HOUSE OF LORDS

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[2006] UKHL 8

on appeal from[2004] EWCA Civ 844

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Matthews and others (Appellants)
v.
Kent and Medway Towns Fire Authority and others (Respondents)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Mance

Counsel

Appellants:
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Respondents:
Kent and Medway Towns Fire Authority and Berkshire Fire and Rescue Service
John Bowers QC
Jeremy Lewis
(Instructed by Beachcroft Wansbroughs)
Secretary of State for the Home Department
Nicholas Paines QC
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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond. For the reasons they give, with which I agree, I would allow this appeal and make the order proposed by Baroness Hale.

LORD HOPE OF CRAIGHEAD

My Lords,

2. The appellants in this appeal are retained fire fighters. They claim that they have been unlawfully discriminated against as to their conditions of employment as compared with those of whole-time fire fighters. The claim is made under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551). Regulation 5(1) provides 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. But before that regulation can be applied there are a number of definitions laid down by the Regulations that need to be satisfied. It is agreed that retained fire fighters are workers as defined by regulation 1(2) and that they are part-time workers for the purposes of the Regulations within the meaning of regulation 2(2). It is also agreed that whole-time fire fighters are full-time workers for the purposes of the Regulations within the meaning of regulation 2(1). The question is whether whole-time fire fighters are comparable full-time

workers within the meaning of regulation 2(4). Unless this definition is satisfied it will not be possible to make the comparison referred to in regulation 5(1).

3. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. As she explains, regulation 2(4) sets out the conditions that must be satisfied in order to determine whether a full-time worker with whom a part-time worker seeks to be compared is a comparable full-time worker. Among other things, both workers must be employed by the same employer "under the same type of contract": regulation 2(4)(a)(i). And they must both be engaged "in the same or broadly similar work" having regard, where relevant, to whether they have a similar level of qualification, skills and experience: regulation 2(4)(a)(ii).

4. Directions as to the situations in which full-time and part-time workers are to be regarded as being employed under different types of contract for the purposes of regulation 2(4) are given in regulation 2(3). A list is given in paragraphs (a) to (e) of five kinds of employee or worker whose contracts are to be regarded as of a different type. It follows that, where both workers are employed under contracts that answer to the description given in the same paragraph, they are both to be regarded as employed under the same type of contract for the purposes of regulation 2(4). They are workers as between whom, assuming that the other requirements of regulation 2(4) are satisfied, it is not permissible for the employer to discriminate unless he can justify this on objective grounds under regulation 5(2)(b).

5. It is agreed that retained fire fighters and whole-time fire fighters are both employed under a contract that is neither for a fixed term nor a contract of apprenticeship. This is a type of contract of the kind described in paragraph (a). There is however one other paragraph in regulation 2(3) that has to be considered. Paragraph (f) adds to the list –

> "any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract."

There is a difference of opinion among your Lordships as to whether the Court of Appeal were right to hold that retained fire fighters were

employees of the type described in paragraph (a), not workers of the description given in paragraph (f). The question is one of construction. What does paragraph (f) mean, when its words are construed according to their ordinary meaning in the context of the regulation read as a whole, having regard to the purpose of the regulation? This is a question of general public importance too. The answer that is given to it will affect all part-time workers who seek the protection of the Less Favourable Treatment Regulations, not just retained fire fighters.

6. It is convenient to look first at the purpose of regulation 2(3). As its opening words make clear, its function is to provide a definition of what are to be regarded as different types of contract for the purposes of paragraphs (1), (2) and (4) of the regulation, all of which direct attention to the question whether workers are employed by the employer under the same type of contract. Clause 3.2 of the Framework Agreement annexed to Council Directive 97/81/EC defines the term "comparable full-time worker" for the purposes of the agreement as a full-time worker in the same establishment having the same type of employment contract or relationship who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills. This is the clause in the Framework Agreement to which regulation 2(4) gives effect.

7. There is no separate definition in clause 3 of the Framework Agreement of what is meant by the expression "the same type of contract". But one can derive from the way clause 3(2) is framed that the question whether a full-time worker is employed under the same type of contract as a part-time worker is to be approached broadly, having regard to the purpose of the agreement set out in clause 1. This is to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work, to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers. The use of the word "type" fits in with this approach. When one thinks of a type of person or a type of car, for example, one looks for a broad characteristic that separates one type from another. One ignores the many variations and differences within each type and looks instead for something that brings them all together within the same category. An over-precise view as to what makes one type of contract different from another would tend to undermine the purpose of the agreement.

8. The wording of the first five paragraphs of regulation 2(3) adopts this approach. The descriptions that are given here are broad. They do not suggest that a contract can be treated as being of a different type from another just because the terms and conditions that it lays down are different. Nor do they suggest that a contract can be treated as being of a different type just because the employer chooses to treat workers of a particular type differently. The underlying purpose seems to be to ensure that it is not left to the employer to decide whether or not to treat persons falling within the same category differently. On the contrary he is not permitted to discriminate between them if they fall within the same category, assuming that the other parts of regulation 2(4) are satisfied, unless he can justify the different treatment on objective grounds under regulation 5(2). By listing the various categories in the way it does, it suggests that all that one needs to do in order to satisfy the requirements of regulation 2(4)(a)(i) is to find that both workers are employed under contracts that fit into one or other of the five listed categories. The question is whether paragraph (f) departs from this approach. Does it add something new, or does it require one to revisit the previous categories?

9. In my opinion the wording of paragraph (f) suggests that it is adding something new. In its opening words it refers to "any *other* description of worker" [my emphasis]. These words, on their own, seem to indicate that we are being asked here to examine a type of worker who is different from any of those previously mentioned. It then goes on to qualify the opening words. But it does so in a way that does not take anything away from the initial impression that we are dealing here with a type of worker, or perhaps various types of workers, who are different from those previously mentioned.

10. Paragraph (f) tells us that we are dealing now with any other description of worker that it is reasonable for the employer to treat differently from other workers, "on the ground that workers of that description have a different type of contract." It is the fact that they have a type of contract which is different from other types of contract that enables the employer to treat them differently, if it is reasonable for him to do so. This wording also permits workers of several different descriptions to be treated differently from each other on this ground under this paragraph. It is the fact that they have a different type of contract, not that the terms and conditions of their employment are different, that enables the employer to treat them differently from other workers. The breadth of the meaning to be given to the expression "type of contract" is indicated by the categories mentioned in the preceding paragraphs, which are defined broadly in a way that allows for a wide

variety of different terms and conditions within each category. This protects the part-time worker from terms and conditions that treat him less favourably in comparison with those that apply to full-time workers in the same category unless the difference of treatment can be objectively justified.

11. Everyone agrees that it is difficult to think of a type of contract which is different from those mentioned elsewhere in the list. But I do not think that this prevents paragraph (f) from being treated as adding something new to the list which will not be reached if a worker falls into one or other of the previous categories. It is sufficient to say, to give it some meaning, that it is there to fill any gaps that may have been left, as a long stop or residual category. The list as a whole makes it unnecessary to carry out the kind of fact-finding exercise that my noble and learned friend Lord Mance envisages. Its purpose, after all, is simply to identify in a broad and simple fashion the types of contract that enable workers to be treated as comparable workers for the purpose of applying the less favourable treatment rules that Part II of the Regulations identifies.

12. For these reasons, and those given by Baroness Hale with which I entirely agree, I would hold that the Court of Appeal were right on this point. This makes it necessary to consider whether the other part of the definition in regulation 2(4)(a)(ii) is also satisfied. Are retained fire fighters and whole-time fire fighters engaged in "the same or broadly similar work", having regard to whether they have a similar level of qualification, skills and experience?

13. The employment tribunal heard evidence on this issue during a hearing which extended over 9 days in November 2001. A further day was needed in February 2002 for evidence on a variety of issues on pensions and 5 more days were taken up with a consideration of the evidence. The decision which the tribunal delivered on 22 July 2002 was commendably detailed and clear in its reasoning. The question which they had to decide was essentially one of fact. The employment appeal tribunal found no error of law in its decision, and the Court of Appeal were not persuaded that the decision was perverse or that the tribunal misdirected itself.

14. The wording of regulation 2(4)(a)(ii) identifies the matters that must be inquired into. One must look at the work that both the full-time worker and the part-time worker are engaged in. One must then ask

oneself whether it is the same work or, if not, whether it is broadly similar. To answer these questions one must look at the whole of the work that these kinds of worker are each engaged in. Nothing that forms part of their work should be left out of account in the assessment. Regard must also be had to the question whether they have a similar level of qualification, skills and experience when judging whether work which at first sight appears to be the same or broadly similar does indeed satisfy this test. But this question must be directed to the whole of the work that the two kinds of worker are actually engaged in, not to some other work for which they may be qualified but does not form part of that work.

15. It is important to appreciate that it is the work on which the workers are actually engaged at the time that is the subject matter of the comparison. So the question whether they have a similar level of qualification, skills and experience is relevant only in so far as it bears on that exercise. An examination of these characteristics may help to show that they are each contributing something different to work that appears to be the same or broadly similar, with the result that their situations are not truly comparable. But the fact that they may fit them to do other work that they are not yet engaged in, in the event of promotion for example, would not be relevant.

16. The key passages in the tribunal's decision are to be found in paragraphs 152-154. They referred in paragraph 152 to their conclusions of fact about the particular methods of working of the retained fire fighter service and the way the whole operation had been geared to focus the working duties of the retained fire fighter substantially on the emergency call out fire fighting role. They then said that it was not in dispute that the fire fighting role was the central and most important job function of the retained fire fighter and a major part of the job role of the whole-time fire fighter. But they also found that there were measurable additional job functions which were carried out by whole-time fire fighters. On that ground alone they held that the job of the whole-time fire fighter was a "fuller wider job" than that of the retained fire fighter.

17. In paragraph 153 the tribunal found that, because of entry standards, probationary standards, probationary training and ongoing training, there were material differences in the level of qualification and skills between the retained fire fighter and the whole-time fire fighter. As for experience, they found that retained fire fighters who put in a large number of hours could develop this characteristic to an impressive

level. They set out their overall conclusion in paragraph 154, putting together the fuller wider role and the higher level of qualification and skills. They held that the retained fire fighter could not establish comparability with his full-time counterpart.

18. It seems to me that there is a weakness in the way the tribunal dealt with differences in the level of qualification and skills between the two kinds of worker. It would not be right to subject the tribunal's reasoning to an unduly critical analysis, especially in view of their assurance in paragraph 5 that they did in the end stand back and look at the whole picture. But I think their reasons show that they failed to appreciate that the question whether the two kinds of worker had a similar level of qualification, skills and experience was relevant only in so far as it bore on the exercise of assessing whether the work that they were actually engaged in was the same or broadly similar. They did not ask themselves whether these characteristics showed that they were each contributing something different to that work. They treated the fact that there were differences in the levels of qualification and skills as an additional factor leading to the conclusion that comparability could not be established, without assessing the extent to which these differences affected the work that the two different kinds of worker were actually engaged in. It would not have been impossible for them to have come to the conclusion that these differences did indeed affect the work that they were engaged in, for the reasons that my noble and learned friend Lord Carswell indicates. But they did not address the issue in that way. In my opinion this defect in their reasoning amounted to a misdirection on a point of law.

19. This criticism on its own does not lead to the conclusion that the decision as a whole is defective. The appellants have to show that it was not open to the tribunal to conclude, as they did in paragraph 154, that the work of the whole-time fire fighter was not comparable with that of the retained fire fighter. It has not been suggested that the tribunal were not entitled to find that there were differences between the work done by these two groups of workers, with the result that the work they were engaged in was not "the same" work. The question whether it was "broadly similar" was, as these words indicate and my noble and learned friend Lord Carswell points out, a question of fact and degree which one would have thought the tribunal having heard the evidence were best placed to answer.

20. I am not confident however that the tribunal gave sufficient weight to the extent to which the work on which both groups of fire

fighters were engaged was "the same" work. The painstaking way in which they addressed themselves to the various differences was a necessary and admirable reaction to the way the evidence was presented and the issues were argued before them. But it led them to concentrate on the differences and not to assess the weight that ought to be given to the similarities. Their conclusion that the job of the whole time fire fighter was a fuller wider job than that of the retained fire fighter was not, as they appear to have thought, the end of the exercise. They still had to address the question posed by the statute which was whether, notwithstanding the fact that the job of the whole time fire fighter was a fuller and wider job, the work on which both groups were engaged could nevertheless be described as broadly similar.

21. In paragraph 154 the tribunal held that, putting together the fuller wider role and the higher level of qualification and skills which they found to be the inevitable inference from the evidence before them, the necessary comparability could not be established. The way this sentence is expressed indicates to me that they did not take the final and vital step of addressing their minds, in the light of these findings, to the test laid down by the statute. For these reasons, and those given more fully by Baroness Hale with which I agree, I think that the decision which they reached was defective and must be set aside. I would allow the appeal and make the order which she proposes.

BARONESS HALE OF RICHMOND

My Lords,

22. It may not be generally appreciated that a large proportion of the operational fire-fighters in the United Kingdom are part-timers, 'retained' to turn out when required, rather than whole-timers, working on a shift system. According to the 2001/2 estimates supplied to us, there were around 18,300 retained fire-fighters and 38,600 whole-time fire-fighters in the whole country, but the proportion of part-timers was much higher in the shire areas, Wales, Scotland and Northern Ireland, than in the metropolitan areas. More fire stations are manned by retained fire-fighters than by whole-timers. It is clear, as a recent Audit Commission Report put it, that retained fire-fighters provide cover for large areas of the country. Their working patterns and some of their terms of employment are significantly different from those of the whole-timers. The issue for us is whether their employment falls to be

compared with that of the whole-timers for the purpose of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR).

23. This depends upon the answers to two questions. First, are both whole-timers and part-timers 'employed . . . under the same type of contract'? Second, are they 'engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience'? The Employment Tribunal and the Employment Appeal Tribunal answered both questions in the negative. The Court of Appeal answered the first question in the positive, but the second in the negative. The fire-fighters, supported by their Union, appeal to this House and both questions are in issue.

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

24. The Regulations were made under section 19 of the Employment Relations Act 1999, which required the Secretary of State to make regulations for the purpose of securing that people in part-time employment were treated no less favourably than people in full-time employment. Without prejudice to that general objective, the regulations were also to comply with the United Kingdom's obligations under Council Directive 97/81/EC, which required member states to implement the annexed Framework Agreement on part-time work. The flavour of the Directive is summed up in Recital 5:

> "Whereas the conclusions of the Essen European Council stressed the need to take measures to promote employment and equal opportunities for women and men, and called for measures with a view to increasing the employment-intensiveness of growth, in particular by a more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition."

In other words, more flexible employment practices can be good both for employees and for business. General consideration 5 preceding the Framework Agreement emphasises the point:

> "Whereas the parties to this agreement attach importance to measures which would facilitate access to part-time work for men and women in order to prepare for retirement, reconcile professional and family life, and take up education and training opportunities to improve their skills and career opportunities for the mutual benefit of employers and workers and in a manner which would assist the development of enterprises."

The object, clearly, was to encourage more flexible working patterns but not at the cost, either of proper protection for the workers or of competitiveness for the employer.

25. Clause 4.1 of the Agreement provides for the principle of non-discrimination:

> 'In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.'

This is reflected in regulation 5(1) and (2) of the PTWR:

> "5.-(1) 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-
>
> (a) as regards the terms of his contract; or
>
> (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
>
> (2) The right conferred by paragraph (1) applies only if-
>
> (a) the treatment is on the ground that the worker is a part-time worker, and
>
> (b) the treatment is not justified on objective grounds."

26. Clause 3.2 of the Agreement defines a 'comparable full-time worker':

> "The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills."

This is reflected in regulation 2(4) of the PTWR:

> "(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) …"

27. Regulation 2(1) defines a full-time worker:

> "2.-(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."

Regulation 2(2) defines a part-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."

28. Regulation 2(3) is the most relevant to the issue of 'same type of contract' under regulation 2(4)(a). At the relevant time it read thus:

> "(3) For the purposes of paragraphs (1) (2) and (4), the following shall be regarded as being employed under different types of contract-
>
> (a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship;
>
> (b) employees employed under a contract for a fixed term that is not a contract of apprenticeship;
>
> (c) employees employed under a contract of apprenticeship;
>
> (d) workers who are neither employees nor employed under a contract for a fixed term;
>
> (e) workers who are not employees but are employed under a contract for a fixed term;
>
> (f) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract."

Finally, it should be noted that, under Regulation 1, a 'worker' means both an 'employee', an individual who has entered into, works or worked under a contract of employment, and an individual who has entered into, works or worked under 'any other contract . . . whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.'

The same type of contract?

29. As the whole purpose of the PTWR is to prohibit unjustified discrimination in the terms and conditions of employment, this threshold requirement is clearly looking for comparable types of employment relationship rather than for comparable terms and conditions of employment. As the Employment Tribunal put it, "It is self evident . . . that a 'part-time contract' is probably almost certainly 'a different'

contract from a whole time contract. Our problem was how to assess and identify the existence of 'a different *type* of contract'" (para 132).

30. The appellants argue that each item in the list in regulation 2(3) is exclusive of the others. Once the relationship falls within one paragraph it cannot fall within another. Here both retained and whole-time fire-fighters fall within paragraph (a): they are 'employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship.' Paragraph (f) was a residual category, included by the draftsman out of an abundance of caution, in case there was some type of employment relationship not covered by paragraphs (a) to (e), although no convincing example has yet been imagined.

31. The respondents argue that paragraph (f) can take a relationship which would otherwise fall within one of the earlier paragraphs into a different category. The Employment Tribunal considered that the "literal meaning of the words is that we should look at the elements of the contract which persuade us that it is taken altogether a 'different type of contract' and then decide whether it is reasonable for the employer to have employees on such a contract." (para 145) A problem which affects both approaches to the construction of paragraph (f) is that it is premised on there being a 'different type of contract' from the others listed but then only applies if it is reasonable for an employer to treat the worker differently for that reason. This leaves the tribunal with nowhere to go if it has determined that it is a different type of contract but then that it is not reasonable to treat the worker differently on that account.

32. The Tribunal referred to the "high degree of commonality" between the contractual terms and conditions of both retained and whole time fire-fighters (para 75). They share the same ranking structure, although the retained fire-fighters cannot progress beyond the rank of sub-officer. They are subject to the same strict discipline. They are covered by the same legislation. Their job descriptions are identical until they get to item 6 (of which more below).

33. However, the retained fire-fighters have different working patterns from the whole-timers. The whole-timers work a "very structured shift system of 42 hours per week with overtime" (para 28). The part-timers commit themselves to regular weekly attendance, of two to three hours, for training and drill. They also commit themselves to being on call for a set number of hours per week, varying from 84 to 156 hours. They are required to be able to attend at the fire-station within 5

minutes of being called out. The Tribunal found that the "part of the retained fire fighters' job role which is . . . virtually unique in our experience is the ad hoc demand led nature of the role of attending call outs to emergency situations" (para 31), although they thought that the coast guard and life boat services might be comparable. The different working patterns are also reflected in different packages of pay. The whole-timers have a conventional salary with overtime structure. The part-timers have a more complicated arrangement, including three main features: an initial 'retaining fee', payment for their regular routine working, and payments for being called out. The Tribunal concluded that "because of the many differences . . . and the many special features of the working patterns as set out above, the Applicants are indeed employed under a different type of contract." (para 142) They also found that there were good reasons for these differences and that it was reasonable for the employer to treat the employees differently on the ground that they had a different type of contract (para 143).

34. The Court of Appeal, however, accepted the appellants' argument on the construction of regulation 2(3). In my opinion they were correct to do so. Regulation 2(3)(f) cannot be designed to allow employers to single out particular kinds of part-time working arrangements and treat them differently from the rest. The list in regulation 2(3) is clearly designed to define different categories of working relationship, within which part-time and full-time workers are to be regarded as comparable but between which they are not. Each category therefore contemplates the possibility of both full-time and part-time workers in that category. Thus the categories are designed to be mutually exclusive. It is accepted by all that categories (a) to (e) are indeed exclusive. But the respondents argue that category (f) is different.

35. I have difficulty accepting that argument because of the way paragraph (f) is drafted. It is drafted in the same way as paragraphs (a) to (e), as the final item in a list of items. If it were indeed intended as an exception to any of the earlier categories, the draftsman would more naturally have included a proviso rather than an additional subparagraph, perhaps along the following lines: "Provided that a description of worker falling within one of the above paragraphs shall be regarded as employed under a different type of contract if it is reasonable for the employer to treat that description of worker differently from other workers on the ground that workers of that description have a different type of contract". Instead, paragraph (f) expressly refers to "any *other* description of worker" which in any ordinary use of language means "any description of worker other than those described in the preceding paragraphs".

36. These purely linguistic considerations are reinforced by the purpose of the regulation. It is there only to provide a threshold to require the comparison between full and part-time workers to take place. Regulation 5 then provides, as we shall see, for a sensible appreciation of what is and is not less favourable treatment. It also allows for differences in treatment to be objectively justified. Part-time employment is inevitably different from full-time employment in a number of ways, yet the purpose of the PTWR is to secure that it is treated equitably. If the threshold of comparability is set too high this can only apply in the most straightforward of situations, for example, where full-timer and part-timer work in exactly the same way but one for, say, 40 hours a week and the other for, say, 20 hours a week. Yet the watchword of the Directive was flexibility in meeting the needs of both employers and workers. Particular workplaces may wish to arrange the pattern of part-time working differently from that of full-time working to suit their particular needs. There is nothing unusual in employing people who are called upon as and when needed. A good example is the judicial system, which in England and Wales makes substantial use of part-time workers who are remunerated on a daily, fee-paid basis. Rather like the retained fire-fighters, these part-timers commit themselves to attending a minimum amount of training when required to do so and to undertaking a minimum amount of judicial sitting when invited to do so. The draftsman clearly foresaw that these part-time members of the judiciary would otherwise fall within the PTWR because he expressly excluded them by regulation 17.

37. I am not unduly troubled by the fact that no-one has yet thought of a convincing example of an "other description of worker" who might fall within sub-paragraph (f). This is largely because of the exclusionary way in which the other sub-paragraphs are drafted. But it is not at all uncommon for a draftsman prudently to add a residual category just in case. Nor am I unduly troubled by the decision of the European Court of Justice in *Wippel v Peek & Cloppenburg GmbH & Co KG* [2005] ICR 1604. The claim in that case, to be paid on the basis of the maximum number of hours the worker could have been asked to work, when she was under no obligation to do any work at all, was clearly outrageous. It is not surprising that the Court found that her 'work when asked and if you please' arrangement was not the same type of relationship as those with whom she wished to be compared. Furthermore, the Court of Justice was concerned with an "employment relationship" under clause 3.2 of the Framework Agreement, whereas we are concerned with the express words of the PTWR. The PTWR should be read as going at least as far as the Framework Agreement goes. But it is open to them to go further, as is clear from the broader regulation-making power contained in section 19 of the 1999 Act.

38. For these reasons, essentially the same as those given by Maurice Kay LJ in the Court of Appeal, I would hold that retained and whole-time fire-fighters are employed under the same type of contract for the purpose of regulation 2(4)(a).

The same or broadly similar work?

39. The "main purpose of the job" of both retained and whole-time fire-fighters in the Kent Fire Brigade is:

> "1. To save life.
> 2. To protect property from fire and the effects of fire.
> 3. To render humanitarian [and special] services.
> 4. To assist in safeguarding the environment.
> 5. To assist in 'Making Kent Safer' by advising and educating the general public and participating in locally organised events."

The first five items in their "main duties and responsibilities" are also the same:

> "1. Respond immediately to all emergency calls.
> 2. Regularly check, test and maintain all fire appliance and station equipment, thereby ensuring its readiness for use.
> 3. Regularly attend and participate in practical drills, exercises, lectures and other forms of training ensuring that a high personal standard of practical and technical expertise is maintained.
> 4. Operate as an effective team member at all times and maintain the high level of fitness necessary.
> 5. Acquire and maintain a good knowledge of special risks, potential hazards, water supplies and fixed installations within the Fire Station area."

Thereafter, item 6 of the retained fire-fighter's list says only that they must "carry out any other duties as directed by supervisory officers". Whole time fire-fighters have these three items:

> "6. Assist with the fire safety workload of the Brigade by becoming familiar with the relevant legislation and carrying out routine inspections and visits, provide advice for other organisations and the general public.
>
> 7. Comply with responsibilities in accordance with the Health and Safety at Work Act and the Fire Authority's Health and Safety Framework to ensure own safety and that of other employees and persons who may be affected by their work.
>
> 8. Promote and support the principles of fairness at all times in accordance with the Fire Authority's Policy Statement on Fairness at Work and other Brigade Fairness at Work policies and relevant legislation."

40. In practice, the Tribunal found that "at the scene of the fire the actual job function carried out by all attending is effectively the same." (para 7) The retained and whole-time fire-fighters were indistinguishable from one another. The first most senior fire-fighter at the scene assumes and remains in control. The main difference was that while the retained fire-fighters spent a high proportion of their time responding to emergencies, the proportion of the working week spent on this by whole-timers was much lower. Accordingly, the whole-timers spent much more of their time on "non-occurrence duties", community fire safety work, such as home fire risk assessments, advising on installation of home fire detectors, attending local events and giving demonstrations. Although retained fire-fighters could do this sort of work, in practice they were never, or hardly ever, called upon to do so. They were not qualified to issue fire certificates. Hence the Tribunal concluded that "there are measurable additional job functions which are carried out by the whole-time fire fighter . . . and on that ground alone we would find that it is a fuller wider job than that of the retained fire fighter." (para 152) They also found that because of differing entry standards, probationary standards, probationary training and ongoing training, "there are material differences in the 'level of qualification and skills'" between retained and whole time fire-fighters (para 153). Putting together the "fuller wider role" and the "higher level of qualification and skills" they concluded that the two were not "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience" for the purpose of regulation 2(4)(a)(ii) (para 154).

41. The respondents argue that this was pre-eminently a question of fact for the industrial jury to resolve on the basis of all the evidence before them. The Tribunal heard a great deal of evidence and deliberated

over it for no less than five days. Their extended reasons were detailed and closely reasoned. It is not for an appellate court to second guess their assessment. The appellants do not point to any clear error of law in the Tribunal's reasoning, nor do they argue that the conclusion was perverse. They do, however, draw attention to the difference in wording between regulation 2(4)(a)(ii), which requires only that the work be "the same or broadly similar", and its nearest equivalent in section 1(4) of the Equal Pay Act 1970:

> "A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment. . . ."

42. This test is employed in the context of a scheme which imposes an equality clause upon the contracts of employment of women who are employed on like work with men. It is not a threshold condition which is the precursor to considering whether there is less favourable treatment which cannot objectively be justified. The equality clause operates unless, under section 1(4), there is a difference between the things she does and the things he does which is of practical importance in relation to their terms and conditions of employment, or, under section 1(3), the variation between their contracts is genuinely due to a material factor which is not the difference of sex. Unsurprisingly, there are indications that the Tribunal saw their task under the PTWR, which was new to them then, as essentially similar to that called for under the Equal Pay Act. Thus they assessed the various similarities and differences between the two types of fire-fighters as having 'high', 'medium' or 'low' importance. They used the term "material differences", which is an important concept in sex and race discrimination but not in the PTWR (para 153). They also referred to a "long established proposition in an enquiry of this kind" (para 155) when discussing the equal pay case of *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse* [2000] ICR 1134. Thus, although they directed themselves (in para 150) that the PTWR test did not contain the Equal Pay Act reference to differences of practical importance, they did not, after pointing out the differences (in paras 152-153), come back to the "same or broadly similar" test when reaching their conclusions. Instead, they reverted to the language of comparability and in doing so failed to evaluate the differences against the similarities.

43. However, while there are similarities between the two types of comparison, they are not the same. The sole question for the Tribunal at this stage of the inquiry is whether the work on which the full-time and part-time workers are engaged is "the same or broadly similar". I do not accept the appellants' argument, put at its highest, that this involves looking at the similarities and ignoring any differences. The work which they do must be looked at as a whole, taking into account both similarities and differences. But the question is not whether it is different but whether it is the same or broadly similar. That question has also to be approached in the context of regulations which are inviting a comparison between two types of worker whose work will almost inevitably be different to some extent.

44. In making that assessment, the extent to which the work that they do is *exactly the same* must be of great importance. If a large component of their work is exactly the same, the question is whether any differences are of such importance as to prevent their work being regarded overall as "the same or broadly similar". It is easy to imagine workplaces where both full and part-timers do the same work, but the full-timers have extra activities with which to fill their time. This should not prevent their work being regarded as the same or broadly similar overall. Also of great importance in this assessment is the importance of the same work which they do to the work of the enterprise as a whole. It is easy to imagine workplaces where the full-timers do the more important work and the part-timers are brought in to do the more peripheral tasks: the fact that they both do some of the same work would not mean that their work was the same or broadly similar. It is equally easy to imagine workplaces where the full-timers and part-timers spend much of their time on the core activity of the enterprise: judging in the courts or complaints-handling in an ombudsman's office spring to mind. The fact that the full-timers do some extra tasks would not prevent their work being the same or broadly similar. In other words, in answering that question particular weight should be given to the extent to which their work is in fact the same and to the importance of that work to the enterprise as a whole. Otherwise one runs the risk of giving too much weight to differences which are the almost inevitable result of one worker working full-time and another working less than full-time.

45. In my view, looking at the extended reasons of the Tribunal as a whole, it is difficult to escape the conclusion that they saw themselves as conducting essentially the same exercise as that required by the Equal Pay Act. They acknowledged that the fire-fighters' work at the fire ground was the same and said that they gave that factor high importance. But they failed to acknowledge the centrality of that work to

the enterprise of the Fire Brigade as a whole. That centrality is demonstrated by the fact that in large areas of the country cover is provided only by retained fire-fighters. Nor did the Tribunal suggest that there was any qualitative difference in the work done by both at the fire ground. Special qualifications, which retained fire-fighters do not have, are needed to operate certain specialist equipment, but not all whole time fire-fighters have those qualifications either. The Tribunal's reliance upon the higher qualification and skills of the whole-time fire-fighters was in connection with the further activities which they were called upon to carry out (para 155).

46. There is a further factor which cannot be ignored, at least in a test case concerning a very large nationwide workforce. This is the extent to which the job description and terms of the part-timer's contract means that he can in fact be required to engage in the same range of tasks as the full-timer, even if in practice he is only rarely called upon to do them. There are likely to be variations in practice across the country, with some places showing greater flexibility in their deployment of their part-timers than others. There are also likely to be variations over time. The recent Audit Commission Report (*Comprehensive Performance Assessment. Learning from CPA for the Fire and Rescue Service in England 2005*) praises those fire authorities which are making more flexible use of their retained fire-fighting force. It also comments that their lack of involvement in community fire safety work is unlikely to be sustainable in the long term. If more authorities take up the recommendation of the Audit Commission that "the lack of inclusion of retained fire-fighters in community fire safety work is reducing the capacity of fire and rescue authorities to deliver local and national objectives" (p 39) the conclusion that they are not engaged in the same or broadly similar work as the whole-timers is also unlikely to be sustainable in the long term. The Tribunal are, of course, judging the case put before them on the evidence put before them as to the present facts. But the requirements which may and sometimes are placed upon the part-time workers are part of that picture.

47. For these reasons I would remit the case to the Tribunal for reconsideration of whether the retained and whole-time fire-fighters are engaged in the same or broadly similar work.

Less favourable treatment?

48. There is a subsidiary question, which only arises if the retained fire-fighters cross both planks in the threshold, of the proper approach to assessing less favourable treatment under regulation 5. The appellants assert that both "less favourable treatment" and objective justification have to be considered term by term. The respondents assert that both should be looked at overall. More favourable elements in the package can be set against the less favourable elements in assessing whether overall it is less favourable to the part-timers. Less favourable elements may be justified by more favourable elements elsewhere.

49. I would not wish to rule out the possibility that, in certain cases, a less favourable term might be so well balanced by a more favourable one that it could not be said that the part-timers were treated less favourably overall. Nor would I wish to rule out the possibility that more favourable treatment on one point might supply justification for less favourable treatment on another. But in this case, even supposing it were to go back before a Tribunal, the question is unlikely to arise. The differences complained of are three: a different way of calculating sick pay which the Tribunal found to be less favourable (para 116); a lower hourly rate for additional duties (para 119); but above all, the exclusion of retained fire-fighters from the pension scheme, which again the Tribunal found would be less favourable treatment, at least in some cases (para 110). The Tribunal found it difficult to see any objective justification for these differences, and in their concluding remarks gave some encouragement to the industry to devise a simple pension scheme and a more equitable sick pay scheme. Although it would be open to a Tribunal hearing the case on remission to reach a different conclusion on consideration of the overall package, it is difficult at this stage to see how the differently structured pay package could justify total exclusion from the pension scheme or a sick pay scheme which is unrelated to the hours actually worked.

50. For those reasons, and those given by my noble and learned friend, Lord Hope of Craighead, with which I agree, I would allow this appeal and remit the case to the Employment Tribunal for reconsideration of the "same or broadly similar work" issue and any further issues which arise as a result of their conclusion on that.

LORD CARSWELL

My Lords,

51. A large amount of the firefighting work in the United Kingdom is carried out by retained firefighters, who serve part-time at firefighting duties, their main employment being as a rule in other occupations. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) ("the PTWR") were passed, in compliance with the terms of the Framework Agreement annexed to Council Directive 97/81/EC, in order to protect the position of part-time workers, recognising the growing prevalence of part-time working and the need to protect them from exploitation. In these proceedings the appellants, who are all retained firefighters, seek to obtain the benefit of the PTWR, complaining that they have unlawfully been discriminated against by comparison with full-time firefighters in relation to their conditions of employment.

52. The two main issues in the appeal before the House are whether each of the two limbs of regulation 2(4)(a) of the PTWR is satisfied. Regulation 2(4), so far as material, provides:

> "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; ..."

53. On the first issue I would uphold the decision of the Court of Appeal, for the reasons given by my noble and learned friend Lord Hope of Craighead, that the retained firefighters are employed by the same employer under the same contract. I agree with him that the categories in regulation 2(3) are mutually exclusive. Since the retained firefighters and the full-time firefighters are both governed by regulation 2(3)(a),

each being employed under a contract that is neither for a fixed term nor a contract of apprenticeship, *cadit quaestio* and one need look no further.

54. The second of the two main issues in the appeal, on which I propose to concentrate, is whether the decision of the Employment Tribunal on the application of Regulation 2(4)(a)(ii) can be upheld. On that issue I regret that I do not find it possible to agree with the majority of the Committee. The Employment Tribunal, after examining and setting out the evidence with commendable care and thoroughness, concluded that the retained firefighters and the full-time firefighters were not engaged in the same or broadly similar work. It was contended on behalf of the appellants that the tribunal erred in their approach to the construction of these provisions and that on the facts found they could only properly have reached the opposite conclusion. In other words, they committed an error or errors of law in that, first, they took incorrect matters into account or failed to take into account factors to which they should have had regard and, secondly, their conclusion was in the legal sense perverse. In assessing the validity of these submissions it is necessary to look in some detail at the findings of fact made by the tribunal and the decision based on them.

55. At the outset of the written decision the tribunal set out in paragraph 5 their approach to the evidence and issues, stating in conclusion:

> "For the purposes of this decision we set out our reasons and conclusions we hope in a logical fashion but we would not wish it to be thought that we did not stand back and look at the whole picture simply because we record a number of our conclusions sequentially."

In paragraph 19 the tribunal said:

> "When we reach our conclusions in our overall final conclusions in the case we directed ourselves that we should wherever possible seek to establish any similarities/differences in job function from either a qualitative point of view or a quantitative point of view and then evaluate mainly the qualitative differential."

Again, in paragraph 74 the tribunal emphasised that in comparing the contractual terms of the retained and full-time firefighters it was concerned to look at "the whole job" of each.

56. The tribunal commenced their examination of the material facts by describing the fireground in terms which were of central importance (para 7):

> "Starting at the beginning it is self evident that an important function of the job role of the whole time fire fighter and the retained fire fighter is the fighting of fires. There was a substantial agreement on the evidence before us that at the scene of the fire the actual job function carried out by all attending is effectively the same. It was accepted by the Respondents' Counsel and witnesses that if the first fire appliance at the scene is operated or commanded by a retained fire fighter the first most senior fire fighter at the scene whether whole time or retained remains in command at the scene of the fire. It was accepted that to the Clapham Omnibus bystander or the anxious householder the fire fighters at the scene would be indistinguishable in their appearance, uniform, activity or any other outward sign (save for an initial attached to the uniform which designates special qualification in a particular type of equipment)."

They examined the work done and the machinery and equipment operated by the retained and full-time firefighters respectively, then went on to state in paragraph 11:

> "We find generally that on the evidence of the Applicants before us looking at an average year the overall picture is that the retained fire fighters' working week contains a 'high' proportion as opposed to 'medium' or 'low' of call out and attendance at incidents in comparison with the retained fire-fighters' other duties. We accept that there may well be many dozens of retained fire fighters who do not, as a matter of fact, often get called on call outs and attendances. But we also find that looking at the earnings of some of the Applicants who for example earn more than say, £10,000.00 per annum that it is obvious that the

> proportion of their working life spent on call outs and attendances is properly to be described as 'very high'."

They expressed their conclusion on this part of the evidence in paragraph 14 in the following terms:

> " … we should stress that the similarity in job function and job role and work carried out by retained fire fighters on the fire ground is clearly the strongest point in the Applicants' case and in our own evaluation of the similarities/dissimilarities argued for and against on each side we have no hesitation in attaching to that similarity a label of 'high' importance as opposed to 'medium' or 'low'".

57. The tribunal then examined "non-occurrence duties", that is to say, those other than attendance at fires, accidents and emergencies. They held that the full-time firefighters had generally on average very much longer working hours. They expressed their view in broad terms on comparison of job function (para 18):

> "We accept that as a matter of individual competence it is certainly possible that an experienced retained fire fighter is capable of carrying out a home fire risk assessment and making recommendations. In a general way we do not doubt that the vast majority of retained fire fighters are perfectly capable of advising about the need for and the mechanics of the installation of a home fire detector."

They stated their view about the community work carried out in paragraph 20 as follows:

> "As to the community work carried out by the two branches of the service it is, we find, obvious that whether expressed as a total number of hours per week or per year or for that matter whether expressed as a proportion of the relevant fire fighter's time whole time fire fighters plainly carry out quantitatively a great deal more of the duties under this heading than their retained colleagues. We find nevertheless that this is not simply a question of having

> more hours available to do that kind of work (which of course is the obvious consequence of being 'full time' rather than 'part time'.) We find that there are a variety of ways in which the whole time fire fighter has a much more specialised body of knowledge and experience which can be brought to bear in carrying out these duties than is available to and applied by retained fire fighters."

They pointed out that retained firefighters are not qualified or entitled to issue fire certificates, concluding in paragraph 22:

> "The retained fire fighters are simply not qualified to carry out this role and do not do so. On a lesser but related level retained fire fighters are not in fact used to carry out risk assessments for the assessment of risk of fire in the home. On this area therefore we conclude that whilst there is an element of the differential which is purely quantitative nevertheless we find that there are critical parts of the differential which flow directly from the whole time fire fighters' 'extra' training and qualification and experience. There is additionally therefore a qualitative difference which in our general approach to these various issues we would rate in this case as 'high'."

58. The tribunal examined the hours of work of each group, but did not place much emphasis on any differences which existed, stating in paragraph 42:

> "Assessing the differential between the 'hours at work' of he retained fire fighter in comparison with whole time we assess the <u>lower number</u> of the hours as immaterial [part time working being the central matter of the regulations] and the significance of the 'demand led unpredictability' of the hours as 'low'."

59. The tribunal looked at recruitment, with particular reference to the Kent and Berkshire areas, which were the subject of the detailed evidence furnished to them. They did not rate the difference between the physical selection tests applied to each group as being of more than "low" significance. On the other hand, the examination-type element in the selection process was much more thorough and detailed, covering all

the aptitudes which the full role of the whole-time firefighter requires. They judged (para 52) that there was an overall qualitative difference in the standard of written tests taken, the standard of the full-time firefighters' tests being much more wide ranging, detailed and demanding. They concluded (para 53):

> "This is a differential which were we carrying out a simple 'Equal Value' sort of investigation we would consider to be a significant or 'high' qualitative difference."

60. When considering the question of comparisons between the groups in respect of training, qualifications and experience, the tribunal accepted (para 54) that the provision made was changing significantly, with a large number of proposals on the stocks for developing core competencies and development plans for retained firefighters. They took the view, however, in paragraph 55 that they were bound to reach their conclusions on the basis of the "state of play" at the time of the originating applications and not by "looking towards some future date when and if there is more extensive training of the retained firefighters." The validity of this approach was not challenged by the appellants in argument and I consider that it was correct. The conclusion reached by the tribunal on this question was set out in paragraph 57 of the decision:

> "Similar evidence as to the training position in the Kent Authority is given by Mr Peter Stanley, the Central Training and Recruitment Management in Maidstone. At paragraphs 10 onwards of his witness statement page 148 he sets out the main modules covered by that training course and he uses the word 'exam' for the passing of modules at four, eight and twelve week points throughout that training course."

61. The tribunal examined the question of promotion, again by reference to the Kent and Berkshire areas, and concluded (para 71):

> "The general picture, however, in both regions is that the hurdles which must be jumped by the retained fire fighter for promotion are by no means as demanding as those which are uniformly and firmly in place for their whole time counterparts. The differential in this case in this area of our comparison exercise we find again to be marked at

> ‘high’ and it is a differential which reflects in our judgment again qualitative differences between the two branches of the service and the ceiling at Sub Officer is a symptom of this whole approach.”

62. They then turned to the comparison of the contractual terms of the groups, observing at paragraph 78 that they would not wish it to be thought that by concentrating on the differences they ignored the “vast commonality” which patently did exist. They examined a number of features, expressing the view (para 84) that the situation of the retained firefighter was

> “highly individual because there is a combination of different types of ‘work’ which have to be legitimately reflected in the complex mechanism of payment which has evolved over the years.”

They examined the several elements of the retained firefighters’ pay package, pointing to a number of features which were highly unusual. After looking at bounty payments they concluded at paragraph 100:

> “Putting all these aspects of the work done/pay received equation together our overall conclusion must be we find that although in detailed respects there are a number of similarities with a number of other ‘casual’ ‘occasional’ ‘on call’ types of job role/occupation the whole picture together looked at in the round is that the retained fire fighter is a very special case.”

They then considered three areas in which the appellants complain that they have been treated less favourably, entitlement to pensions, sick pay and increased pay for additional responsibilities. On each of these the tribunal accepted that there was less favourable treatment of the retained firefighters.

63. The tribunal set out in paragraphs 152 to 154 their views on the issue whether both types of workers were engaged in the same or broadly similar work:

"152. In reaching our conclusion as to whether the retained fire fighter Applicants are rightly to be held as 'engaged in the same or broadly similar work' we would have regard again to many of our main conclusions of fact about the particular methods of working of the retained fire fighter service and to the conclusions of fact which we have reached about the way the whole operation has been geared to focus the working duties of the retained fire fighter substantially on the emergency call out fire fighting role. That central fire fighting role was not in dispute before us as being the central and most important job function of the retained fire fighter and being certainly a major part of the job role of the whole time fire fighter. We have accepted above however that there are measurable additional job functions which are carried out by the whole time fire fighter (and in the main we accept Mr Bowers' submissions on these issues) and on that ground alone we would find that it is a fuller wider job than that of the retained fire fighter.

153. Additionally we find that because of entry standards, probationary standards, probationary training and ongoing training in the main areas which we have set out in foregoing paragraphs, again there are material differences in the 'level of qualification and skills' between the retained fire fighter and the whole time comparator. Whilst we were not called upon to make the comparison there is obviously simply no comparison between retained ranks above Station Officer since promotion is not permitted (depending on the Region) above that level. We exclude from this part of our assessment the question of 'experience' because we fully take on board and accept the Applicant's case that retained fire fighters particularly those who put in a large number of part time hours can develop an impressive level of experience.

154. Putting together however the fuller wider role and the higher level of qualification and skills which we find to be the inevitable inference from the evidence before us, our conclusion is that were we called upon to consider the case under Regulation 2(4) the retained fire fighter would not establish comparability with his full time counterpart under sub-section 2(4)(a)(ii)."

On the question of comparison of qualifications, skills and experience they held in paragraph 155 that there was –

> " … a long established proposition in an enquiry of this kind namely that a higher level of qualification which, further, is reflected in a higher level of skills and which, further, in fact is demonstrated by further activities which the complainant by lack of that level of qualification skill or training is not qualified to carry out and does not in fact carry out places the two workers into different non-comparable situations. If we were called upon therefore to reach a conclusion under this Regulation we would not accept the Applicant's case."

64. The second part of the appellants' submission on this part of the case can be quickly dispatched. The test, as laid down in such cases as *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, is difficult to satisfy. As expressed by Lord Radcliffe at page 36, for the conclusion of an inferior tribunal to be set aside on this ground requires a finding that –

> "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal."

The same point was made by the Court of Appeal (para 22 of Maurice Kay LJ's judgment), citing the remarks of Mummery LJ in *Yeboah v Crofton* [2002] IRLR 634, 643 para 93. In my opinion it cannot be said that the present case falls into this category. The facts were fully and conscientiously examined by the tribunal, and the issues were discussed at length in their written decision, a point made very well at paragraph 46 of the decision of the Employment Appeal Tribunal. They had material before them on which they were entitled to come to the conclusion which they reached, and in my view their decision could not be set aside on this ground.

65. One of the submissions advanced by Mr Allen QC on behalf of the appellants was that the tribunal adopted the wrong approach to the assessment of the similarity of the work done by retained and full-time firefighters, in that they focused too much on the differences. At one point he argued that a tribunal should not consider differences between

comparables at the stage when they are considering Regulation 2(4), but only when they come to the question whether the employer can justify the differences under Regulation 5. I cannot accept this contention. In order to make a meaningful comparison of two items and determine the extent of their similarity one necessarily has to look at those aspects in which they are like each other and those in which they are different. I am of opinion that the tribunal were quite correct to look in detail at these matters, so long as they maintained a proper balance and breadth of vision sufficient to satisfy the test "broadly similar". The tribunal did acknowledge carefully at the outset of their examination of the issue the considerable similarity in respect of the core firefighting work done by each group. They investigated in detail the differences between the two groups, but they did in my view address the main issue, whether their work was broadly similar: see, for example, the first sentence of para 152 of their decision, in which they drew together the arguments and commenced to express their conclusions. I consider that there was no error of law in this respect.

66. I revert then to the subject matter of the first part of the appellants' submission, whether the tribunal took into account the correct considerations in approaching the issues on which they decided the applications. I have already expressed the view that the tribunal was justified in looking at the differences between the work done by the respective groups, but it has been suggested, first, that they failed to recognise the importance of the common core work of firefighting and rescues and became diverted from proper consideration of the issue by dwelling too much on the differences – put shortly, that they did not see the wood for the trees, the submission made on behalf of the appellants in the Court of Appeal (para 15 of the judgment of Maurice Kay LJ). Secondly, the tribunal directed its attention only to the work done in the mainly urban south of England, in particular in the counties of Kent and Berkshire, and did not take into account the large tracts of country in more remote rural areas in which the fire stations are staffed solely by retained firefighters, who must have to carry out many of the tasks performed in Kent and Berkshire by full-time firefighters. Thirdly, it might be suggested that they did not pay any or sufficient attention to the increasing flexibility applied by the Fire Service to the division of work between retained and full-time firefighters. Fourthly, the view has been expressed by Lord Hope that the reasoning of the tribunal on the differences in the level of qualification, skills and experience between the two types of worker amounted to a misdirection.

67. The first point has a degree of attractiveness, as a robust way to reverse the decision of a tribunal or lower court where one disagrees

with the balance of that decision. It is necessary, however, for an appellate court to be cautious about adopting this approach, for it may on proper examination turn out that it has the effect of evading the application of the strict test enshrined in *Edwards (Inspector of Taxes) v Bairstow,* to which I have referred. In the present case I do not consider that there is any room for adopting the approach. If the tribunal had material on which they were entitled to reach their conclusion, as they manifestly had, and that conclusion was within the parameters of those to which a reasonable tribunal properly instructed could come, then it must stand. The tribunal examined the evidence with very great care and were clearly aware of the importance of the common function of the two groups of firefighters in their core work of firefighting and rescue. As I have already stated, I do not think that their conclusion can be upset as perverse. Once that has been established, I do not consider that there is any room in this case for questioning its validity on the suggested ground that their approach dwelt too much on the differences and not enough on the similarities.

68. The applications to the Employment Tribunal were regarded as test cases brought on behalf of the whole group of approximately 12,000 retained firefighters throughout the country. In the course of the argument before your Lordships it emerged that there may be significant differences between the staffing and duties carried out by retained firefighters in remote rural areas and the pattern in Kent and Berkshire, where the claimants are stationed. For example, it appears from page 35 of the Audit Commission's published document Fire and Rescue Comprehensive Performance Assessment (which did not become available until after the conclusion of the hearing of the appeal) that in Devon 46 out of 58 stations, or almost 80 per cent, are crewed by retained duty system staff. I think it most likely that evidence of the position in many areas in rural parts of Great Britain, especially the more remote places, would show a similar pattern. Indeed, it was accepted by the first respondents in their closing outline submissions to the tribunal that practice in other stations and forces would differ markedly (Appendix, Part III, p 636). But the tribunal could make their findings only on the evidence adduced before them, and they would not have been justified in reaching conclusions by resort to factual material outside that. By the same token, I do not consider that this House as an appellate tribunal would be justified in resorting *proprio motu* to material, even though it is in the public domain, which was not before the tribunal and on which they did not base their findings. I do not wish to speculate whether other cases might be brought by other retained firefighters on different facts. On the case as presented to the tribunal, I do not consider that they were in error in deciding it on the material before it.

69. The same may be said of the suggestion that the tribunal did not pay proper attention to the increasing amount of flexibility now being adopted by fire authorities in the employment of retained firefighters and the duties assigned to them: see, eg, the Audit Commission document, *op cit,* p 39. This does not appear to have been the subject of evidence or argument before the tribunal, and they can hardly be faulted for failing to take that factor into account in their decision. In considering a similar submission made to them about training, the tribunal correctly, as I have held (para 60 above), declined to take into account current developments which were proposed but had not been put into effect at the date of the originating applications.

70. Finally, I am unable to agree that the tribunal misdirected themselves in respect of qualification, skills and experience. In my opinion the reference to these in regulation 2(4)(a)(ii) is intended to reflect the fact that such differences may be sufficiently great to bring about a difference in kind rather than degree. Various examples were suggested in the course of argument, but one which I think illustrates the point clearly is that of chefs working in a kitchen. The member of the team of chefs who has the lowest level of qualification, skills and experience may perform the most menial culinary tasks. His function may be so far removed from that of the chef de cuisine who heads the team that they might properly be regarded, in common parlance, as being in a different league, and hence not being engaged in the same or broadly similar work. I think that the reference in regulation 2(4)(a)(ii) was designed to recognise this and that the tribunal, appreciating that in discussion of the point, were justified in treating the differences in qualification, skills and experience as an additional factor in making their comparisons.

71. My conclusion accordingly has to be that the appellants have failed to make good their challenge to the tribunal's findings on the issue whether they were engaged in the same work as the full-time firefighters or work broadly similar to theirs. I do not reach it lightly or without regret, for the appellants' case has obvious merit and the retained firefighters deserve great credit for their important work, which is of such benefit to the public. I nevertheless have to conclude that the tribunal were not in error in the manner in which they reached their decision, which must stand.

72. I would therefore dismiss the appeal.

LORD MANCE

My Lords,

73. This appeal raises two main issues. The first is whether the twelve retained firefighters whose cases were examined by the employment tribunal were employed under the same type of contract as their chosen full-time comparators within the meaning of regulation 2(3) and (4)(a)(i) of The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the "PTWR"). The second is whether, if they were, the retained and full-time firefighters were "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skill and experience" within the meani ng of regulation 2(4)(a)(ii) of the PTWR.

74. The first issue raises an important question about the status of paragraph (f) in regulation 2(3). Regulation 2(3) lists six classes of employee or worker who "shall be regarded as being employed under different types of contract". It follows that employees or workers within the same class are to be regarded as being employed under the same type of contract. It is common ground that the retained and full-time firefighters, whose contracts fall to be compared on this appeal, both fall within the literal language of class (b), that is "employees employed under a contract for a fixed term that is not a contract of apprenticeship". The respondents' argument, which was accepted by the employment tribunal and the employment appeal tribunal but rejected in the Court of Appeal, is that the retained employees also fall within the language of class (f) – "any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract" – and that, if so, they are to be regarded as being employed under a different type of contract from their full-time worker comparators, who only fall within class (b). In short, where class (f) applies, there is a different type of contract, even if, apart from class (f), the employees or workers being compared would both fall within one and the same of the earlier classes.

75. The definition of "worker" in regulation 1(2) embraces an employee, as well as any individual working under any other contract whereby he "undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

76. At first glance, class (f) is formulated to cover some further mutually exclusive class of worker, not falling within any of the prior classes, in the same way as all the previous classes are mutually exclusive. The word “other” in particular would seem to point in this direction. But, since the previous classes are (obviously) all-embracing, there is a difficulty in thinking that this was what the draftsman can have had in mind. Further, if all that the draftsman intended was to cover some perceived (though non-existent) risk that the previous categories were not all-embracing, all that he needed to cover was any other description of worker under a type of contract not falling within and different from any specified in any of the preceding classes. Instead, the draftsman has introduced an apparent element of freedom or judgment, so that class (f) applies where “it is reasonable for the employer to treat” a particular description of worker “differently from other workers on the ground that workers of that description have a different type of contract”.

77. Class (f) seems to me to pre-suppose a situation where an employer may or may not decide to treat a particular description of worker as having a different type of contract and differently on that ground, and, where if the employer is reasonable in so doing, that particular description of worker is to be regarded as having a different type of contract, although otherwise he or she would not be so regarded. The word “other” on this basis is simply referring to the particular description of worker so identified. That description will necessarily be different from any of those previously listed, in that it must at least involve additional and more specific criteria and will therefore be an “other description” from any of them, even though, apart from it, the particular workers to whom it applies would also be regarded as falling within one of the more general earlier classes. The problem to which my noble and learned friend, Baroness Hale of Richmond, refers in paragraph 31 of her opinion does not in these circumstances arise on the respondents’ approach, but only on the appellants’ approach. On the respondents’ approach, if the employer is unreasonable in treating the particular part-time worker differently from other workers on the ground that he or she has a different type of contract from workers in one of the earlier classes, clause (f) simply does not apply and the part-time worker falls back into whichever of the earlier classes he or she would fall without class (f). On the appellants’ approach, there is by definition no earlier class into which the part-time worker can fall apart from class (f), and the worker must end up in limbo if the employer is unreasonable.

78. On the appellants' approach, class (f) seems inexplicable, except as very hesitant and faltering drafting. The respondents' approach gives sensible effect to class (f). The classification achieved in classes (a) to (e) has a certain formulaic rigidity. It distinguishes, as being employed under different types of contract falling within classes (a) and (b) respectively, employees who may be doing precisely the same work over a long period, e.g. two employees, one employed under an indefinite length contract, the other employed under a fixed term contract. So the regulations cannot be as tightly controlling in their requirement that employers justify differences in treatment on objective grounds as the appellants' case and the reasoning of the Court of Appeal would suggest. However, each of classes (a) to (e) would at the same time by itself be capable of embracing a wide variety of contractual engagements, which might in reality be very different in character. Thus class (a), taken by itself, would assimilate all employees under contracts which are not for a fixed term and not for apprenticeship, while class (b) would assimilate all employees under contracts which are for a fixed term and not for apprenticeship. In these circumstances, class (f) is entirely explicable on the ground that so crude a categorisation might ignore real differences which could reasonably justify employers treating as quite different in character the contracts of particular workers who would otherwise fall within one and the same earlier class. (This is, one might add, consistent with the background to the Regulations, which shows that their aim was deliberately restricted to employees or other workers on "the same type of contract", under what was described as a "light-touch" approach: see the Department of Trade and Industry's Consultation Document on Part-time Work (January 2000; URN 99/1224) and House of Commons Research Paper 00/50 of 15 May 2000 on Part-time Work).

79. Further (contrary to Maurice Kay LJ's statement that "such an approach forms no part of Directive 97/81 which gave rise to the Regulations" and to Longmore LJ's statement that it would make it "difficult for the Directive to have its intended effect"), it is the respondents', rather than the appellants', approach that gives better effect to the underlying Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement of 6 June 1997 on part-time work. By clause 3(2) of the Framework Agreement:

> "The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due

> regard being given to other considerations which may include seniority and qualification/skills.
>
> …"

80. The purpose of the Directive, as stated in its article 1, "is to implement the Framework Agreement" and, by its article 2, Member States were obliged to "bring into force the laws, regulations and administrative provisions necessary to comply with this Directive". Recital (14) records that the Directive "binds the Member States as to the result to be achieved, whilst leaving national authorities the choice of form and methods". Recital (16) recites that

> "… with regard to terms used in the Framework Agreement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice ….. provided that the said definitions respect the content of the Framework Agreement".

81. The definition in clause 3(2) of the Framework Agreement involves on its face a general test, whether or not the employment contracts or relationships under comparison are of the same or a different type. The European Court of Justice in its decision in *Wippel v. Peek & Cloppenburg GmbH & Co KG* (Case C-313/02) looked accordingly at all aspects of a part-time worker's contract of employment, before concluding that it "differs, as to subject matter and basis" and so as to type from that of any full-time worker employed by the defendant. The part-time worker in *Wippel* was engaged under a framework contract of employment which lasted in the event from October 1998 to June 2000, but under it the duration and scheduling of any work was determined by agreement (in practice from week to week) between the parties and she was paid on an hourly basis for any hours she was asked and agreed to work (plus sales commission on sales thereby achieved). Her contention was that she was discriminated against because her contract did not contain a fixed weekly working time with a predetermined salary, whether or not she did or did not work for the whole of that working time. It is of interest that the Court disposed of this ambitious argument, not under clause 4 of the Framework Directive (equivalent to regulation 5(2)(b) of the United Kingdom Regulations) on the basis that her different treatment was justified on objective grounds (because it was her choice whether or not to work), but rather under clause 3 of the Directive on the basis that her employment was not of the same type as that of the full-time employees

with whom she sought to compare herself. Clause 3 is thus a threshold which must be crossed before one gets to detailed examination of objective justification.

82. In the light of clause 3(2) of the Framework Agreement, reinforced by the decision in *Wippel*, it again seems to me likely that class (f) was conceived to introduce a greater element of flexibility than the rigid classification of classes (a) to (e) could allow, in order to cater for particular employees or workers who would otherwise fall within one of such classes and to allow them to be treated differently and as having a different type of contract, if reasonable so to do on the stated ground. Indeed, unless this were so, Ms Wippel's "framework contract of employment" might even under English and Scottish law have to be treated as being of the same type as the contracts of the full-time workers with whom she sought to compare herself, contrary to the intent of the Framework Agreement and Directive as explained by the European Court of Justice.

83. The Court of Appeal's other objection of substance, as opposed to linguistic analysis, to the above conclusion was that the protection intended would otherwise be undermined. It was, Maurice Kay LJ said:

> "always open to an employer to justify less favourable treatment on objective grounds under regulation 5(2)(b) once the threshold tests of the same type of contract and engagement in the same or broadly similar work have been satisfied. It is neither necessary nor desirable to bring forward an objective test based on reasonableness to enable an employer to remove an employee who would otherwise fall into one of (a) to (e). To do so would unduly complicate eligibility and would run counter to the purpose of the legislation" (para. 12, p. 908E).

Longmore LJ added:

> "There are, to my mind, serious difficulties about accepting this construction of regulation 2(3), because it effectively permits the employer to decide for himself who is and is not to be regarded as a comparable full-time worker. If an employee can "reasonably" treat part-time workers differently from full-time workers and say that the

> ground on which he is so doing is that part-time workers have a different type of contract from full-time workers, there will be little or no scope for an employment tribunal to assess for itself, as it is obliged to do under regulation 5, whether the employer is treating the part-time worker less favourably than a comparable full-time worker as regards "the terms of his contract". All the more will this be the case if it is "the terms of his contract" on which the employer is entitled to rely for the purpose of asserting that it is reasonable to treat his part-time workers differently for the purposes of regulation 2(3)(f)." (para. 28, pp.95-96)

84. However, it was the clear intention of the Framework Agreement to create a general threshold to any comparison and to any requirement on the part of an employer to justify, on objective grounds, a difference in treatment of different workers doing the same or similar work. The threshold was that the workers being compared should have "the same type of employment contract or relationship". That general threshold appears to me, as I have said, to be reflected in, and to explain, the introduction of class (f). The element of judgment, introduced by the reference to "any other description of worker that it is reasonable for the employer to treat differently", is limited both by the boundaries of reasonableness and by the fact that the employer can only treat another description of worker differently "on the ground that workers of that description have a different type of contract". Mere differences in contractual terms would not achieve this result. The European Court of Justice's decision in *Wippel* illustrates the type of relatively uncommon situation in which class (f) might apply. I do not think that there is any risk that the construction I prefer would undermine the purposes of the Directive, or of the United Kingdom legislation.

85. The question on this basis is whether the present case falls within the relatively confined class (f). This was essentially a matter for the employment tribunal to assess. It did so after many days of evidence and deliberation, and expressed its reasons and conclusions with great care. This House should be slow to interfere with them, although I acknowledge that it is always possible that such a tribunal may get too close to the detailed facts to be able to stand back and make a valid overall judgment. Here, I cannot see how this can be said to have been the case. The retained firefighters were engaged on special contracts, under which they only made themselves available on call within specified and agreed hours and were bound, for this purpose, to live within five minutes of the relevant station. They had the burden of

having to be prepared for a turn-out during those hours, but benefits in the form of a substantial annual "retaining" fee (apparently in the region of £2000 p.a.), remuneration on different scales for attendance for drill or other duties, turn-out and attendance as well as "bounty" payments for long service. (I add that the tribunal also found that full-time firefighters' contracts include one main field of duty and responsibility without counterpart in retained firefighters' contracts; that is to assist with the fire safety workload of the brigade by becoming familiar with the relevant legislation and carrying out routine inspections and visits, and to provide advice for other organisations and the general public - cf paragraph 6 in the list of their duties set out by my noble and learned friend Baroness Hale in paragraph 39 of her opinion; and this is a field of work in which the Tribunal found that full-time firefighters spend about one-third of their time.) The employment tribunal regarded the "ad hoc demand led nature of the role of attending call outs to emergency situations" as "virtually unique" in their experience (para.31), and reached the overall conclusion "that on all the evidence before us as a group of employees it is obvious that the Applicants are a very special anomalous atypical and possibly unique group of employees". They considered whether it was reasonable for the respondents to treat them as a different description of worker to the full-time firefighters put forward as comparators, and concluded that it was. Further, if and in so far as it was relevant to look at the comparative merits of the different packages provided to retained and full-time firefighters, they concluded that the overall package offered to and accepted by the retained firefighters could not be said to be "anywhere like 'oppressive'", and that they had insufficient material to assess "whether taken as a whole the package is 'equitable' or properly described as 'equal value'" (para 146).

86. No basis has in my view been shown for disagreeing with the tribunal's assessment of the facts regarding the differences in the type of contracts, and I would disagree with the Court of Appeal and restore the conclusions reached by the employment tribunal and employment appeal tribunal in favour of the respondents on this ground, and dismiss the appellants' appeals accordingly.

87. It is unnecessary for me in these circumstances to express a view on the second main issue in the appeal, beyond saying that I see great force in my noble and learned friend Lord Carswell's analysis. This was a careful evaluation, after hearing much evidence which the House has not examined and giving the issues much thought, by an expert Tribunal. An appellate court should not be astute to dissect the Tribunal's reasoning. The primary question (which it clearly identified)

was whether the full- and part-time firefighters were engaged in the same or broadly similar work. Even under close dissection, I find it difficult to see how the Tribunal can be said to have adopted a wrong test in law. Equally, I find it difficult to see how it can be said, in its analysis of the evidence, to have focused insufficiently on similarities, and to have concentrated instead on differences (particularly in qualifications, skill and experience) not necessarily bearing on work actually undertaken. As it would appear to me at present, the Tribunal had all relevant considerations of law and fact in mind.