PO-18988

Ombudsman's Determination

Applicant	Mrs S
Scheme	Judicial Pension Scheme (**JPS**)
Respondent	Ministry of Justice (**MoJ**)

Complaint Summary

Mrs S complains that the MoJ wrongly failed to automatically enrol her into a workplace pension or alternatively allow her to join the JPS from February 2014.

Summary of the Ombudsman's Determination and reasons

The complaint is not upheld against the MoJ because I consider that its decision not to automatically enrol Mrs S into a workplace pension or allow her to join the JPS from February 2014 was correct based on current law applicable to this issue.

Detailed Determination

Legal Background

1. The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (**PTWR**), allow part-time workers to challenge less favourable treatment which is on the ground of their part-time status if it cannot be objectively justified. The part-time worker must identify an appropriate full-time worker as a comparator who must be: (a) employed by the same employer; (b) employed under the same type of contract; and (c) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills or experience.

2. In O'Brien v MoJ [2013] UKSC 6, the Supreme Court (**SC**) held that the denial of pensions to part-time (also known as fee-paid) judges in circumstances where their full-time salaried comparator colleagues were entitled to a pension in the JPS amounted to less favourable treatment contrary to the PTWR. In response to the SC's decision, the MoJ set up the Fee-Paid Judicial Pension Scheme (**FPJPS**) to provide fee-paid judges with a pension entitlement comparable to their full-time, salaried comparators. The introduction of the FPJPS represented recognition by the MoJ that fee-paid judges are entitled to non-discriminatory pension benefits, because the work they do is comparable to that carried out by their full-time salaried colleagues.

3. In Gilham v MoJ [2017] EWCA Civ 2220, the Court of Appeal (**CA**) held that judges are not "workers" within the meaning of section 230(3) of the Employment Rights Act 1996 (**ERA**) and therefore not entitled to protection from whistleblowing under its provisions. The CA concluded that the core rights and obligations of a judicial office holder (**JOH**) were derived from statute and not from any relationship with the Lord Chancellor. The CA noted that the functions of a judge, the duration of appointment, the power to determine salary and pension rights all originated from statute. As such, there was no analogy with the right of an employer to terminate a contractual relationship and the claimant was therefore not in a contractual relationship with the Lord Chancellor. The CA conceded that this arguably left the law in a somewhat incoherent state because: (a) a judge was not a "worker" in the context of the purely domestic whistleblowing provisions; but (b) the decision in O'Brien v MoJ, concerning the entitlement of part-time JOHs to occupational pensions, confirmed that a judge was a "worker" in the context of EU law. The CA also said that even if there was such an anomaly, only Parliament, however, could remedy it.

4. In Moultrie v MoJ [2015] UKEAT/0239/LA, an Employment Appeal Tribunal (**EAT**) dismissed the appeal because it concluded that the employment judge had correctly decided that even if a high proportion of the work done by a full-time employee is the same as the part-time employee, there might not be a valid comparator.

5. In McGrath v MoJ [2015] UKEAT/0247/LA, the claimant, who was an employment tribunal lay member, brought a claim alleging part-time worker discrimination. An EAT rejected the comparator and dismissed the appeal because it concluded that the

tribunal judge had not decided the point based on his own experience rather than on the available evidence.

6. In Roddis v Sheffield Hallam University [2018] UKEAT/0299/DM, an EAT allowed the appeal and substituted a finding that the appellant, a part-time lecturer employed on a zero-hours contract and his comparator, a full-time lecturer was employed under the 'same type of contract' for the purposes of the PTWR.

Material facts

7. Mrs S was appointed as a "Fee Paid Disability Qualified Tribunal Member of the First Tier Tribunal Social Entitlement Chamber" in 2001.

8. Her "Outline Conditions of Appointment and Terms of Service" stipulate that:

> "The appointment is non-salaried and non-pensionable. A JOH will receive a fee for each day sat. This fee is revised from time to time…
>
> Fee-paid members are regarded as holders of an office for tax and National Insurance purposes. Fees payable will, as a result, be chargeable to tax under parts 2 to 7 of the Income Tax (Earnings and Pensions Act 2003) and subject to Class 1 National Insurance contributions. These liabilities will be deducted via the MoJ's payroll system and the net fee paid to the office holder. Fees are not subject to VAT.
>
> …
>
> It would be helpful, and avoid confusion, if any correspondence with HMRC regarding fees and allowance attributable to any fee-paid office…office holders would…mention the fact that they are office holders and not employees of the MOJ."

9. In 2016, Mrs S enquired about pension rights in the Scheme. The MoJ responded in an e-mail dated 15 March 2016 as follows:

> "…as a result of the recent Employment Tribunal (**ET**) proceedings, the MoJ is in the process of bringing a pension scheme for fee-paid judges into effect. However, following rulings within those proceedings, membership of this scheme will be restricted to legally qualified fee-paid judges where a salaried comparator has been identified. This does mean that non-legally qualified Panel members will not be able to join the fee-paid scheme.
>
> Also, we have recently sought legal advice on the position of JOHs in respect of auto-enrolment…
>
> The MoJ does not consider that the provisions in Part 1 of the Pensions Act 2008 (**the 2008 Act**) relating to pension scheme membership for jobholders

apply to JOHs. This is because they do not work under a contract and so do not fall within the definition of worker set out in those provisions. The MoJ therefore does not have any plans to make arrangements for Tribunal Members to become members of an automatic enrolment scheme."

Summary of Mrs S's position

10. She has an employment relationship with the MoJ. She is therefore both a worker and a JOH. Her terms of service have features of an employment contract. She is supervised by a line manager and entitled to both statutory sick pay and maternity leave. She is required to carry out preparatory work and attend training. Income tax and National Insurance contributions are deducted from her daily tribunal attendance fees and expenses. The MoJ also pays employer National Insurance contributions on these.

11. She has been refused membership of an occupational pension scheme on the grounds of her employment status by the MoJ because it has misinterpreted the relevant legislation and precedents set in case law.

12. For a claim under the PTWR, she considers that her comparators are fee paid legal and medical members of the Social Security Appeal Tribunal because there are individuals in these roles "who sit on a regular basis as many days in a year as the full time appointed salaried Legal Member Judges".

13. In her view, as a Fee-Paid Disability Qualified Panel Member, she is not a lay member. She contributes "on an equal basis" and the recruitment process to be a such a member is rigorous and competitive. Furthermore, the job description for Fee-Paid Disability Qualified Panel Members does not say the role is lay.

14. To resolve her complaint on amicable basis, she is prepared to join a workplace pension established by MoJ into which she paid contributions only. The MOJ's reason for not doing so is disappointing. The government says individuals should be preparing for retirement and yet one of its own departments "is not providing a pension fairly and equally".

15. My formal determination of her complaint should be deferred until the Supreme Court ruling for the Gilham case, due in June 2019, is known because it may affect the outcome.

Summary of the MoJ's position

16. Part 1 of the 2008 Act provides that jobholders are entitled to benefit from the auto-enrolment provisions. A jobholder is a worker who meets certain conditions. A worker is an individual who has entered into or works under a contract of employment or any other contract by which the individual undertakes to do work or perform services personally for another party to the contract

17. JOHs are appointed to an office and do not work under a contract. They do not therefore fall within the definition of worker in the 2008 Act and are not jobholders for its purposes.

18. As Mrs S does not have a medical or legal qualification she is considered a lay member and is not engaged in the same or broadly similar work to qualified members. Mrs S says that she strongly disagrees with this statement.

19. Mrs S, as a lay member, is a JOH and not an employee working under a contract. She is therefore not entitled to a workplace pension and this is stated explicitly in her Outline Conditions of Appointment and Terms of Service.

20. The provision of maternity and statutory sick pay does not determine Mrs S's employment status. The Outline Conditions of Appointment and Terms of Service make it clear that these benefits are provided because of her appointment as a fee-paid JOH and not because she is an employee with a contract of employment.

21. It does not accept Mrs S's view that the judgment of the SC in the O'Brien case requires it to auto-enrol her in a workplace pension or allow her to join the JPS. Its position is based on the EAT's judgment in the Gilham case that non-legal tribunal members such as Mrs S are not workers for the purposes of the 2008 Act and the Pensions Regulator (**TPR**) has previously accepted this.

22. For a part-time worker claim to succeed, Mrs S needs to establish that she has a salaried comparator and that the basis for unequal treatment is her part time status. The legal position of whether lay members of a tribunal have salaried comparators was considered by the ET and EAT in Moultrie v MoJ. Both the ET and EAT rejected the claim that medical lay members have a salaried comparator. Mrs S does not have a salaried comparator and consequently not entitled to protection under the PTWR.

23. None of the existing pension schemes which it has set up allows for employee contributions only and there is no obligation on it to create such a scheme for Mrs S.

Conclusions

24. The law applicable to Mrs S's complaint is still developing and is somewhat contentious. Nonetheless, by considering the relevant law as it currently stands, the existence or otherwise of a contract, comparisons with published cases and any guidance available such as that published by the TPR, it is open to me to form an opinion on whether Mrs S should have been automatically enrolled into a workplace pension or allowed to join the JPS in February 2014.

25. The O'Brien case, considered a part-time fee-paid judicial position, rather than a lay member position. I do not therefore consider that the principles of the O'Brien case can be directly applied to Mrs S's complaint because the decision only applies to fee-paid judicial roles. The case was determined on the basis that the PTWR requires a valid comparator, that is, a salaried full-time judge and a part-time fee-paid judge.

26. I concur with the MoJ's view that Mrs S does not have a valid comparator to make a similar claim under the PTWR. Mrs S contends that fee paid legal and medical members of the Social Security Appeal Tribunal "who sit on a regular basis as many days in a year as the full time appointed salaried Legal Member Judges" are her full-time comparators. In my opinion, Mrs S's position and that of the legal and medical members are markedly different. Therefore, I see no obvious reason why such a claim by Mrs S would result in any different outcome to that in Moultrie and McGrath which specified that the comparator must be very similar, if not identical, and that a claim based on the PTWR will fail if this is not the case.

27. I have also considered the Roddis case, which held that a comparison between a part-time lecturer and a full-time lecturer was sufficient. However, this case merely demonstrates that the part-time and full-time jobs being compared must be very similar, if not the same. In my view, the Moultrie and McGrath cases are good authority that in Mrs S's circumstances, the comparators identified are not sufficiently similar. In my opinion, the Roddis case, does not therefore assist Mrs S's complaint.

28. Whilst I have sympathy for Mrs S and her circumstances, if the law does not provide her with a remedy, her claim must fail regardless of how unfair that may seem when compared with the situation that part-time fee-paid judges now find themselves in.

29. On the implied contract and 'worker' claim issues, I am not convinced that the Gilham case is particularly helpful given that it concerns consideration of "worker" in a different context, that is, whistleblowing. It does, however, acknowledge the distinction, and inconsistency, between definitions for "worker" under EU law and domestic law, as per Underhill LJ's comments at para. 74:

> "We are very aware that our decision that…the Appellant is not a worker within the meaning of section 230 (3) creates a distinction between those employment rights accorded to workers which derive purely from domestic law and those which derive from EU law, as established in O'Brien; and that may not appear to be a coherent or particularly satisfactory state of affairs. But the only way of avoiding the problem is to find that judges work under a contract with the Lord Chancellor, and such a finding is not open to us on the conscientious application of the principles most recently expounded in Preston. If that is an anomaly it can only be remedied by Parliament."

30. This anomaly seems to me even more illogical if, as in Mrs S's case, an O'Brien type interpretation of 'worker' is applied to any PTWR arguments (it having derived from EU law) and a Gilham type interpretation of 'worker' to the implied contract claim (it having derived from domestic law, the 2008 Act). However, that, to my mind, is how the law currently stands.

31. The specific definition of "worker" in the 2008 Act is:

> "(3).…an individual who has entered into or works under—

(a) a contract of employment, or

(b) any other contract by which the individual undertakes to do work or perform services personally for another party to the contract.

(4) But a contract is not within subsection (3)(b) if the status of the other party is by virtue of the contract that of a client or customer of a profession or business undertaking carried on by the individual concerned.

(5) For the purposes of subsection (3)(b), it does not matter whether the contract is express or implied or (if it is express) whether it is oral or in writing.

(6) Any reference to a worker's contract is to be read in accordance with subsections (3) to (5).”

32. Automatic enrolment duties apply to employers only in respect of “workers”. The distinction between personal service workers and those who provide services as part of their own business may be hard to determine but the Pensions Regulator has included a list of considerations in its Detailed Guidance No 1. Paragraphs 35 and 36 of this guidance state that:

“Office-holders

35. An office-holder is not normally a worker.

36. An office-holder has no contract or service agreement in relation to their appointment, nor do they usually receive a salary or regular remuneration for their services. They may however, be paid a fee for their services or to cover their expenses”

33. The MoJ’s position that Mrs S as a JOH has no contract and consequently not a worker with a pension entitlement under the 2008 Act is, in my opinion, consistent with both the relevant legislation and the TPR guidance.

34. Based on the available evidence and current case law, I consider that the MoJ’s decision to classify Ms S as an office-holder only and not a worker is reasonable and its automatic enrolment duties do not therefore apply to her.

35. As I have concluded that the Gilham case is not particularly helpful in Mrs S’s complaint, I do not consider it necessary for me to defer my judgment until the Supreme Court ruling on the Gilham case has been made.

36. I also agree with the view expressed by MoJ that it is not obliged to set up a new workplace pension solely to accept employee contributions from Mrs S.

37. I do not uphold Mrs S's complaint.

Anthony Arter

Pensions Ombudsman
7 May 2019