Neutral Citation Number: [2024] EAT 121

Case No: EA-2023-SCO-000034-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 25 July 2024

Before:

THE HONOURABLE MR JUSTICE SWIFT

- -

Between :

THE SCOTTISH MINISTERS

Appellants

- and -

JOHANNA JOHNSTON

Respondent

- -
- -

BRIAN NAPIER KC (instructed by Anderson Strathern LLP) for the **Appellants**
AIDAN O'NEILL KC (instructed by McGrade & Co.) for the **Respondent**

Hearing date: 19 March 2024

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JUDGMENT

SUMMARY

Part Time Workers

The Appeal Tribunal allowed an appeal against the decision of the Employment Tribunal on a preliminary issue, that the Claimant was a part-time worker, as defined in the Regulations. The Claimant held judicial office as a Sheriff. She was then appointed a Temporary Judge of the Court of Session. The Employment Tribunal concluded that from the time the Claimant was appointed a Temporary Judge, the terms of her appointment had been varied by conduct such that she held two, concurrent, part-time appointments, one as Sheriff, the other as Temporary Judge.

The Appeal Tribunal concluded: (a) that 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) that, in any event, on the evidence before 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) that in reaching the conclusion that two such relationships had come into existence, the Employment Tribunal had misapplied regulation 2(2) of the Part-Time Workers Regulations by failing to have regard to the employer's custom and practice.

The Appeal Tribunal set aside the Employment Tribunal's decision on the preliminary issue and substituted a decision that the Claimant was not a part-time worker.

THE HONOURABLE MR JUSTICE SWIFT

A. Introduction

1. The Scottish Ministers appeal against the judgment of the Employment Tribunal on a preliminary issue, sent to the parties on 28 February 2023. For sake of convenience in this judgment, I will refer to the parties as they were described below: the Scottish Ministers as the Respondents; Ms Johnston as the Claimant.

(1) The Claimant's claim in the Tribunal proceedings

2. The Claimant's claim is brought under regulation 8 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the Part-Time Workers Regulations"). From September 2013 the Claimant was a Temporary Judge of the Court of Session. She contends: that as a Temporary Judge she was paid less than permanent judges of the Court of Session; that this was contrary to the requirement at regulation 5 of the Part-Time Workers Regulations that part-time workers should not be treated less favourably than "comparable full-time workers"; and, in particular, that this was contrary to the "pro-rata principle" at regulation 5(3) of the Part-Time Workers Regulations, and defined at regulation 1(2).

3. In outline, the circumstances in which the Claimant's case arose are as follows. From 2003 until her retirement in 2022 the Claimant held judicial office. In May 2003 the Claimant became a part-time Sheriff. In September 2008 she was appointed to the office of Sheriff, which was a salaried position. With effect from 10 September 2013, the Claimant was appointed a Temporary Judge of the Court of Session ("a Temporary Judge"). That appointment was made by the Respondents in exercise of powers then contained in section 35(3) of and paragraph 5 of Schedule 4 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 ("the 1990 Act"). So far as material and at the material time, section 35 of the 1990 Act was as follows.

> "(1) Paragraphs 1 and 3 of Schedule 4 to this Act shall have effect in relation to the eligibility of sheriffs principal, sheriffs and solicitors to be appointed as judges of the Court of Session.

> …
>
> (3) Notwithstanding any provision in any enactment, if it appears expedient to the Secretary of State he may, in accordance with the provisions of paragraphs 5 to 11 of the said Schedule, and after consulting the Lord President, appoint persons to act as temporary judges of the Court of Session."

Paragraph 1 of the Schedule 4 to the 1990 Act provided that Sheriffs who had held office for not less than 5 years were eligible for appointment as judges of the Court of Session. Paragraph 5 of Schedule 4 provided that any person eligible for appointment as a judge of the Court of Session under paragraph 1 "may be appointed as a temporary judge under section 35(3) of this Act". The Claimant was appointed a Temporary Judge for the term specified in paragraph 5(2) of the Schedule 4 – i.e. for 5 years.

4. In 2018 the Claimant was re-appointed. By that time, the provisions in the 1990 Act had been repealed and replaced. The relevant statutory provision at that time (and now) were at sections 20B and 20C of the Judiciary and Courts (Scotland) Act 2008 ("the 2008 Act") which, in the circumstances of the Claimant's case, required her re-appointment.

5. Following appointment as a Temporary Judge, the Claimant continued to work as a Sheriff combining that work with work as a Temporary Judge. The time spent by the Claimant sitting as a Temporary Judge varied from year to year: for example, in the 2013 calendar year she sat for 13 days, and in the 2015 calendar year she sat for 101 days. A table setting out the Respondents' calculation of the Claimant's sitting days is at paragraph 17 of the Tribunal's judgment. Following her appointment as Temporary Judge, the Claimant continued to receive the salary she had been paid as Sheriff notwithstanding that part of her time was spent sitting as Temporary Judge.

6. The Claimant's claim under the Part-Time Workers Regulations is that these arrangements meant that, as Temporary Judge, she was a part-time worker and was treated less favourably than permanent judges of the Court of Session. The salary of a permanent judge of the Court of Session is higher than the salary paid to a Sheriff. The Claimant contends that for each day's sitting as a Temporary Judge she should have been paid an additional amount over and

above her Sheriff's salary so that her total remuneration for the day was equivalent to the *per diem* remuneration paid to a permanent judge of the Court of Session (i.e., remuneration equivalent for each day sitting to 1/210th of the salary of a judge of the Court of Session). The Claimant contends that the failure to make such payment is a breach of regulation 5 and of the pro-rata principle. She claims compensation.

(2) The Tribunal's judgment

7. The preliminary issue for the Tribunal was whether the Claimant was a part-time worker as defined in the Part-Time Workers Regulations. Regulation 2 defines "full-time worker", "part-time worker", and "comparable full-time worker" 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."

8. The Tribunal concluded the Claimant became a part-time worker at the time of her appointment as a Temporary Judge and from that time held two, concurrent, part-time posts. The Tribunal's reasons, set out from paragraph 53 of its judgment, may be summarised as follows. The Tribunal noted that the Claimant's appointment as Sheriff and Temporary Judge were separate appointments. The Tribunal considered the detail of the Claimant's day-to-day work as Sheriff and as Temporary Judge concluding that her work in each capacity was separate from the other. The Tribunal explained this conclusion as follows.

> "64. There was no overlap whatsoever in the work which the claimant did as a Temporary Judge with the work she did as a sheriff or that she was appointed to do as a sheriff. When siting in the sheriff court the claimant could be required to undertake the full range of duties of Sheriff court civil and criminal work. When sitting in the High Court she dealt with the criminal work which would be undertaken by a Senator of the College of Justice sitting in the Outer House of the Court of Session and she worked under different rules of procedure. The Tribunal considered the difference in the work performed to be a very significant feature.
>
> 65. The claimant was not listed to sit in the Sheriff court when listed to sit in the High Court. While the Tribunal did not consider that a great deal turned on it as it was essentially a matter of court administration, it was persuaded that in the main High Court listings took had priority over sitting in the Sheriff Court, albeit there that there was a discussion between the Sheriff Principal and the Keeper about listings.
>
> 66. The work which would have been covered by the claimant in the sheriff court during periods when she was sitting in the High Court was often performed by fee paid sheriffs, indicating distinct nature of the claimant's work as a Temporary Judge, and the impact that had on her ability to carry out duties in the Sheriff Court.
> 67. The work the claimant carried out in the Sheriff Court remained the same but her total workload in that court inevitably reduced as a result of time spent away from it. There was no issue that when a Temporary Judge sits as sheriffs, they do the same tasks as a sheriff who was not a Temporary Judge. The Tribunal did not consider much turned on the fact that the claimant could no longer sit in the Drugs Court, as it forms no material part of the claimant's case that she did different work as a sheriff as a result of her appointment as Temporary Judge. The fact that the claimant was no longer able to sit in the Drugs Court, did however give an indication of the degree to which she spent her time in the High Court.

68. In the two roles the claimant had what might be described as different judicial line managers, or individuals to whom the claimant could refer with relevant issues or concerns arising from her workload in the two Offices.

69. The claimant was not obliged to take up the post of Temporary Judge when it was offered to her. This was in contrast with the duties in the sheriff court which she was expected to perform as outlined in the 'Role of a Sheriff' document after she accepted the post of Sheriff.

70. It was not the decision of the Sheriff Principal, who had judicial line management responsibility for the claimant as a sheriff, to appoint her as a Temporary Judge. He could not veto such an appointment. Only around 1 in 5 Sheriffs are appointed as Temporary Judges, underlining that the appointment to Temporary Judge does not follow automatically on the appointment of Sheriff.

71. The claimant attended training, which was specific to the position of Temporary Judge, and training specific to the post of Sheriff.

72. The claimants place of work in the two roles was different. She also had the benefit of a chauffeur driven car to take her courts outside of Edinburgh while sitting as a Temporary Judge which was not a benefit available to her as a Sheriff. She had a different title in the two positions.

73. The claimant sat in the High Court for a substantial amount of time, other than during lockdown and because of ill health. Mr Napier in his submissions approximated her sittings as a Temporary Judge as 20 weeks a year. The time she spent sitting in the High Court reflected the time she did not sit in the Sheriff Court.

74. These factors in the Tribunals view demonstrated, as submitted by Mr McGrade, that it was unlikely that the two roles would be confused or that there would be difficulty in identifying whether at any given point in time the claimant was exercising the duties of a sheriff or a Temporary Judge. Not only were they two separate judicial appointments, the work required by each appointment was different, and a practical level the two roles were easily distinguishable. The claimant was in effect carrying out two separate jobs.

…

84. The fact that the claimant was content to take on the role of Temporary Judge for no extra payment is consistent with the duties being seen as part of her shrieval duties, but nor is it necessarily inconsistent with the role of Temporary Judge being separate to the role of Sheriff. It was suggested to the claimant in cross examination that the appointment as Temporary Judge provided her with opportunities

> for career advancement and to carry out interesting work, which suggests that there was at least a perception of there being a non-financial benefit to the taking up the Temporary Judge appointment. It was put to the claimant in this context that a number of Senators had previously held the position of Temporary Judge.
>
> 85. While the Tribunal considered the fact that claimant continued to work for the same salary was a factor which tended to support of the position that she was at all times acting within the scope of her shrieval duties it was not one which could be conclusive on the matter.

9. The Tribunal drew two inferences from these matters. The first was that on appointment as a Temporary Judge the Claimant's full-time appointment as Sheriff had been varied.

> "81. The Tribunal agree with Mr McGrade that the 'agreement' to vary the claimants full time sheriff's appointment was to be found in that as a matter of fact that the respondents allocated her work during the full time working hours of her original shrieval appointment, away from the Sheriff court and away from carrying out Sheriff Court work, so that she carry out work in the High Court performing work as a Temporary Judge. Both sides worked under that arrangement without complaint."

10. The second inference was that from the same time, the Claimant held two, concurrent, part-time positions. One as Sheriff the other as Temporary Judge.

> "100. The fact that the claimant undertook her work as a Temporary Judge during the hours of her original appointment as a full-time sheriff, and that she continued to receive the salary and benefit from the same terms and conditions as a full-time sheriff notwithstanding her work as a Temporary Judge are factors which pointed towards full time status. However, these have to be considered against what was referred to in *Keegan* as the 'reality 'of the situation. The Tribunal is not bound by *Keegan*, the facts are not the same, and the statutory regime for appointment was not the same in *Keegan* as before this Tribunal, but 'reality' here must be relevant as it was in *Keegan*. The reality in this case is that the claimant was performing two different jobs as a sheriff and as a Temporary Judge, and in each instance was working less than the full-time hours recognised for the post of a full time Senator or full time Sheriff. These were factors which were clearly not indicative of full-time status in either post despite the fact that the claimant continued to receive the salary of a full-time sheriff.
>
> …

> 110. The claimant's letter of appointment did not add a great deal, in that although it informed the recipient that they may be allocated business out with the sheriffdom from time to time this was in the context of the appointment being to a particular sheriffdom and did not refer to work in the High Court. Had it been the intention that Sheriffs could be allocated work in the High Court there is no reason why the appointment letter would not have said so. Further it was difficult to see how a shrieval appointment could contemplate a sheriff being asked to work in the High Court without some intervening statutory appointment, which the individual required to agree to.
>
> 111. Having considered each of the factors identified by Mr Napier individually the Tribunal also stood back and accessed their cumulative effect and considered whether taken together they supported the conclusion that the claimant in performing the duties of a Temporary Judge was carrying out an extension of her shrieval duties. It was significant that the claimant performed her duties as a Temporary Judge during her full-time contracted hours provided for in her appointment as a full-time sheriff, and for the salary and under the terms and conditions of a full-time sheriff; and to a lesser degree it was significant that the respondents perception was that she continued in the role of full-time sheriff. However, these factors taken together with the other elements relied upon by Mr Napier were insufficient to allow the Tribunal to conclude that the performance of duties as a Temporary Judge was an extension of her shrivel duties, set against the Tribunal's conclusions as to what appointment as a Temporary Judge meant as a matter of fact; that is it say, the reality of the position. That reality included that both positions as a Sheriff and Temporary Judge were as a result of separate judicial appointments; there was the ability to continue in one role while retiring from the other; different judicial line management; different training regimes; a different pace of work; and significantly both involved the performance of wholly different work."

The Tribunal's conclusion that the Claimant's work as a Temporary Judge comprised a distinct part-time engagement was the premise for its conclusion on the application of regulation 2(2), that the Claimant was a part-time worker for the purposes of the Part-Time Workers Regulations.

> "115. The Tribunal being satisfied that the claimant was not exercising her shrieval function when sitting as a Temporary Judge, and being satisfied that in the capacity of a Temporary Judge she was carrying out a different job to that which she carried out as a Sheriff, did not consider that there was any good reason to depart from consideration of the custom and practice of the working pattern of full-

> time Senators for the purposes of Reg 2(2) . It therefore concluded that the claimant as a Temporary Judge was a part-time worker for the purposes of Regulation 2."

11. The Tribunal's reasoning is detailed. In reaching the conclusions I have set out above the Tribunal considered and rejected submissions advanced on behalf of the Respondents, all to the effect that the Claimant's appointment as Temporary Judge did not mean that she had ceased to hold a single, full-time appointment. These submissions relied on: (a) the effect of the statutory provisions under which the Claimant was appointed as Temporary Judge; (b) the continuation of, and absence of formal variation to, the Claimant's terms of appointment as Sheriff in 2013 when she was appointed a Temporary Judge; and (c) the absence of evidence of any custom and practice that on appointment as Temporary Judge, a full-time appointment as Sheriff became a part-time appointment. I will not in this judgment rehearse the parts of the Tribunal's reasoning dealing with these matters save to the extent necessary to address the Respondent's submissions in this appeal.

(3) The grounds of appeal

12. In this appeal as in any other, the overarching issue is whether the Tribunal's conclusion that the Claimant was a part-time worker rested on any error of law.

13. The Respondents pursue four grounds of appeal. Ground of Appeal 1 rests on the statutory provisions applicable to the Claimant's appointment as temporary judge – i.e. those in the 1990 Act as at the time of her appointment in September 2013, and those in the 2008 Act which were in force when the Claimant was re-appointed in 2018. The Respondents contend the Tribunal misconstrued the meaning and effect of these provisions. Grounds of Appeal 2 and 3 are linked to the first ground. Each challenges the Tribunal's conclusion that from 2013, the terms of the Claimant's appointment as Sheriff were varied by conduct. The Respondents' submission is that the significance of what happened in practice – what the Tribunal referred to as "the reality" of the situation – is very different if considered in the context of the statutory provisions (in the 1990 Act and in the 2008 Act), and in the context of the documentary evidence relevant to the Claimant's appointment as Sheriff. The thrust of these submissions is that the "reality" identified by the Tribunal relied on matters that were not and could not produce the result that the Claimant's full-time engagement as sheriff had become two part-

time engagements, one as Sheriff the other as Temporary Judge. Ground of Appeal 4 is that the Tribunal misapplied the definition of part-time worker at regulation 2(2) of the Part-Time Workers Regulations to the circumstances of this case by taking too narrow an approach to relevant custom and practice, disregarding evidence that Sheriffs appointed as Temporary Judges continued to be regarded as full-time Sheriffs. The relevant part of the Tribunal's judgement is paragraph 92, which is set out below.

14. The Claimant's response, in very short summary, is that the Tribunal's understanding and application of the relevant provisions in the 1990 Act and the 2008 Act was correct, and the remaining grounds of appeal disclose no error of law and amount only to attempts to challenge findings of fact that were properly available to the Tribunal.

B. Decision

15. The submissions for both parties have included submissions made by reference to the judgment of the Employment Appeal Tribunal in *Ministry of Justice v Dodds* [2023] ICR 715. In that case, this Tribunal considered claims brought by English judges under the Part-Time Workers Regulations. There is superficial similarity between those claims and the claims before me. The Claimants in *Dodds* were holders of full-time judicial office who, on occasion sat temporarily in different jurisdictions: for example, some were Circuit Judges who, pursuant to section 9 of the Senior Courts Act 1981, occasionally sat as Deputy Judges of the High Court. The Circuit Judge claimants in *Dodds* contended that when sitting as Deputy Judges of the High Court they were part-time workers and for that work they should, pro-rata, be paid the same as High Court Judges appointed under section 10 of the Senior Courts Act 1981.

16. However, notwithstanding some similar circumstances, this Tribunal's conclusions in *Dodds* rested on consideration of the provisions in the Senior Courts Act 1981 and the evidence available in that case relating to the claimants' appointments. The conclusions reached in *Dodds* provide no template for the present case. This case requires consideration of different statutory provisions, those in the 1980 Act and the 2008 Act, and of the conclusions of the Employment Tribunal on the evidence available to it. All this must be considered on its own terms. In the premises, I have not considered it necessary to spend time in this judgment

analysing the conclusions reached in *Dodds*. The issues in this case all arise from the Tribunal's conclusion that following appointment as Temporary Judge in 2013 the Claimant was party to two discrete employment relationships, each a part-time arrangement. The focus of attention in this litigation must be on whether that conclusion was correct in law.

(1) Ground of Appeal 1. Misapplication of the statutory provisions relevant to the Claimant's appointment as Temporary Judge.

17. The Respondent's submission to the Tribunal was that the conclusion that the Claimant by reason of her appointment as Temporary Judge became a part-time worker was inconsistent with the statutory provisions concerning the appointment of temporary judges. At the Tribunal hearing, submissions on this point were made by reference to the provisions in section 20B of the 2008 Act and, in particular section 20B(7). Section 20B of the 2008 Act provides as follows.

> "**20B Temporary judges**
>
> (1) The Scottish Ministers may appoint an individual to act as a judge of the Court of Session; and an individual so appointed is to be known as a *"temporary judge"*.
>
> (2) An individual appointed under subsection (1) may also, by virtue of the appointment, act as a judge of the High Court of Justiciary.
>
> (3) The Scottish Ministers may appoint an individual under subsection (1) only if—
>
> (a) the individual is qualified for appointment as a judge of the Court of Session, and
> (b) the Scottish Ministers have consulted the Lord President before making the appointment.
>
> (4) Subject to section 20C, an appointment as a temporary judge lasts for 5 years.
>
> (5) Subject to subsection (6), an individual appointed under subsection (1) is, while acting as a judge of the Court of Session or the High Court of Justiciary, to be treated for all purposes as a judge of that Court and may exercise the jurisdiction and powers that attach to that office.

> (6) Such an individual is not to be treated as a judge of the Court of Session for the purposes of any enactment or rule of law relating to—
>
> > (a) the appointment, tenure of office, retirement, removal or disqualification of judges of that Court (including, without limiting that generality, any enactment or rule of law relating to the number of judges who may be appointed),
> > (b) the remuneration, allowances or pensions of such a judge.
>
> (7) The appointment of an individual under subsection (1) does not affect—
>
> > (a) any appointment of the individual as a sheriff principal or sheriff, or
> > (b) the individual's continuing with any business or professional occupation not inconsistent with the individual acting as a judge."

18. As already mentioned, section 20B of the 2008 Act came into effect on 1 April 2015, after the Claimant's appointment as Temporary Judge in September 2013. At the time the Claimant was appointed, in 2013, the provisions material to that appointment were in section 35A and Schedule 4 to the 1990 Act. In summary those provisions were as follows. By section 35(3) of the 1990 Act, appointment of temporary judges was governed by paragraphs 5 to 11 of Schedule 4 to the 1990 Act (set out above, at paragraph 3). By paragraph 5, any person meeting the requirements for eligibility at paragraphs 1 of the Schedule could be appointed. Appointment was for a period of 5 years subject to reappointment. Paragraphs 6 to 8 provided as follows.

> "**6.** Subject to paragraph 7 below, a person appointed as a temporary judge under the said section 35(3) shall, while so acting, 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.
>
> **7.** Subject to paragraph 8 below, a person shall not, by virtue of paragraph 6 above, be treated as a judge of the Court of Session for the purposes of any other enactment or rule of law relating to—
>
> > (a) the appointment, tenure of office, retirement, removal or disqualification of judges of that Court, including, without prejudice to the generality of the foregoing, any enactment or rule of law relating to the number of judges who may be

> appointed; and
> (b) the remuneration, allowances or pensions of such judges.
>
> **8.** A person appointed to be a temporary judge of the Court of Session shall, by virtue of such appointment, be a temporary Lord Commissioner of Justiciary in Scotland."

These provisions in Schedule 4 to the 1990 Act are materially the same as section 20B(5), (6) and (2) of the 2008 Act, respectively. Paragraph 11 of Schedule 4, the predecessor to section 20B(7) of the 2008 Act, was in the following terms.

> "**11.** The appointment of a person to act as a temporary judge under the said section 35(3) is without prejudice to—
>
> (a) any appointment held by him as a sheriff principal or sheriff; or
> (b) his continuing with any business or professional occupation not inconsistent with his acting as a judge."

19. The Tribunal's conclusion on the effect of section 20B(7) of the 2008 Act is at paragraphs 77 to 80 and 112 to 114 of its judgment.

> "77. Firstly, Mr Napier [leading counsel for the Respondents] submitted that the Claimant's appointment as a full-time sheriff had not been varied either by operation of law or by agreement. He relied on section 20B(7)(a) of the Judiciary and Courts (Scotland) Act 2008 (as amended) (the Act). He submitted that there is an important distinction to be made between appointment and job content. Being appointed as a Temporary Judge did impact on the work that the Claimant did but could not impact on her appointment as a full-time salaried sheriff, which continued unchanged throughout her tenure of the office of Temporary Judge.
>
> 78. The Tribunal considered the terms of Section 20B(7). Section 20B(7)(a) provides that the appointment of a Temporary Judge does not affect any appointment of the individual as a sheriff or sheriff principal; Section 20B(7)(b) provides that on appointment an individual can continue with any business or professional occupation not inconsistent with the individual acting as a judge.
>
> 79. Section 20B(7) therefore does not only deal with Sheriffs appointed as Temporary Judges, but also with individuals and it seemed to the Tribunal that the purpose of these provisions is to ensure that those appointed as Temporary Judges are still able to continue as a

sheriff or with their other business, while holding that appointment.

80. The effect of these provisions is that an individual appointed as a Temporary Judge can hold that appointment and is permitted to continue with the conduct of their business (subject to certain limitations); and that a sheriff appointee's appointment as a sheriff is unaffected, meaning they can continue in the office of sheriff while also holding the appointment of Temporary judge. The Act makes no provision about the operational impact of appointment as a Temporary Judge on the appointment of sheriff, such as whether they remain full time or otherwise, but simply provide that any appointment as a sheriff is itself unaffected. The Tribunal therefore could not agree that the effect of Section 20B(7)(a) was that it prevented the claimant qualifying as a part time sheriff for the purposes of the Regulations.

…

112. The Tribunal also considered the respondents' *esto* case which was that to maintain that the claimant's status changed from full-time to part-time worker under the Regulations on appointment as a Temporary Judge involves disregarding section 20B(7)(a) of the Act: A move from full-time to part-time salaried status is manifestly something that affects the Claimant's appointment as sheriff. Standing that provision, it cannot be said that appointment as a Temporary Judge brings about a change from full-time to part-time status.

113. The Tribunal has already considered the impact of Section 20B(7)(a) above, and for the reasons which are outlined earlier it did not conclude that Section 20B (7) prevented the claimant acquiring part time status for the purposes of the Regulations. A change from full time to part time does not in the Tribunals view manifestly affect *any appointment to the office of sheriff*, in that the appointee continues to hold the appointment to that office, and the purpose of Section 20B (7) is to allow Sheriffs who are appointed as Temporary Judges to continue in the office of Sheriff.

114. For the sake of completeness Section 20B(6) (b) which provides that an individual appointed under Section 20B (1) as a Temporary Judge *'shall not be treated as a Judge of the Court of Session for the purposes of the remuneration, allowances or pension of such a judge'* , did not add anything, as it merely distinguished the position of Temporary Judges however so appointed, from Judges of the Court of Session."

The Tribunal's reference to the provisions in the 2008 Act rather than those in the 1990 Act makes no material difference to any of the issues arising in this appeal. Paragraph 11 of Schedule 4 to 1990 Act and section 20B(7) of the 2008 Act use different words: the former

states that appointment to act as temporary judge is "without prejudice to… any appointment held by [the person] as … sheriff"; the latter that "… appointment… does not affect… any appointment of the individual as… sheriff". However, the different words used do not produce any different outcome. The purpose of each provision is a declaration that a person's appointment as Sheriff is unaffected by appointment as Temporary Judge. The same conclusion goes for each of the other provisions in Schedule 4 to the 1990 Act, now superseded by provisions in the 2008 Act. For sake of convenience in this judgment I will refer to the provisions as they appear in the 2008 Act.

20. The Tribunal's approach was that section 20B(7) means only that appointment as Temporary Judge does not mean the individual ceases to hold the office of Sheriff. As interpreted by the Tribunal, section 20B(7) refers only to the bare holding of the office of Sheriff, and not to the terms attaching to that office. So far as concerned the Claimant, the Tribunal's conclusion was that section 20B(7)(a) did not prescribe the consequence of appointment as Temporary Judge on the terms on which she held the office of sheriff. This permitted the Tribunal's further conclusion that, on appointment as Temporary Judge, the Claimant's terms were varied by conduct such that she held two discrete part-time appointments one as Sheriff, the other as Temporary Judge.

21. Identification of the terms on which the Claimant held office following her appointment as a Temporary Judge is critical to whether the Claimant was a part-time worker. This follows from the reasoning of the Supreme Court in *Ministry of Justice v O'Brien* [2013] ICR 499 which concerned the application to judicial office holders of the definition of worker in the Part-Time Workers Regulations. *O'Brien* was a claim under the Part-Time Worker Regulations by a person appointed to the office of Recorder pursuant to section 21 of the Courts Act 1971. The office of Recorder is a part-time, fee-paid office. The claim was that Recorders were less favourably treated than (salaried, full-time) Circuit Judges because their work was not treated as pensionable. The Court of Appeal had dismissed the claim on the basis that Recorders were not workers as defined at regulation 1(2) of the Part-Time Workers Regulations – i.e. not persons who worked under a contract of employment or under a contract requiring provision of personal service. The Supreme Court referred the following questions to the Court of Justice of the European Union, on the meaning of provisions in the Part-Time Workers Directive (Counsel Directive 97/81/EC):

> "(1) Is it for national law to determine whether or not judges as a whole are 'workers who have an employment contract or employment relationship' within the meaning of clause 2.1 of the framework agreement, or is there a Community norm by which this matter must be determined?
>
> (2) If judges as a whole are workers who have an employment contract or employment relationship within the meaning of clause 2.1 of the framework agreement, is it permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions?"

The Court of Justice of the European Union answered by saying that the matter was one for national courts applying certain principles, one of which was that the purpose of the definition of "worker" as used in the EU Directive was to exclude self-employed persons from the scope of the Directive. Relying on that answer, the Supreme Court concluded that, notwithstanding the absence of a contract, Recorders were "workers" for the purposes of the Part-Time Workers Regulations because they were in an employment relationship.

22. In the present litigation, the Respondents accept that, so far as concerns the existence of an employment relationship, the same reasoning applies to the Claimant. It follows that the question for the purpose of the preliminary issue in these proceedings was whether the Claimant was party to an employment relationship under which she was a part-time worker. By regulation 2 of the Part-Time Workers Regulations a part-time worker is defined as a person "not identifiable as a full-time worker". If, following her appointment as Temporary Judge, the Claimant remained a full-time worker she can have no viable claim under regulation 5 of the Part-Time Workers Regulations.

23. I consider the Tribunal's conclusion on the meaning and effect of section 20B(7)(a) of the 2008 Act was wrong. The reference to a person's "appointment … as a … sheriff" is more naturally understood as embracing all aspects of that appointment; not simply the bare holding of the office of Sheriff, but also the terms attaching to that office as it was held by that person.

24. This conclusion fits with the other provisions in section 20B of the 2008 Act. Section 20B(1) refers to appointment to "act as a judge of the Court of Session" (emphasis added) rather than

appointment as a judge of that court which is the language used in section 20A of the 2008 Act when referring to full-time judges of the Court of Session. The language used in section 20B(1) both supports a conclusion that a sheriff appointed as a Temporary Judge retains her existing office in full, doing no more than acting as a judge of the Court of Session from time to time, and points against a conclusion that appointment as a Temporary Judge gives rise to any new, discrete, employment relationship.

25. The language of section 20B(1) is reflected in the terms of the Claimant's appointment. The Claimant's commission as Temporary Judge was provided under cover of a letter dated 17 September 2013 which was, I assume, in a standard form. The commission referred to the Claimant's appointment "… to act as a Temporary Judge of the Court of Session on such occasions as the Lord President made from time to time direct …". There is no doubting the importance of the appointment to the position of Temporary Judge, but it is an appointment to a position that is occasional, not one that derogates from appointment as Sheriff.

26. The other relevant provisions in section 20B are subsections (5) and (6) (set out above, at paragraph 17). Taken together these provide that Temporary Judges (a) are to be treated as judges of Court of Session having the powers and jurisdiction of the office of judge of that court while so acting; but (b) are not to be treated as judges of the Court of Session for the purposes of provisions relating to appointment of a judge of the Court of Session or "the renumeration, allowances or pensions of such a judge". The clear and only inference from each provision is that the person appointed remains a sheriff, albeit entitled by appointment as a Temporary Judge to act in a different capacity.

27. Thus, the only conclusion on the meaning and effect of section 20B(7)(a) of the 2008 Act that is consistent with these provisions is not the one reached by the Tribunal, but rather the conclusion that when a Sheriff is appointed to be a Temporary Judge, the terms attaching to her appointment to the office of Sheriff are unaffected. It must follow the Tribunal's conclusions at paragraphs 77 – 80, and 112 – 114 (all set out above, at paragraph 19) were in error. This error as to the meaning and effect of section 20B of the 2008 Act is critical so far as concerns the remainder of the Tribunal's reasoning.

28. The Claimant advances two submissions to the contrary. The first is that the Tribunal's

conclusion on the meaning of section 20B(7) of the 2008 Act is correct because any reasoning applied to sub-paragraph (a) must also apply to sub-paragraph (b), the provision that applies to practitioners who are appointed to be Temporary Judges. The Claimant's submission is that if section 20B(7)(a) is construed as "preventing" any change to the Claimant's terms and conditions of appointment the same reasoning would necessarily apply to sub-paragraph (b). I do not consider this submission properly captures the effect of section 20B(7) of the 2008 Act either in its application in sub-paragraph (a) or sub-paragraph (b). The subsection "prevents" change only in the sense that it makes clear that appointment as a Temporary Judge is not the occasion of any such change. Thus, the reasoning I have set out above applies equally to sub-paragraph (a) cases and to those within sub-paragraph (b). The Claimant's second submission relies on section 20 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). This provides that an appointment as a Sheriff will end "… if the individual is appointed as another such judicial officer". The Claimant submits that if section 20 of the 2014 Act is read together with the definition of "judicial office holder" at section 43 of the 2008 Act, appointment as a Temporary Judge would be an appointment such as is referred to in section 20 of the 2014 Act – that would bring any appointment to the office of Sheriff to an end. It follows (so this submission goes) that the purpose of section 20B(7)(a) of the 2008 Act is only to prevent what would otherwise be the effect of section 20 of the 2014 Act. I do not agree with this analysis. The definition of "judicial office holder" at section 43 of the 2008 Act applies only for the purposes of Part 2 of that Act. It has no application to the 2014 Act. Further, section 20 of the 2014 Act only concerns the effect on one shrieval appointment in the event of appointment to a different shrieval office; it has nothing to say about the effect of appointment as a Temporary Judge.

29. Returning to the Tribunal's judgment in this case, the premise of the Tribunal's reasoning was that the Claimant's appointment as Temporary Judge was akin to appointment of to a new job. This led the Tribunal to undertake a detailed assessment of the Claimant's working patterns and duties following her appointment as Temporary Judge, considering how her hearings were listed, by whom cases were allocated, and where cases were heard, with a view to constructing a new and discrete employment relationship as a Temporary Judge on the assumption from September 2013 this relationship sat alongside the arrangements under which the Claimant carried out the duties of the office of Sheriff.

30. Section 20B of the 2008 Act, properly understood, renders that exercise both inappropriate and unnecessary. I consider that the plain meaning and consequence of the statutory provisions is that the Claimant's appointment as Temporary Judge did not affect either her employment as Sheriff or the terms on which that office was held. To put the point in the language of the Supreme Court in *O'Brien*, the Claimant's appointment as Temporary Judge did not give rise to any discrete and new employment relationship; rather, when the Claimant worked as a Temporary Judge, that work was an aspect of the work she was able to undertake by virtue of her appointment a Sheriff.

31. Drawing these matters together the Tribunal's conclusions at paragraphs 80 and 113 of its judgment were wrong. Ground of Appeal 1, therefore, succeeds.

(2) Grounds of Appeal 2 and 3. Variation of the Claimant's terms of appointment by conduct.

32. The starting point for considering whether terms of an appointment have been varied by conduct should be consideration of the terms on which the appointment was held prior to the variation that is claimed. Whether the matters relied on as giving rise to the variation have that effect must be considered in the context of the terms of the original appointment. In this case the direct evidence as to the terms on which the Claimant held office as Sheriff was limited. There was no formal statement of the terms on which she held that office. At paragraphs 2 and 4 of its judgment, the Tribunal recorded the following which was part of the agreed statement of facts.

> "[2]. The Claimant was appointed by the Scottish Ministers to the office of a salaried full-time Sheriff from 30 September 2008 under a Royal Warrant Appointment. Her appointment letter, dated 11 September 2008, noted that she was appointed as an all-Scotland floating sheriff based at Hamilton with effect from 30 September 2008 and that her annual leave allowance was 9 days for the remainder of 2008.
>
> [3]. The Claimant continued in this role until her retirement on 30 June 2022.
>
> [4]. Sheriffs are appointed to Sheriffdoms. They can sit in one court or multiple courts within their allocated Sheriffdoms. The Claimant was initially appointed as an all-Scotland floating Sheriff based at Hamilton however, she later became based at Glasgow Sheriff Court. Sheriffs do not work in the High Court as a Sheriff. Full-time salaried Sheriffs undertake the full range of work: Summary Trials, Solemn Trials, Civil

Proofs, Debates, Fatal Accident Inquiries, Children's Referrals."

Under the heading "Additional Findings of Fact" the Tribunal referred to information about the office of Sheriff published by the Judicial Office for Scotland.

> "20. The Judicial Office for Scotland have produced a paper called *The Office Of Sheriff* which provides a *Note On the Role and Responsibilities of a Sheriff* (document 12). That document outlines the role of a sheriff and provides under the heading *Primary Functions;*
>
> > *"The primary function of the sheriff is to act as judge at first instance. However, sheriffs also exercise some appellate and a large number of administrative and quasi-judicial functions, including the conduct of Fatal Accident Enquiries. Some sheriffs, with five or more years' experience, are appointed as appeal sheriffs to sit in the Sheriff Appeal Court. They may be asked to act as temporary judges in the High Court."*
>
> 21. What is described as a *Sheriff Information Pack - Judiciary in Scotland* (document 13) provides general information on the duties of a sheriff. Under the heading *Role of a Sheriff*, the same clause is reproduced.
>
> 22. The claimant accepts that these documents give a reasonably accurate account of the duties of a Sheriff."

For present purposes, the reference to acting as a Temporary Judge as stated in these documents is a little laconic, but is capable of being understood and is better understood as indicating that acting as a Temporary Judge is one possible aspect of the role of those who hold the office of Sheriff.

33. The major part of the Tribunal's reasoning in support of the conclusion that there were two concurrent part-time appointments comprised detailed consideration of the Claimant's sitting arrangements from 2013. The Tribunal distinguished the Claimant's work as a Sheriff from her work as a Temporary Judge, concluding that once she had been appointed as a Temporary Judge the employment relationship that had until that time existed was supplanted by two concurrent part-time employment relationships, one covering her work as Sheriff the other her work as Temporary Judge. The Tribunal noted that the Claimant's work as Sheriff was distinct from her work as a Temporary Judge (paragraph 64 of the judgment); that she sat in

different courts (paragraph 72); was subject to different "judicial line managers" (paragraph 68); and undertook different training (paragraph 71). The Tribunal's conclusion was that it was a necessary inference from these matters that two separate part-time employment relationships had come into being. This, the Tribunal concluded, was "the reality" of the position: see the Tribunal's judgment at paragraphs at paragraphs 100 and 110 (set out above, at paragraph 10).

34. There are two reasons why this conclusion cannot stand. The first rests on the conclusion already stated on the meaning and effect of the provisions in the 2008 Act applicable to the Claimant's appointment as Temporary Judge. Those statutory provisions require the conclusion that the Claimant's appointment as Sheriff was not affected by her appointment as Temporary Judge. The inference the Tribunal drew: that the arrangements made to enable the claimant to sit as a Temporary Judge were evidence that a new employment relationship had come into existence, one that cut down the employment relationship that had previously existed, was inconsistent with those statutory provisions. Since the provisions in the 2008 Act mean that appointment as a Temporary Judge has no effect on appointment as Sheriff, neither the practical arrangements necessary to enable the Claimant to sit as a Temporary Judge, nor the matters that were the necessary consequence of those arrangements are capable as being relied on as evidence of a variation of the Claimant's terms of appointment as Sheriff. In fact, any such arrangements and all such consequences are consistent with the ordinary and expected operation of section 20B of the 2008 Act. This being so, the conclusion reached by the Tribunal rested on an inference that could not properly be drawn.

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.

(3) Ground of Appeal 4. Misapplication of the definition of part-time worker at regulation 2(2) of the Part-Time Workers Regulations.

37. The words at the end of regulation 2(2) require that the decision on whether the worker is a part-time worker to be made taking account of the employer's custom and practice. A worker will not be a part-time worker if by reason of custom and practice he is identified by that employer as a full-time worker. This part of the definition recognises the difficulty inherent in any definition of part-time worker framed by reference to maximum or minimum hours worked, and serves to meet the purpose the Regulations pursue, namely that an employer should not treat the part-time workers he employs less favourably than full-time workers

simply by reason of the fact they work part-time. Thus, who is part-time and who is full-time must have regard to the practices the employer adopts.

38. In this case the Tribunal referred to the words at the end of regulation 2(2) at paragraph 95 of its judgment.

> "95. The Tribunal considered that in applying Reg 2(2) it was relevant to take into account the custom and practice of the respondents which was that Senators were expected to work 210 days a year in the Supreme Court and a full-time sheriff expected to work 215 days a year in the Sheriff Court. No argument was advanced by the respondents to suggest that was not the custom and practice. Having regard to that custom and practice, the claimant worked less than a full-time comparator in both jurisdictions and on that analysis was a part time worker in both roles. The possibility exists to depart from that custom and practice, but only if there is good reason to do so."

39. Thus, the Tribunal considered (a) that the Claimant worked part-time as a Sheriff because she worked fewer days as a Sheriff than she would have done but for her appointment as Temporary Judge; and (b) that she worked part-time as a Temporary Judge because she was not expected to work the same number of days in that capacity as persons appointed judges of the Court of Session. The Respondents' submission is that this was a misapplication of the words at the end of regulation 2(2): it rests on the Tribunal's incorrect conclusion that the Claimant was party to two concurrent employment relationships; it fails to consider the employer's custom and practice when a Sheriff appointed as a Temporary Judge to act as a judge of the Court of Session which drew no distinction between days when that judge sat as a Sheriff and days she sat as a Temporary Judge such that all sitting days were considered part and parcel of a single appointment. Instead, it is submitted, the relevant custom and practice was that Sheriffs who also acted as Temporary Judges were treated in the same way as Sheriffs who did not so act. Each was regarded as having a single, full-time appointment.

40. On the facts of this case, this submission adds little to the submissions already considered on the effect of the provisions in the 2008 Act, and on whether it was open to the Tribunal to infer the existence of two concurrent employment relationships. I have already concluded that the Tribunal misconstrued the effect of the statutory provisions, and erred in law when it concluded the necessary inference following the Claimant's appointment as a Temporary

Judge in 2013, was that two distinct part-time employment relationships existed. It necessarily follows from these conclusions that the Tribunal did misapply regulation 2(2) of the Part-Time Workers Regulations in the circumstances of this case. The premise for the Tribunal's application of regulation 2(2) was the existence of two part-time employment relationships. That was a false premise. This ground of appeal also succeeds.

C. Disposal

41. For the reasons above, the Respondents' appeal succeeds on all grounds. Given the conclusions I have reached in this appeal, the only conclusion available in the proceedings before the Tribunal is that the Claimant was not a part-time worker for the purposes of the Part-Time Workers Regulations. The decision of the Tribunal will be set aside. A declaration will be made that the Claimant was not a part-time worker for the purposes of the Regulations. The Claimant's claim under the Part-Time Workers Regulations must therefore be dismissed.
