EMPLOYMENT TRIBUNALS

Claimants:
1. Mrs J George
2. Mr S Barker
3. Mr S Farquhar
4. Mr I Bugg
5. Mr I Atherton

Respondents:
1. The Ministry of Justice
2. The Lord Chancellor

Heard at: London Central **On:** 17-19, 21 and 24-27 June 2024

Before: Regional Employment Judge Robertson (sitting alone)

Representation
Claimants: Ms R Crasnow, King's Counsel, and Mr M Jackson, counsel
Respondents: Mr A Allen, King's Counsel, and Mr A Line, counsel

JUDGMENT

1. The claimants Mrs George, Mr Barker, Mr Farquhar and Mr Bugg are not or were not part-time workers within the meaning of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 when undertaking work in the High Court pursuant to their authorisations under section 9(1) of the Senior Courts Act 1981.

2. The claimants Mrs George, Mr Barker, Mr Farquhar and Mr Bugg are not or were not entitled to compare themselves with salaried High Court Judges for the purpose of their claims under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 as such High Court Judges were not in comparable full-time employment.

3. The less favourable treatment of the claimants Mrs George, Mr Barker, Mr Farquhar and Mr Bugg as to their remuneration when undertaking work in the High Court pursuant to their authorisations under section 9(1) of the Senior Courts Act 1981 was not done on the ground that they are or were part-time workers.

4. The claimant Mr Atherton was a part-time worker within the meaning of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 as a salaried District Judge from 1 November 2011 but not before. He was not at any time a part-time worker in respect of his appointment as a Recorder when sitting in such capacity during his salaried District Judge time.

5. The less favourable treatment of the claimant Mr Atherton as to his remuneration when undertaking work as a Recorder during his salaried District Judge time was not done on the ground that he was a part-time worker.

6. The less favourable treatment of the claimants by the respondents was not justified on objective grounds within regulation 5(2)(b) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

7. In consequence of paragraphs 1-5 above, the claimants' claims under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 that they were subjected to unlawful less favourable treatment on the ground that they were part-time workers are not well-founded and are dismissed.

REASONS

Introduction

1. These sample proceedings brought under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the PTWR") return to the Employment Tribunal for re-hearing following the judgment of the Employment Appeal Tribunal dated 7 March 2023 ("*Dodds*")[1]. That judgment set aside the decision of the Employment Tribunal (Employment Judge S J Williams sitting alone) following a hearing in September 2021 and remitted the sample claims for re-hearing by a differently-constituted Employment Tribunal.

2. The five claimants, Mrs George, Mr Barker, Mr Farquhar, Mr Bugg and Mr Atherton, are judges[2]. They are sample representatives from a larger number of judges who sit at various levels in the judiciary and who have brought similar complaints under the PTWR. The five claimants are not lead claimants within rule 36 of the Employment Tribunals Rules of Procedure 2013, but the parties envisage that determination of the issues in these claims will assist in resolving the wider claims that have been brought.

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[1] Reported as *Ministry of Justice v Dodds* [2023] ICR 715.

[2] I have used their personal names rather than judicial titles in this decision. No disrespect is intended by so doing.

3. In the hearing before Employment Judge Williams, the sample claimants were Mrs George, Mr Barker, Mr Atherton, Mr Mark Everall and Mr Patrick Field. Mr Field and Mr Everall are no longer sample claimants and have been replaced by Mr Bugg and Mr Farquhar. By a Presidential Case Management Order dated 13 March 2020, all other similar claims were stayed pending the outcome of these proceedings.

4. Mrs George, Mr Bugg and Mr Farquhar are or were Circuit Judges in the family jurisdiction and Mr Barker was a Senior Circuit Judge in the Chancery and Business and Property Courts jurisdictions. Mr Atherton was a District Judge undertaking civil and family work. Each of them from time to time "sat up" in a more senior judicial capacity that was substantively remunerated at a higher level than their appointed roles. Mrs George, Mr Barker, Mr Bugg and Mr Farquhar sat up as High Court Judges pursuant to authorisations under section 9(1) of the Senior Courts Act 1981 ("the SCA"). For ease of reference, I shall describe them as "the claimant Circuit Judges" from now on and refer to them by name only when necessary to distinguish between them. Mr Atherton sat up as a Recorder, appointed under section 2(1) of the Courts Act 1971 ("the CA").

5. The claimants contend that when they "sat up," they were part-time workers within the PTWR and the respondents treated them less favourably than comparable full-time workers by failing to remunerate them at the *per diem* equivalent of the higher rate of remuneration paid to those who sit full-time in the more senior judicial capacity. For the claimant Circuit Judges, this was the rate paid to a High Court Judge and for Mr Atherton, the rate paid to a Circuit Judge. Instead, they were paid when "sitting up" at the rate attributable to their substantive salaried role as Circuit or Senior Circuit Judge or District Judge or, put another way, they did not receive any additional remuneration for "sitting-up" beyond the salary for their substantive salaried appointment.

6. The respondents, the Ministry of Justice and the Lord Chancellor[3], accept that the claimant Circuit Judges are or were paid less than the *per diem* equivalent of full-time salaried High Court Judges for their sittings as section 9(1) judges and this is or was less favourable treatment. They accept also that Mr Atherton was paid less than a full-time salaried Circuit Judge when sitting as a Recorder in his salaried time. They accept further that salaried Circuit Judges are valid comparators to District Judges sitting as Recorders, meaning that Mr Atherton may compare himself with a full-time Circuit Judge for the purposes of the PTWR. Otherwise the respondents contest the claims and contend that:

   (a) The claimant Circuit Judges are or were full-time salaried workers when undertaking their section 9(1) duties. They did not have separate part-time appointments as section 9(1) judges and were not part-time workers within the PTWR;

   (b) The claimant Mr Atherton became a part-time worker when from 1 November 2011 (but not before) he reduced his working time as a salaried District Judge to a 90% fraction, but he did not have a separate part-time

[3] Strictly the respondent should be "The Secretary of State for Justice and Lord Chancellor", but I shall adopt the designation already used in the proceedings.

appointment as a Recorder and was not in that capacity a part-time worker within the PTWR;

(c) High Court Judges are not or were not in comparable full-time employment in relation to the claimant Circuit Judges sitting up under section 9(1);

(d) In any event, the less favourable treatment in respect of the claimants' rate of remuneration was not done on the ground that they are or were part-time workers but was because their section 9(1) and Recorder sittings were treated as being done as part of their salaried roles;

(e) If the claimants were part-time workers in respect of their sitting-up, and if they may compare themselves with a High Court Judge or Circuit Judge, and if their less favourable treatment was on the ground of their part-time status, the treatment was objectively justified as a proportionate means of achieving the legitimate aims of fair and flexible deployment of judges, fair allocation of resources and reflecting the hierarchy and differences in full-time roles as between different judicial roles.

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the PTWR")

7. In order to put the Agreed Generic Issues and findings of fact in context, I shall identify the relevant provisions of the PTWR at the outset. They are as follows:

"2. – Meaning of full-time worker, part-time worker and comparable full-time worker

(1) A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.

(2) A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker…..

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

(a) both workers are-

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

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and

(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

5. – Less favourable treatment of part-time workers

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

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

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

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

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

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

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate. …

8. – Complaints to employment tribunals etc. …

(1) …a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation (5)…

(6) Where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment."

8. The claimants also rely on the provisions of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time Working ("the PTWD") As I will explain, I have decided the claims solely under the PTWR, the terms of which are consistent with the PTWD. I have had regard to the provisions of the PTWD when interpreting and applying the terms of the PTWR. I need set out only the terms of the definitions clause 3 of the underlying Framework Agreement:

"For the purpose of this agreement –

1 The term "part-time worker" refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

2, The term "comparable full-time worker" means a full-time worker in the same establishment having the same type of employment or relationship, who is engaged in the same or similar work/occupation, due regard being given to other considerations which may include seniority and qualifications/skills."

The Agreed Generic Issues

9. Against this background, the Agreed Generic Issues which I have to determine in this hearing are as follows:

1. PART TIME WORKERS

1.1 Are the Claimant Circuit Judges (or were the Claimant retired Circuit Judges) part-time workers within the meaning of the Part-time Workers Directive ('PTWD') and/or the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR') when undertaking work in the High Court pursuant to their authorisation under s9(1) Senior Courts Act 1981 ('the SCA')?

1.2 Was the Claimant retired District Judge a part-time worker within the meaning of the PTWD and/or the PTWR when undertaking work as a Recorder during his salaried District Judge time? The Respondent accepts that he was a part time worker from 1 November 2011 when he went down to 90%.

2. COMPARATORS

2.1 For the purposes of the PTWR and/or PTWD are High Court Judges valid comparators to Circuit Judges acting up as High Court Judges pursuant to their authorisation under s9(1) of the SCA?

2.2 For the purposes of the PTWR and/or PTWD, the Respondents accept that Circuit Judges are valid comparators to District Judges when undertaking work as Recorders.

3. LESS FAVOURABLE TREATMENT ON THE GROUND OF PART-TIME STATUS

3.1 In the Circuit Judge cases, the Respondents accept that the Claimants were treated in a less favourable manner by:

3.1.1 In the case of Circuit Judges undertaking work in the High Court, being paid at the rate of a Circuit Judge rather than at the higher rate of a High Court Judge;

3.1.2 In the case of the Claimant retired District Judge, being paid at the rate of a District Judge rather than at the higher rate of a Circuit Judge when acting as a Recorder during his District Judge time.

3.2 Was the less favourable treatment on the ground of their part-time status?

4. OBJECTIVE JUSTIFICATION

4.1 Was such less favourable treatment objectively justified on objective grounds consistently with the PTWR and the PTWD? The Respondent relies on the aims of:

4.1.1 Fair and flexible deployment of judges to Courts and Tribunals whose office holders may be paid at rates which are different (higher or lower) from theirs;

4.1.2 Fair allocation of resources; and

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

5. TIME LIMITS

The parties agree that potential time issues that arise in respect of individual Claimants are determined alongside remedy if they succeed on the generic issues.

The hearing

10. I heard the claims over eight days in June 2024. I sat alone with the agreement of the parties. The claimants were represented by Ms Rachel Crasnow KC and Mr Matthew Jackson and each of the claimants gave sworn evidence. The respondents were represented by Mr Andrew Allen KC and Mr Alexander Line who called sworn evidence from Lord Justice Jonathan Baker, the Master of the Rolls Sir Geoffrey Vos and Mr Andrew Waldren, Deputy Director of the Judicial Pay and Pensions Division of the Ministry of Justice. I had access to a very substantial agreed bundle of documents and considered such documents from it as the parties referred to in evidence or submissions I reserved my

decision and following the hearing, I allowed the parties until 10 September 2024 to lodge, in addition to their detailed written and oral submissions at the hearing, written submissions on two decisions of the Employment Appeal Tribunal handed down since the hearing: *Augustine v Data Cars Limited [2024] EAT 117* and *Scottish Ministers v Johnston [2024] EAT 121***.** I apologise to the parties for the short delay thereafter in producing this decision.

Senior Courts Act 1981 ("the SCA")

11. As the claimants' claims concern their "sitting up" as High Court Judges or Recorders, it is also convenient before making my findings of fact to refer to the material provisions of the legislation about their roles and about "sitting up", beginning with the SCA.

12. Section 9 of the SCA is headed "Assistance for transaction of judicial business". Section 9(1) provides:

> **"(1) A person within any entry in column 1 of the following Table may…at any time, at the request of the appropriate authority, act-**
>
> **(a) as a judge of a relevant court specified in the request; or**
>
> **(b) if the request relates to a particular division of a relevant court so specified, as a judge of that court in that division."**

13. The table that follows includes at entry 5, a "Circuit Judge" in column 1, with column 2 ("where competent to act on request") as "the High Court and the Court of Appeal". Section 9(2) explains that the "appropriate authority" means the [Lady] Chief Justice or a judicial office holder that [s]he has nominated to exercise that function.

14. Sections 9(2CA) and (3) to (6) then provide:

> **"(2CA) In the case of a request to a person within entry 5…in column 1 of the Table to act as a judge of the High Court, the appropriate authority may make the request only if the person is a member of the pool for requests under subsection (1) to persons within that entry.**
>
> **(3) The person to whom a request is made under subsection (1) must comply with the request…**
>
> **(4) Without prejudice to section 24 of the Courts Act 1971 (temporary appointment of deputy Circuit Judges…) if it appears to the Lord Chief Justice, after consulting the Lord Chancellor, that it is expedient as a temporary measure to make an appointment under this subsection in order to facilitate the disposal of business in the High Court or the Crown Court or any other court or tribunal to which persons appointed under this subsection may be deployed, he may appoint a person qualified for appointment as a puisne judge of the High Court to be a deputy judge of the High Court during such period or on such occasions as the Lord Chief Justice may, after consulting the Lord Chancellor, think fit; and during the period or on the occasions for which a person is appointed as a deputy judge under this subsection, he may act as a puisne judge of the High Court.**

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

(6) A person shall not by virtue of subsection (5)-

(a) be treated as a judge of the court in which he is acting for the purposes of section 98(2) or of any statutory provision relating to-

(i) the appointment, retirement, removal or disqualification of judges of that court;

(ii) the tenure of office and oaths to be taken by such judges; or

(iii) the remuneration, allowances or pensions of such judges; or…"

15. Section 9(8) provides that such remuneration and allowances as the Lord Chancellor may (with the concurrence of the Minister for the Civil Service) determine may be paid out of money provided by Parliament to any deputy judge of the High Court appointed under subsection (4). There is no corresponding provision for remuneration of judges authorised under section 9(1). Section 9(8B) says that a person appointed under section 9(4) is to hold and vacate office as a deputy judge of the High Court "in accordance with the terms of the person's appointment, which are to be such as the Lord Chancellor may determine". There is no corresponding provision for terms of appointment as section 9(1) judges.

16. Section 9(2CA) was enacted when the Judicial Appointments Commission became responsible for selecting section 9(1) judges through an open recruitment competition leading to membership of a pool from which judges may be requested to sit under section 9(1).

17. The statutory precursor to section 9 was section 23(1) of the CA:

"If requested to do so by or on behalf of the Lord Chancellor, a Circuit Judge or Recorder shall sit as a judge of the High Court for the hearing of such case or cases or at such place and for such time as may be specified by or on behalf of the Lord Chancellor."

18. Section 23(3) stated that a Circuit Judge or Recorder sitting in this capacity would not be treated as a judge of the High Court for the purpose of appointment, remuneration or pension.

Courts Act 1971 ("the CA") and County Courts Act 1984

19. Section 16 of the CA provides for the appointment of Circuit Judges and states that they may serve not only in the Crown Court and county courts, but may also

"**carry out such other judicial functions as may be conferred on them under this or any other enactment".**

20. Senior Circuit Judges do not hold a distinct statutory role. Senior Circuit Judges are appointed as Circuit Judges but receive a higher salary to reflect their seniority and leadership responsibilities.

21. District Judges are appointed under section 6 of the County Courts Act 1984. By section 6(5), they are paid such salary as may be determined by the Lord Chancellor with the concurrence of the Treasury. Mr Atherton's Memorandum of Conditions of Appointment and Terms of Service stated (in its 1998 and 2009 editions) that:

> **"if a District Judge wishes to sit as a Recorder, and is so appointed, he will be expected to sit for a minimum of 20 days[4] in that capacity…No extra remuneration in addition to his salary as a District Judge may be claimed in those circumstances."**

22. As to Recorders, section 21(1) of the CA states that:

> **"(1) Her Majesty may from time to time appoint qualified persons, to be known as Recorders, to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them under this or any other enactment….**
>
> **(7)There shall be paid to Recorders out of money provided by Parliament such remuneration and allowances as the Lord Chancellor may, with the approval of the Minister for the Civil Service, determine.**

23. Mr Atherton's terms of appointment as a Recorder stated this:

> **"The daily fee is the salary of the full-time office holder divided by 220 on the basis that the full-time office holder is required to sit 220 days per annum.**
>
> **….**
>
> **Full-time holders of judicial office receive no remuneration for any part-time office held concurrently irrespective of how much time is devoted to sitting in a part-time capacity or when part-time sittings are undertaken."**

Findings of fact – High Court Judges and the work of the High Court

24. There are 108 substantive (or "puisne") High Court Judges. The number is fixed by Parliament and has changed from time to time. 71 judges are assigned to the King's Bench Division, 19 to the Family Division and 18 to the Chancery Division.

25. It is not in dispute that there are too few substantive High Court Judges to meet the demands of the work in the High Court, and without the assistance of judges authorised or appointed under sections 9(1) and 9(4) of the SCA, the High Court could not adequately function.

26. As Mr Barker was a Chancery judge and Mrs George, Mr Farquhar and Mr Bugg were or are Family Judges, I will concentrate on the work of the High Court in those fields. However, I will also deal briefly with the work of the King's Bench Division.

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[4] The minimum number of sitting days has changed from time to time. Nothing turns on this.

27. Beginning with the Chancery Division, much of its work is now carried out under the umbrella title of the Business and Property Courts of England & Wales ("the BPC"), although some King's Bench Division work in the Commercial, Admiralty and Technology and Construction Courts also falls within the ambit of the BPC. Chancery work in the BPC includes high-value financial disputes, business, financial services, regulatory and pensions cases, competition, insolvency and Companies Act work, intellectual property, property, trusts and probate and revenue and tax.

28. BPC work is handled in the Rolls Building in London and at seven regional centres, including Birmingham where Mr Barker was based.

29. Chancery and BPC work is allocated to one of three categories. Category A means "cases of great substance or difficulty or of public importance, suitable for trial only by a High Court Judge", Category B cases are "cases of substance and/or difficulty suitable for trial either by a High Court Judge, a section 9 judge or a deputy" and category C covers "cases of lesser substance and/or difficulty than category B cases, suitable for trial by a section 9 judge, a deputy or a Master." In London, cases are assigned to a category by the Chancery Masters and outside London, by a District Judge at a Costs and Case Management Conference or later by a Senior Circuit Judge.

30. As Sir Geoffrey Vos explained in evidence, Chancery Masters will also look to transfer cases of lower value and importance to the County Court or to the regions, and Mr Barker told me that in Birmingham, cases in the High Court may be transferred to the County Court.

31. Category A cases are almost always reserved for High Court Judges. Even in London they are relatively uncommon, and in the regions very rare, as Mr Barker acknowledged, but where they occur, they may involve trials lasting several weeks or months. This means that they occupy a greater proportion of judicial time and resources than their number might suggest.

32. Category B cases may be (and are) tried by High Court Judges or by section 9(1) or section 9(4) judges. Allocation to a particular judge will be done by listing officers who have regard to judges' experience, expertise and availability. I deal later with any distinction between section 9(1) and section 9(4) judges in terms of work allocation.

33. Salaried Circuit Judges with section 9(1) authorisations, such as Mr Barker, will also undertake interlocutory "box work" which may relate to High Court and County Court cases.

34. Outside London, there are about 21 Senior Circuit Judges in the seven Business and Property Courts who undertake mostly BPC work and will always hold a section 9(1) authorisation. These included Mr Barker until his retirement. They also sit in the Rolls Building for six weeks per year and in the Administrative Court for six to eight weeks per year. There are also a significant number of civil Circuit Judges and Designated Civil Judges who may hold

section 9(1) authorisations and may sit in London or in the Administrative Court.

35. There are two Supervising Judges of the BPC, one for the Midlands, Western and Wales Circuit and one for the Northern and North-Eastern Circuits, who are always High Court Judges.

36. Sir Geoffrey Vos explained, and I accept, that in addition to the Category A work already mentioned, there is other work undertaken by High Court Judges which is not done by section 9(1) or section 9(4) judges. This includes emergency and out of hours applications, applications for permission to appeal from decisions of Circuit Judges, Masters and Insolvency and Companies Court Judges[5], and leadership and management roles including Presiding Judge, Family Liaison Judge and Supervising Judge of the BPC. Whilst Circuit Judges with section 9(1) authorisations may also undertake non-sitting activities such as involvement in rules committees, reform, mentoring, outreach and diversity activities, Judicial Appointments Commission recruitment and judicial training, I accept Sir Geoffrey Vos's observation that they will carry out these functions under the umbrella of their substantive role and not under their section 9(1) authorisation.

37. Sir Geoffrey Vos asserts, from his experience as a consultee on many High Court competitions and section 9(1) authorisation exercises in which he has been involved, that the standards applied to the selection of substantive High Court judges are higher that are applied to section 9(1) selections. He says that candidates for the High Court bench must display a much higher standard of abilities and competencies. I accept that this is the aspiration of the senior judiciary. I allow the possibility of an element of self-selection; only exceptional candidates would seek a High Court appointment.

38. However, Ms Crasnow KC observes that the skills and abilities for section 9(1), section 9(4) and High Court judges in 2022/3 were in identical terms. The Competency Frameworks for section 9(1) judges and section 9(4) judges in 2016 and 2018 were also in identical terms:

> **"Those seeking appointment/authorisation should have exceptional intellectual ability, expertise and experience to deal with all but the very heaviest cases (normally reserved for the salaried High Court Bench). [They] can be expected to deal, immediately upon appointment, with some of the most complex and high profile cases in England & Wales of the kind which require deft management of matters of important legal principle and issues of wide significance at the very cutting edge of the law. High Court work can be regarded s fundamentally important not just to those parties immediately and directly affected but to society as a whole."**

39. I do not know exactly how and to what extent the policy aspiration about recruitment of High Court Judges is reflected in Judicial Appointments Commission selection processes[6]. But this wording communicates that there

[5] Although section 9(1) judges may hear the substantive appeal if permission is granted.

[6] I am aware that there are a significant number of documents in the bundle relating to job descriptions, vacancy requests, eligibility requirements and the like concerning the recruitment of section 9(1) judges, but I was referred to very few of them and do not take any account of those to which I was not referred.

are the very heaviest cases that section 9(1) and section 9(4) judges do not regularly undertake, and this accords with the evidence of the claimant Circuit Judges.

40. Sir Geoffrey Vos also seeks to distinguish, at paragraphs 59 – 64 of his witness statement, between the work of section 9(1) and section 9(4) judges. He reminds me that the purpose of section 9(1) judges is to assist in the transaction of the business of the High Court. He says, and it is not disputed, that between the early 2000s and 2015 there were very few section 9(4) appointments. That changed in 2015, since when there have been several very competitive recruitment exercises. Between 2015 and 2019, section 9(1) candidates were told that they would be listed for the same kind of work as section 9(4) judges. But in 2020 it was decided that they should no longer be treated the same, as they had different career paths and different skills. Section 9(4) judges were often practitioners who were seriously considering High Court appointment. Thereafter, Sir Geoffrey Vos says, section 9(1) judges appointed before 2015 and after 2019 were treated differently; section 9(4) was seen as a pathway to High Court appointment, but section 9(1) judges were not necessarily seen as strong contenders for substantive appointment; and section 9(4) judges were offered more challenging category B cases. Lord Justice Baker gave similar evidence in respect of family section 9(1) and 9(4) judges.

41. The difficulty with this is to know how, and how consistently, these shifting work allocation practices have been applied and what the effect, if any, they have had on the work normally undertaken by section 9(1) judges. I return to this below after considering the position in the Family Court. Sir Geoffrey Vos and Mr Waldren assert that the lower standard of section 9(1) judges is shown by the “relatively few” such judges who have been successful in High Court competitions; they do not furnish any comparative figures to support these assertions, and I do not accept that level of success in Judicial Appointments Commission competitions is necessarily an indication without more of a lower standard of candidate.

42. A similar categorisation into A, B or C cases operates in the King’s Bench Division. Generally High Court Judges hear category A cases, although Sir Geoffrey Vos accepted that section 9(1) judges may sometimes hear complex or difficult cases. Of the 71 High Court Judges in the King’s Bench Division, 13 are ticketed for the Commercial Court and 10 for the Technology and Construction Court. The High Court Judges sit for 4-8 weeks a year in the Court of Appeal (Criminal Division), which section 9(1) judges will not do, and most of them hear serious criminal cases on circuit for up to six weeks a year but the amount of time they spend doing so depends on the judge and whether they have specialisms such as planning or media work which occupy them in cases in those specialisms.

43. Most King’s Bench Division High Court Judges have specialisms such as planning, media, BPC or the Employment Appeal Tribunal in which they sit for significant periods. They will also hear general civil cases of a complex nature.

!4 High Court Judges are Presiding Judges who sit on circuit in the regions in complex criminal cases.

44. Turning then to family cases, most are heard in the Family Court, established in 2014. Some residual work remains assigned to the Family Division. Presidential Guidance sets out cases which must be commenced in the Family Division (that is, in the High Court). These include cases invoking the inherent jurisdiction of the High Court such as deprivation of liberty cases, or cases which are commenced in the Family Division but may be transferred to the Family Court; examples are cases involving conflict of laws, or recognition or enforcement of orders abroad or exceptional asylum or immigration issues.

45. In the Family Court, there are four levels of judges who may sit there and cases are assigned to the appropriate level in accordance with (abbreviating the title somewhat) the Family Procedure Rules 2014. These are “Judges of High Court Level” which include High Court Judges of the Family Division and section 9(1) or section 9(4) judges authorised or appointed to sit in the Family Court; judges of “Circuit Judge level” which means Circuit Judges and Recorders; judges of “District Judge level” and lay family magistrates.

46. The Family Procedure Rules 2014 set out how work within the Family Court is distributed. Under rule 20, the factors are effective and efficient use of judicial resource, avoiding delay, the need for judicial continuity, the location of the parties and complexity. Generally, the most complex cases are assigned to substantive High Court Judges but other factors may militate against this and complex cases are heard by section 9(1) or section 9(4) judges.

47. Judges with section 9(1) authorisations or section 9(4) appointments may therefore sit in the High Court (the Family Division) and in the Family Court but are less likely to do so in more complex cases including those of exceptional financial value. Lord Justice Baker, Mrs George, Mr Farquhar and Mr Bugg each told me in evidence, and I accept, that the amount of section 9(1) work varies considerably from time to time and between judges.

48. An important part of the work of the Family Court concerns children. Responsibility for the allocation of this work rests with the 43 Designated Family Judges (of whom Mrs George was one) who lead gatekeeping teams and operate under formal guidance issued in 2016. Broadly speaking, where such cases are to be heard by a judge of High Court level, or where proceedings are commenced in the Family Division, the permission of the Family Presiding Judge (who is always a High Court Judge) must be obtained before any hearing in the proceedings is conducted by a section 9(1) or section 9(4) judge. Factors will include the seriousness and complexity of the issues, the availability of a substantive High Court Judge to hear the case, and in some cases the experience of the section 9 judge. The number of such requests will vary between courts and regions; the more there are (for example in areas of high social deprivation), the more cases must be dealt with by section 9(1) or section 9(4) judges to meet the workload.

49. Lord Justice Baker's evidence supported the evidence and impression of Mrs George, Mr Farquhar and Mr Bugg that over time, the number and complexity of cases being dealt with by section 9(1) and section 9(4) judges has increased and they now hear cases that formerly would have been heard by a substantive High Court Judge.

50. Financial remedies cases are conducted in the Financial Remedies Court which sits within the Family Court. Such cases will only be transferred to a substantive High Court Judge

> **"If it is exceptionally complex or there is another substantial ground for the case being heard at that level and that allocation to that level is proportionate."**

51. In practice this means that cases are only allocated to a High Court Judge if the value is ultra-high or there are complicating issues such as trust assets or assets held abroad. I accept Lord Justice Baker's evidence that there are only about 80 such cases per year.

52. In the Royal Courts of Justice, arrangements are somewhat different. Section 9(4) judges are invited to sit there in both the Family Division and the Family Court. Designated Family Judges are also invited to sit (although not all do). Section 9(1) judges are invited only to hear deprivation of liberty cases (the number of which has increased in recent years following the creation of a national list of such cases under which the first hearing takes place at the Royal Courts of Justice before transfer elsewhere).

53. Substantive High Court Judges hear the most serious cases, including appeals, radicalisation and complex medical cases. International child adoption cases may be heard by High Court Judges but many are heard by section 9(4) judges and section 9(1) Designated Family Judges, who may also hear forced marriage and forced relocation cases and complex care proceedings.

54. Some work in the Royal Courts of Justice is reserved to High Court Judges of the Family Division. This includes emergency out of hours applications and applications for permission to appeal. In addition, High Court Judges of the Family Division undertake activities and have responsibilities outside of sitting commitments. These include acting as Lead Family Presiding Judge, Vice President of the Court of Protection, Lead Reform Judge, Family Presiding Judge (there are eight of these), and lead judges for areas of work such as adoption, appeals, asylum or deprivation of liberty cases. Most High Court Judges sit for several weeks on circuit and the Family Presiding Judges spend 12-18 weeks of the year on their circuits where they share responsibility for leading and allocating judicial resources.

55. I accept that in family cases, the work allocated to section 9(1) and section 9(4) judges differs somewhat. I have mentioned specifically the position in the Royal Courts of Justice. I accept that from time to time, section 9(4) has been used as a way of attracting leading practitioners to think about a career on the High Court Bench. I accept Lord Justice Baker's evidence that section 9(4) judges are offered opportunities to utilise their practice specialisms in allocating cases to them, which may mean, particularly in the Royal Courts of Justice, that they

hear cases of greater complexity. I noted his evidence, however, that even if it is now the intention of the senior judiciary that section 9(4) is the stronger route to appointment, it has not been seen in that way by judges and practitioners in the past. It is clear that in all Divisions of the High Court, policy in this regard has not been consistent. Outside the family jurisdiction, I do not find that there has been any consistent and significant difference in the work done by section 9(1) and 9(4) judges..

Findings of Fact – Section 9(1) Judges

56. I begin with some preliminary and general matters which are not factually in dispute, although the significance of them for the claims is controversial.

57. I set out the terms of section 9(1) above. The statutory purpose of section 9 of the SCA is to facilitate assistance with judicial business.

58. There are about 297 section 9(1) judges across the three divisions of the High Court. Of these, 133 are Circuit Judges, 49 are Senior Circuit Judges and 102 are Recorders. The remainder are mainly Upper Tribunal Judges. I do not have the number of section 9(4) judges. The system relies very heavily on section 9 judges to cover a substantial part of High Court sittings. In his findings of fact, Employment Judge Williams noted that Lord Woolf in 2000 recorded that in the previous 12 months the total number of sitting days by section 9 judges in the three divisions of the High Court was 2,301. Further, Employment Judge Williams recorded that in 2005, section 9 judges did approximately 45% of High Court sitting days. I do not have more up-to-date figures but I have no reason to think that proportion has decreased.

59. The claimant Circuit Judges are or were authorised to act as High Court Judges under section 9(1) by virtue of their status as salaried Circuit Judges (or, in the case of Mr Barker, as a Senior Circuit Judge).

60. The claimant Circuit Judges have not received any additional remuneration beyond their Circuit Judge or Salaried Circuit Judge salary for any of their section 9(1) sittings. Thus they are not paid at the pro rata equivalent of a High Court Judge's salary for their sittings. They agree that they were aware when they accepted section 9(1) authorisation that they would not receive any additional remuneration for the role.

61. I interpose that Recorders may also be authorised under section 9(1). Recorders form a significant proportion of the cadre of section 9(1) judges: something over 30%. Some Recorders also hold salaried judicial office; if so, they do not receive any additional remuneration beyond their substantive salary for their section 9(1) sittings which they undertake in their salaried time. If they do not hold a salaried judicial office, as many Recorders do not, they receive the pro rata equivalent of a High Court Judge's salary for their section 9(1) sittings.

62. The claimant Circuit Judges' section 9(1) sittings count towards and are included in their salaried sitting commitment of 210 days per year as Circuit Judges. The terms of appointment of Circuit Judges in their various iterations at least since 2000 have required Circuit Judges to devote at least 210 days to "the business of the courts" and "judicial business" (without specifying or limiting what that business consists of).

63. Although they may keep their own, informal records, I heard no evidence that they, or any other section 9(1) judges, were required to maintain, or the administration maintained, any official record of the number of section 9(1) sittings undertaken by them.

64. Section 9(1) judges receive only a brief letter confirming their authorisation. The letters which I have seen in the bundle vary slightly in wording, but Mrs George's letter dated 22 October 2014 (1772) is typical:

> **Dear Judge**
>
> **Authorisation under section 9(1) of the Senior Courts Act 1981**
>
> **I am pleased to inform you that following the agreement of the Judicial Appointments Commission and consultation with the Lord Chancellor, I am including your name in the pool of judges who can sit as Deputy Judges of the High Court under section 9(1) of the Senior Courts Act 1981 as amended by the Courts and Crime Act 2013.**
>
> **I wish to take this opportunity to congratulate you on your appointment to the Circuit Bence."**

65. Mr Barker's letter was in similar terms:

> **Dear Judge**
>
> **Authorisation under s.9(1) Supreme Court Act 1981**
>
> **I understand that, following selection by the Judicial Appointments Commission (JAC), you have accepted appointment and are shortly to be sworn in, as Specialist Chancery Judge at the Birmingham Civil Justice Centre.**
>
> **Under section 9(1) Supreme Court Act 1981, as amended by Schedule 4 paragraph 121 of the Constitutional Reform Act 2005, the Lord Chief Justice has the power, with the concurrence of the JAC and after consulting the Lord Chancellor to authorise Circuit Judges to act as a judge of the High Court. The Lord Chief Justice has delegated that power to me in respect of the Chancery Division.**
>
> **The concurrence of the JAC and consultation with the Lord Chancellor has taken place as part of your selection process and I am therefore authorising you, with effect from your date of appointment to the Circuit Bench, to sit as a High Court Judge as required by the business needs of the court, with the intention that you will sit in the Chancery Division.**
>
> **May I take this opportunity to congratulate you on your imminent appointment."**

66. It is notable that the letters include no terms and conditions of appointment or reference to remuneration (in contrast to the Conditions of Appointment and Terms of Service issued to section 9(4) appointees.

67. Deputy High Court Judges[7] may be appointed under section 9(4) of the SCA to facilitate the disposal of business in the High Court. As long as they are qualified for appointment as puisne (substantive salaried) judges of the High Court, they are not required to hold salaried (or indeed any other) judicial office. Most of them are experienced senior practitioners who do not hold salaried judicial office. They receive the pro rata equivalent of a High Court Judge's salary for their section 9(4) sittings, unless they hold salaried office, in which event in line with the respondents' practice they receive no additional remuneration for section 9(4) sittings in their salaried time.

68. The respondents' undisputed evidence is that their consistent policy has been that judicial "sittings-up" falling within salaried time do not attract any additional remuneration beyond the salary for the substantive salaried post. The claimant Circuit Judges have been paid in accordance with this policy. This is equally the case if judges "sit-down" in a lower-remunerated post, such as Court of Appeal judges sitting in the High Court; they continue to receive their substantive salary. However, I observe in this regard that there is a statutory prohibition on reducing judges' salaries.

69. As Deputy Director of the Judicial Pay and Pensions Division, Mr Waldren is responsible within the Ministry of Justice for policy on judicial remuneration. He has been in post for less than two years, and he was candid in his evidence that he had drawn on others and on relevant documentation for information about historic practice, including the evidence given by Mr Masterson given at the hearing before Employment Judge Williams. Although he was obliged to retract in his oral evidence a section of his witness statement about the sitting statistics of section 9(1) judges, and whilst accepting the limitations of his personal knowledge, I had no reason to doubt the accuracy of what he told me about the respondents' policy.

70. Having set out that many salaried judges are asked to sit in jurisdictions different to those to which they are substantively appointed, Mr Waldren described the respondents' general policy in this area in paragraph 10 of his witness statement:

> **"The respondents' general policy and practice…is that when salaried judicial office holders are deployed to sit in a different Court or Tribunal, they are paid at the rate applicable to their salaried office and not at a different rate which would be applied to an office in that other Court or Tribunal (which may be higher or lower, as the case may be).**

71. He observed that the origins of this practice are unclear:

> **"The origin and development of this policy cannot be sourced back to a single unifying document but has developed over time and can be evidenced from a variety of sources and also general practice."**

[7] Section 9(1) judges have from time to time also adopted the term Deputy High Court Judge, and Mrs George's letter of authorisation includes it, but the legislation confers it only on appointees under section 9(4).

72. He referred to the terms of appointment for Circuit Judges which say this, at paragraphs 34-37 of the 2009 edition:

"The Lord Chancellor and [Lady] Chief Justice consider it essential, in particular because of the burden of work on the courts and tribunals., for Circuit Judges to devote at least 210 days in each year, and perhaps more, to the business of the courts…in order to ensure that 210 sitting days can be achieved, notwithstanding any hearings which might be cancelled, the Lord Chancellor and [Lady] Chief Justice thus expect that the initial plan for any year's work will provide for judges to devote between 215 and 220 days to judicial business…"

73. He then described the aims of the policy at paragraphs 17-21 of his witness statement, which I set out in full:.

"17. As to the aims of the policy, as set out in the Respondents' pleaded case, these are threefold:

(a) fair and flexible deployment of judges to Court and Tribunals whose office holders may be paid at rates which are different (higher or lower) than theirs;

(b) fair allocation of resources (including the difficulties of administering a system involving differential rates of pay for CJs undertaking s9(1) duties); and

(c) reflecting the differences in hierarchy and the differences in full-time roles as between judicial roles. A linked point is that s. 9 allows some salaried and fee-paid judges to gain insight into the work of other jurisdictions and to gain career development opportunities.

In relation to these aims:

a. Taking first the fair and flexible deployment of judges, it is essential to the smooth and effective running of the justice system that judges of appropriate experience can be deployed into different courts and tribunals to meet business demand. A statutory cap exists on the number of High Court Judges (currently 108, deriving from the Senior Courts Act 1981 s. 4(1)(e)). This means that flexibility is required in terms of deployment because business needs can vary. It also ensures that judicial work can be prioritised in a fair and efficient way, ensuring that cases are dealt with by a judge of suitable experience. Maintaining consistency of pay in these situations has obvious administrative and planning advantages, but it also ensures consistency, predictability and fairness – a Circuit Judge sitting in his/her salaried hours in a different jurisdiction (whether for an hour or a day or a week) will continue to be paid as a Circuit Judge, in exactly the same way that a High Court Judge will continue to be paid at his/her salaried rate if sitting in a different jurisdiction. Judges are subject to statutory salary protection (in the case of tribunal judges, the MoJ applies the principle by analogy) in order to protect judicial independence. If the salary they receive could be impacted by decisions about where they sit then this endangers judicial independence. It also has the ability to create real and/or perceived conflicts of interest for serving judges. In some situations, a discretional judicial decision will be required to determine if a case should be dealt with by a s. 9(1) judge. I understand that this is particularly apparent in Family Court work, where permission will in certain situations be needed from the Family Presiding Judge for a case to be heard by a s. 9(1) judge following a referral by a circuit judge, who may well be the s. 9(1) judge who could hear the case. If different rates of pay applied to s. 9(1) work, this would give rise to difficulties because (a) the judge making the initial referral could benefit financially from categorisation under s. 9(1); and (b) the judge responsible for making that decision would effectively be responsible for deciding how much another judge should be paid for undertaking work within their normal salaried time. These points concerning independence are relevant to aim (a), but I also rely on them in relation to (b) below. This also has the potential to affect the working relationship between circuit judges and Family Presiding Judges.

b. As to the fair allocation of resources (including the difficulties of administering a system involving differential rates of pay for CJs undertaking s9(1) duties), it is important that judges are paid consistently with their salary grade, and their terms and conditions of appointment, in relation to their salaried sittings. If judges were paid at different rates depending on where they sit, as opposed to by reference to their salaried terms, this could lead to difficulties. First, in situations where the judge is sitting in an inferior jurisdiction, the pay in that jurisdiction could actually be lower than their salaried rate. A salaried judge, understandably, would not wish to be paid at a rate which is lower than his/her salaried rate. Examples of this situation are set out below at paragraph 21. Second, there would be resourcing implications of paying judges above their salaried rates which would lead to higher costs. The Respondents' policy enables it to manage its resources in a way that creates fairness and consistency, but also which enables it to maximise the available judicial resources in an efficient way. There can be no doubt that if the Respondents did not operate the policy in the way they do, then there would be significant financial consequences, not only in terms of the additional fees payable but also in relation to administration and management costs, due to the complexity of some claims arising from short periods (see paragraph 19(g) below). An eventual consequence of the financial burden may be a lesser use of s. 9(1) in favour of meeting the demands of the High Court in different ways or further increasing the delays in the system, which could result in fewer opportunities for judges to undertake work in different jurisdictions (which can bring with it job satisfaction and career development advantages). This might be achieved for example by changing the jurisdictional boundaries between the County Court and High Court; or by increasing the financial value threshold for a civil claim to be issued in the High Court. It is likely that, if the cost burden was increased, then savings would need to be made elsewhere, and so ultimately there could be a negative impact on the administration of justice. The impacts have not yet been fully modelled and determined, but it is safe to say that they would be significant in financial and administrative terms. This is to be distinguished from work MOJ is currently doing to review the 'Additional Fees' policy. This review is looking into differences of remunerating non-sitting activities, such as fees for preparing cases, across the fee-paid judiciary. These differences reflect inherited arrangements that pre-existed the unified structure created in 2007. The review is not considering the issue in this case, i.e. giving additional remuneration for doing elements of the work of a salaried judge of a higher grade within a Circuit Judge's normal salaried time.

c. Lastly, in relation to reflecting the differences in full-time roles, it is fair and reasonable for judges of different rank to be paid at different rates to reflect the judicial hierarchy. In respect of the High Court, the Respondents want the most exceptional practitioners to aspire to the High Court Bench. Offering superior pay compared to other judicial offices is one way of achieving this. The superior pay also reflects the difference in the work generally done in the High Court by Circuit Judges compared to High Court Judges; and the other leadership responsibilities attached to a High Court Judge's role outside of sitting commitments which I understand will be referred to in the witness statements of the Master of the Rolls and Baker LJ. Similarly, the remuneration of a Circuit Judge is set at a higher rate than other roles, such as the office of District Judge, which on the same basis is a fair and reasonable approach.

18. This policy approach enables the Respondents to make optimal use of judicial resources, having regard to: securing the proper administration of justice as economically and efficiently as possible; meeting the business needs of the courts and tribunals; and facilitating the development of judicial careers through enabling greater flexibility in the deployment of judicial office holders in courts and tribunals.

19. There are a number of reasons for the Respondents' policy approach which explains why Circuit Judges and Senior Circuit Judges are not paid at the rate of High Court Judges under s. 9(1) consistent with these aims, which also serve to show that the Respondents' approach is proportionate to them. They include:

a. Generally, when a Circuit Judge sits in the High Court through s. 9(1) authorisation, this will be just one element of the work Circuit Judges generally do (much of which will not require s. 9(1) authorisation). Usually s. 9(1) work will not represent the majority of the

overall work which the Circuit Judge will do. The amount of s. 9(1) work undertaken by Circuit Judges will of course vary between judges, some will do comparatively more or less s. 9(1) work than others. I appreciate that some Senior Circuit Judges (who are in any event already paid more), particularly those in the Business and Property Courts, may undertake a relatively higher proportion of specific s. 9(1) work but, on my understanding, their situation is not reflective of that which generally applies to ordinary Circuit Judges with s. 9(1) authorisation. As I also comment on further below, the data we have available tends to show that overall Circuit Judges generally spend the majority of their time doing their staple Circuit Judge work, as opposed to s. 9(1) work. However, as I have already acknowledged, the amount of s. 9(1) work done by a Circuit Judge is likely to vary as between individual judges. The term of authorisation/appointment under ss. 9(1) and 9(4) is currently a fixed period of 6 years. This was increased in or around 2018 from 4 years. This was because it became apparent that, for the s. 9(4) judges, and those s. 9(1) judges in the 2015-2019 cohort (which I discuss later), a 4 year term provided insufficient career development opportunity to support a future High Court Judge application. Whilst from 2020, s. 9(1) is not looked at as a 'pipeline' to the High Court Bench in the way which applies to s. 9(4) judges, the 6 year term has been retained. Prior to the JAC's involvement in the s. 9(1) recruitment process, my understanding is that authorisations were renewed automatically on an annual basis.

b. As discussed earlier, s. 9(1) is an authorisation. It is not a separate appointment. Unless a Circuit Judge also holds an appointment under s. 9(4), a Circuit Judge will have no free-standing right to sit in the High Court other than through s. 9(1) authorisation, which is ultimately linked to a preexisting salaried office. Opportunities for ss. 9(1) and 9(4) recruitment competitions arise periodically and are advertised on the Judicial Office and JAC websites. I understand that there are public announcements in the case of s. 9(4) appointments, but this does not happen for s. 9(1) authorisations. This is because they are not appointments, and those who are given authorisation will already hold a pre-existing judicial appointment.

c. As I understand will be set out in greater detail by the Respondents' other witnesses, the Master of the Rolls and Baker LJ, there are important differences between what s. 9(1) judges and High Court Judges do. Although from the Respondents' perspective there is the expectation that those who are granted s. 9(1) authorisation will be high calibre individuals, my understanding is that it is nevertheless the case that s. 9(1) judges will generally do work of lower value, complexity and/or importance relative to High Court Judges. That is not to say that there will never be exceptions, but it represents the general situation. Ultimately, Circuit Judges are not High Court Judges, rather it is the case that some Circuit Judges are authorised through s. 9(1) to undertake some types of High Court work, and there are practical limits to the type of High Court work they are permitted to perform, because the most important, valuable and complex work will be done by High Court Judges. Circuit Judges are positioned lower than High Court Judges in the judicial hierarchy not least because of the difference in the work performed, and it is reasonable that this is reflected in their pay.

d. Furthermore, High Court Judges perform numerous important and essential tasks outside of their court sittings which are not performed by s. 9(1) judges. If Circuit Judges also perform tasks outside of their court sittings, which some (but not all) do, they do such activities as Circuit Judges. This is linked to their salaried role and is not relevant to their s. 9(1) work. I understand that in their witness statements, the Master of the Rolls and Baker LJ will set out examples of the types of work that High Court Judges perform, outside of their sittings, and as part of their salaried role, which s. 9 judges do not. It is reasonable that such work is reflected in the pay of High Court Judges as compared to Circuit Judges with s. 9(1) authorisation.

e. As I have explained, the effect of the terms and conditions of office, which apply to salaried judges, including those applicable to Circuit Judges, are clear that instances of flexible deployment in different jurisdictions form part of the salaried role. Circuit Judges are (or, at least, arguably should be) aware upon entering office that, if they are authorised to sit in the High Court under s. 9(1) in relation to their salaried role, they will not receive higher remuneration.

f. There are also situations where judges are asked to sit in different, arguably inferior jurisdictions, both under s. 9(1) but also in a wider sense. The clear advantage of the policy is that it provides general consistency and predictability to such situations, whether or not the judge is required to sit in an inferior or superior jurisdiction.

g. The way in which s. 9(1) is used can be very flexible in practice, particularly in relation to work carried out on circuit. My understanding is that it is not the case that all s. 9(1) sittings are booked out far in advance of a Circuit Judge's diary, although there clearly are situations where this does occur particularly for those occasions when a judge on circuit comes to London to undertake s. 9(1) sittings. I understand that flexibility is particularly important in relation to Family Court work due to the jurisdictional limits of the Family Court, such that a need can arise on a relatively ad hoc basis for jurisdiction to be exercised by a judge of High Court level, for example if certain orders need to be made, which I understand Baker LJ will provide greater insight into in his witness statement. I understand that there is detailed Presidential Guidance in relation to the allocation and transfer of work in the Family Courts and the Family Division of the High Court. There are relevant documents to the issue in the bundle, including at [937-970; 1226-1233]. Much family work will be dealt with on the Circuits, whereby the judges with s. 9(1) authorisation are likely to be dealing with lists that require their jurisdiction to be used flexibly. I understand that a judge doing s. 9(1) work may only be doing so for a part of their day or for a particular purpose when this arises, as opposed to the whole day, or may need to seek permission to sit in a s.9(1) capacity as and when a need to do so becomes apparent. If different rates of pay were to be applied each and every time this occurred, which in practice would be extremely difficult if not impossible to predict from a planning perspective, then this would lead to difficulties and complications in terms of the administration of judicial pay, and as I have discussed earlier will have the undesirable consequence of making judges responsible for decisions which had consequences for the amount of salary paid to other judges.

20. The same approach applies (albeit via a different mechanism and under different circumstances) to a salaried District Judge who sits as a Recorder (under a separate, fee-paid, appointment) within his/her salaried time. Whilst this situation falls outside of s. 9, it falls within the generally applicable policy approach described above, the effect of which here is that a salaried judge will not be paid at a different rate when sitting elsewhere, in a different fee-paid capacity, within their salaried time. In such circumstances the District Judge would continue to receive their salary, but would not be given any additional remuneration, and this is reflected in their terms and conditions.

21. It is important to stress again that flexible deployment does not always equate to deployment into a higher jurisdiction. Judges are asked to sit in lower courts or tribunals, where work demands and resourcing require this. In such instances, they continue to receive remuneration that is due under their terms and conditions of salaried office. Taking s. 9(1) on its face, there will be situations where a particularly high-profile case which is to be heard in the High Court requires a Lord or Lady Justice of Appeal to sit as a High Court Judge. I understand that examples were given in the witness statement of Sir Brian Leveson, and that this will also be commented on by the Master of the Rolls in his statement. Section 9(1) facilitates this. There are also examples which fall outside of s. 9(1), but which demonstrate that the policy of flexible deployment which predicates the Respondents' approach does not only flow in one direction. On this point, I again refer the Tribunal to the witness statement of Sir Brian Leveson, who discussed a number of such examples which include High Court Judges sitting in the Upper Tribunal and in the Crown Court, and Circuit Judges sitting as coroners or assistant coroners, and on the Parole Board. Furthermore, I understand it was the evidence of Simon Masterson that in 2019, as a result of a shortfall of District Judges and Deputy District Judges, a number of courts in London identified an accumulation of box work. At this time, Recorders were specifically booked and deployed to specific courts to hear the lists of the District Judges so that they could be released to dispose and reduce the levels of the box work. The Recorders were booked as Recorders, and therefore received the relevant Recorder fee despite the level of work being that of a District Judge or Deputy District Judge. This reflects the general position that where a judge sits in an inferior jurisdiction in their

salaried (or, in the above example, fee-paid) time, they will nevertheless continue to be paid at the rate applicable to their office, even though judges who sit in that jurisdiction will ordinarily be paid less than this."

74. Mr Waldren told me in oral evidence, and I accept, that despite the first sentence of paragraph 17, he was narrating the respondents' policy which was consistent with their case in these proceedings, rather than reciting their case as if it were evidence.

75. At paragraph 17 of the Judicial Office Flexible Deployment and Assignment Framework 2020, the following appears:

"[Where a judge sits in an alternative jurisdiction] whether an assignment, authorisation or other form of permission to sit which does not constitute a separate appointment, [this] does not affect a judge's appointment to judicial office or their existing terms and conditions of service, including pay and pension provision."

76. Whilst he does not suggest that this is the reason for the policy, Mr Waldren observes that it is consistent with the Civil Service Management Code which provides that public servants do not receive any additional remuneration for other work which is part of or concurrent with their salaried role.

77. Mr Waldren told me that where salaried judges sit full-time, all of their sittings are regarded as done within their salaried role and remunerated accordingly. He accepted that it would not be impossible to find ways of identifying and separately remunerating section 9(1) work, but said it would be very complex as there was no kind of template for it. He acknowledged that there were systems for paying fee-paid judges fees for additional work such as writing-up judgments on a time basis, but these were marginal and were under review in any event with the aim of simplifying and basing fees on sitting time allocated to the case. He suggested that it might be difficult to identify what was section 9(1) work and recording time would be burdensome for judges. There would be a need to develop new systems and policy issues to be worked through. He acknowledged that there had been no modelling of the administrative time and cost involved.

78. Mr Waldren suggested that it encouraged planning and flexibility of deployment if there was consistency of pay. He accepted that in paragraph 17b he was saying that savings might have to be found elsewhere to cover any increased costs. As to the possibility of conflicts of interest, he said that his concern was around the perception of conflict rather than actual risk that judges would act without integrity in allocating work.

79. I find, indeed it has not been disputed, that the policy has existed for many years, and is applied across the judiciary as a whole where "sitting up" takes place within salaried time. I have heard no evidence about when, if ever, the policy was different. I think it likely, looking at the wording of section 9(6) of the SCA and the absence of any provision conferring entitlement to additional remuneration for section 9(1) sittings (in contrast to the position as to section 9(4)) that it has existed at least since the enactment of the SCA. As similar wording to section 9(6) appeared in the precursor legislation in the CA, it

seems likely it has existed since the office of Circuit Judge came into being in 1971.

80. In recent years many judges have opted to work on a salaried part-time or fractional basis, subject to the respondents' agreement in each individual case based on business need. In furtherance of this, the respondents have adopted a formal Salaried Part-time Working Policy.

81. Where a judge works to a fractional pattern, it is possible (although I accept not encouraged by the respondents[8]) for some judges to sit in a more senior capacity, such as a District Judge sitting as a Recorder, outside their salaried sitting time. In those circumstances the Recorder sittings are paid at the pro rata higher rate, so for a Recorder pro rata to the salary of a Circuit Judge, in addition to substantive salary and do not count towards salaried sitting day expectations, whereas if undertaken in salaried time, they do not attract any additional remuneration and they count towards the sitting day commitment. However, no Circuit Judge has sought to undertake section 9(1) sittings in non-working time, and I accept the evidence of Mr Waldren and Sir Geoffrey Vos that were a request to be made, the respondents would not permit it, as sitting under section 9(1) in non-salaried time would be inconsistent with section 9(1) being an authorisation and considered to be part and parcel of the judge's salaried Circuit Judge work. I add that it is not possible for a judge to sit fee-paid in retirement as a section 9(1) judge; the authorisation falls away upon retirement from the salaried role pursuant to which authorisation was granted.

Findings of Fact – the claimant Circuit Judges

82. I turn then to the relevant individual circumstances of each of the claimant Circuit Judges.

Mrs George

83. Mrs George was appointed as a full-time Circuit Judge sitting in the family jurisdiction on 22 October 2014. At the same time she received authorisation to act as a High Court Judge under section 9(1), having applied in both capacities in a Judicial Appointments Commission selection exercise. She applied because she believed it would give her access to a wider and more interesting variety of judicial work. She became the Designated Family Judge for Leicestershire on 3 December 2018 and she retired in April 2022.

84. Based on her figures which she referred to in evidence, and which I accept, in the period April 2017 to January 2020 Mrs George sat on section 9(1) business on 162 days. Assuming 210 sitting days per year, this amounted to a little less than 30% of her sitting days in that period. However, only 73 days were full days and the remainder were days spent partly on section 9(1) business (mostly directions hearings) and partly on Family Court Circuit Judge business. Sometimes she sat for only an hour on section 9(1) work and the remainder of the sitting day was Circuit Judge/Family Court work. Occasionally it was

[8] In evidence Mr Waldren described it as "anomalous", on the basis the rate of pay was dictated by the salaried office or appointment held

necessary to switch between Family Court Circuit Judge and section 9(1) work in the course of the same hearing.. A small number of the section 9(1) hearings were multi-day final or fact-finding hearings, one of which was 10 days and another 15 days.

85. Mrs George told me that as a Family Court Circuit Judge, she heard public law cases of more complexity, possibly including an international element, serious non-accidental injury or medical issues. Private law cases at Circuit Judge level might also involve an international element or particularly intractable issues. In 2015, she was appointed as a judge of the Court of Protection but she did not undertake any sittings in the Court of Protection as a section 9(1) judge. I accept her assessment that a high proportion of cases at High Court level of seriousness or importance are now heard by section 9(1) or 9(4) judges as the volume of work is too great to be dealt with by the substantive High Court Judges, of whom there are only 19 in the Family Division. Otherwise as she said, the system could not cope.

86. Mrs George gave examples of cases which she had dealt with at High Court level. These included applications to relocate with children to a non-Hague Convention country involving factual and legal complexities; a 15-day fact-finding hearing involving possible criminal damage and arson committed by the father at the mother's property; a care case involving the murder of the mother in sight of the children; cases about the relinquishing of a baby in cultural or family honour situations. Mrs George expressed the opinion that these cases involved work indistinguishable from that undertaken by substantive High Court judges, and I accept that assessment.

Mr Farquhar

87. Mr Farquhar was appointed as a full-time Circuit Judge sitting in the Brighton Family Court on 9 October 2013 and received his section 9(1) authorisation on 19 July 2016. In 2019 he was appointed as Lead Judge for Financial Remedies for Kent, Surrey and Sussex and he estimated that financial remedies work occupied him for about one week per month. He also sits in the Court of Protection and the First-tier Tribunal (Mental Health). He told me that he sat as a section 9(1) judge on 24 full-day hearings and 11 short hearings in 2018 but he could find evidence of very few section 9(1) hearings in other or later years. Given this, and his evidence to which I refer in the next paragraph, I infer and find that his section 9(1) sittings have been only a small amount of his time.

88. Mr Farquhar explained, and I accept, that as a Circuit Judge in the Family Court, he heard the more complex public law children cases, private law and ancillary relief disputes. He also spent about 20 days per year in the Court of Protection. The time he could devote to section 9(1) work was limited by his other activities including financial remedies, Court of Protection and Mental Health. He had conducted as a section 9(1) judge a 15-day fact find in a complex care case involving multiple health issues in 2018. In the same year he had conducted a four-day hearing in a shaken baby case. Mostly the section 9(1) work related to applications in cases involving deprivation of liberty, vaccinations or international disputes. These were often included in a list

otherwise comprising Circuit Judge Family Court work. He had dealt with only one case at High Court level in the Court of Protection or in respect of financial remedies.

Mr Bugg

89. Mr Bugg was appointed as a full-time Circuit Judge sitting in the East London Family Court on 22 January 2019 and received his section 9(1) authorisation on 15 October 2019. He estimated, and I accept, that he had conducted "well over" 100 section 9(1) hearings in total in the years 2021-2023 but the frequency varied considerably.

90. As a Family Court Circuit Judge Mr Bugg deals with child protection and private law disputes. He spends two weeks per year sitting in the Deprivation of Liberty List in the Royal Courts of Justice. This latter work must be dealt with at High Court level as it relates to potential deprivation of liberty and accordingly this is work he undertakes under section 9(1).

91. Consistent with Mrs George's evidence, Mr Bugg told me that from his experience as a practitioner in the field, some of the cases which he heard as a section 9(1) judge would in past years have required a substantive High Court Judge, such as the murder of the mother by the father in front of the children; cases involving asylum-seekers; and very serious sexual abuse. The work done by section 9(1) judges has become more complex over the years.

92. Each of Mrs George, Mr Farquhar and Mr Bugg told me that section 9(1) work in the family jurisdiction could arise in two ways: (1) cases proceeding in the Family Court that for reasons of complexity or the significance of the issues or which raised issues of deprivation of liberty should be tried by a judge at High Court level (either a substantive High Court Judge or a section 9(1) judge) or (2) cases proceeding in the Family Division of the High Court because they engaged the inherent jurisdiction of the High Court such as wardship or were required by the Family Procedure Rules such as international child abduction. They accepted that there were cases which were always dealt with by a substantive High Court Judge, such as financial remedy cases involving ultra-rich individuals, life support cases or issues involving radicalisation. They observed that it could happen that matters requiring a judge of High Court level such as deprivation of liberty and more straightforward questions that were suitable for the Family Court arose in the same hearing, meaning the judge effectively had to change jurisdiction mid-hearing.

93. As Mrs George explained in evidence, a section 9(1) authorisation did not in itself confer on a Family Court Circuit Judge jurisdiction to act as a section 9(1) judge in any particular case. The practice in the Family Court and Family Division was that judges were required to obtain the permission of the Family Division Liaison Judge, who is always a substantive High Court Judge, to act under section 9(1). This was where it appeared that the facts or circumstances of the case engaged the jurisdiction of the Family Division or the case remained in the Family Court but was of such seriousness as ordinarily to require a judge of High Court level to hear it, in accordance with the Public Law

and Private Law Schedules covering allocation of cases between different levels of judges and Presidential Guidance issued by the President of the Family Division from time to time. I saw in the bundle several examples of emails between the claimant Circuit Judges and Family Division Liaison Judges about the allocation of work which required or might require a judge at High Court level to hear it and whether they could or should be allocated it to hear under section 9(1).

Mr Barker

94. Mr Barker was appointed as a full-time Specialist Senior Circuit Judge (Chancery) on 27 October 2010, sitting at the Birmingham Civil and Family Justice Centre. At the same time he received separate authorisations under section 9(1) to act as a High Court Judge in (1) the Chancery Division and (2) the Mercantile Court and Technology and Construction Court. These now form part of the BPC, and where I describe the work Mr Barker undertook under these arrangements, I shall, unless the context otherwise requires, describe them as BPC work. In April 2012, he was also authorised to sit in the Administrative Court. He retired in 2020.

95. Mr Barker's working arrangements, and the division of his work between section 9(1) and Circuit Judge duties, were substantially different to those of Mrs George, Mr Farquhar and Mr Bugg as Family Circuit Judges, and so I must describe then in more detail.

96. Mr Barker's undisputed evidence, which I accept, is that he sat in his section 9(1) capacity for about 80-85% of his annual sitting commitment of 210 days and as a Senior Circuit Judge for the remainder. He divided his time sitting as a section 9(1) judge between London and Birmingham.

97. Mr Barker devoted at least 30 days per year to BPC work as a section 9(1) judge in London. In practice, in some years he did more than this; I accept his evidence that between 2010 and 2020, he sat for more than 300 days in London as a section 9(1) BPC judge, generally in fortnightly blocks.

98. In London, Mr Barker undertook a wide range of trials, applications, and appeals. These covered business, company law, wills and administration of estates, trusts, corporate insolvency and intellectual property but not patents. He had no involvement in the allocation of work to him. Most of the cases he heard were category B. He agreed that Category A cases were relatively rare in London and very rare in Birmingham and might be lengthy, of high financial value or exceptional complexity or public importance.

99. Mr Barker provided, at paragraphs 123-174 of his first witness statement, numerous examples of cases which he undertook as a section 9(1) judge. It is unnecessary to refer to these individually in this decision; I accept that they show Mr Barker regularly and routinely undertaking complex and difficult work at High Court level, although not the most weighty cases which were categorised as grade A. In that regard, Mr Barker accepted that substantive High Court Judges undertake category A cases of great complexity, public

importance or difficulty and whilst the number of such cases is small, they may be extremely lengthy and inherently unsuitable for section 9(1) judges for whom section 9(1) work is mot their primary activity. He observed, however, that by definition all of the section 9(1) work he did was work suitable to be done by a High Court Judge.

100. Mr Barker accepted also that substantive High Court Judges have leadership and management responsibilities which he did not have as a section 9(1) judge (although he did have them in his role as Senior Circuit Judge). The Presiding Judges and Deputy Presiding Judges who have leadership responsibility for circuits are always High Court Judges. The Supervising High Court Judge for the Midlands Circuit had responsibility for BPC work across the whole circuit and as on-site lead judge for BPC matters at Birmingham, Mr Barker reported to him.

101. Each of Mrs George, Mr Farquhar, Mr Bugg and Mr Barker told me in evidence that they always regarded themselves as full-time Circuit (or Senior Circuit) Judges holding one or more section 9(1) authorisations. Mr Barker agreed that he would not describe himself as part-time; he perceived himself to be a full-time judge, and a full-time salaried Senior Circuit Judge with two section 9(1) authorisations.

102. Each of the claimant Circuit Judges agreed that flexibility of deployment was a feature of assisting the business of the courts, and that their terms and conditions did not limit them to the County Court. Mr Barker told me that when he applied for the role of Senior Circuit Judge, section 9(1) authorisation was "part of the package", in that he needed the authorisation for the Senior Circuit Judge role that he applied for.

103. It will be apparent from the foregoing, and I find, that the extent of the section 9(1) duties undertaken by the claimant Circuit Judges varied considerably. For Mr Barker, such duties were the majority of his work and required of him from the outset as part of the Senior Circuit Judge for which he applied; for Mrs George and Mr Bugg less so but still significant; and for Mr Farquhar substantially less so.

Findings of fact - Mr Atherton

104. Mr Atherton was appointed as a salaried District Judge on 16 June 2000, initially assigned to Leeds County Court before transferring to Newcastle County Court in July 2001. He sat full-time (a sitting commitment of 215 years per year) until 1 November 2011 when he reduced to a 90% fractional arrangement. He sat across the range of civil and family jurisdictions in the High Court and Family Court, with a specialism in technology and construction. He sat about 80% at Newcastle and 20% in other courts in the region. He was the Lead Judge for Chancery and Technology and Construction in Newcastle. He retired on 26 August 2019.

105. Mr Atherton was appointed as a Recorder sitting in crime on 29 May 2002. His letter of appointment (3037) dated 6 June 2002 from the Lord Chancellor's

Department stated that his appointment was made under section 21 of the CA, which, by way of reminder, states:

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

106. Mr Atherton subsequently obtained tickets to sit as a Recorder in civil, Technology and Construction, private and public family and serious sexual offences. He continues to sit as a Recorder since retiring from his salaried role. From November 2011, he undertook Recorder sittings within both his 90% salaried time and his 10% non-working time. His appointment as Recorder was separate to his salaried District Judge appointment and he did not undertake any work in crime as a District Judge whereas crime was a substantial part of his work as a Recorder.

107. As a Recorder, Mr Atherton spent 18 days between December 2002 and April 2003 on training and induction into the crime jurisdiction. Thereafter until November 2011 he sat as a Recorder on 277 days and on 442 days in total during his period of service as a District Judge. He arranged his Recorder sittings some months in advance (although he did occasionally sit at short notice) and the sittings were booked out of his District Judge diary (and so reduced the days on which he sat as a District Judge). The sittings counted towards both his sitting commitment of 215 days as a District Judge and 20 days as a Recorder.

108. Mr Atherton did not receive any additional remuneration beyond his salary as a District Judge for his Recorder sittings undertaken in his salaried time. Thus he was not paid for such sittings pro rata to the remuneration of a salaried full-time Circuit Judge as a Recorder without a salaried judicial appointment would have been paid. He was paid pro rata to the Circuit Judge rate for his sittings outside his salaried time.

109. Mr Atherton accepts that he was aware that he would not receive additional remuneration for his Recorder sittings. his Memorandum of Conditions of Appointment and Terms of Service stated (in its 1998 and 2009 editions) that:

"if a District Judge wishes to sit as a Recorder, and is so appointed, he will be expected to sit for a minimum of 20 days in that capacity…No extra remuneration in addition to his salary as a District Judge may be claimed in those circumstances."

110. Mr Atherton also accepts that his terms of appointment as a Recorder stated this:

"The daily fee is the salary of the full-time office holder divided by 220 on the basis that the full-time office holder is required to sit 220 days per annum.

….

Full-time holders of judicial office receive no remuneration for any part-time office held concurrently irrespective of how much time is devoted to sitting in a part-time capacity or when party-time sittings are undertaken."

Relevant law, deliberations and conclusions

111. This concludes my findings of fact. I shall set out the relevant law, my conclusions and the reasons for them by reference to the Agreed Generic List of Issues. I shall refer to counsel's submissions as I do so.

112. It will emerge that my conclusions and decision on Issue 1 are determinative of the claims. It is strictly unnecessary, therefore, to decide Issues 2,3 and 4. However, to assist the claimants in these and the stayed cases, I shall make findings on the remaining issues based on assumptions which I will identify.

113. I begin with Issue 1, and set it out again for ease of reference.

Issue 1

1. PART TIME WORKERS

1.1 Are the Claimant Circuit Judges (or were the Claimant retired Circuit Judges) part-time workers within the meaning of the Part-time Workers Directive ('PTWD') and/or the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR') when undertaking work in the High Court pursuant to their authorisation under s9(1) Senior Courts Act 1981 ('the SCA')?

1.2 Was the Claimant retired District Judge a part-time worker within the meaning of the PTWD and/or the PTWR when undertaking work as a Recorder during his salaried District Judge time? The Respondent accepts that he was a part time worker from 1 November 2011 when he went down to 90%.

114. By way of preliminary observation, the position of the claimant Circuit Judges and of Mr Atherton is not necessarily the same in relation to this or the other issues and I shall, here and elsewhere, consider their positions separately.

115. Also by way of preliminary observation, the Employment Appeal Tribunal observed in *Engel v Ministry of Justice 2017 ICR 277* at paragraph 18:

> **"the purpose of the legislation is not to redress any and all injustices that may exist; it is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time workers".**

116. Further, Lord Carnwath JSC commented in *Miller v Ministry of Justice 2019 UKSC 60* as to the difficulties of applying the PTWR to judicial office holders:

> **"…it must be borne in mind that the Regulations have to be construed in a highly artificial context. That results not only from the need to conform to the requirements of European law, but also from the special characteristics of judicial appointments and judicial pensions under domestic law. In the first place, while the Regulations assume the existence of a 'contract' of employment …, a judicial officer is not employed under a contract…so that references to the 'terms of a contract' can at best be applied by analogy." (paragraph 31).**

117. I have these observations clearly in mind in these cases, and in deciding Issue 1 my focus will be on the requirements of regulation 2 in the particular context

of the working arrangements for judicial office-holders in the position of these claimants. I set out regulation 2 again for ease of reference:

> **"2. – Meaning of full-time worker, part-time worker and comparable full-time worker**
>
> **(1) A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.**
>
> **(2) A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker.**
>
> **….."**

118. Although counsel directed me to provisions of the PTWD and the Framework Agreement underpinning it, especially clauses 3 and 4 of the Framework Agreement, it is necessary for me to say only that clause 3 defines a part-time worker as:

> **"an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker".**

119. In *Dodds* at paragraphs 150-159 the Employment Appeal Tribunal held that there was no inconsistency between the PTWD and regulations 2(1) and (2) as to the definition of part-time work, and I will set out my conclusions only by reference to the PTWR, but interpreting and applying the PTWR consistently with the PTWD.

120. Following *O'Brien v Ministry of Justice (No 1) [2013] UKSC 6*, it is not disputed that judges are workers for the purposes of the PTWR.

121. It has also not been disputed before me that the claimants are paid wholly or in part by reference to the time they work. All judges, including Circuit Judges and District Judges are required by their terms of appointment to devote a specified minimum number of days per year to their judicial work[9]. This was accepted before the original Employment Tribunal and in the Employment Appeal tribunal in *Dodds*.

122. The claimants are required to prove that they are or were part-time workers as defined in regulation 2(2). It is important to understand the claimants' case in this regard. Ms Crasnow KC says at paragraph 14 of her closing submissions that regulation 2(2) only obliges me to consider the work done on the days which are the subject of the claims. This is the work for which comparison is required with full-time High Court judges. Whilst she accepts, at paragraphs 17

[9] At paragraph 113 of the decision in *Dodds*, the Employment Appeal Tribunal commented on the disconnect in the decision of the original Employment Tribunal, which found that the claimants were paid by reference to the time worked for their full-time work but did not address whether the same could be said for the work asserted to be part-time. There may be an answer to this, but I heard no argument on the point and it is in the event immaterial to my decision, and I say no more about it.

and 45(i), that the Tribunal should focus on the full picture, she says that the focus should most particularly be on the sitting-up role performed by each claimant which gives rise to the claim. The question is whether they are identifiable according to their normal hours of work, not whether the respondents so identified them.

123. Ms Crasnow KC articulates the claimants' case at paragraphs 27, 45(iii) and 46 of her closing submissions. This is that each claimant had two separate, part-time appointments rather than one full-time appointment. They had separate judicial roles as Circuit Judges and section 9(1) judges or, in Mr Atherton's case, as District Judge and Recorder. There was no likelihood of confusing the two roles both of which were in reality undertaken part of the time. She says that having regard to the duties in the separate roles, the differences in job descriptions, the fact of the appointments being something the judge must agree to, the differences in place of work and the need to undergo a separate recruitment process, the reality of their position is that after they took up their appointments as section 9(1) judges or as Recorder, they had two part-time posts. Given that, in their section 9(1) or Recorder roles, the time they worked or their normal hours of work were less than their full time comparators.

124. The respondents deny that in carrying out their section 9(1) or Recorder duties during their salaried time, the claimants had separate part-time positions. They say that the claimants' work was all carried out within their salaried positions and thus the claimants were not part-time workers, whether assessed under the PTWR or the PTWD.

125. At paragraph 27 of *Dodds*, the Employment Appeal Tribunal said this:

> **"A part-time worker is defined by reference to what they are not; they are a worker who is not a full-time worker. Counsel have been unable to identify any caselaw that bears directly on the issues of law that I have to resolve in relation to [this]. It appears that in the vast majority of cases there has been no dispute over whether the claimant is a part-time worker for the purposes of the PTWR. In their section on part-time workers, the authors of Harvey on Industrial Relations and Employment Law observe of the identification of a part-time worker by reference to custom and practice: "In spite of the resemblance that this may be to the classic 'elephant' definitional problem (ie that you cannot define it, but know one when you see it) this element of the regulatory scheme has hitherto not caused litigated problems" (paragraph 133.02). The authors of Tolley's Employment Handbook say of regulations 2(1) and (2) PTWR: "Despite the vagueness of these definitions, there are remarkably few cases in which there has been any argument over whether a worker is full- or part-time". However, perhaps prophetically, they continue: "But there are some questions which will one day need answering" (page 1010).."**

126. Of course I will have particular regard to the decision in *Dodds,* which is binding upon me*,* on the requirements of regulation 2(2),. But I have also asked for, and received, counsel's submissions on the recent Employment Appeal Tribunal decision in *Scottish Ministers v Johnston [2024] EAT 121*, in which the same or similar issues appear to arise.

127. The claimant in *Johnston* was a salaried Sheriff in the Scottish Courts who also held a position "sitting-up" as a Temporary Judge of the Court of Session. She brought a complaint under the PTWR that she had been subjected to unlawful

treatment as a part-time worker when she was paid less pro-rata for her sittings as a Temporary Judge than full-time salaried judges of the Court of Session.

128. The Employment Tribunal upheld her claim but the Employment Appeal Tribunal (Mr Justice Swift) overturned the decision. The Employment Appeal Tribunal found that: (a) the conclusion that by reason of her appointment as Temporary Judge, the claimant held concurrent part-time appointments was inconsistent with the provisions of section 20B of the Judiciary and Courts (Scotland) Act 2008; (b) in any event, on the evidence it had not been open to the Employment Tribunal to conclude that, by conduct, two part-time employment relationships had come into existence; and (c) in reaching the conclusion that two such relationships had come into existence, the Employment Tribunal had misapplied regulation 2(2) of the PTWR by failing to have regard to the employer's custom and practice.

129. Counsel agree, and I accept, that *Johnston* is not binding upon me as it turned on the meaning and effect of section 20B(7) of the Judiciary and Courts (Scotland) Act 2008, a provision that does not appear in section 9 of the SCA. But they disagree on the extent to which I should regard any part of the decision as persuasive and take it into account in my decision. Ms Crasnow KC suggests that I should not do so, in the same way as Mr Justice Swift in *Johnston* did not regard *Dodds* as material as it arose out of the different legislation applying in England and Wales. Mr Allen KC points to what he regards as the obvious similarities in the cases and that some of the conclusions in *Johnston* did not depend on the wording of the Scottish legislation and are applicable in these proceedings.

130. In particular, Mr Allen KC highlights paragraphs 35 and 36 of *Johnston*:

> **"35. But in any event, and even if the statutory provisions were to be disregarded, the Tribunal was wrong in law to draw the inference it did that two part-time employment relationships had come into existence. Had the situation before the Tribunal depended on determining the modification of contractual provisions, the question would have been whether the facts gave rise to a necessary inference that a single contract had been replaced by two part-time contracts. Even though the present circumstances concern the terms on which an office is held rather than the terms of a contract, the approach and standard required should be no different. It was for the Tribunal to be satisfied that the necessary inference to draw from the practical arrangements made to allow the Claimant to sit as a Temporary Judge, was that two employment relationships had come into existence.**
>
> **36. Applying that standard, the evidence in this case was not such as to permit that inference to be drawn. Some matters did change following the Claimant's appointment as Temporary Judge. When sitting as a Temporary Judge she had a different place of work, she conducted the judicial work of a of a different jurisdiction. But other important matters did not change. There was no change in the identities of parties to the employment relationship, and there was no change in the arrangements for remuneration. Some weight must also attach to the documents referred to by the Tribunal in its "Additional Findings of Fact": set out above at paragraph 31. Those documents support the conclusion that acting as a Temporary Judge can be one of the functions of those appointed to the office of Sheriff. In these circumstances it would have been open to the Tribunal to conclude that the terms on which the Claimant held the office of Sheriff had changed to the extent necessary to permit her, from time to time, to sit as a Temporary Judge of the Court of Session. However, the matters**

identified by the Tribunal (for example at paragraph 81 of the judgment, set out above at paragraph 9) are not, capable of supporting a necessary inference that a new, second employment relationship had come into existence. Those changes were, at the least, equally consistent with the conclusion that the existing, single, employment relationship between the same parties remained in force, albeit on varied terms. There was no necessary conclusion that a second, concurrent, employment relationship had been created. The Tribunal's reasoning at paragraphs 84 and 85 of the judgment (above at paragraph 8) recognised that there was no necessary inference that a second employment relationship had come into existence. In the premises, the Tribunal's conclusion that a separate, second employment relationship had arisen was wrong in law. For these reasons Grounds of Appeal 2 and 3 also succeed."

131. *Johnston* is not binding upon me, and I must treat the decision with caution. Underpinning the judgment is the decision about the meaning and effect of section 20B(7) of the 2008 Act which states that the appointment of an individual as a Temporary Judge does not affect any appointment of the individual as a sheriff, a provision which does not exist or have an equivalent in the SCA. But I have noted (1) the observations at paragraph 24 about the significance of the words "act as" in the legislation; (2) the contents of paragraphs 35 and 36, quoted above, about the creation of two separate part-time employment relationships and (3) paragraph 37 as to the requirement in regulation 2(2) of taking the employer's custom and practice into account. I shall have regard to these findings, whilst not being bound by them, in my decision.

132. Returning then to *Dodds*, at paragraph 114 the Employment Appeal Tribunal said this:

"The second component of regulation 2(2) requires the tribunal to determine whether the worker "is not identifiable as a full-time worker". In conducting this assessment, the tribunal is to "have regard" to the "custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract". I do not consider that the wording of regulation 2(2) confines the tribunal to only having regard to the employer's custom and practice. If that were the intention, the regulation could have said so. To require tribunals to "have regard" to a matter, does not, of itself, mean that they should exclude consideration of other matters that bear on whether the worker is not identifiable as a full-time worker. In addition, there is force in Mr Robin Allen's point that requiring the employer's custom and practice to be decisive on this point would not accord with the PTWD provisions. However, the employer's custom and practice is the only consideration that is expressly mentioned in the regulation and, on the face of it, it is a highly relevant factor, albeit in a context where the question is whether the worker is "identifiable" as a part-time worker, not whether they are "identified" as such by the employer."

133. This means that in considering the question posed by regulation 2(2), which is whether, having regard to the custom and practice of the respondents in relation to workers employed by the respondents under the same type of contract, the claimants are not identifiable as full-time workers, I must consider the totality of the working arrangements, including (but not concentrating on) the time alleged by them to be or have been part-time work. This exercise is not confined to consideration of custom and practice, although that is an important factor. The issue is whether the claimants were not identifiable as full-time workers. As I have said, whilst accepting that I must look at the totality, Ms Crasnow KC has invited me to have particular regard to the work asserted to be or have been part-time work, but agreeing with Mr Allen KC, I will not

approach the exercise in that way on this issue; I will consider all aspects of the relationship and the respondents' custom and practice and any other relevant factors relating to it as a whole.

134. I am reinforced in this view by *Dodds*, where the Employment Appeal Tribunal further held that:

> **"120 …. In my judgment, the tribunal could only decide whether the claimants had a single full-time employment (as the respondents contended) by analysing the respondents' custom and practice in respect of their salaried roles.**
>
> …..
>
> **123. … As I have observed at paragraph 27 above, a part-time worker is defined in a negative way by reference to what they are not; a worker who is not identifiable as a full-time worker. Accordingly, where the point is in issue and it is said that the worker is in fact a full-time worker at the time when they are undertaking the work in question, the issue can only be resolved by considering that alleged full-time role, having regard to the employer's custom and practice in respect of it, as well as to the alleged part-time working. As the EJ recognised (paragraph 45, Reasons) and both parties accept, the claimants could not be both full-time and part-time workers during the same periods of time; if they were full-time workers when they were sitting-up then they failed on Issue 1."**

135. I begin my considerations with the Claimant Circuit Judges. They are Circuit Judges or a Senior Circuit Judge who are authorised under section 9(1) of the SCA to "sit up" in the High Court, as I indicated in the introductory section of this judgment. It is not disputed that they are employed by the respondents on the same type of contracts as other judges sitting up in a more senior capacity.

136. I set out the relevant provisions of section 9 at paragraph 12 above. For ease of reference, however, I will set them out again here. Section 9 relevantly provides:

> **9. Assistance for transaction of judicial business**
>
> **(1) A person within any entry in column 1 of the following Table may…at any time, at the request of the appropriate authority, act-**
>
> **(a) as a judge of a relevant court specified in the request; or**
>
> **(b) if the request relates to a particular division of a relevant court so specified, as a judge of that court in that division."**
>
> **…..**
>
> **(2CA) In the case of a request to a person within entry 5…in column 1 of the Table to act as a judge of the High Court, the appropriate authority may make the request only if the person is a member of the pool for requests under subsection (1) to persons within that entry.**
>
> **(3) The person to whom a request is made under subsection (1) must comply with the request…**
>
> **(4) Without prejudice to section 24 of the Courts Act 1971 (temporary appointment of deputy Circuit Judges…) if it appears to the Lord Chief Justice, after consulting the Lord Chancellor, that it is expedient as a temporary measure to make an appointment under this subsection in order to facilitate the disposal of business in the High Court or the**

Crown Court or any other court or tribunal to which persons appointed under this subsection may be deployed, he may appoint a person qualified for appointment as a puisne judge of the High Court to be a deputy judge of the High Court during such period or on such occasions as the Lord Chief Justice may, after consulting the Lord Chancellor, think fit; and during the period or on the occasions for which a person is appointed as a deputy judge under this subsection, he may act as a puisne judge of the High Court.

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

(6) A person shall not by virtue of subsection (5)-

(a) be treated as a judge of the court in which he is acting for the purposes of section 98(2) or of any statutory provision relating to-

(i) the appointment, retirement, removal or disqualification of judges of that court;

(ii) the tenure of office and oaths to be taken by such judges; or

(iii) the remuneration, allowances or pensions of such judges; or

(b) …"

137. I agree with Mr Allen KC that the language used throughout section 9 is significant (although as Ms Crasnow KC reminds me, it is not decisive of the issue: an employer cannot determine status by the label it uses).

138. The words used are "act as", "competent to act", "acting". I agree with the opinion of the Employment Appeal Tribunal at paragraph 104 of *Dodds* that "act as" tends to indicate that at the material time a Circuit Judge remains a Circuit Judge, but that he or she has the powers and authority of a High Court judge; without that, the judge would not be able to carry out the judicial work of that jurisdiction in any meaningful sense when they sat in the High Court. Thus they are "acting as" judges of the High Court, but without holding an appointment as such. The word "assistance" used in the heading of section 9 is also consistent with this; this does not suggest a substantive role.

139. Section 9(5) makes clear that when the judge is sitting under section 9(1), they may exercise the "functions" of a High Court judge. As observed in *Dodds*, this is not intended to impact upon the judge's terms and conditions, as reinforced by section 9(6), which provides that "acting as" does not extend to the terms and conditions of the judges of "that" court, which is to say the court in which the judge is sitting up. All of this indicates authorisation to act, rather than a separate appointment (and this is consistent with the wording of Mrs George's letter mentioned above, which uses the word "authorisation").

140. This is in distinction to section 9(4) which specifically speaks of "appointment" of Deputy High Court Judges, most section 9(4) judges would not hold an existing salaried judicial appointment. Ms Crasnow KC says that the distinction between authorisation and appointment is insignificant; she says that on occasions, the terms are used interchangeably. But in my judgment, the clear

tenor of section 9(1) is of judges "acting as" High Court judges and not of a separate and distinct appointment as the claimants contend.

141. Ms Crasnow KC says at paragraph 20 of her closing submissions that section 9(6) means no more or less than that judges cannot claim the right to be paid the same as High Court Judges by virtue of the status conferred by section 9(5). This does not exclude the matters set out in section 9(6) being conferred by another enactment such as the PTWR. As I understand it, the respondents do not suggest that section 9(6) excludes the PTWR; but the PTWR do not as such confer the right to be paid as High Court Judges.

142. The meaning of section 9(6)(a)(iii) is clear – section 9(5) does not extend to the remuneration of section 9 judges. This applies to section 9(1) and 9(4) judges alike but I do not agree with Ms Crasnow KC that the position of section 9(4) judges is anomalous. Their remuneration is specifically dealt with by "another enactment" as envisaged by section 9(6), namely by section 9(8), and I note that there is no similar provision about the remuneration of section 9(1) judges when acting as such. Ms Crasnow KC suggests that there is no need for such a provision as the position of Circuit Judges sitting-up is governed by the remuneration provisions in section 18(5) of the CA, but in my judgment that extends only to remuneration as Circuit Judges and does not confer any right to additional remuneration as section 9(1) judges (and in any event no allowance has been determined for section 9(1) judges as section 18(5) requires).

143. Ms Crasnow KC and Mr Allen KC each direct me to section 16(1) of the CA. This provides for the appointment of Circuit Judges, and states that Circuit Judges may serve not only in the Crown Court and county courts but may also

> **"carry out such other judicial functions as may be conferred on them under this or any other enactment".**

144. Mr Allen KC says at paragraph 71 of his closing submissions that section 9(1) is an "other enactment" as referred to in section 16(1), showing that sitting in the High Court under section 9(1) authorisation is consistent with the claimant Circuit Judges' appointments and statutory role. Ms Crasnow KC submits at paragraph 28 of her closing submissions that the provision does not mean that section 9(1) functions are necessarily part of the claimant Circuit Judges' appointments but is permissive in the sense that there is no bar on such functions. She points out that Circuit Judges are not obliged to apply for or accept section 9(1) authorisations and must undergo a competitive recruitment process to be admitted to the pool of judges from which requests will be made.

145. The Employment Appeal Tribunal held at paragraphs 129-130 of *Dodds*:

> **"… the terms of appointment of a circuit judge contemplate that the judge will not only serve in the Crown Court and the county courts but "carry out such other judicial functions as may be conferred"; and a district judge's siting days requirement is in respect of "judicial business". When a worker carries out duties that are contemplated by their terms and conditions, it does not follow, simply because those duties are infrequent or peripheral or in some respects distinct to their central responsibilities, that they are no longer acting in that role and are instead working in a separate part-time**

role. There are many situations where workers are required to perform tasks which are ancillary to their main duties but are a part of their contractual role, including (but not limited to) temporarily performing some work that is routinely carried out by a higher paid employee. It would be a most surprising situation if this in itself led to the conclusion that the worker was in fact undertaking two (or more) part-time jobs rather than one full-time role."

146. The correct interpretation of section 16(1), in my judgment, is that Circuit Judges by virtue of their office may undertake other judicial activities conferred upon them. Whilst I accept that, as Ms Crasnow KC says, not all Circuit Judges will apply for or be successful in securing a section 9(1) authorisation, when they do have such an authorisation, the work falls within the scope of section 16(1) and does not support a conclusion that a separate part-time appointment is created.

147. None of this is conclusive in itself, and as required by regulation 2(2), I turn to consider the respondents' custom and practice and any other relevant factors. As I have already said, this requires consideration of custom and practice across the whole of the arrangements between the respondents and the claimant Circuit Judges and others employed on the same type of contract, both as to their Circuit Judge duties and their alleged part-time work as section 9(1) judges.

148. Counsel have not raised any question about the type of contract on which other judges were employed, and I have found that the arrangements for the claimant Circuit Judges to undertake section 9(1) duties were typical of section 9(1) arrangements across the salaried judiciary. At paragraph 138 of the decision in *Dodds*, the Employment Appeal Tribunal identified examples of relevant custom and practice:

(a) the terms and conditions of the claimants' respective appointments (as Circuit Judges and District Judge);

(b) sitting-up days were treated as part of the annual sitting commitment of the salaried roles;

(c) the respondents' undisputed evidence that the general policy was that judicial sittings falling within salaried time were remunerated at the rate applicable to that salaried office;

(d) this policy was, for example, applied to section 9(4) judges who already held salaried office;

(e) in relation to the claimant Circuit Judges, there was no clear demarcation between their circuit judge duties and their section 9(1) duties; for example, the undisputed evidence from Mrs George was that she would sometimes switch between the two jurisdictions several times during a single court day;

(f) the claimant Circuit Judges' perception that their salaried roles were full-time ones.

149. The Employment Appeal Tribunal did not suggest that those were the only aspects of the respondents' custom and practice to be taken into account. With that reminder in mind, I turn to counsel's submissions on these and any other relevant factors.

150. Ms Crasnow KC says that the claimant Circuit Judges' primary position is that the evidence demonstrates a lack of any reliable custom and/or practice. I found this surprising as it is not disputed that the respondents' long-running practice was that no additional remuneration was paid where salaried judges undertook additional responsibilities at a more senior and higher-remunerated level, including Circuit Judges sitting up under section 9(1), and such sittings counted towards the judge's sitting commitment in their primary role. It appeared to me that Ms Crasnow KC's contention was directed towards the lack of evidence about the reason for the policy, rather than to its existence, which seemed to me to be unarguable.

151. As to the terms and conditions of the respective roles, Ms Crasnow KC says that they are separate and distinct; no Circuit Judge was obliged to apply for a section 9(1) authorisation; there was a competitive recruitment process for the pool. She says that "judicial business and the business of the courts" have more than one possible meaning. She contends that the section 9(1) role for which application must be made is different to roles for which Circuit Judges are eligible *ex officio* such as sitting in the Upper Tribunal.

152. As to section 9(1) sittings forming part of sitting commitments, Ms Crasnow KC says that the respondents justify this on the basis this is how it has always been done, rather than as a result of any thought or policy. She says the same about the respondents' practice of not paying additional remuneration for "sitting-up".

153. Ms Crasnow KC says that a conclusion that there was no clear demarcation between Circuit Judge and section 9(1) duties is not justified by the evidence. Mr Barker and Mr Bugg were booked for specific periods. Further, in the Family Court section 9(1) work can specifically be identified as it requires prior agreement from the Family Division Liaison Judge. On the evidence, High Court work was a regular and intrinsic part of the work.

154. Ms Crasnow KC contends that there was no single discernible purpose for which section 9(1) was deployed. The respondents' use of section 9(1) had changed from time to time in terms of whether section 9(1) and section 9(4) judges were regarded as candidates for the High Court bench. The respondents appeared to have changed policy in 2020 to improve their position in the litigation.

155. In conclusion, Ms Crasnow KC invites me to assess each of the factors individually and then stand back and assess their cumulative effect. She invites me to reach the conclusion that the claimant Circuit Judges' substantive and section 9(1) roles were in reality separate and distinct judicial roles.

156. Mr Allen KC reminds me that although the Employment Appeal Tribunal in *Dodds* held that the respondents' custom and practice was not the only consideration, it is a highly relevant one and the only one specifically identified for the purposes of regulations 2(1) and (2). He says that on the facts of these cases, it is decisive.

157. For the claimant Circuit Judges, Mr Allen says that their terms of appointment make clear that they must support the business of the courts in their 210 salaried sitting days which is not restricted to the work of the county courts. The claimant Circuit Judges accepted in evidence that their section 9(1) sittings counted towards their annual sitting commitment as Circuit Judges.

158. Mr Allen KC says where a salaried Circuit Judge works on a salaried part-time basis, section 9(1) work cannot take place in non-working time. Similarly, when a Circuit Judge retires, there is no freestanding entitlement to undertake section 9(1) sittings in retirement. That is because the section 9(1) authorisation is parasitic on the Circuit Judge appointment, and cannot be treated as severable from the Circuit Judge role. There is no evidence that section 9(1) sittings in non-salaried time ever happen. Mr Allen KC acknowledges that Recorders such as Mr Atherton may sit in their non-salaried time, and whilst the respondents discourage this, it is not prohibited.

159. Mr Allen KC reminds me that fee-paid section 9(4) judges are paid at the Deputy High Court judge rate. If they do not hold a salaried office, they fall outside the scope of the no extra remuneration policy, but if they do hold salaried office, and perform their section 9(4) sittings in their salaried time, they are paid at their salaried rate, not the Deputy High Court Judge rate. This, Mr Allen KC says, is consistent with the respondents' general policy that judicial sittings falling within salaried time are remunerated at the rate applicable to that salaried office.

160. Mr Allen KC says, however, that I should be very wary of placing reliance on the fact that fee-paid section 9(4) judges are paid at the Deputy High Court Judge rate when assessing the question of whether Claimant Circuit Judges are part-time workers, and refers me to paragraphs 144-146 of *Dodds*.

161. Mr Allen KC says that the claimant Circuit Judges (even Mr Barker, who performed a higher quantity of section 9(1) work compared to the others) do not only perform section 9(1) work, but when they do such work, it falls within salaried time. Particularly in the context of family work, it can be necessary to switch between jurisdictions during a single court day (sometimes in the context of the same case). Whenever section 9(1) work was or is done, it falls within salaried time.

162. Mr Allen KC does not accept that the Judicial Appointments Commission recruitment process can be relevant to the question of part time status. If it is relevant to custom and practice, Sir Geoffrey Vos said in evidence that a higher standard is applied for the recruitment of High Court judges than to section 9(1) authorisations. Mr Allen KC submitted that it stood to reason that higher standards were applied to High Court judge recruitment as greater and different

expectations are placed on them in terms of the nature, complexity and importance of their work their other functions including leadership.

163. Mr Allen KC says that if judges "sit down" in their salaried time, as they are sometimes required to do, such as a Court of Appeal judge sitting in the High Court; or a Senior Circuit Judge sitting in the Upper Tribunal; or a Circuit Judge sitting in the First-tier Tribunal, they are not regarded as having separate part time appointments. Whilst salaried judges enjoy salary protection and cannot be paid less if they "sit down", this protection is contingent on their statutory appointment. But if, as they contend, the claimant Circuit Judges were doing separate part-time work when sitting under section 9(1), the same position would apply to work in a lower-paid role. This would be separate part-time work and salaried pay protection would not apply as the work would be outside their salaried time.

164. Mr Allen KC contended that there were characteristics of a salaried judicial appointment which would not apply to separate fee-paid part-time roles. These included: security of office; regularity and predictability of income; entitlement to benefits, such as sick pay; no risk of not being paid if there was lower levels of work to do; entitlement to paid annual leave; pension benefits (such as relating to ill health retirement); a requirement to leave practice permanently upon taking office; greater restrictions on outside activities (such as those affecting commercial directorships and political activity).

165. My conclusions on Issue 1 in respect of the claimant Circuit Judges are as follows. I remind myself that under regulation 2(2) of the PTWR, I must decide at this stage only whether, having regard to the custom and practice of the respondents in relation to workers employed by them under the same type of contract, the claimant Circuit Judges are not identifiable as full-time workers. I remind myself also that the foundation of the claimant Circuit Judges' case is that they had separate part-time appointments as Circuit Judges and as section 9(1) judges. It is not their case that at the same time they held (or could have held) both full-time and part-time employments.

166. I have set out at paragraphs 136-146 above my findings that the wording of the legislation suggests that the claimant Circuit Judges remained or remain Circuit Judges but with authority conferred upon them to act as High Court judges.

167. I find that the respondents had a consistent custom and practice in regard to section 9(1) work that such work counted as part of the claimant Circuit Judges' salaried sitting commitment of 210 days. It did not reduce that commitment nor was there any commitment to sit for any number of days as a section 9(1) judge. This is, in my view, a strong factor in support of a conclusion that such work was part of the Circuit Judge appointment.

168. I find it relevant also that not only had the claimant Circuit Judges no statutory entitlement to additional remuneration but their letters of authorisation contained no terms or conditions of appointment about remuneration or anything else. This, in my view, is consistent with there being no creation of a separate appointment distinct from their substantive Circuit Judge role. Equally,

there was no communication of any change in their terms of appointment as Circuit Judges when they secured their section 9(1) authorisations[10].

169. I find that the respondents also had a consistent custom and practice that when the claimant Circuit Judges sat up under section 9(1), they received only the remuneration applicable to their substantive salaried role without any additional payment to reflect the higher salary attributable to the role in which they "sat up". This was an expression of the respondents' policy and practice to "sitting-up" across the salaried judiciary as a whole.

170. The treatment of section 9(4) judges reinforces my finding that this was the respondents' practice for salaried judges when "sitting-up". The respondents treated section 9(4) judges who did not have salaried roles differently by paying them the *pro rata* High Court salary, but paid salaried section 9(4) judges and section 9(1) judges only their substantive salary.

171. As I have already said, I find that the provisions of the claimant Circuit Judges' terms of appointment stating that they must support the business of the courts in their 210 salaried sitting days without limiting the scope of that business supports the conclusion that the work undertaken pursuant to section 9(1) authorisation fell within the scope of their Circuit Judge appointments.

172. I note that the claimant Circuit Judges regarded themselves as full-time judges, with section 9(1) authorisations. They did not regard themselves as having separate appointments. This is not conclusive; it is another relevant factor.

173. As to demarcation of duties, I accept that some section 9(1) work was undertaken in fixed blocks of time agreed in advance (for example much of Mr Barker's work or Mr Bugg's work in the deprivation of liberty list). But that, I find, was for administrative convenience. I accept also that the judge would know at any one time whether they were dealing with section 9(1) or Circuit Judge work, for example because express authority was required to hear section 9(1) family work. But on the other hand, Mrs George's and Mr Farquhar's evidence was that section 9(1) work was intermingled and might be only a small part of what was otherwise a Circuit Judge list (and indeed both types of work could arise in the same hearing). I have noted that the amounts of section 9(1) work varied widely from time to time and between judges. This, it seems to me, was inherent in the way work was organised and does not, in my judgment, point toward separate part-time appointments.

174. I accept Ms Crasnow KC's submission that the separate job descriptions for Circuit Judge and section 9(1) judge and the recruitment process through the Judicial Appointments Commission for the section 9(2CA) pool may point towards these being different appointments. There is an obvious point of distinction between a position for which judges must competitively apply and

[10] Mr Farquhar and Nr Bugg obtained their section 9(1) authorisations separately, after they became Circuit Judges. If they thereby became engaged on separate part-time appointments, the terms of their Circuit Judge appointments must have been varied. However, the parties have disavowed any argument as to variation and I have not considered any of the principles about variation, instead focussing, as the parties invited me to do, on the reality of the situation.

roles which they are able to perform ex officio. But on balance, I conclude that these factors reflect that section 9(1) authorisation confers on judges the right to hear cases at a more senior level than that at which they are substantively appointed and the respondents' practice has been to have a formal recruitment process for that.

175. I do not find any differences, actual or perceived, in the standard of candidates for section 9(1) or High Court roles, or as to the perception of section 9(1) or 9(4) judges for future appointment to the High Court bench, material as to this issue. In any event I would be cautious in attributing significance to factors which have changed from time to time as suggested by the evidence I heard.

176. I have drawn the factors together. None has been decisive in itself but I have found the wording of the legislation, the absence of any provision as to remuneration or any other terms and conditions of the section 9(1) authorisations, and the respondents' clear custom and practice that section 9(1) sittings counted towards and were regarded as part of the Circuit Judge sitting commitment and did not attract any additional remuneration particularly significant. Looking at matters cumulatively, I do not find that the claimant Circuit Judges had separate and distinct part-time appointments as Circuit Judges and section 9(1) judges such as to lead to a conclusion that they were part-time workers for their section 9(1) work. Rather, I find that they were or are identifiable as full-time workers in the role of Circuit Judge or Senior Circuit Judge whose section 9(1) work was pursuant to an authorisation which they held by dint of their status as Circuit Judges which enabled then to be called upon to assist the High Court in the transaction of its business when the need arose. They were not part-time workers as defined in regulation 2(2) of the PTWR.

177. In *Dodds*, the Employment Appeal Tribunal considered the position under the PTWD at paragraphs 150-159. The first question was whether the determination on Issue 1 should be upheld on the basis of claims made in reliance on the definition of a part-time worker in clause 3 of the PTWD.

178. At paragraph 152, the Employment Appeal Tribunal held that:

> **"…as a first stage, clause 3 requires the identification of the employee's "normal hours of work" before a comparison is then drawn. Identifying an employee's normal hours of work involves having regard to the nature of their employment, their terms and conditions and, potentially, the employer's custom and practice."**

179. The Employment Appeal Tribunal concluded that the terms of regulations 2(1) and (2) of the PTWR were not inconsistent with the approach contemplated by the PTWD; the PTWR made the sequential stages more explicit but there was no tension between the two, and it was necessary to determine the alleged part-time worker's normal hours of work before any meaningful comparison exercise can be undertaken.

180. I find that applying the formulation of "normal hours of work" in clause 3, the claimants were not part-time workers. They did not have separate part-time

appointments. Their normal hours of work were their full-time hours as Circuit Judges. Clause 3 does not assist the claimants.

181. I now consider the position of Mr Atherton. As set out at paragraph 1.2 of the Agreed Generic List of Issues, the question for him is whether he was a part-time worker within the meaning of the PTWD and/or the PTWR when undertaking work as a Recorder during his salaried District Judge time.

182. The respondents concede that he became a part-time worker from 1 November 2011 when he reduced his working time to 90%. That means that for the purposes of regulation 2(2) he was not identifiable as a full-time worker and he is entitled to pursue a claim under the PTWR as a part-time worker.

183. However, as recorded by the Employment Appeal Tribunal at paragraph 116 of *Dodds*, the concession is that Mr Atherton was a part-time worker only because his salaried role as a District Judge was part-time from that point. The respondents do not concede that when Mr Atherton sat as a Recorder during his 90% salaried District Judge time, he was undertaking a second, distinct part-time role. It is essential to Mr Atherton's case which requires a comparison to be made with full-time Circuit Judges that he establishes that he had that separate, part-time appointment as a Recorder. This consideration will apply to all others who sit as Recorders in their salaried time where the salaried roles are lower-remunerated. Mr Atherton cannot sustain that comparison if he had a single appointment covering his roles as District Judge and Recorder, whilst he sat regularly as a Recorder, the majority of his working time was as a District Judge. That is why Issue 1.2 is framed as it is.

184. At paragraph 39 of her closing submissions, Ms Crasnow KC says that Mr Atherton's appointment as a Recorder was free-standing. It was independent of his role as a District Judge; it contained no reference to him as a District Judge; it continued after he ceased to be a District Judge; it was in an entirely different practice area; he booked his Recorder sittings separately and sat at a different location. Further, Mr Atherton's appointment as a Recorder was under section 21 of the CA which expressly describes Recorders as "part-time judges of the Crown Court". This, she says, shows that his Recorder appointment was a separate and distinct, and part-time, role.

185. Mr Allen KC reminds me at paragraph 74 of his closing submissions that Mr Atherton's terms of appointment as a District Judge and as a Recorder specified that no extra remuneration in addition to salary may be claimed for concurrent part-time sittings. Also, at paragraph 96, he directs me to what the Employment Appeal Tribunal said at paragraph 111 of *Dodds*, which continues to reflect the respondents' position:

> **"Whilst these are matters of potential significance, I do not consider that they are conclusive in terms of Mr Atherton's status when he sat as a recorder, as Mr Robin Allen submits. Mr Andrew Allen relies upon his terms and conditions as a district judge. As the EJ noted at paragraph 28 of his Reasons, the most recent version of the terms and conditions (from 2009) required district judges to "devote 215 days in each year to judicial business". Mr Andrew Allen emphasises that this phrase is not limited to sitting in the county court. He also stresses that the terms and conditions contemplate a district judge sitting as a recorder; and provide that a district judge appointed as a**

recorder will be expected sit for a minimum of 15 days a year in that capacity and will not receive extra remuneration in addition to his/her salary as a district judge for doing so. I am told that similar provisions were contained in earlier versions of the district judge's terms and conditions in 2005 and 2007. The respondents also rely on Mr Masterson's undisputed evidence that sitting as a recorder will count towards a district judge's 215 days annual sitting commitment."

186. I have considered whether, having regard to the custom and practice of the respondents in relation to workers employed by the respondents under the same type of contract, and looking at the totality of the working arrangements, including (but not concentrating on) the time alleged by him to be or have been part-time work as a Recorder, Mr Atherton was not identifiable as a full-time worker. I will consider all aspects of the relationship and the respondents' custom and practice and any other relevant factors relating to it as a whole.

187. I have not found this as straightforward as the position of the section 9(1) judges. The fundamental difference between Mr Atherton's case and the claims of the claimant Circuit Judge is that there is no doubt that Mr Atherton held a separate, distinct appointment as a Recorder. All of the factors identified by Ms Crasnow KC at paragraph 184 above hold true and are material to my determination of the issue. But in the end, I prefer the submissions of Mr Allen KC. Whilst Mr Atherton's role as a Recorder was an identifiable, separate appointment (unlike the authorisations of the Claimant Circuit Judges under section 9(1)), the respondents' custom and practice was that his Recorder sittings in his District Judge time counted towards his sitting requirements as a District Judge and did not attract any additional remuneration. This was consistent with his terms of appointment and the statutory underpinning of the role. Applying the requirements of regulation 2(2), he was not identifiable as a part-time worker, because the Recorder sittings were undertaken within his salaried role. Rather, he was identifiable as a full-time worker who performed his duties under his separate appointment as a Recorder as part of his role as a salaried District Judge.

188. Accordingly, I find that Mr Atherton has not shown that he was a part-time worker within the PTWR in respect of that role.

189. As I have decided Issue 1 against the claimants, their claims must fail, as they were not part-time workers within the PTWR. But as already intimated, in case I am wrong in my conclusion, and to assist the parties in these or the stayed cases, I have gone on to consider the other Agreed Generic Issues.

190. I begin with Issue 2, which arises only in the claims of the claimant Circuit Judges, it being conceded that Mr Atherton is entitled to compare himself with a full-time Circuit Judge. I must assume, to decide this issue, that the claimant Circuit Judges have established their case that they were part-time workers within the PTWR.

Issue 2

191. I set out Issue 2 again here for ease of reference:

2. COMPARATORS

2.1 For the purposes of the PTWR and/or PTWD are High Court Judges valid comparators to Circuit Judges acting up as High Court Judges pursuant to their authorisation under s9(1) of the SCA?

2.2 For the purposes of the PTWR and/or PTWD, the Respondents accept that Circuit Judges are valid comparators to District Judges when undertaking work as Recorders.

192. Regulation 2(4) provides as follows as to comparability:

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

(a) both workers are-

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

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and

(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

193. I adopt the analysis at paragraphs 28-30 of *Dodds* as to the correct approach to the identification of a "comparable full-time worker" in regulations 2(4) and 5(1) of the PTWR.

"28. This was identified by the House of Lords in Matthews v Kent and Medway Towns Fire Authority [2006] UKHL 8, [2006] ICR 365 ("Matthews"). Baroness Hale explained the position as follows:

"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…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 Regulations which are inviting a comparison between two types of worker 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."

29. In Moultrie v Ministry of Justice [2015] IRLR 264, the Employment Appeal Tribunal upheld a tribunal's finding that fee-paid medical members of tribunals such as the mental health tribunal were not engaged in "the same or broadly similar work" as full-time salaried regional medical members, although 85% of their work was identical. Mr Justice Lewis (as he then was) concluded that the tribunal had faithfully applied the test identified in Matthews. During the course of his analysis he observed:

"29. The only basis upon which the appellants' submission 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."

30. It is well established that the comparison must be made with an actual, rather than a hypothetical comparator: Carl v University of Sheffield [2009] ICR 1286 at paragraph 23.

194. Ms Crasnow KC submits that I must consider each claimant's case individually. She says that the claimants who have retired (Mr Barker and Mrs George) cannot have their cases affected by matters which took place after that retirement. That is plainly correct, in my view, applying the wording of regulation 2(4) that the comparison must concern the period in which the alleged detrimental treatment took place.

195. Ms Crasnow KC contends that the threshold for whether two roles are comparable is low. She warns me against taking an "over-precise" view. She refers me to paragraph 36 of *Matthews*, where Baroness Hale stated:

"36. Part-time employment is inevitably different from full-time employment in a number of ways, yet the purpose of the 2000 Regulations is to secure that it is treated equitably. If the threshold of comparability is set too high this can only apply in the most straightforward of situations, for example, where full-timer and part-timer work in exactly the same way but one for, say, 40 hours a week and the other for, say, 20 hours a week. Yet the watchword of Directive 97/81 was flexibility in meeting the needs of both employers and workers."

196. Ms Crasnow KC says that the work of all of the levels of judiciary represented in these cases is to assist with the business of the courts and tribunals in England and Wales. That is true of the District Judge, Recorder, Circuit Judges, Deputy High Court Judges and High Court Judges. Each is engaged to decide cases and further the public good by doing right by all manner of people after the laws and usages of the realm.

197. Ms Crasnow KC accepts that the differences between the overall work done by the comparator judges, when compared with the claimant Circuit Judges, are relevant, but reminds me of what was said at paragraph 44 of *Matthews*:

. 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 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…"

198. Ms Crasnow KC says that the respondents' evidence has failed to engage with that analysis. It does not analyse the scope of work done "broadly" but in a narrow and pernickety way. Overall, she says that the work of the claimant Circuit Judges when acting under section 9(1) was broadly similar to that of a full-time salaried High Court Judge.

199. Mr Allen KC says that *Matthews* requires a careful examination of the whole of the work undertaken by the claimant Circuit Judges and their comparators. This must analyse all the work they are actually engaged in. *Moultrie* shows that it is possible for a Tribunal to conclude that part-time and full-time workers are not comparable even though there may be a lot of things which both workers do which are the same or broadly similar.

200. Mr Allen KC says (paragraph 98 of his closing submissions) that although there are similarities in the work, there are important differences which mean the work is not the same or broadly similar. He notes that the claimant Circuit Judges have not identified specific actual comparators; Mr Barker compares himself with substantive judges of the Chancery Division and BPC; Mrs George, Mr Farquhar and Mr Bugg with substantive judges of the Family Division[11].

201. Mr Allen KC identifies at paragraph 102 of his closing submissions specific matters which High Court Judges do which section 9(1) judges do not perform.

202. My conclusions are as follows. The question I am answering is whether the work done by the claimant Circuit Judges was broadly similar to that undertaken by comparator substantive High Court Judges.

203. The primary role of any judge, including the claimant Circuit Judges and the High Court Judges with whom they compare themselves, was and is to hear and determine claims or cases according to law. It is clear that when acting as section 9(1) judges, the claimant Circuit Judges were hearing cases which otherwise would be undertaken by High Court Judges. It was work which had been determined by way of case management process as of High Court level because of its complexity or seriousness. Thus, a large component of the work done by the claimant Circuit Judges and their High Court comparators was exactly the same.

204. In line with paragraph 44 of *Matthews*, the question then is whether any differences in the work are of such importance as to prevent their work being regarded overall as "the same or broadly similar".

[11] Except as mentioned here, and despite the decision in *Carl*, no point has been taken about the claimant Circuit Judges' failure to identify specific, named comparator High Court Judges. The point being made here is that the comparison must be made by considering the roles of High Court Judges in general terms.

205. What are the differences? First, it is not in dispute that in all three divisions of the High Court, the very weightiest, most valuable and most important cases are reserved for substantive High Court judges. The claimant Circuit Judges accepted in evidence that substantive High Court judges undertake work at a level which they would not be asked to do. The difficulty, however, is to determine how much of the work of High Court Judges is at that level, what I would describe as category A cases (accepting that designation is not used in family cases).

206. I acknowledge what Ms Crasnow KC says about the vagueness of the evidence about this, but I must do my best with what I have. I was consistently told about what was described as "mission creep", meaning that section 9(1) judges now hear cases of greater importance and difficulty than hitherto, and I accept that evidence, but my impression, and I find, is that "category A" cases are relatively rare, but when they occur, they occupy significant judicial time and are an important part of the caseload diet of substantive High Court Judges. Sir Geoffrey Vos's very high-level estimate of an average of 60-70% of time on such work may not be precisely accurate, but it supports my assessment that the time involved can be significant.

207. Second, there is some work which is reserved to High Court Judges which section 9(1) judges cannot undertake, including applications for permission to appeal and duty out of hours and emergency work. High Court Judges may sit in the Court of Appeal on civil and family matters, and in the Divisional Court, which section 9(1) judges do not. Some High Court Judges may sit in crime, or in other divisions, which section 9(1) judges do not. Also, High Court Judges in family cases do not require permission to undertake Family Division or High Court level work; section 9(1) judges do.

208. Third, substantive High Court judges undertake a variety of duties outside their court work which section 9(1) judges are not required to do. These duties at High Court level include leadership and management, chairing committees, mentoring and career guidance, training and recruitment, reform, acting as presiding or supervising judges or in family, Family Division Liaison Judges. I accept that the extent to which any particular High Court Judge engages in such work depends on their commitments, skills and interests.

209. Ms Crasnow KC invites me to bear in mind that some differences arise because substantive High Court Judges are full-time in the role whereas section 9(1) judges are only part-time and would not have time or it would not make sense for them to perform duties outside court. I accept this but do not attribute any significance to it; the question for me is what differences there are, rather than the reasons for them.

210. Regulation 2(4)(a)(ii) requires me to have regard as part of a comparison to "qualifications, skills and experience". As Mr Allen KC reminds me at paragraph 106 of his closing submissions, clause 3(2) of the Framework Agreement includes seniority, which does not appear in regulation 4(2). Whilst I recognise, and have already commented upon, Sir Geoffrey Vos's evidence about what he described as the higher standards expected of appointees to the High Court Bench, I do not regard qualifications, skills and experience as material in these

cases. In terms of the comparison to be made, the claimant Circuit Judges and their High Court comparators had the qualifications, skills and experience to undertake High Court work; the issue in these cases is whether the work done was the same or similar.

211. I must decide whether the work of substantive High Court Judges and section 9(1) judges was or is "the same or broadly similar". I must avoid concentrating unduly on differences or undertaking too detailed an analysis.

212. I have found that a large part of the work of section 9(1) judges is exactly the same as that of substantive High Court judges. I have accorded that factor appropriate weight. But I have also found differences in the work. It is a matter of degree and assessment whether the differences are significant enough that the work is not broadly similar. In my judgment, the differences which I have identified at paragraphs 205-208 are such that the work is not broadly similar.

213. High Court Judges undertake the most complex and difficult hearings which section 9(1) judges are not asked to do. These form a significant part of the function of a High Court Judge. High Court Judges undertake work as identified in paragraph 207 which section 9(1) judges do not do under section 9(1). High Court Judges undertake a range of senior administrative and leadership roles and functions outside of sitting which section 9(1) judges do not do under section 9(1).. I have taken into account that Mr Barker undertook a substantially greater amount of section 9(1) work than did the other section 9(1) Circuit Judges but where the comparison concerns the nature and quality of the work, this is not significant for the outcome; on the facts of these cases, the work was not the same or similar however much of it was done.

214. I find, therefore, that the roles are or were not the same or broadly similar, and on Issue 2, my decision is that tor the purposes of the PTWR, High Court Judges are not valid comparators for Circuit Judges acting up under section 9(1).

Issue 3

215. Moving on then to Issue 3, I must assume, contrary to my findings in Issues 1 and 2 (except Issue 2 for Mr Atherton) that the claimants have established that they were part-time workers who are or were entitled to compare themselves with High Court Judges or Circuit Judges (Mr Atherton).

216. This is as below:

3. LESS FAVOURABLE TREATMENT ON THE GROUND OF PART-TIME STATUS

3.1 In the Circuit Judge cases, the Respondents accept that the Claimants were treated in a less favourable manner by:

3.1.1 In the case of Circuit Judges undertaking work in the High Court, being paid at the rate of a Circuit Judge rather than at the higher rate of a High Court Judge;

3.1.2 In the case of the Claimant retired District Judge, being paid at the rate of a District Judge rather than at the higher rate of a Circuit Judge when acting as a Recorder during his District Judge time.

3.2 Was the less favourable treatment on the ground of their part-time status?

217. This is an issue as to causation. Regulation 5 of the PTWR is in the following terms:

> **5. – Less favourable treatment of part-time workers**
>
> **(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker-**
>
> **(a) as regards the terms of his contract; or**
>
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.**
>
> **(2) The right conferred by paragraph (1) applies only if-**
>
> **(a) the treatment is on the ground that the worker is a part-time worker, and**
>
> **(b) the treatment is not justified on objective grounds.**
>
> **(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate. …**

218. The question, therefore, is whether the admitted treatment was on the ground of the claimants' part-time status. Regulation 5(2)(a) refers to less favourable treatment "on the ground" that the worker is a part-time worker, whereas clause 4.1 of the PTWD prohibits such treatment "solely because" the part-time worker works part-time. In the recent case of *Augustine v Data Cars Limited* [2024] EAT 117, on which I invited counsel's submissions, the Employment Appeal Tribunal held that the correct approach to the phrase "on the ground that" under regulation 5(2)(a) is as identified in *Sharma v Manchester City Council* [2008] ICR 623 and *Carl v University of Sheffield* [2009] ICR 286*:* part-time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause.

219. Although there is an alternative line of authority, based on cases such as *McMenemy v Capita Business Services Limited 2007* IRLR 400 which states that part-time status must be the *sole* cause of the treatment, Ms Crasnow KC and Mr Allen KC invite me to follow *Augustine*, *Sharma* and *Carl,* and I shall do so, *Augustine* being the most recent authority and binding upon me. In any event the answer in these cases would be the same whichever test I adopted.

220. Ms Crasnow KC says that the issue in dispute under regulation 5 is whether at least part of the reason why the claimants were treated less favourably was that they are or were part-time workers or put another way, part-time status must be more than a minimal cause.

221. Ms Crasnow KC says that the respondents' approach to the causation Issue shows they are posing the wrong question in focussing on why the claimants are paid the way they are. The right question, she says, is "Why have the claimants suffered less favourable treatment in not being paid the same as their comparators?" If the question is posed the way the respondents propose, the

answer is "they are paid as they are, because that is how we pay them according to our policy and our terms." That presupposes the conclusions and provides an entirely subjective answer to the question.

222. Ms Crasnow KC contends that the respondents' stance on causation equates to saying that a necessary ingredient of being a section 9(1) judge, in and of itself, is also the reason for their treatment. She reminds me that in *Sharma* the Employment Appeal Tribunal said at paragraph 57:

> **"It would make a nonsense of the protection afforded to part-timers if the employer could successfully allege that differentiating between them and full-timers on the basis of the terms exclusively attributed to them was not discriminating against them on the basis that they were part-time. Take the case of an employer who does not give sick pay to part-timers but does to comparable full-timers. He would surely not be allowed to say that the basis of the distinction is the term of the contract, the part-timer not having the right to sick pay when the full-timer does. Of course, in principle the different treatment may be justifiable, but if the council were correct in this argument, it would mean that the Regulations would not be engaged at all and the issue of justification would not even arise."**

223. Ms Crasnow KC says that likewise in these cases the respondents argue the basis of the distinction is the term and policy the part-timers work under; and it would make a nonsense of the PTWR if the respondents can evade their scope via a reliance on a term or policy. Thus the respondents' case always ends with the answer that the claimants were paid this way because the respondents decided as such, and put in place a policy that salaried judges would not get an uplift if sitting up.

224. Ms Crasnow KC says that this ignores the fact that there is no full time section 9(1) judge, and a full-time recorder would be a Circuit Judge. Mr Atherton only suffered a detriment because he worked as a recorder after becoming a District Judge and such work was necessarily part time. The claimant Circuit Judges had to be salaried to become section 9(1) judges and so could not escape the policy. This means that the respondents' case focuses on the full-time role and the claimants' on the part time role. Specifically for section 9(1) judges, the way the judges undertake work is via the section 9(1) authorisation, which is dependent upon being salaried. The work cannot be done full time. Because the claimant Circuit Judges are only able to be appointed under section 9(1) because they are already salaried, the reliance on salary for these purposes is not a distinct or divisible status from being part-time. When the correct question for the purpose of the PTWR is asked, the answer is that the claimants are paid as they are because they are part-time and are undertaking their full-time comparators' role.

225. Ms Crasnow KC says that there can be no argument that, as the offending treatment was not accorded to all part-time workers, the less favourable treatment *could not* have been on grounds of part-time status. In *Sharma* it was said at paragraphs 50 and 58:

> **"50 The fact that not all part-timers are treated adversely does not mean that those who are, cannot take proceedings for discrimination if being part-time is a reason for their adverse treatment.**

> **51 In our judgment, once it is found that the part-timer is treated less favourably than a comparator full-timer and being part-time is one of the reasons, that will suffice to trigger the Regulations."**
>
> **58 Where the reason for the distinction is the existence of the very term which is alleged to be the source of the less favourable treatment, and that term is exclusive to the group of part-timers, there is prima facie discrimination against the part timers, by which we mean unlawful discrimination unless the treatment can be justified."**

226. Thus, Ms Crasnow KC says, it does not matter if there are other part-time workers (such as section 9(4) judges or section 9(1) recorders) to whom the term or policy is not applied. That does not change the reason why the claimants were treated as they were.

227. Mr Allen KC invites me to conclude that, applying clause 4 of the Framework Agreement and/or regulation 5(2)(a) of the PTWR, the claimants' part-time worker status was not the effective and predominant cause of any less favourable treatment they experienced.

228. Mr Allen KC says that the claimants' perception may be that it is unfair that they are or were paid less than their comparator High Court Judges for their section 9(1) sittings. However, I must be satisfied that the less favourable treatment is or was on the ground that they were part-time. If I am not satisfied that that is the effective and predominant cause, then the claims must be dismissed. It is not necessary at this point for the respondents to show that the reason for the difference in treatment is good, desirable, fair or equitable. Such considerations are irrelevant to the causation question. Perceptions of fairness may become relevant later to the question of objective justification, which arises only if the treatment was on the ground of the claimants' part-time status.

229. Mr Allen KC submits that in respect of the claimant Circuit Judges, they hold or held full-time salaried offices, in relation to which they are required to devote their working time to the 'business of the courts'. They are or were paid at the Circuit Judge rate because their section 9(1) sittings took place in their salaried time, in accordance with their salaried terms, and consistent with the wider policy approach taken by the respondents towards judicial pay and flexible deployment of the judiciary.

230. In other words, Mr Allen KC says, the reason why these claimants continued to be paid as salaried Circuit Judges when acting pursuant to section 9(1) is because, they are salaried Circuit Judges working within salaried time. They may have been acting as High Court Judges, but their section 9(1) work formed part of their salaried work falling within their salaried time. The claimant Circuit Judges were paid the way they were for their section 9(1) sittings because those sittings are within salaried time, but those sittings were attributable to their appointment as Circuit Judges (because their authorisation was parasitic on their appointments).

231. Mr Allen KC says that in many work situations there will be times when a salaried worker is doing the same sort of work as another salaried worker who is superior or inferior in the workplace hierarchy to them. It does not follow that in relation to that particular task, the worker is a part-time worker or that their pay should be

based on each task performed rather than for the role overall, or that the reason for this treatment relates to part-time worker status (where this can be established). That is exactly the case for the salaried Circuit Judges who, in relation to their office, where they have obtained the necessary authorisation, may sit in the High Court pursuant to section 9(1).

232. As to Mr Atherton, Mr Allen KC says the answer to the causation question is essentially the same. The reason why he continued to be paid as a District Judge (before and after varying his salaried terms to 90% FTE) when sitting as a Recorder is that, at all material times, his Recorder sittings took place within his District Judge salaried time. In accordance with the terms and conditions which applied to his salaried office (and also the respondents' general policy approach), he was required to give priority to his work as a District Judge and, if sitting as a Recorder within salaried time, he was to be paid at his salaried rate. Mr Atherton agreed, when it was put to him in cross examination, that the reason he was paid at the District Judge rate during his salaried time (whether sitting as a Recorder or a District Judge) was because he was a salaried District Judge. He accepted that the key factor that determined how he was paid as a Recorder after becoming a salaried part-time District Judge was whether his Recorder sittings fell within his salaried time or not. The respondents agree with his evidence on this point.

233. Mr Allen KC says that from 1st November 2011, when he sat as a Recorder during his 10% non-salaried time, Mr Atherton was paid a Recorder fee which was equivalent to the Circuit Judge rate, whereas the Recorder sittings in his 90% salaried time continued to be paid at his salaried rate (as they had been when he was a full-time salaried District Judge). This, Mr Allen KC says, plainly shows that, before and after he became a part-time worker in relation to his District Judge appointment, the reason for his rate of Recorder pay during salaried time was that the Recorder sittings fell within his salaried time and no part of the reason was that he was a part-time worker.

234. Mr Allen KC asks me to note that there are other situations where judges sitting in inferior jurisdictions (within and outside of the scope of section 9(1)) continue to receive their salaried remuneration, such as when a Lord Justice of Appeal sits in the High Court, or when a Senior Circuit Judge such as Mr Barker sits in the Upper Tribunal, or when a Circuit Judge sits in the First-tier Tribunal. Such examples show that, on a wider basis, judges in different situations are treated by the respondents' policy consistently and in accordance with their terms and conditions of salaried office. The example of a salaried section 9(4) judge is also relevant. They do not receive the Deputy High Court Judge rate, but are paid in accordance with their salary because they are salaried. This supports the respondents' position that the claimants were not paid at the rate that they were on the ground of part-time status, but because they were salaried judges and sittings took place during salaried time.

235. Mr Allen KC suggests the wider position in the Civil Service for Crown Servants is also noteworthy. The policy relating to no extra remuneration for judges tallies with the wider position of salaried civil servants. Although the judiciary are not

Crown Servants, it is relevant that the respondents' treatment of them is consistent with a wider picture.

236. Mr Allen KC does not accept that the respondents' position on causation is circular or otherwise lacking in substance. The only effective and predominant cause was that the claimants were salaried judges and their sittings took place within their salaried time. Mr Allen KC says that if I accept this, I must reject the claims at the causation stage.

237. I have to decide whether the claimants' part-time worker status was the effective and predominant cause of the less favourable treatment in terms of their remuneration. The respondents' case is that the less favourable treatment was because the claimants were salaried judges who undertook their work as section 9(1) judges or as a Recorder during their salaried time. It was not because they were part-time.

238. I have readily concluded that the effective and predominant reason the claimants were paid as they were was not their claimed part-time status. The reason was that they were salaried judges who undertook their section 9(1) or Recorder duties during salaried time. The respondents therefore succeed on this issue.

239. I have found as fact that the respondents' consistent policy was that where salaried judges undertook duties as section 9(1) judges or Recorders during salaried time, they did not receive any additional remuneration. I have accepted the evidence of Sir Geoffrey Vos and Mr Waldren to this effect; indeed, the claimants themselves accepted this was the case. It was in accordance with the terms of appointment of District Judges, Circuit Judges and Recorders.

240. I accept Ms Crasnow KC's submission that the fact that other part-time judges are treated differently does not mean that the claimants' part-time status could not be the reason for their treatment. But I do not agree with her that it does not matter that other part-time judges are not treated the same. The treatment of others is capable, as the Employment Appeal Tribunal put it at paragraph 186 of the decision in *Dodds,* of shedding light on the question whether the less favourable treatment of the claimants was on the ground of their part-time status.

241. I have found that section 9(1) judges who were not salaried received the pro rata equivalent of a High Court Judge's salary. Section 9(1) judges who were salaried did not. The same was true of section (94) judges; the majority of whom were not salaried and received the pro rata High Court Judge's salary. I have noted that when Mr Atherton became 90% fractional, he received a pro rata High Court Judges' salary for sittings done outside salaried time but received no additional remuneration for those in salaried time. All of this, taken with the evidence of Sir Geoffrey Vos and Mr Waldren as to the reason the claimants and other judges in their position were and are paid as they were, leads me to the conclusion that the claimants' salaried status was the reason for their treatment.

242. I accept Ms Crasnow KC's submission that all those who are affected by the policy will be part-time. I accept also that Circuit Judges cannot escape the policy as their authorisation is dependent on their salaried status. But I am not applying

a "but for" test, and neither fact determines what the reason for the treatment was. I accept also that judges in this position may feel that the result is unjust. But the only question for me on the causation issue is what the reason for the treatment was, and it is clear in my judgment that it was not part-time status but rather that the work was done in salaried time as part of salaried duties. That means that within regulation 5, the less favourable treatment was not on the ground of part-time status, and the claimants' claims fail for this reason also.

Issue 4

243. I come finally to Issue 4, the question of objective justification. This arises under regulation 5(2)(b) of the PTWR. I must assume for this issue that the claimants have established that they were part-time workers who can compare themselves with High Court Judges or Circuit Judges (Mr Atherton) and the reason for their treatment was their part-time status.

244. Issue 4 is in the following terms:

> **4. OBJECTIVE JUSTIFICATION**
>
> **4.1 Was such less favourable treatment objectively justified on objective grounds consistently with the PTWR and the PTWD? The Respondent relies on the aims of:**
>
> **4.1.1 Fair and flexible deployment of judges to Courts and Tribunals whose office holders may be paid at rates which are different (higher or lower) from theirs;**
>
> **4.1.2 Fair allocation of resources; and**
>
> **4.1.3 Reflecting the difference in hierarchy and the differences in full-time roles as between different judicial roles.**

245. Regulation 5(2)(b) provides:

> **5. – Less favourable treatment of part-time workers**
>
> **(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker-**
>
> **(a) as regards the terms of his contract; or**
>
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.**
>
> **(2) The right conferred by paragraph (1) applies only if-**
>
> **(a) the treatment is on the ground that the worker is a part-time worker, and**
>
> **(b) the treatment is not justified on objective grounds.**

246. At paragraph 32 of the decision in *Dodds*, the Employment Appeal Tribunal identified that the case law on what is required to establish justification on objective grounds was reviewed by Lord Hope and Baroness Hale in *O'Brien [2013] ICR 299.* The Employment Appeal Tribunal identified the key parts of the Supreme Court's analysis in *O'Brien* as follows:

"44. There is, however, little guidance from the Court of Justice as to what might constitute such objective grounds, other than that which we have been given in this particular case [2012] ICR 955, paras 64 – 66:

"64. …the concept of 'objective grounds'…must be understood as not permitting a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. On the contrary, that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose: see, by way of analogy with clause 5.1(a) of the Framework Agreement on Fixed-term Work, Del Cerro Alonso [2008] ICR 145, paras 57 and 58.

65. …

66. It must be recalled that budgetary considerations cannot justify discrimination."

45. The first sentence of para 64 means no more than that it is not enough for a member state to provide for the difference in treatment in its law (or enforceable collective agreement): see Adeneler v Ellenikos Organismos Galaktos (Case C-212/04) [2007] All ER (EC) 82; [2006] ECR I-6057. The fact that regulation 17 of the domestic 2000 Regulations excludes fee-paid part-time judicial officers from the protection given by the Regulations is neither here nor there. The second sentence of para 64 repeats the familiar general principles applicable to objective justification: the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary to do so.

46. The opinion of Advocate General Kokott [2012] ICR 955, para 62, is slightly more expansive:

"The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued: see Del Cerro Alonso [2008] ICR 145, para 58 and Angé Serrano v European Parliament (Case C-496/o8P) [2010] ECR I-1793, para 44." This court proposes to follow the guidance given by the Court of Justice and the Advocate General in those passages."

247. Then at paragraph 33 the Employment Appeal Tribunal observed that caselaw on whether a respondent may rely upon costs savings as a justification defence was reviewed by Underhill LJ in *Heskett v Secretary of State for Justice* [2021] ICR 110 . The case concerned an age discrimination claim under the Equality Act 2010, but the principles summarised by Underhill LJ apply to part-time worker claims. At paragraph 81 Underhill LJ set out the principles:

"81. I turn to the fundamental question, which is what is meant by the phrase "solely [to avoid] increased costs"…On this it seems to me that we are bound by the guidance given by Rimer LJ at paras 66-67 of his judgment in Woodcock [2012] ICR 1126, but even if we were not, I would respectfully agree with it. He says in para 66 that the CJEU's language "cannot mean more than that the saving or avoidance of costs, will not, without more" – my emphasis – "amount to the achieving of a 'legitimate aim'". In other words, to take the paradigm case of discriminatory pay, an employer cannot "justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B."

82. That might seem too trite to need saying…but it is not difficult to understand why the CJEU thought it important to spell it out. It is the same obvious but important point that the Supreme Court makes at several points in O'Brien…: see para 67 of its judgment ("very different from deliberately discriminating against part-time workers in order to

save money"), para 69 ("a legitimate aim other than the simple saving of cost") and the example given at the end of para 74 ("it would not be legitimate to pay women judges less than men judges on the basis that it would cost less").

83. It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle…but it is real. …..

88. …there is certainly an established principle that, to take Rimer LJ's formulation in Woodcock [2012] ICR 1126, para 66, "the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim" for the purpose of the defence of justification in a discrimination claim; but that that principle needs to be understood in the way that I have sought to explain it in the preceding paragraphs. It only bites where the aim is, as the CJEU put it in Hill v Revenue Comrs [1999] ICR 48, "solely" to avoid costs.

89. …It is better, in any case where the issue arises, to consider how the employer's aim can most fairly be characterised, looking at the total picture. It is only if the fair characterisation is indeed that the aim was solely to avoid increased costs that it has to be treated as illegitimate."

248. A further relevant consideration in evaluating claimed objective justification is to balance the discriminatory effect of the provision against the business reason for it, including whether a less discriminatory measure might be adopted.

249. Ms Crasnow KC identifies the claimants' case in respect of each of the three grounds relied on by the respondents as follows:

(a) fair and flexible deployment of judges to courts and tribunals may in principle be a legitimate aim, but having regard to rates of pay where work to which judges are deployed is remunerated at higher or lower rates is not. There is no possibility of paying any salaried judge less than their salary. There is a statutory prohibition on doing so.

(b) Fair allocation of resources, provided only that it includes administrative difficulties or challenges, can be a legitimate aim in principle; and

(c) Reflecting differences in hierarchy is not a legitimate aim. The claimants have established they are part-time workers, doing comparable work to their comparators. It cannot be a legitimate aim to pay less money for equal work. This also appears to admit a purely budgetary purpose. This is effectively a justification that "it is acceptable to pay part-time workers less than full-time workers". That is self-evidently unavailable as a legitimate aim.

250. As to flexible deployment, Ms Crasnow KC says there is no suitability at all for the difference in treatment for this aim. As Mrs George pointed out in her evidence, withholding pay does not in any way change how flexibly the judiciary can be deployed. There are a number of enactments that provide for different judges sitting in different courts or tribunals. Similarly judges may be deployed at different locations at the "same" level. Nothing about either of those, or any other, factors necessitates paying part-time workers less than their full-time equivalent. Mr Atherton made this point in his evidence that "*Flexibility in any*

organisation must be a benefit if the people are qualified in doing the work - but it would not make me any less flexible if I was paid as a recorder properly."

251. As to fair allocation of resources, Ms Crasnow KC submits that there has been no substantiating evidence on this particular point. Mr Waldren said that a different system and validation of payments would be required, but there was no evidence of what time or resource would be required for this. Ms Crasnow KC submits that this is an insufficient evidence base to discharge the burden on the respondents that the difference in treatment is a suitable means of achieving the aim.

252. Ms Crasnow KC says that if, contrary to the claimants' case, reflecting differences in hierarchy is a legitimate aim, the evidence is not sufficient to demonstrate the suitability of the difference in treatment. The "hierarchy", insofar as it exists, ceases to exist once a judge is "siting up" and exercising the jurisdiction of the more senior office.

253. Ms Crasnow KC submits that it is not reasonably necessary to pay part-time workers less to achieve the aims relied on. She directs me to Lady Hale's judgment in *O'Brien* at paragraph 71:

> **"[Giving greater reward to those who need it]…might be a legitimate aim, but (as Advocate General Kokott explained) the unequal treatment of different classes of employees must be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria. An employer might devise a scheme which rewarded its workers according to need rather than to their contribution, but the criteria would have to be precise and transparent. That is not so here. Some part-timers will need this provision as much as, if not more than, some of the full-timers. On examination, this objective amounts to nothing more than a blanket discrimination between the different classes of worker, which would undermine the basic principle of the PTWD.".**

254. As to administrative difficulties, Mr Waldren suggested that there could be a negative impact on the administration of justice if the costs burden was increased, as savings might have to be made elsewhere. This, Ms Crasnow KC submitted, was tantamount to placing the burden of saving costs directly upon part-time workers.

255. Finally, Mr Crasnow KC contended that the constitutional problems suggested by Mr Waldren if other judges identified sitting up opportunities from which judges sitting-up might financially benefit were fanciful; it was absurd to suggest the public would be concerned by any perceived conflict of interest..

256. Mr Allen KC invites me to conclude that the respondents' policy approach is justified in accordance with clause 4 of the Framework Agreement and/or regulation 5(2)(b).That policy is that where salaried office holders are deployed to sit in a different court or tribunal, they are paid at the rate applicable to their salaried office.

257. Mr Allen KC says that the aims are those discussed at paragraphs 17-21 of Mr Waldren's witness statement.

258. The first aim is fair and flexible deployment of judges to courts and tribunals whose office holders may be paid at rates which are different (higher or lower) from theirs. Mr Allen KC says that fair and flexible deployment of judges is an essential feature of the efficient administration of the justice system, which ensures that variable work demands can be met, work can be prioritised and allocated in an effective and efficient way, and that work is dealt with by judges of appropriate experience and seniority. There is a statutory cap on the number of High Court Judges, and section 9(1) is a tool which assists with the burden of High Court work. Furthermore, as Mr Waldren explained, flexibility is assisted by having consistency of pay and by not having the administrative and financial constraints discussed below. The processes required if the claimants succeed will inevitably be more costly, cumbersome and administratively complex to implement, which will undermine the aim of flexibility of deployment.

259. The second aim is fair allocation of resources (including the difficulties of administering a system involving differential rates of pay to Circuit Judges undertaking section 9(1) duties). It is, Mr Allen contends, fair and reasonable that salaried judicial office holders are paid in accordance with their terms and conditions of appointment and their salary grade for the sittings they undertake within salaried time. This aim also includes the respondents' ability to utilise its judicial resources in a fair and efficient way.

260. Mr Allen KC submits that the claimants' contention that judges should be paid at a rate which reflects the level of work done during a particular period of time would, on a wider basis, have significant financial and administrative consequences for the respondents and other members of the judiciary (requiring paying judges differently depending on the type of work they do). When Mr Waldren was asked about the disparate approaches to additional fees for fee-paid judges, and an ongoing review of additional fees across the courts and tribunals, Mr Waldren responded that the review was about harmonising and simplifying variety of approaches across different jurisdictions, and paying an additional fee to a fee-paid judge (for example, for reading-in) was not the same as paying a salaried judge differently from the salary they already received for particular tasks carried out in their salaried time. Mr Waldren accepted that devising a system would not be impossible, but emphasised that it would be complex and costly to create, involving a new system. This, Mr Allen KC contended, would be a disproportionate task.

261. Mr Allen KC submitted that the respondents did not have to show, to make good their objective justification defence, that it would be impossible to implement a system to give enhanced pay for section 9(1) work. The significant administrative disadvantage of devising a new system, combined with the other factors including cost, is sufficient to show that the discrimination is justified. It is unnecessary to model the cost, as there is no dispute that it would be considerable, nor can it sensibly be disputed that devising and implementing a new system would be complex. The claimants were unable to explain in a convincing way how their proposed system could or would work, or even agree whether every minute of section 9(1) work should be remunerated at the higher level, or minimum threshold would need to be crossed.

262. The third aim was reflecting the differences in hierarchy and between full-time judicial roles. In Mr Allen KC's submission, it was reasonable for judges of differing levels of rank or seniority, as reflected by the judicial hierarchy, to be paid differently, which also related to ability to recruit the very best candidates to the High Court bench. Superior pay is one way in which the best calibre candidates for more senior judicial roles can be attracted and retained. Different levels of pay also reflect the differences between judicial roles (for example, in relation to complexity of the work or wider commitments attributable to the role).

263. Mr Allen KC submits that the question of proportionality includes consideration of the importance of judicial independence and the avoidance of conflict of interest or a perception of conflict of interest. He observes that the claimants reacted strongly to the suggestion that the public perception of judicial probity and independence could be undermined. The respondents do not dispute that judges are appointed as individuals of integrity and no criticism is intended of the personal probity of any of the claimants. However, judges are not, and should not be, beyond scrutiny or reproach. They are capable of error, and the respondents are concerned about the perception of judicial integrity. Mr Allen KC says that the fact is that, if these claims succeed, judges will need to make decisions which have direct consequences on the pay that they themselves or other judges receive, for example at gatekeeping stage. There is scope for a perception of conflict of interest. Pay differentials should not, even implicitly, be a feature of or a consequence of the exercise of discretion. The introduction of a pay differential also introduces a potential public perception that such a pay differential could play a part in the decision-making process. As things stand, pay does not feature in these decisions, and that is the way it should be, as being consistent with the independence of the judiciary. Mr Allen KC describes this as a point of constitutional significance.

264. The principles which I will apply in considering whether the impugned treatment is justified on objective grounds are that the identified difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary for the purpose. As to avoiding cost, it is necessary to consider how the employer's aims can most fairly be characterised, looking at the total picture. It is only if the fair characterisation is that the aim was solely to avoid increased costs that it has to be treated as illegitimate. With those principles in mind, my conclusions are as follows.

265. I find that the respondents' first aim is legitimate in principle. This is fair and flexible deployment of judges to courts and tribunals whose office holders may be paid at rates which are different (higher or lower) from theirs. The respondents say that the current arrangements assist flexibility in judges moving easily from siting in one capacity to another during the course of a day.

266. In terms of objective justification, however, there is force in the claimants' criticism that it is difficult to see how paying judges less than the appropriate pro rata rate for the work is a suitable means for achieving this flexibility objective. Judges will be no less flexible if they are paid the rate for the job. But as I understand it, the respondents' primary contention relates to the cost and

administrative difficulty of paying additional remuneration for judges when they sit up, and I will return to this.

267. The second asserted aim is fair allocation of resources (including the difficulties of administering a system involving differential rates of pay to Circuit Judges undertaking section 9(1) duties). I find that fair allocation of resources is a legitimate objective in itself; but the second part of the asserted aim (in parentheses as set out above) seems to me to be part of the justification rather than the aim. Again, I return to this below.

268. I find that the respondents' third aim of reflecting the differences in hierarchy and between full-time judicial roles in terms of the salaries attributable to the roles is also legitimate in principle. Hierarchy denote seniority, in terms of experience and complexity and seriousness of the work undertaken in different roles, and I agree with Mr Allen KC that such distinctions are legitimate, for the reasons he gives. It is a legitimate aim that rates of pay will reflect the seniority and responsibility of the role and are set to attract appropriate candidates to undertake the role on a salaried basis. But it is difficult to see how paying judges sitting-up less than the pro rata rate is suitable for achieving the objective; the rate paid to section 9(1) judges is immaterial to the purpose of paying substantive senior judges a rate which reflects the seniority and difficulty of the role.

269. Inherent in the respondents' case as to objective justification, as I see it, are three matters. The first is cost, and I accept that to pay judges sitting-up the same pro rata salary as substantive office-holders would carry a substantial cost. Mr Waldren said in evidence that savings would need to be found elsewhere in the respondents' budget were this cost to be incurred, and it is possible that increased administration and management costs could lead to less use of section 9(1) judges in favour of meeting the demands of the High Court in different ways. Cost cannot be, of course, in itself an objective ground justifying discrimination. I find that the respondents' main purpose is indeed saving cost, but I find also that it is not their only purpose, and this leads me to the second matter, which is administrative difficulties. I acknowledge that no system exists within the respondents' organisation to identify and pay salaried office-holders additional remuneration for sitting-up, and that developing and operating such a system would require substantial time and effort. This is particularly so when the evidence shows that section 9(1) work may occupy only a small, and unpredictable, part of a Circuit Judge's day.

270. Although the respondents did not lead any evidence as to what the cost of paying section 9(1) judges or recorders on a pro rata basis would be, I will accept without more that it would be significant; I have referred to the extent of the use of section 9(1) judges. Administrative difficulties are more troubling; Mr Waldron's evidence was not that it was impossible to design the necessary systems; it was that doing so would increase administration and management costs and planning projections would be difficult particularly in relation to family work, where a Circuit Judge may switch between section 9(1) work and County Court work several times a day. Mr Waldron told me that the respondents had not modelled what would be involved in a system of, for example, a time-record or part-day basis of claiming additional remuneration. But I must accept that there would be

significant administrative and cost implications not only in respect of the additional remuneration payable under such arrangements, but also in designing and developing, implementing and operating such a system.

271. In respect of Mr Atherton, I heard no evidence that administrative difficulties arose when, from 2011, some of his sittings as a recorder which were performed outside his salaried time were paid at the pro rata Circuit Judge rate.

272. The respondents also rely upon, as a third overarching consideration, the conflicts of interest (or public perception of conflicts of interest) that could arise if salaried judges were paid differently depending on the type of work that they did. They say that this arises because judges categorising or allocating work might be motivated by a desire to allocate to the financial advantage to other judges. In his evidence, Mr Waldron focussed on the public perception of bias that might exist.

273. I regard this as fanciful. I have made findings of fact about the systems which exist for allocating work based on the circumstances of each case and without any consideration whatever of judges' remuneration. I note also that work is already allocated to fee-paid Recorders without similar concerns arising. The assertion – which is all it is - that judges might make such decisions from a desire to benefit other judges in terms of the fees they would receive impugns the integrity of judicial office-holders in an unwarranted and unjustified way and I have no hesitation in rejecting it. As to public perception, I do not consider that any fair-minded observer with full knowledge of the circumstances of allocation of work would conclude there was any real possibility of bias in such decisions. There is no evidence whatever that any issues of adverse public perception would arise.

274. I do not find that there is any possibility of judges being paid less if they "sat down" in an inferior jurisdiction. The respondents accept that such an outcome is prohibited by statute. Judges' pay cannot be reduced. There is no reason why paying judges additional remuneration for "sitting-up" carries any concomitant risk of paying less for "sitting-down".

275. I draw all this together and have undertaken the required balancing exercise. As I have said, the identified difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary for the purpose. On the assumed findings, the discriminatory effect of the respondents' policy is that when the claimants "sat up," the respondents treated them less favourably as part-time workers than comparable full-time workers by failing to remunerate them at the *per diem* equivalent of the higher rate of remuneration paid to those who sit full-time in the more senior judicial capacity.

276. I accept that it is easier for the respondents to achieve flexibility of deployment of section 9(1) judges and recorders if there is no requirement to pay additional remuneration for their sitting-up. There is a saving of the cost of the additional remuneration and no requirement for an administrative system for calculation and payment of additional remuneration. I accept also that the respondents will incur significant additional cost and administrative time and expense in

designing, implementing and operating the required systems (which do not presently exist) for paying additional remuneration to salaried judges "sitting-up".

277. But I do not accept that the treatment which involves paying part-time judges less than their full-time comparators on the ground of their part-time status is suitable for the purpose or reasonably necessary. Cost is not in itself a ground justifying a discriminatory policy and the respondents have not established what the extent of the administrative difficulties in addition to the cost of the payments would be sufficient to establish that the policy is objectively justified when weighed against its discriminatory effect. It is insufficient in the circumstances of these cases simply to say that there are no systems in place to make the necessary payments to remove the discrimination and it will be difficult to implement them, without clear evidence of what that will entail. Objectively viewed, a method of payment for time spent on "sitting-up" appears capable of being devised, and the respondents have not established that it would be disproportionately difficult or expensive to implement judged against the requirement that the existing policy must be justified on objective grounds.

278. Similarly and for the same reasons, I do not find that the asserted aim of fair allocation of resources has been established as objectively justified because ameliorating the adverse effect on the claimants and judges in their position would entail cost and administrative resources. The respondents do not say that paying part-time judges less that their full-time comparators is in itself justified as being a fair allocation of resources; they rely on the cost and administrative resources involved in setting up and operating systems for doing it. For the reasons I have given above, I do not find that this was justified on objective grounds.

279. I find, therefore, in respect of Issue 4 that the respondents have not discharged the burden upon them of showing that the assumed treatment of the claimants was justified on objective grounds. In light of my conclusions on Issues 1, 2 and 3, however, the claimants' claims are not well-founded and are dismissed.

S D Robertson

Regional Employment Judge Robertson

28 October 2024

Sent to the parties on:

29 October 2024

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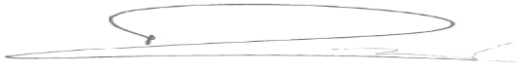
For the Tribunal Office:



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