



28 July 2010

## PRESS SUMMARY

### **O'Brien v Ministry of Justice [2010] UKSC 34**

*On appeal from the Court of Appeal [2008] EWCA Civ 1448*

**JUSTICES:** Lord Hope (Deputy President), Lord Walker, Lady Hale, Lord Clarke, Sir John Dyson SCJ

### **BACKGROUND TO THE APPEAL**

This appeal raises questions of European Law concerning the rights of part-time workers, as well as questions of domestic law about the status and terms of service of judges in England and Wales.

The Appellant, Mr O'Brien, is a barrister. On 1 March 1978, he was appointed by the Lord Chancellor's department as a recorder (a part-time judge) under the Courts Act 1971. Mr O'Brien had his appointment extended a number of times until he retired on 31 March 2005. He was remunerated, as were other recorders, by way of a fee paid for each day that he sat. Unlike full-time judges and part-time salaried judges, however, Mr O'Brien and other recorders were not given a pension upon retirement.

On 29 September 2005, Mr O'Brien commenced proceedings in the Employment Tribunal against the Respondent's predecessor, the Department of Constitutional Affairs, contending that, like the other types of judges, he was entitled to a pension. He relied on the terms of a European directive known as the Part-Time Workers Directive ('the Directive') and an associated pan-European Framework Agreement on part-time work ('the Framework Agreement'). This EU legislation sought to prevent part-time workers from being treated less favourably than their full-time equivalents. Clause 2 (1) of the Framework Agreement stated that the agreement applied to 'workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.' Regulation 17 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which transposed the EU legislation into UK law, sought to exclude daily fee-paid judges from the scope of the rights given.

Mr O'Brien argued that under EU law, there was an autonomous definition of 'workers having an employment contract or employment relationship' which did not depend on national law and that recorders fell within this definition. He further argued that even if this was not the case, recorders would be regarded under the English domestic law as having an employment contract or employment relationship and that the EU legislation did not grant national authorities the discretion to depart arbitrarily from the general position using a device such as regulation 17.

Mr O'Brien was successful in the Employment Tribunal. The Employment Appeal Tribunal allowed the Respondent's appeal against this decision on the grounds that Mr O'Brien's claim was out of time. The Court of Appeal allowed an appeal by the Appellant on the time limit issue, but directed the Employment Tribunal to dismiss Mr O'Brien's substantive claim. Mr O'Brien appealed to the Supreme Court.

Both Mr O'Brien and the Respondent contended in their primary submissions to the Court that the issues of European law contained in the appeal were clear in their favour. They argued, however, that if their primary submissions did not succeed, the Supreme Court should refer the questions of European law to be determined by the European Court of Justice ('the ECJ').

## JUDGMENT

*The Supreme Court unanimously referred the appeal to the ECJ. The Court asked the ECJ to consider two questions: (1) whether it was 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 whether there was a European Community norm by which this matter must be determined and (2) If judges are workers who have an employment contract or employment relationship within the meaning of clause 2 (1), whether it was 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.*

## REASONS FOR THE JUDGMENT

- The Court preferred to express no concluded view on the domestic law issue [paragraph 27].
- In relation to the European law issues, three points were clear. First, there was no single definition of 'worker' which held good for all the purposes of European law. Second, in contrast to the position under other directives, the effect of the Framework Agreement, read together with the Directive, was to make domestic law relevant to the interpretation of the expression 'worker'. Thirdly, however, domestic law was not to oust or 'trump' the principles underlying the EU legislation in such a way as to frustrate them. The underlying purpose of the legislation in protecting against discrimination must be respected [paragraph 28].
- The jurisprudence of the ECJ gave little guidance as to the extent of discretion afforded to member states as to the definition of 'worker'. It was not clear what sort of national law would fail to respect the principles underlying the EU legislation. Accordingly, the question would be referred to the ECJ for consideration [paragraph 40].

## NOTE

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)