Trinity Term

[2017] UKSC 46

On appeal from: [2015] EWCA Civ 1000

JUDGMENT

O'Brien (Appellant) v Ministry of Justice (Respondent)

before

Lady Hale, Deputy President

Lord Kerr

Lord Reed

Lord Carnwath

Lord Hughes

JUDGMENT GIVEN ON

12 July 2017

Heard on 7 July 2016, 8 and 9 March 2017

Appellant	Respondent
Robin Allen QC	John Cavanagh QC
Rachel Crasnow QC	Charles Bourne QC
Tamar Burton	Rachel Kamm
(Instructed by Browne Jacobson LLP)	(Instructed by The Government Legal Department)

LORD REED: (with whom Lady Hale, Lord Kerr, Lord Carnwath and Lord Hughes agree)

Introduction

1.

This appeal raises a question relating to the temporal scope of Council Directive 97/81/EC of 15 December 1997, 1998 OJ L14/9, concerning the Framework Agreement on part-time work ("the directive") as extended to the United Kingdom by Council Directive 98/23/EC of 7 April 1998, 1998 OJ L131/10, and the general principles of EU law governing the non-retroactivity of legislation.

2.

The question arises in the context of proceedings between Mr Dermod O'Brien QC and the Ministry of Justice concerning the pension to which Mr O'Brien is entitled by reason of his part-time service in a judicial office.

3.
In essence, the question is whether, where a part-time worker retires after the entry into force of the directive and is entitled under the directive, taken together with national law, to an occupational pension based on his length of service, periods of service which were completed before the directive entered into force should be taken into account.

The facts

4.
The material facts are as follows. Mr O'Brien is a retired self-employed barrister who also held part-time judicial office as a recorder (a part-time judge of the Crown Court) between 1 March 1978 and 31 March 2005, when he retired at the age of 65. Recorders were not salaried but were paid fees on a per diem basis. There was no provision for the payment of a judicial pension on retirement.

5.
In June 2005 Mr O'Brien wrote to the Ministry, requiring that he be paid a retirement pension on the same basis, adjusted pro rata temporis, as that paid to former full-time judges who had been engaged on the same or similar work. He was informed by the Ministry that he fell outside the categories of judicial office-holder to whom a judicial pension was payable. In September 2005 he began proceedings in the Employment Tribunal, in which he claimed that he was entitled to a judicial pension by virtue of the directive and the regulations transposing it into domestic law.

6.
On 28 July 2010 the Supreme Court referred two questions to the Court of Justice for a preliminary ruling under article 267 TFEU:

"(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?"

7.
On 1 March 2012 the Second Chamber of the Court of Justice, having received the opinion of the Advocate General (Kokott) on 17 November 2011, gave judgment: O'Brien (Case C-393/10) [2012] 2 CMLR 25. It answered the questions as follows:

"(1) European Union law must be interpreted as meaning that it is for the member states to define the concept of 'workers who have an employment contract or an employment relationship' in clause 2.1 of the Framework Agreement … and in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81, as amended by Directive 98/23, and that agreement. An exclusion from that protection may be allowed only if the relationship between judges and the

Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers.

(2) The Framework Agreement … must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine.”

8.

Following that ruling, the Supreme Court held that Mr O’Brien was at the material time a part-time worker within the meaning of clause 2.1 of the Framework Agreement, and that no objective justification had been shown for departing from the principle of remunerating fee-paid part-time judges on the same basis as full-time judges, subject to adjustment pro rata temporis. Mr O’Brien was therefore entitled to a pension on terms equivalent to a circuit judge (a comparable full-time judge): [2013] UKSC 6; [2013] 1 WLR 522.

9.

The case was remitted to the Employment Tribunal for determination of the amount of the pension to which Mr O’Brien was entitled. The question which then arose 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). The Employment Tribunal held that the calculation should take into account the whole of his service, but the Employment Appeal Tribunal held the contrary: [2014] ICR 773. The Court of Appeal upheld the decision of the Employment Appeal Tribunal: [2015] EWCA Civ 1000; [2016] 1 CMLR 28. Mr O’Brien now appeals to the Supreme Court.

The legal context

(a) National law

10.

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.

11.

The United Kingdom gave effect to the directive by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), which came into force on 1 July 2000. The Regulations provide that 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. In determining whether a part-time worker has been treated less favourably than a comparable full-time worker, the pro rata principle is to be applied unless it is inappropriate. The Regulations expressly do not apply to fee-paid part-time judges.

(b) Relevant EU law

12.
In European Commission v Moravia Gas Storage AS (Case C-596/13 P) [2015] 3 CMLR 17, para 32, the Court of Justice stated:

“A new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.”

13.
The Court applied that principle in the context of the directive in Istituto Nazionale della Previdenza Sociale (INPS) v Bruno (Joined Cases C-395/08 and C-396/08) [2010] ECR I-5119, where the question arose whether service prior to the entry into force of the directive counted towards the service required to qualify for a retirement pension. The Court cited the principle that “new rules apply, unless otherwise specifically provided, immediately to the future effects of a situation which arose under the old rule” (para 53), and concluded:

“Accordingly, the calculation of the period of service required to qualify for a retirement pension such as the pensions at issue in the main proceedings is governed by Directive 97/81, including periods of employment before the directive entered into force.” (para 55)

14.
The Court cited that judgment when rejecting an objection to the admissibility of the first preliminary reference in the present proceedings. In O’Brien (Case C-393/10) [2012] ICR 955, the Court stated:

“24. The Latvian Government doubts whether the reference for a preliminary ruling is admissible. It is contrary to the principle of the protection of legitimate expectations and the principle of legal certainty to hold that Directive 97/81 may apply to facts which took place before the entry into force of that directive in the United Kingdom and which continued for a short time after its entry into force, even if the right to a retirement pension claimed by Mr O’Brien arose after the expiry of the time-limit for transposing Directive 97/81.

25. The Court has already declared, as regards the applicability ratione temporis of that directive that new rules apply, unless otherwise specifically provided, immediately to the future effects of a situation which arose under the old rule. Thus the Court concluded that the calculation of the period of service required to qualify for a retirement pension is governed by Directive 97/81, including periods of employment before the directive entered into force (Joined Cases C-395/08 and C-396/08 Bruno [2010] ECR I-5119, paras 53 to 55).

26. Consequently, the reference for a preliminary ruling must be declared admissible.”

15.
The Court has treated occupational pensions as a form of pay, the entitlement to which accrues over the length of the employee's service. In Ten Oever v Stichting Bedrijfspensionenfonds voor her Glazenwassers en Schoonmaakbedrijf (Case C-109/91) [1993] ECR I-4879, the Court stated, in relation to its Barber v Guardian Royal Exchange Assurance Group judgment (Case C-262/88) [1990] ECR I-1889:

"17. The Court's ruling took account of the fact that it is a characteristic of this form of pay [scil, benefits provided for by private occupational pension schemes] that there is a time-lag between the accrual of entitlement to the pension, which occurs gradually throughout the employee's working life, and its actual payment, which is deferred until a particular age.

...

19. Given the reasons explained in para 44 of the Barber judgment for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the Barber judgment ..."

(c) Summary of arguments of parties

16.
The fundamental difference between the parties is as to whether Mr O'Brien's entitlement to a pension in respect of his service prior to 7 April 2000 (the final date for transposition of the directive) should be regarded as a legal situation which arose and became definitive under the law then in force, or should be regarded as one of the future effects of a legal situation which arose under the old law, to which the directive therefore applies.

17.
Mr O'Brien argues that the reasoning in the Bruno and O'Brien judgments implies that periods of employment before the directive entered into force are to be taken into account when applying the directive in situations which arise after it should have been transposed. In particular, they are relevant not only to qualification for a retirement pension (which the Ministry does not dispute), but also to the quantification of that pension, where its quantification is based on the employee's length of service.

18.
The Ministry argue that since, following Ten Oever, a pension payable under an occupational pension scheme constitutes deferred pay for past work, and the worker's entitlement to pension accrues at the time of the work for which it constitutes pay, it follows from the non-retroactivity principle that the accrued right cannot be affected retrospectively by a change in the law. The entitlement is permanently fixed at the time when the right accrues, rather than being determined when the person retires and the pension becomes payable. On that basis, it is argued that Mr O'Brien's non-entitlement to pension in respect of his first 22 years of service was definitively established before the directive entered into force.

(d) The view of the national court

19.
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.

20.
However, the Court of Justice has not as yet considered the argument that if, following the Ten Oever line of authority, an occupational pension is treated as deferred pay, the right to which is acquired at the time of the work to which the pay relates, then it follows from the general principle of non-retroactivity that the directive does not alter or affect rights acquired (or, in Mr O'Brien's case, not acquired) before it was brought into force, there being no provision in the directive which overrides that general principle. Although the majority of the court are inclined to think that Ten Oever was concerned with the exceptional Barber limitation, which does not arise in the present context, the correct approach does not appear to the Supreme Court to be acte clair.

The question referred

21.
The Supreme Court has therefore concluded that it is necessary to refer the following question to the Court of Justice:

Does Directive 97/81, and in particular clause 4 of the Framework Agreement annexed thereto concerning the principle of non-discrimination, require that periods of service prior to the deadline for transposing the Directive should be taken into account when calculating the amount of the retirement pension of a part-time worker, if they would be taken into account when calculating the pension of a comparable full-time worker?