

Briefing Note

Dear Judge,

It has been suggested that it will assist those of you who have legal expenses insurance for a briefing note to be prepared for submission to the insurers so that they might fund a contribution towards an intervention in the Supreme Court in the O'Brien litigation.

The case came before the Supreme Court ("SC") on 04th July 2012. With great rapidity - in a week - the SC issued a decision, reasons to follow, that Mr O'Brien was a worker when sitting as a recorder. Directions were also given, and a further hearing listed for 30th November 2012. The government is ordered to file details of exactly why it says it is objectively justified for the fee paid judiciary to be excluded from the judicial pension scheme, and other directions made, which focus on the office of recorder.

The Council of Immigration Judges is already an intervener, and the SC has been made aware of the differing sorts of fee paid judiciary - 32 different appointments it seems. However it would doom the litigation to interminable length if each of those groups had to fight the same battles all the way through the system, and be hugely expensive.

At the same time, in its efforts to reduce the cost of the judicial pension scheme the Government has stated that the reason is cost, which it fixes at 35% of salary. Accordingly, the starting point for a compensation payment is simply calculated by taking 35% of all earnings since appointment. These are substantial sums, and all the more reason to try hard to get the SC to decide on a broad basis - for all fee paid judiciary not just recorders.

More, the odds of succeeding in rebutting any form of justification on the facts are greatly enhanced by the experiences and circumstances of the eclectic and random selection of judges in our group. We have those with one jurisdiction who sit little, those who have more than one, and those who sit almost full time. We have some who are salaried part time in one jurisdiction and are fee paid in another. We have some who are salaried part time, where there are no full time salaried judges. It is going to be very much harder to justify treating all these people the same way than for the Government to argue justification for one particular group whose circumstances are likely to be similar.

There is a gender argument too - the fee paid include many fee paid, and by demonstrating this (40% of our group is female) it will be harder to justify the discrimination against the part time workers that the fee paid are now held to be. That argument assists male claimants as well as female.

Accordingly my advice to you is that an intervention is likely to enhance the chances of success of your claim and may well do so with a considerable saving in time and cost. It is important to appreciate that the biggest element of the Government's defence has gone - the worker status is now a judicial decision. There is no prospect of there being any contention that other fee paid judiciary are not workers.

The cost of intervening is large, but Counsel is keen to be involved in this case, which is high profile, and the brief fee is accordingly much less large than usual. With our present cohort the cost per individual is likely to be no more than £350 in total. There is the possibility of substantial numbers of others joining the intervention, which would bring the cost per head down. It is, put shortly, a very small sum to have an expert QC argue your case in the Supreme Court, and is miniscule compared to the cost should the SC decide solely for

recorders and your case has to be fought right from the beginning, for the Government has already demonstrated that it will prevaricate as much as it possibly can, and concede nothing.

Your case will be lost if the Government establishes objective justification, and it is most unfortunate were to be lost without your circumstances and those of the rest of the group being advanced.

For the sake of completeness I mention that it is within the power of the SC to award costs against interveners. Having attended the first hearing, I can say that it is clear that the possibility of that occurring is vanishingly small.

Please ask your insurer to approve the expense, and provide them with a copy of this note.

If your insurer has any particular query, please put them in touch with us.

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