Michaelmas Term
[2019] UKSC 60
On appeal from: [2015] EWCA Civ 1368

JUDGMENT

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

before

Lady Hale, President
Lord Reed, Deputy President
Lord Wilson
Lord Carnwath
Lady Arden

JUDGMENT GIVEN ON

16 December 2019

Heard on 11 July 2019

Appellants	*Respondent*
Robin Allen QC Rachel Crasnow QC (Instructed by Browne Jacobson LLP)	John Cavanagh QC Charles Bourne QC (Instructed by The Government Legal Department)

LORD CARNWATH: (with whom Lady Hale, Lord Reed, Lord Wilson and Lady Arden agree)

Introduction

1. The issue in this appeal is when time starts to run for a claim by a part-time judge to a pension under the Part-time Workers' Directive (Directive 97/81) ("PTWD"), as applied by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) ("PTWR"). The directive was required to be transposed into domestic law by 7 April 2000.

2. The appellants are four judges, each of whom has held one or more appointments as fee-paid part-time judges, in some cases moving between such part-time and full-time salaried appointments. They are illustrative of the different ways in which such part-time (PT) and full-time (FT) appointments may be combined in a single career, as Mr Allen QC (for the appellants) explains in his printed case:

> "The careers of Mr Haworth and Mr Sprack illustrate the common situation of a judge moving from PT to FT in the same jurisdictions: Mr Haworth as a Costs Judge, and Mr Sprack as an Employment Judge. Mr Sprack also reverted to working PT before finally retiring.
>
> The careers of Mr Fox and Mr Wain illustrate the kinds of judicial careers that are based on a portfolio of PT judicial appointments which can change over time prior to retirement. Additionally, Mr Wain also held a FT appointment as a District Judge between May 2004 and January 2011, though even then he also held a PT appointment as a Mental Health Tribunal judge."

3. Each appellant lodged a claim with the Employment Tribunal more than three months after the end of a part-time appointment, and therefore out of time if that is the relevant date; but within time, if the relevant date is the date of retirement. In a decision given on 2 January 2014 EJ Macmillan held that the period of three months started to run from the end of any part-time appointment, and that the claims were accordingly out of time. He declined to exercise the discretion (under PTWR para 8(3)) to extend time as being "just and equitable"; that part of his decision is no longer in issue. Since then there has been no substantive judicial consideration of

these issues at higher levels, the issues being treated as in substance turning on decisions, domestic and European, in the related case of *O'Brien v Ministry of Justice* (see below).

The statutory framework

4. In *Ministry of Justice v O'Brien (No 2)* [2017] UKSC 46; [2017] ICR 1101, para 10, Lord Reed summarised the domestic legislation governing judicial pensions:

> "Domestic legislation provides for the payment of judicial pensions under two statutes, the Judicial Pensions Act 1981 and the Judicial Pensions and Retirement Act 1993. The 1981 Act applies to persons appointed prior to 31 March 1995, unless they elect to have their pension paid under the 1993 Act. The 1993 Act applies to persons appointed on or after 31 March 1995. Under the Acts, a pension is payable to any person retiring from 'qualifying judicial office', subject to their having attained the age of 65 and, under the 1993 Act, subject also to their having completed at least five years' service in such office. At the material time, full-time judges and salaried part-time judges held a qualifying judicial office, but fee-paid part-time judges, such as recorders, did not. Under both schemes, the amount of pension payable to a full-time judge is based on his or her final year's salary and on his or her number of years' service in a qualifying judicial office by the date of retirement. Under the 1981 Act, circuit judges must have served for 15 years in order to qualify for a full pension of one half of their last annual salary. The corresponding period under the 1993 Act is 20 years. Under both schemes, judges who have served for shorter periods receive a proportion of the full pension corresponding to the length of their service. There is also a lump sum payable on retirement, the sum being based on the amount of the annual pension. Judicial pensions were at the material time non-contributory. Since 2012, judges have had to pay a contribution."

5. For present purposes it is sufficient to refer to the provisions of the 1993 Act, which applied to those appointed on or after 31 March 1995. The basic concept in the 1993 Act is "qualifying judicial office" (1993 Act section 1(1)). By section 1(6):

> "(6) For the purposes of this Act, a person shall be regarded as holding, or serving in, qualifying judicial office at any time when he holds, on a salaried basis, any one or more of the offices specified in Schedule 1 to this Act; …"

Schedule 1 is a list of offices ranging from court judges at different levels, through "court officers" (such as Queen Bench Masters), to "members of tribunals" in a range of specified jurisdictions. It is to be noted that the focus (under section 1(6)) is not on individual offices or appointments, but on "qualifying judicial office" - a composite term which may comprise any one or more of the listed offices.

6. By section 2(1):

> "Any person to whom this Part applies -
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> (a) who retires from qualifying judicial office on or after the day on which he attains the age of 65, and
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> (b) who has, at the time of that retirement, completed, in the aggregate, at least five years' service in qualifying judicial office,
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> shall be entitled during his life to a pension at the appropriate annual rate."

Later subsections deal with the variation of the pension entitlement in special cases: for early retirement on medical grounds (section 2(3)); early removal from office (section 2(4)); and resumption of qualifying office after beginning to take a pension (section 2(5)). Section 3 fixes the appropriate annual rate by reference to "the aggregate length of … service in qualifying judicial office" at the point of retirement. The appellants, so long as not being paid on a "salaried basis", were excluded from the definition of "qualifying judicial office", and therefore also excluded from rights to pensions under the Act.

7. The PTWR, which came into force on 1 July 2000, and gave effect to the PTWD, were designed to put part-time workers on the same footing as their full-time equivalents. Regulation 5 provided:

> "5(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 -
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> (a) as regards the terms of his contract; or
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> (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer …"

Initially this did not assist the appellants, since regulation 17 provided:

> "These Regulations do not apply to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis."

However, the Supreme Court later made clear (in the first *O'Brien* judgment - see below) that regulation 17 must be disapplied so as to bring the meaning of "worker" in the PTWR into line with the PTWD. This opened the way to claims by fee-paid judges, such as the appellants, under the PTWR.

8. The relevant time limit for a complaint to the Employment Tribunal is set by regulation 8 of the PTWR which provides:

> "(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months … beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them,
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> …
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> (4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2) -

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

O'Brien v Ministry of Justice

9. Dermod O'Brien QC was appointed as a Recorder of the Crown Court from March 1978, initially for three years, but extended periodically until his retirement on 31 March 2005. Although his terms of service gave no right to a pension, he claimed to be entitled under the PTWR to a pension on terms equivalent to those applying to a circuit judge. Following a reference to the CJEU, in February 2013 his claim in principle was upheld by the Supreme Court (*O'Brien v Ministry of Justice* [2013] UKSC 6; [2013] 1 WLR 522; [2013] ICR 499).

10. The claim was remitted to the Employment Tribunal for determination of other matters in dispute, including a dispute as to the period to be taken into account in calculating his pension. The question was whether, in calculating the amount of his pension, account should be taken of the whole of his service since the beginning of his appointment on 1 March 1978 (a period of 27 years), or only his service since the deadline for transposing the directive expired (a period of less than five years). Following conflicting decisions of the Employment Tribunal and the Employment Appeal Tribunal, on 6 October 2015 the Court of Appeal held that only the shorter period should be taken into account (*O'Brien v Ministry of Justice* [2015] EWCA Civ 1000; [2016] ICR 182). On 9 November 2015, the Court of Appeal dismissed the appellants' appeals in the *Miller* cases without further analysis, treating them as governed by its judgment in *O'Brien*.

11. Following an appeal to the Supreme Court, the court decided on 12 July 2017 to refer a further question to the CJEU (*O'Brien v Ministry of Justice (No 2)* [2017] UKSC 46; [2017] ICR 1101). In his judgment explaining the reference, Lord Reed (paras 15-20) cited *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers en Schoonmaakbedrijf* (Case C-109/91) [1995] ICR 74; [1993] ECR I-4879) ("*Ten Oever*"), as showing that the CJEU had treated occupational pensions "as a form of pay, the entitlement to which accrues over the length of the employee's service." Mr O'Brien had argued that, consistently with the future effects principle, earlier periods of employment were to be taken into account when applying the directive in situations which arose after it should have been transposed. In contrast the Ministry had argued that, since (under *Ten Oever*) the entitlement to an occupational pension accrued at the time of the work, his non-entitlement to pension in respect of his first 22 years of service must, in line with the non-retroactivity principle, be left out of account having been definitively established before the directive entered into force.

12. While accepting that the resolution of these conflicting arguments was not acte clair so that a reference was necessary, Lord Reed indicated the provisional view of the majority of the court in favour of Mr O'Brien's contention:

> "The majority of the court are inclined to think that the effect of Directive 97/81 is that it is unlawful to discriminate against part-time workers when a retirement pension falls due for payment. The directive applies ratione temporis where the pension falls due for payment after the directive has entered into force. In so far as part of the period of service took place prior to the directive's entry into force, the directive applies to the future effects of that situation."

13. On 7 November 2018, the CJEU handed down judgment in *O'Brien v Ministry of Justice (No 2)* (Case C-432/17) [2019] ICR 505 ("*O'Brien 2*"). The CJEU, in effect upholding the majority view, held that periods of service prior to the deadline for transposing the directive must be taken into account for the purpose of calculating the retirement pension entitlement. As the court explained, while a new legal rule does not apply to legal situations that "arose and became definitive" prior to its entry into force, it does apply to "the future effects of a situation which arose under the old law" (para 27). It was accordingly necessary to examine whether -

> "the gradual acquisition of pension entitlements over the period preceding the deadline [for transposition of the directive] has the effect that the legal situation of the claimant must be considered to have become definitive at that date." (para 29)

14. It noted the argument for the government that at the end of each period of service the corresponding pension entitlement "exhausts its effects", and therefore should be left out of account (para 30). However, (in a passage relied on by both parties in the present appeal) the court observed:

> "… with regard to the argument of the United Kingdom Government that the calculation of the period of service required to qualify for a retirement pension should be distinguished from the rights to a pension, it must be noted that it cannot be concluded from the fact that a right to a pension is definitively acquired at the end of a corresponding period of service that the legal situation of the worker must be considered definitive. It should be noted in this respect that it is only subsequently and by taking into account relevant periods of service that the worker can effectively avail himself of that

> right with a view to payment of his retirement pension." (para 35)

15. The Ministry has accepted that judgment as determinative of the *O'Brien* appeal in his favour.

Innospec Ltd v Walker ("Walker")

16. Before returning to the present appeals, it is necessary to refer to another case which was heard by the Supreme Court at the same time as the *O'Brien* but in which the court gave a final ruling rather than making a reference ([2017] UKSC 47; [2017] ICR 1077). The issue in *Walker* in short was whether the civil partner of Mr Walker (under a partnership registered in January 2006) was entitled to be paid a survivor's pension calculated by reference to Mr Walker's service, both before and after the transposition date of Directive 2000/78/EC (the Framework Equality Directive), which outlawed discrimination on grounds of sexual orientation. Consistently with its view in *O'Brien*, applying the *Ten Oever* principle, the Court of Appeal had held that only Mr Walker's service after the transposition date (2 December 2003) should be taken into account in calculating the survivor's pension to which his partner would be entitled.

17. This court rejected that approach. No issue arose as to the time limit for bringing the claim under regulation 8. However, Mr Allen relies on a paragraph in the majority judgment of Lord Kerr dealing with the *Ten Oever* argument:

> "Mr Chamberlain [counsel for Mr Walker] submitted that the appeal tribunal … wrongly took Advocate General Van Gerven's description of pension benefits in the *Ten Oever* case … as 'deferred pay' as equating the time at which a pension right accrues with the time at which any discrimination in the provision of resulting benefits is to be judged. I agree that the appeal tribunal was wrong to do so. *The point of unequal treatment occurs at the time that the pension falls to be paid*. If Mr Walker married a woman long after his retirement, she would be entitled to a spouse's pension, notwithstanding the fact that they were not married during the time that he was paying contributions to his pension fund. Whether benefits referable to those contributions are to be regarded as 'deferred pay' is neither here nor there, so far as entitlement to pension is concerned. Mr Walker was entitled to have for his married partner a spouse's pension at the time he contracted a legal marriage. The period during which he acquired that entitlement

had nothing whatever to do with its fulfilment." (para 56, emphasis added)

The Miller appeals

Judge Macmillan's reasoning

18. It is right to pay tribute to Judge Macmillan's commendably thorough and insightful treatment of the issues in the Employment Tribunal. He summarised his conclusion on the time limit issue at the outset of his judgment:

> "1. For the purposes of bringing a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 in respect of denial of access to the judicial pension scheme, time runs from the ending of each fee paid appointment about which complaint is made, irrespective of whether the claimant then transfers into a salaried appointment or has other fee paid appointments which continue (paras 15-26) …"

19. The paragraphs there referred to contain a careful analysis of the respective submissions before him, including discussion of the House of Lords decision in *Barclays Bank plc v Kapur* [1991] 2 AC 355. It is sufficient to quote the most relevant part of his conclusion:

> "25. I therefore reach the same conclusion as the tribunal in *O'Brien*, namely that the act of discrimination complained of, denial of access to the scheme while a fee paid judge, must be distinguished from the consequences of that act, the failure to pay a pension reflecting fee paid service, a passage expressly approved by the Court of Appeal in *O'Brien*. *Barclays Bank plc v Kapur*, in my judgment, far from being a trump card is in fact irrelevant. In a simple transfer case time therefore runs from the date on which the fee paid office about which complaint is made, ended.
>
> 26. If that is true of the simple transfer cases it must, in my judgment be true of the so-called portfolio cases, that is those cases where at some point in their career a fee paid judge has held other fee paid offices which they no longer hold at the time the claim was presented. Time runs in those cases from the date

> on which each office was relinquished. The variants of the simple transfer case, where the salaried judge returns to fee paid office on retirement from the salaried post and where the fee paid judge continues to hold a fee paid office in addition to their salaried office, produce the same result although for different reasons. In the former case Mr Allen has failed to explain how, if the first period of fee paid service is out of time, the second period somehow resurrects the corpse. He has failed to explain it because no explanation is available. In the latter case the answer lies in regulations 5(1) and 8(4)(a). Any term in the parallel fee paid 'contract' cannot be less favourable in the sense of the pension it fails to generate as the salaried terms and conditions are generating the maximum pension entitlement possible …"

20. As already noted, there was no substantive consideration of this reasoning in the Employment Appeal Tribunal or the Court of Appeal, in view of the perceived link with the issues in *O'Brien*. As Lewison LJ explained in the Court of Appeal:

> "1. The issue on these appeals is whether the appellants were in time in submitting their claims to the Employment Tribunal complaining of unlawful discrimination under the Part Time Workers Directive. That, in turn, depends on whether their pension rights are definitively acquired at the time of their service or only when they retired; which is a question of EU law.
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> 2. In *O'Brien v Ministry of Justice* [2015] EWCA Civ 1000, decided on 6 October 2015, this court held that a worker definitively requires pension rights attributable to a particular period of days during that period of service and does so by reference to the law applicable during that period of service. The decision in *O'Brien* is equally applicable to these appeals with the consequence that the appellant's applications were out of time." ([2015] EWCA Civ 1368, paras 1-2)

The competing arguments in this court

Ministry of Justice

21. For the Ministry Mr Cavanagh QC accepts that, before the CJEU judgment in *O'Brien 2*, the expectation was that the *O'Brien* and *Miller* appeals would stand or fall together. However, that view was no longer tenable in the light of the reasoning of the court. He starts from the key issue in *Miller* as identified in the Statement of Facts and Issues, agreed by the parties in October 2016 (at para 22):

> "The answer to the question whether [the Miller appellants'] claims are in time depends on the point in time at which pension rights are definitively acquired and time for bringing a claim starts to run."

In *O'Brien 2* (para 35) the CJEU confirmed that the right to a pension is "definitively acquired" at the end of the corresponding period of service. That would appear to give a clear answer to the issue identified in the *Miller* appeals, which is unaffected by the CJEU's disposal of *O'Brien* itself by reference to its application of the "future effects principle".

22. He notes that, following the first judgment of this court in *O'Brien* [2013] 1 WLR 522, para 42, it is clear that the claims are domestic claims, arising under the PTWR, but subject to the disapplication of regulation 17 so as to bring the meaning of "worker" in the PTWR in line with its meaning in the PTWD. The procedural rules and limitations applicable to such claims are matters for domestic law (subject to the requirements of effectiveness and equivalence, which are not in issue).

23. Applying regulation 8, the question for the purpose of the primary time limit is when the less favourable treatment took place. Under domestic legal principles, pensions are treated as deferred pay (*Parry v Cleaver* [1970] AC 1 at 16C-D), the entitlement to which accrues at the time of service. The fact that the pay is received some time after employment has ended, so that the consequences may not be felt for some time afterwards, does not detract from the position that the less favourable treatment or detriment took place during the service. A distinction is to be drawn between the less favourable treatment or detriment and its consequences (*Barclays Bank plc v Kapur* [1989] ICR 753, 770 per Mann LJ). This is illustrated by *Sougrin v Haringey Health Authority* [1992] ICR 650, in which it was held that time ran from the alleged act of discrimination (the refusal to promote the claimant), not from the subsequent period during which she received a lower salary in consequence.

24. This approach is, he submits, consistent with the decision of the House of Lords in *Barclays Bank plc v Kapur* [1991] 2 AC 355. This was a claim under the Race Relations Act 1976, brought by Asian Barclays employees whose service in Kenya (before their expulsion and further employment by Barclays in the UK) had not been treated as counting towards their pension entitlement with Barclays Bank Ltd. The time limit for bringing a claim was set by section 68, which provided:

> "(1) An industrial tribunal shall not consider a complaint [of race discrimination] unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done.
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> …
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> (7) For the purposes of this section -
>
> (a) when the inclusion of any term in a contract renders the making of the contract an unlawful act, that act shall be treated as extending throughout the duration of the contract; and
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> (b) any act extending over a period shall be treated as done at the end of that period; and
>
> (c) a deliberate omission shall be treated as done when the person in question decided upon it …"

25. Under section 68 the House of Lords held that the less favourable treatment took place throughout the period of employment, so that the three month primary limitation period commenced at the end of the employment. Lord Griffiths, with whom the other members of the House agreed, said (at p 369):

> "In the present case the Court of Appeal were in my view right to approve these two decisions and to classify the pension provisions as a continuing act lasting throughout the period of employment and so governed by subsection (7)(b). … A man works not only for his current wage but also for his pension and to require him to work on less favourable terms as to pension is as much a continuing act as to require him to work for lower current wages."

As Mr Cavanagh submits, it is clear from this that less favourable treatment or detriment in relation to pensions takes place at the same time as in relation to any other aspect of a worker's terms and conditions, that is during service. Lord Griffiths did not say that it occurred at the time the claimants took their pensions.

26. He submits further that to hold that the relevant date does not arise until the pension is taken would lead to absurd consequences:

> "It would mean that a claimant in a pensions case would have no right to take proceedings under the PTWR until they had reached pension age which may be very many years after the period of service and which may well be too late to obtain a genuine remedy. It would also mean that the very many claims that have been brought by claimants in the judicial pensions litigation who are below retirement age would have to be struck out on the basis that there has been as yet no breach of the PTWR."

The appellants

27. Mr Allen for the appellants reads regulation 8 as posing the question: when did the less favourable treatment allegedly unlawful contrary to regulation 5 *finally* occur? (his emphasis). The Ministry's arguments fail to give weight to the true nature of their claims. The treatment which is less favourable, compared to that afforded to a full-time judge, is the non-payment of a pension pro rata temporis on retirement at or above 65. The detriment finally occurs at the point at which, had they only ever worked full-time in qualifying judicial office, they would have been actually entitled to a pension:

> "Until then the pension entitlement of the comparator is, prospective, contingent and inchoate in the sense of not being fully formed. Until then their right to equal treatment is similarly prospective, contingent and inchoate."

28. This approach is, he submits, entirely consistent with para 35 of the CJEU's judgment in *O'Brien 2* (see above). Although the court spoke of the right being "definitively acquired" at the end of a period of service, it recognised that this was not "definitive" of the worker's legal situation, since it was "only subsequently and by taking into account relevant periods of service" that he could "effectively avail himself of that right" with a view to payment of his retirement pension.

29. The passage of Lord Griffiths' speech in *Kapur* does not assist Mr Cavanagh, both because the wording of the relevant provision was different, but also because the House was not asked to consider whether or not there was relevant unfavourable treatment also at the time of retirement. Conversely, his argument disregards the clear and specific treatment of this issue by Lord Kerr in *Walker*. Nor is there any basis for the suggested absurdity arising from the appellants' argument. The fact that there is relevant detriment at the time of retirement does not mean that there is no detriment at an earlier period, nor that there is anything to prevent proceedings in that respect at an earlier stage.

Discussion

30. As I understand it, it is now common ground that the issue in this appeal is one of domestic law, turning on the construction and application of regulation 8 of the PTWR, and that the determinative question is: when did the less favourable treatment occur, or (in Mr Allen's words) when did it *finally* occur? Although perhaps understandable at the time, the former assumption (apparent in the judgment of the Court of Appeal) that the issue was one of European Law, and that the present claims would stand or fall with *O'Brien*, seems to have proved something of an impediment to a clear analysis of the relevant issues of domestic law.

31. At the same time it must be borne in mind that 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 (see regulation 5, 8(4)), a judicial officer is not employed under a contract (see *Gilham v Ministry of Justice (Protect intervening)* [2019] UKSC 44; [2019] 1 WLR 5905), so that references to the "terms of a contract" can at best be applied by analogy. Secondly, as has been seen, the judicial pension scheme is not based on individual appointments, but on "qualifying judicial office", which may include a number of different appointments within those specified in Schedule 1 of the 1993 Act.

32. That special feature of the scheme needs to be taken into account in making a comparison for the purposes of the regulations. It may be misleading and unfair to direct attention to the nature and timing of individual part-time appointments, without regard to the broader concept of "qualifying judicial office", which would have applied had they been brought within the statutory scheme. This as I understand it was a point made by Mr Allen in the Employment Tribunal, as recorded by Judge Macmillan (ET para 12):

> "The Judicial Pensions and Retirement Act 1993 permits the payment of pension only on retirement from judicial office, not from 'a' judicial office and requires the judge's pension to be calculated on their aggregated service in judicial office, meaning that the judge who changes roles has her total service counted for pension purposes, not just her service in the latest role. The European cases relied upon by Mr Cavanagh are simply not in point as they do not deal with time limit issues at all."

33. As has been seen (para 19 above), the judge took a narrower view. He proceeded on the basis that, in what he called a "simple transfer case" -

> "time therefore runs from the date on which the fee paid office about which complaint is made, ended."

He applied the same approach to more complex "portfolio" cases where a fee-paid judge has held other fee-paid offices, or has moved between salaried and fee-paid offices: time runs "from the date on which each office was relinquished". I understand the logic of that approach. But, as Mr Allen submitted, it does not fit well with the aggregate approach required by the 1993 Act. The varied combinations of fee-paid or salaried offices undertaken by different individuals were a desirable feature of a flexible judicial system, but there is no reason why they should govern the entitlement to pension, under the PTWR any more than under the 1993 Act itself.

34. I also agree with Mr Allen that the speech of Lord Griffiths in *Kapur* is not determinative. The issue was whether the unfavourable treatment continued throughout the period of employment. The House was not required to consider whether there was an unfavourable treatment also at the point when the pension was or would be taken. For the same reason, I would reject Mr Cavanagh's submission as to the "absurd" consequences which would follow from denying complainants a remedy at an earlier stage. As regulation 5 makes clear, the unfavourable treatment may relate to the terms of the contract, or "any other detriment" resulting from an act or failure to act by the employer. By analogy, in the context of judicial pensions, the part-time judge may properly complain both during his period of service, that his terms of office did not include provision for a future pension; and, at the point of retirement, that there has been a failure at that point to make a pension available. The former does not exclude the latter.

35. Finally, I agree with Mr Allen that Lord Kerr's judgment in *Walker* is helpful in that respect. Although he was not concerned with the application of a comparable time limit, that does not detract from the generality of his statement that "the point

of unequal treatment occurs at the time that the pension falls to be paid". It is consistent also with Lord Reed's statement in *O'Brien* that "it is unlawful to discriminate against part-time workers when a retirement pension falls due for payment". In my view, that also accords with the common sense of the matter. It may be that the appellants could have complained of less favourable treatment, as compared to their full-time colleagues, by reference to the lack of any equivalent provision for a pension in their terms of office. But that does not detract in any way from the less favourable treatment they undoubtedly suffered, or would suffer, at the point of retirement.

Conclusion

36. For these reasons I would allow the appeals, and make declarations accordingly.