

## **STATEMENT TO FEE PAID CHAIRMEN OF INDUSTRIAL TRIBUNALS AND THE FAIR EMPLOYMENT TRIBUNAL**

This statement, on behalf of the Department for Employment and Learning (“the Department”), is made in light of decisions by:

- the UK Supreme Court in *O’Brien v Ministry of Justice* [2013] UKSC 6;
- the Employment Tribunal on 2 January 2014 in *Miller & Others v Ministry of Justice*;
- the Employment Appeal Tribunal on 4 March 2014 in *Ministry of Justice v O’Brien*; and
- the response made by the Department to claims made by fee paid legal chairmen of industrial tribunals and the Fair Employment Tribunal (ITFET).

The Employment Tribunal in England and Wales continues to hear preliminary hearings on related issues and there are appeals to the Employment Appeal Tribunal and Court of Appeal. There are also a number of similar actions before the industrial tribunal in Northern Ireland.

Although these actions are ongoing, the Department is aware that past and present fee paid ITFET judicial office holders wish to know what steps the Department is taking in response to the judgments thus far, particularly in light of statements made by the Ministry of Justice (“MOJ”) in response to the decisions noted above.

The Department has received amended claims in respect of non-pension matters and these are under consideration. This statement relates to pensions entitlement only. It is envisaged as the first in a series of communications that the Department will publish on this matter.

### **Pension schemes**

The Lord Chancellor’s statement of 31 May 2013 (as amended on 18 November 2013) accepted that a number of fee paid non-devolved judicial office holders, where a legal qualification is a requirement of appointment and subject to having a salaried full time comparator, are entitled to a pension. It was confirmed that once the

litigation has concluded, a final list of those fee paid judicial offices eligible for a pension will be drawn up.

While the Lord Chancellor's statement does not extend to devolved office holders, the Department has been considering the implications for its own remit and, in light of its concession in response to claims made by fee paid legal chairmen of the ITFET (that they require a legal qualification and have, in full time legal ITFET chairmen, a full time, salaried comparator), it accepts that fee paid chairmen of ITFET are entitled to a pension on a similar basis to that set out in the Lord Chancellor's statement.

Consequently, the Department is currently undertaking steps to ensure the development of a suitable comparable pension scheme mirroring, as far as is possible, the current Judicial Pensions and Retirement Act 1993 (JUPRA) scheme for salaried judges. The scheme will be known as the Fee-paid Judicial Pension Scheme (FPJPS).

As a first step, the MOJ tabled an amendment to a provision in the Pension Schemes Act 2015 which allows the Lord Chancellor, by regulations, to establish and maintain a pension scheme for fee paid office judicial holders to extend that provision to cover devolved fee paid judicial office holders in Northern Ireland. A legislative consent motion in respect of this amendment, tabled by the Minister for Employment and Learning, was passed by the Northern Ireland Assembly on 9 December 2014. The FPJPS will be brought into effect by MOJ regulations laid under JUPRA in the next Parliamentary session. FPJPS is set to open during the financial year 2015/2016.

This will mean that relevant past and present eligible fee paid chairmen of ITFET will have access to a fee paid judicial pension scheme offering benefits in line with the current judicial pension scheme for full time chairmen. It is anticipated that, from 2015-16, the scheme will provide pensions for service from 7 April 2000 until 31 March 2015.

Entitlement in all cases depends upon a fee paid ITFET chairman having brought a claim in time or still being able to do so, having regard to the terms of the Moratorium issued by the Department on 1 May 2013.

In late 2014 (19 September-12 December), MOJ issued a consultation paper on the proposed design of a pension scheme for eligible judicial office holders in England and Wales, Scotland and Northern Ireland. All fee paid judicial office holders within these jurisdictions were encouraged to read the consultation and MOJ welcomed comments from all those likely to be affected by the establishment of the scheme. From 1 April 2015, serving salaried and fee paid ITFET chairmen are eligible for membership of the new Northern Ireland Judicial Pension Scheme subject to the operation of Transitional or Tapering Protection.

### **Time limits**

In Great Britain, the Employment Tribunal in *Miller* considered how time limits apply to the pension claims of eligible fee paid judicial office holders.

The Tribunal held:

- (1) for the purposes of bringing a claim under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("2000 Regulations"), a three month time limit runs from the end of each fee paid appointment about which a complaint is made irrespective of whether the claimant transfers into a salaried appointment or a new fee paid appointment, or holds other fee paid appointments that continue; and
- (2) that there are no generic grounds which made it just and equitable to extend time.

The Department is aware that appeals have been lodged in relation to points (1) and (2). These have yet to be finally determined.

The Tribunal also held that, where the sole reason for a pension claim being out of time is that the judicial office holder delayed commencing proceedings because of

the Moratorium issued by the MOJ on 5 April 2013 it would be just and equitable to extend time.

In light of this decision the Department considers that, where the sole reason for a pension claim being out of time is that a fee paid chairman of ITFET delayed commencing proceedings because of the Department's Moratorium issued on 1 May 2013, it would be just and equitable to extend time.

### **Reckonable service**

In *Ministry of Justice v O'Brien*, the Employment Appeal Tribunal (EAT) heard an appeal on 28 January 2014 from the Employment Tribunal in *O'Brien v Ministry of Justice* (19 August 2013) on whether reckonable service for pension purposes begins from 7 April 2000 or from appointment (if before 7 April 2000). The judgment of the EAT given on 4 March 2014 is that, under the 2000 Regulations, reckonable service begins from the date by which the relevant European Directive should have been transposed, namely 7 April 2000 (or from appointment, if after that date).

MOJ is therefore currently working on the basis that only service from 7 April 2000 is to be taken into account for pension purposes. Mr O'Brien has appealed to the Court of Appeal ("*O'Brien No 2*") challenging the EAT findings on the year 2000 point; when the less favourable treatment ceased; and when time started to run. This decision is not expected before October 2015.

The Department is currently working on the basis that only service from 7 April 2000 is to be taken into account for pension purposes. It is aware that this matter is still before the industrial tribunal in Northern Ireland.