fact that the two wing members could outvote the chair doesn't by itself make this case any different from ***McGrath***.

33. The claimants' do not actually submit but come close to suggesting, that

even the non-ticketed member could establish a comparator. They can't have it both ways. They say ticketed chairs do broadly similar work to Tax Judges when they chair, but they do that so infrequently. So if you accept, as the claimants appear to, that a member who doesn't chair doesn't have a comparator – and these claimants don't chair for the majority of their time - where is the line to be drawn? This case may be getting close to the line but is still the wrong side of it. While there is less of a distinction between the role of the chair and the role of the wing member than in previous cases, the more this point is emphasised – that the role is a hybrid one – the more difficult it becomes to make good the comparisons relied on. If the claim succeeds for the ticketed members you get dangerously close to succeeding for the non-ticketed members as well and that clearly cannot be right. The lack of an appellate role tips this this case over the edge. Even though it might be a small role for both the Tax Judge and the District Judge it is an important qualitative difference which adds weight to those roles. Ms Kamm accepted that the fact that the ticketed members do not do interlocutory work is of less importance as they have done it in the past and could still do the work if asked to do so.

- **the claimants**

34. Mr Margo submits that all the work undertaken by the claimants apart from the time spent on appraisals, mentoring, training and the like was judicial work and this took up, by common consent, between 90% and 95% of their time. Following ***Edge*** and ***Thompson, Barran and Burton*** it is both unnecessary and impermissible to drill down into the detail of what that work involves in circumstances where the work is of equal importance to the enterprise as a whole. From that it follows that how frequently the respective office holders sit alone is irrelevant. The tribunal will ultimately need to focus on how to categorise the work of the ticketed members when they are sitting as wing members.

35. CICAP is unique in that all its members are of equal status in the sense that they all have the same decision making powers under the 2008 Composition Order and the Senior President's Practice Statement, and historically were paid the same and had the same terms and conditions of appointment. All are expected to prepare equally and to play an equal part in the hearing and during deliberations. There is no requirement for a lawyer to be on a hearing panel at all and no-one has a casting vote. All are provided with the same legal material and are expected to be fully conversant with the Scheme. All play an equal part in the running and administration of the tribunal through involvement in training etc and the committees they sit on. A hearing Panel is genuinely a three headed beast with the distinction even between the judge and a non-ticketed medical member being a very narrow one restricted to the particular responsibilities that come with chairing. It would be highly artificial to conclude that a ticketed member is only carrying out judicial work when they are chairing hearings.

36. The comparison between ticketed members and their judge colleagues is highly relevant even though it cannot provide a direct route to the answer to the comparison issue in this case. The more similarity there is between the work and status of the ticketed member and a judge, the more compelling the case that the judicial and other work of the ticketed member has the same or broadly similar

status and importance within CICAP as the work of the comparators has within their own jurisdictions. In fact the role of the ticketed member and the judge are the same or at the very most any discernible differences are very minor indeed. The fact that the judge may chair 60% of the time doesn't mean the ticketed members occupy a different place in the hierarchy. The 40% chairing time of the ticketed members is 'happenstance'. All are equal and the aim is equal division.

37. So far as the non-chairing work is concerned it is simply not sensible to compare it with the work of the valuer members in the RPTS or the lay members in the Employment Tribunal. The role of both non-legal members in CICAP is very different, but, Mr Margo, emphasised, he was not at all submitting that non-ticketed members have a comparator. Finally it would be artificial to say that the advanced judicial skills in which the claimants have been trained were not being exercised when they were out of the chair.

Discussion and conclusions

38. I accept Ms Kamm's description of the factors which I must take into account, but given her apparent concession that for the 40% or so of their time when they chair hearings the ticketed members are doing work which is at least broadly similar to that of their comparators, it seems to follow that for that period of time she accepts that they have similar relevant levels of qualifications, skills, and experience. Note that the key word is 'levels'. She does not explain the relevance of, in particular, qualifications, to the differences between the roles and no point is made about the legal qualifications held the comparators. It is difficult to see how this factor can be of relevance to the differences between the roles when it is by necessary implication conceded that it has no relevance – in the sense of making dissimilar that which would otherwise be broadly similar - to the similarities.

39. I reject Ms Kamm's contention that there are four distinguishing features between the roles of the claimants and their comparators when they are not chairing hearings, namely how frequently they sit as wing members (which might be regarded as an alternative way of saying the frequency with which they chair hearings); jurisdiction over appeals; interlocutory work; and the fact that the claimants are becoming subject to the supervision of their judge colleagues when the judge sits as a wing member. The last is not made out on the facts. To the extent that it is happening at all it is as the product of an attitude of mind of some judges who have either come in from other more traditional tribunal jurisdictions or who have been influenced by the prevailing attitude within the FTT. To the extent that it is happening it is quite contrary to the Good Practice Guide and therefore should not be happening.

40. The three features which remain fall into two groups: those which arise from and are inherent in the respective jurisdictions and those that arise from the practice adopted in the jurisdictions. The first group consists of the jurisdiction over appeals, the second of the split of time spent at hearings between chairing and being a wing member and interlocutory work. The claimants do not act as a permission filter for appeals because CICAP as a whole has no such jurisdiction. But I do not regard this as a sufficiently important distinction by itself to prevent the claimants' role being broadly similar to that of the comparators as Tax Judges

appear to exercise this part of their jurisdiction only about once a month and District Judges for only about 1% of their time.

41. A key question appears to be the significance of the fact that the other distinguishing features arise from the way CICAP is managed internally – Mr Margo's 'happenstance' point. Ms Kamm appears to concede that it has some significance as she acknowledged that the fact that ticketed members were capable of doing interlocutory work and had done it in the past decreases the importance of this difference, but that doesn't take us very far. It seems clear that I can derive no assistance from either ***McGrath*** or my decision in respect of the valuer members of RPTS as their roles in their respective tribunals were very different from the role played by the claimants. I agree however with Ms Kamm that simply giving the label 'judicial' to the work done by the ticketed members takes us nowhere – at least not without considerable additional explanation - as that would very probably also be the only label that really fits the work done by Mr McGrath and the valuer members.

42. That also means that the answer is not provided by ***Thompson, Barran and Burton*** [para 32] at least not in the straightforward way for which Mr Margo contends, as the issue here seems to be the place in the hierarchy of the claimants on the one hand and their comparators on the other, although that of course is an issue which he also addresses. ***Thompson*** only gives me the answer to this question if I first conclude that the two sides do operate at a roughly similar level in the tribunals' hierarchy, and if I also accept Mr Margo's contention that the whole of the claimants sitting work is judicial in nature. I accept Mr Margo's contention that CICAP is unique among the tribunals encountered in this litigation for the reasons which he has submitted. The chair is truly, in a way that no other judge chairing a panel of three is, first among equals, and only first in a limited and necessarily transient way. So far as the parties before them are concerned the chair is the tribunal lead for their case, the public face of the tribunal. So far as the Panel itself is concerned, the chair's role, apart from conducting the hearing, is that of facilitator, taking on only slightly greater significance when it comes to drafting extended reasons if required as the draft must be approved by all members of the Panel. This equality is not merely dependent on practice, even as formalised in the Good Practice Guide, but is enshrined in the Practice Statement on the Composition of CICAP tribunals.

43. Although I have previously accepted Ms Kamm's submission that attaching the label 'judicial' to the non-sitting work of the ticketed members takes them no-where, that is only true without the explanatory background which is now provided. That background demonstrates why the judicial work of the ticketed members when not chairing is significantly different from the judicial work of Mr McGrath and the valuer members, putting it roughly on a par with that of the CICAP judges when they act as chair.

44. It is in the context of hierarchy that both the classification of Ms Kamm's three distinguishing features into two groups and Mr Margo's happenstance argument come together. The fact that a Tax Judge almost never sits (and a District Judge never sits) with another who is qualified to chair a hearing and therefore almost always (or always) chairs their hearings, is a necessary fact of

judicial life in their respective jurisdictions. The number of times a ticketed member chairs a hearing is contingent on a range of factors including, not facetiously as this apparently happened on one occasion, whether the judge falls down the steps of a railway station on the way to a hearing. The ticketed member just seamlessly steps into the judge's shoes in such an eventuality. So the fact that the chairing role is - by custom and practice coupled with the demographics of the tribunal - divided up in the way that it is, does not detract, in my judgement, from the overall status of equality: it is not a necessary fact of judicial life in CICAP.

45. The ticketed member therefore undoubtedly occupies the same level in the hierarchy of CICAP as the legal member, the judge, subject to the interlocutory work point. But here too the division of work is contingent, it being merely a matter of policy, albeit now that of three succeeding Chairmen or Principal Judges, that interlocutory work should be done only by volunteer judges. It could be done by ticketed members equally well. Where the burden of interlocutory work falls in CICAP does not, in my judgment, displace the otherwise overwhelming impression that the ticketed chairs and their judicial colleagues sit at the same level of CICAPs hierarchy and that some 90% to 95% of their work (excluding only the time spent in training, mentoring etc) is judicial. But as Mr Margo rightly cautions me, that does not provide me with the answer to the comparison question I must decide here. It is an important piece of the jigsaw but it does not follow from that finding that they also both sit at the same level in the hierarchy as the claimants' comparators. ***Thompson, Barran and Burton*** only provides the answer to the comparison question if the answer to that preceding question is that they both do.

46. I do not fall into the trap of conflating the equality of status of the ticketed member and their legally qualified colleagues with the question of whether the work of the claimants was broadly similar to that of their comparators, when I say that the only sensible approach to the problem of hierarchy at this point in the discussion is to consider the position of the ticketed members and their legally qualified colleagues together. It seems pointless having established that the twins are more or less identical to now separate them. The ticketed member/legal chair and the salaried Tax Judge are the judges for their respective jurisdictions. They sit in first instance tribunals at the same level in the First-tier Tribunal. They prepare for hearings, hear evidence and argument, make decisions and produce reasons in broadly similar ways albeit in vastly different areas of law. It therefore follows that the ticketed members do operate at roughly the same level in the tribunals' hierarchy as the Tax Judges. Given my previous findings of fact, that they spend very similar proportions of their time on judicial work, ***Thompson, Barran and Burton*** does now apply and the comparison must go through because it would be impermissible to drill down below the finding of roughly equal status in the hierarchy and equality of time spent in judicial work to explore how much time is spent on different aspects of that work, there being no claim that the work of the ticketed members is of any less importance to the enterprise of the Ministry of Justice than the work of the Tax Judges.

47. That finding makes it un-necessary for me to consider in detail the comparison with District Judges (civil) which is complicated by the fact that they

sit in the County Court rather than the FTT and spend a little less of their time on purely judicial work. Nonetheless, the appearance of broad similarity remains compelling as the District Judges appear to occupy a niche in the civil jurisdiction at roughly the same level as that of judges in the FTT and, so far as it is possible to work out what percentage of time the non-existent paradigm District Judge spends on judicial work, spend a not very dissimilar amount of time on judicial work. The comparison with the District Judges (civil) therefore also goes through.

Final conclusion

48. The claimants work as ticketed members of CICAP was broadly similar to that of the Tax Judges of the First-tier Tribunal (Tax Chamber) and of District Judges (civil).

Employment Judge

Dated 22nd May 2016

JUDGMENT & REASONS SENT TO THE PARTIES ON

24th May 2016

FOR THE TRIBUNAL OFFICE