JUDGMENT OF THE COURT (Second Chamber)
1 March 2012 (*)
(Framework agreement on part-time work — Definition of 'part-time workers who have an employment contract or employment relationship' — Judges working part-time remunerated on a fee-paid basis — Refusal to grant a retirement pension)

In Case C-393/10,
REFERENCE for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 28 July 2010, received at the Court on 4 August 2010, in the proceedings
Dermod Patrick O'Brien
v
Ministry of Justice, formerly Department for Constitutional Affairs,
THE COURT (Second Chamber),
composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh and A. Arabadjiev (Rapporteur), Judges,
Advocate General: J. Kokott,
Registrar: C. Strömholm, Administrator,
having regard to the written procedure and further to the hearing on 8 September 2011,
after considering the observations submitted on behalf of:
Mr O'Brien, by R. Allen, QC, and R. Crasnow, Barrister,
The Council of Immigration Judges, by I. Rogers, Barrister,
the United Kingdom Government, by S. Behzadi-Spencer, acting as Agent and T. Ward, QC,
Ireland, by D. O'Hagan, acting as Agent and B. Doherty, Barrister,
the Latvian Government, by M. Borkoveca, Z. Rasnača and I. Kalniņš, acting as Agents,
the Portuguese Government, by L. Inez Fernandes, acting as Agent,
the European Commission, by M. van Beek and N. Yerrell, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 17 November 2011,
gives the following

Judgment

This reference for a preliminary ruling concerns the interpretation of Clause 2.1 of the Framework Agreement on part-time work concluded on 6 June 1997 ('the Framework Agreement on part-time work') which appears in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10) ('Directive 97/81').

The reference has been made in proceedings between Mr O'Brien, Queen's Counsel and former Crown Court recorder, and the Ministry of Justice, formerly the Department for Constitutional Affairs, concerning the refusal by the latter to pay Mr O'Brien a retirement pension calculated pro rata temporis on the retirement pension payable to a full-time judge taking retirement at age 65 who has performed the same work.

Legal context

European Union law

In accordance with Directive 98/23, extending Directive 97/81 to the United Kingdom of Great Britain and Northern Ireland, the period in which to transpose that directive prescribed for that Member State expired on 7 April 2000.

Article 1 of Directive 97/81 states that its purpose is to implement the Framework Agreement on part-time work.

It is stated in recital 11 in the preamble thereto:
'Whereas the signatory parties wished to conclude a framework agreement on part-time work setting out the general principles and minimum requirements for part-time working; whereas they have demonstrated their desire to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike.'

Recital 16 in the preamble to that directive is worded as follows:
'Whereas, 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, as is the case for other social policy Directives using similar terms, providing that the said definitions respect the content of the Framework Agreement'.

The provisions of the Framework Agreement on part-time work relevant to the case in the main proceedings are as follows:

'Clause 1: Purpose:

The purpose of this Framework Agreement 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 organisation of working time in a manner which takes into account the needs of employers and workers.

Clause 2: Scope

This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.

Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish if the objective reasons for making them remain valid.

Clause 3: Definitions

For the purpose of this agreement:

The term "part-time worker" refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of 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.

…

Clause 4: 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.

Where appropriate, the principle of pro rata temporis shall apply.

The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice.

Where justified by objective reasons, Member States after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification. Qualifications relating to access by part-time workers to particular conditions of employment should be reviewed periodically having regard to the principle of non-discrimination as expressed in Clause 4.1.'

National law

The United Kingdom gave effect to Directive 97/81 and the Framework Agreement with the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('the Part-time Workers Regulations') which were made on 8 June 2000 and came into force on 1 July 2000.

Section 1(2) of the Part-time Workers Regulations contains the following definitions:

'"contract of employment" means a contract of service or of apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

"worker" means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under –

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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.'

Section 5 of the Part-time Workers Regulations prohibits less favourable treatment of part-time workers which is unjustified.

In Part IV of those regulations, entitled 'Special Classes of Person', Section 12 thereof, entitled 'Crown employees', provides in subsection 1 that those regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees and workers. Subsection 2 provides that 'Crown employment' means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

However, Regulation 17 of the Part-time Workers Regulations entitled 'Holders of judicial offices', provides that the regulations do not apply 'to any individual in his capacity as the holder of a judicial office if he is

remunerated on a daily fee-paid basis'.

Section 21 of the Courts Act 1971, in its original version, provided:

Her Majesty may from time to time appoint qualified persons, to be known as Recorders, to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them under this or any other enactment.

Every appointment of a person to be a Recorder shall be of a person recommended to Her Majesty by the Lord Chancellor, and no person shall be qualified to be appointed a Recorder unless he is a barrister or solicitor of at least ten years' standing.

The appointment of a person as a Recorder shall specify the term for which he is appointed and the frequency and duration of the occasions during that term on which he will be required to be available to undertake the duties of a Recorder.

There shall be paid to Recorders out of money provided by Parliament such remuneration and allowances as the Lord Chancellor may, with the approval of the Minister for the Civil Service, determine.'

As is clear from the order for reference, the judicial pension scheme is principally governed by the Judicial Pensions Act 1981, as amended by the Judicial Pensions and Retirement Act 1993. In accordance with Section 1(6) thereof, as amended, 'qualifying judicial office' for access to the judicial pension scheme is a reference to any office so specified if it is held on a salaried basis. The referring court also states that there is no express provision on pensions for recorders or other judges remunerated on a daily fee-paid basis.

It is clear from the file that the United Kingdom has not taken any measures under Clause 2.2 of the Framework Agreement.

The dispute in the main proceedings and the questions referred for a preliminary ruling

It is apparent from the file before the Court that, in the United Kingdom, judges are historically described as 'office holders' and work outside the framework of an employment contract.

Since the Courts Act 1971, the number of part-time judges has increased considerably. A distinction should be drawn between those who are remunerated on a fee-paid basis, including recorders such as Mr O'Brien, and those who receive a salary. Recorders work mainly in the Crown Courts. Their daily remuneration is 1/220th of the salary of a full-time Circuit Judge. Unlike full-time judges and part-time salaried judges, recorders are not entitled to a retirement pension.

Mr O'Brien was called to the Bar in 1962 and appointed Queen's Counsel in 1983. He worked as a Recorder from 1978 until his retirement in 2005, on his 65th birthday. It was then that he requested, relying on Directive 97/81 and the Part-time Workers Regulations, a retirement pension calculated as a proportion pro rata temporis of that which a full-time Circuit Judge would be entitled to if he had retired on the same date. The Department of Constitutional Affairs rejected his request, considering that Mr O'Brien had no claim to a pension.

Mr O'Brien commenced proceedings before the Employment Tribunal in September 2005. Although successful at first instance, he lost on appeal to the Employment Appeals Tribunal on the ground that his claim was out of time. It was later ordered that the substantive issue and the time-limit issue should both be heard by the Court of Appeal (England and Wales) (Civil Division) as a test case. In December 2008, the Court of Appeal allowed Mr O'Brien's appeal on the time-limit issue, but directed the Employment Tribunal to dismiss the claim on the issue of substance. Mr O'Brien therefore brought an appeal before the referring court.

The Supreme Court observes that judicial office is one of the oldest and most important offices known to English law. It also states that a recorder holds an office marked by a high degree of independence of judgment and is not subject to the directions of any superior authority as to the way in which he performs the function of judging. Nevertheless that court states that judicial office partakes of most of the characteristics of employment.

The Supreme Court of the United Kingdom concludes from the case-law of the Court of Justice that there is no single definition of 'worker'. It also notes that the effect of Clause 2.1 of the Framework Agreement on part-time work, read in conjunction with recital 16 in the preamble to Directive 97/81, is to leave to national law the task of interpreting the concept of 'worker', but that national law cannot oust the underlying principles of European Union legislation in such a way as to frustrate it.

That court seeks guidance as to whether the permissibility of a national deviation from the Community norm should be judged by some or all of the following considerations: first, the number of persons affected, second, the special position of the judiciary, for whose work independence of judgment is an essential feature and, third, the extent to which that deviation is voluntary. The Supreme Court of the United Kingdom notes that the exclusion of part-time judges remunerated on a daily fee-paid basis by Regulation 17 of the Regulations has some appearance of being a deliberate ad hoc exclusion of a particular category while their full-time or salaried part-time colleagues, doing the same or similar work, are entitled to judicial pensions on retirement.

In that context, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

Is it for national law to determine whether or not judges as a whole are workers who have an employment contract or employment relationship within the meaning of Clause 2.1 of the Framework Agreement [on part-time work], or is there a Community norm by which this matter must be determined?

If judges as a whole are workers who have an employment contract or employment relationship within the meaning of Clause 2.1 of the Framework Agreement [on part-time work], is it permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions?'

Consideration of the questions referred

Admissibility

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

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

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

Substance

The first question

By its first question, the referring court asks essentially whether European Union law must be interpreted as meaning that it is for the Member States to define the concept of 'workers who have an employment contract or employment relationship' in Clause 2.1 of the Framework Agreement on part-time work.

It must be recalled that the scope ratione personae of the Framework Agreement on part-time work is defined in Clause 2.1 thereof. According to that provision, the agreement applies 'to workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State'. Neither Directive 97/81 nor the Framework Agreement on part-time work contains a definition of 'worker', 'employment contract' or 'employment relationship'.

Recital 16 in the preamble to Directive 97/81 states that with regard to terms used in the Framework Agreement which are not specifically defined therein, Directive 97/81 leaves Member States free to define those terms in accordance with national law and practice, as is the case for other social policy directives using similar terms, providing that those definitions respect the content of the Framework Agreement.

As the parties in the main proceedings, all the governments having lodged submission and the European Commission acknowledge, there is no single definition of worker in European Union law: it varies according to the area in which the definition is to be applied (Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 31, and Case C-256/01 *Allonby* [2004] ECR I-873, paragraph 63).

In the present case, it must be held, as is clear from the wording of recital 11 in the preamble to Directive 97/81, that the Framework Agreement on part-time work was not intended to harmonise all national laws on part-time employment contracts or working relationships, but merely aims, by setting out the general principles and minimum requirements for part-time working, to 'establish a general framework for eliminating discrimination against part-time workers'.

It follows from the foregoing considerations that the European Union legislature, by adopting that directive, considered that the concept of 'workers who have an employment contract or an employment relationship' was to be interpreted in accordance with national law.

The Court confirmed that approach, stating that a worker comes within the scope of the Framework Agreement on part-time work when he has a contract of employment or an employment relationship as defined by the law, collective agreement or practices in force in the Member States (Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 40).

However, the discretion granted to the Member States by Directive 97/81 in order to define the concepts used in the Framework Agreement on part-time work is not unlimited. As the Advocate General observed in points 36 and 37 of her Opinion, certain words used in that agreement may be defined in accordance with the national law and practices on condition that they respect the effectiveness of the directive and the general principles of European Union law.

In that regard, Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see Case C-61/11 PPU *El Dridi* [2011] ECR I-3015, paragraph 55).

In particular, a Member State cannot remove at will, in violation of the effectiveness of Directive 97/81, certain categories of persons from the protection offered by that directive and the Framework Agreement on part-time work (see, by analogy with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43) ('the Framework Agreement on fixed-term work'), Case C-307/05 *Del Cerro Alonso* [1997] ECR I-7109, paragraph 29).

That interpretation is supported by the provisions of those two acts, which do not contain any indication from which it may be inferred that certain categories of employees are excluded from their scope. Indeed,

as is clear from the wording of Clause 2.1 of the Framework Agreement on part-time work, the scope of the agreement is conceived in broad terms, covering generally fixed term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State. The definition of 'fixed term workers' for the purposes of the framework agreement, set out in Clause 3.1, encompasses all workers without drawing a distinction according to whether their employer is in the public, or private, sector (see, by analogy with Directive 1999/70 and the Framework Agreement on fixed term work annexed thereto, Joined Cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* [2010] ECR I-14031, paragraphs 39 and 40 and the case-law cited).

It must be held, as the Commission stated, that the definition of 'workers who have an employment contract or an employment relationship' for the purposes of Clause 2.1 of the Framework Agreement on part-time work will have an effect on the scope and effectiveness of the principle of equal treatment enshrined in that agreement.

In the present case, according to the United Kingdom Government, domestic law has long-recognised that judges are not employed under a contract, and that that law does not recognise any category of 'employment relationship' as distinct from the relationship created by a contract. For those reasons, according to the Ministry of Justice and the United Kingdom Government, judges in general do not fall within the scope of Directive 97/81. Consequently, the sole purpose of Regulation 17 of the Part-time Workers Regulations, which states that those regulations do not apply to part-time judges remunerated on a daily fee-paid basis, is strictly redundant.

According to the interpretation under national law of the concept of 'workers who have a contract of employment or an employment relationship', as suggested by the United Kingdom Government, holding judicial office excludes from the outset the existence of an employment contract or an employment relationship, thereby depriving judges from the benefit of the protection offered by Directive 97/81 and the Framework Agreement on part-time work.

In that connection, it must be observed that the sole fact that judges are treated as judicial office holders is insufficient in itself to exclude the latter from enjoying the rights provided for by that framework agreement.

It follows from paragraphs 34 to 38 of the present judgment and, in particular, from the need to safeguard the effectiveness of the principle of equal treatment enshrined in that framework agreement, that such an exclusion may be permitted, if it is not to be regarded as arbitrary, only if the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of 'workers' under national law.

It is ultimately for the referring court to examine to what extent the relationship between judges and the Ministry of Justice is, by its nature, substantially different from an employment relationship between an employer and a worker. The Court may, however, mention to the referring court a number of principles and criteria which it must take into account in the course of its examination.

In that connection, it must be observed, as the Advocate General stated in point 48 of her Opinion, that in examining whether the nature of that relationship is substantially different from that between employees falling, according to national law, within the category of 'workers' and their employers, the referring court will therefore have to bear in mind that, in order to have regard to the spirit and purpose of the Framework Agreement on part-time work, that distinction must be made in particular in the light of the differentiation between that category and self-employed persons.

With that in mind, the rules for appointing and removing judges must be considered, and also the way in which their work is organised. In that connection, it is apparent from the order for reference that judges are expected to work during defined times and periods, even though this can be managed by the judges themselves with a greater degree of flexibility than members of other professions.

Furthermore, as appears from the order for reference, that judges are entitled to sick pay, maternity or paternity pay and other similar benefits.

It must be observed that the fact that judges are subject to terms of service and that they might be regarded as workers within the meaning of Clause 2.1 of the Framework Agreement on part-time work in no way undermines the principle of the independence of the judiciary or the right of the Member States to provide for a particular status governing the judiciary.

As the Supreme Court of the United Kingdom observed in paragraph 27 of its order for reference, judges are independent in the exercise of the function of judging as such, within the meaning of the second subparagraph of Article 47 of the Charter of Fundamental Rights of the European Union.

Those findings are not called into question by the Latvian Government's argument that the application of European Union law to the judiciary has the result that the national identities of the Member States are not respected, contrary to Article 4(2) TEU. It must be held that the application, with respect to part-time judges remunerated on a daily fee-paid basis, of Directive 97/81 and the Framework Agreement on part-time work cannot have any effect on national identity, but merely aims to extend to those judges the scope of the principle of equal treatment, which constitutes one of the objectives of those acts, and to protect them against discrimination as compared with full-time workers.

The same is true with regard to the argument that judges as a whole do not fall within the scope of Directive 97/81 and the Framework Agreement on part-time work because, under Article 51 TFEU the free movement of workers does not apply to activities involving the exercise of public authority. It must be

stated that that framework agreement does not concern the free movement of workers.

In those circumstances, the answer to the first question referred is that European Union law must be interpreted as meaning that it is for the Member States to define the concept of 'workers who have an employment contract or an employment relationship' in Clause 2.1 of the Framework Agreement on part-time work and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81 and that framework agreement. An exclusion from that protection may be permitted only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, within the category of workers.

The second question

By its second question, the referring court asks essentially if, according to national law, judges fall within the concept of 'workers who have an employment contract or an employment relationship' in Clause 2.1 of the Framework Agreement on part-time work, whether the latter must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from discriminating between full- and part-time judges, or between different kinds of part-time judges.

As is apparent from the file submitted to the Court, that question arises due to the fact that Regulation 17 of the Part-time Workers Regulations expressly provides that the latter does not apply to judicial office holders remunerated on a fee-paid basis such as recorders. Therefore, recorders cannot rely on Regulation 5 thereof, which prohibits less favourable treatment of part-time workers which is unjustified, so that, unlike full-time judges and part-time salaried judges, they cannot join the judiciary's pension scheme and receive a pension under that scheme on retirement.

Clause 4.1 of the Framework Agreement on part-time work prohibits, in respect of employment conditions, part-time workers being 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. Clause 4.2 provides that, where appropriate, the principle of pro rata temporis applies.

It must be observed that the concept of 'employment conditions' in Clause 4 of the Framework Agreement on part-time work covers retirement pensions which depend on an employment relationship between worker and employer (see, in particular, *Bruno and Others*, paragraph 42).

The difference in treatment experienced by part-time judges remunerated on a daily fee-paid basis results from the fact that, by reason of the method for remunerating them, they are not entitled to a pension from the judicial profession's pension scheme on their retirement or to the protection offered by Regulation 17 of the Part-time Workers Regulations.

The United Kingdom Government submits in that connection that Directive 97/81 and the Framework Agreement on part-time work concern only discrimination between full- and part-time judges, and not between different categories of part-time workers carrying out different functions.

In that connection, it must be held, as the United Kingdom Government itself noted at the hearing, that, at the time when the Part-time Workers Regulations were adopted, part-time judges were, with few exceptions, all remunerated on a daily fee-paid basis. It is therefore against that background that the situation of part-time judges remunerated on such a basis must be understood. Thus, where national provisions reserve to employees the right to join the judicial pension scheme, that amounts to reserving that right to full-time judges and thereby excluding part-time judges who are, with few exceptions, remunerated on a daily fee-paid basis.

In those circumstances, the fact that part-time salaried judges are treated identically, as regards the right to a retirement pension, with full-time judges is irrelevant. Therefore, there is no need to examine whether Directive 97/81 and the Framework Agreement on part-time work authorise distinctions introduced by national law, in order to define the right to a retirement pension, between different kinds of part-time judges.

It must therefore be examined whether the failure to grant a retirement pension to part-time judges remunerated on a daily fee-paid basis means that they are treated in a less favourable manner than full-time workers in a comparable situation.

In that connection, Clause 3 of the Framework Agreement on part-time work lays down the criteria for defining 'comparable full-time worker'. The latter is defined in the first subparagraph of Clause 3.2 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'. It must be held that those criteria are based on the content of the activity of the persons concerned.

Therefore, it cannot be argued that full-time judges and recorders are not in a comparable situation because they have different careers, as the latter retain the opportunity to practise as barristers. The crucial factor is that they perform essentially the same activity. In that connection, the parties concerned, including the United Kingdom Government, explained at the hearing that recorders and full-time judges perform the same functions. It was explained that their work is identical and that they carry out their functions in the same courts and at the same hearings.

According to Clause 4 of the Framework Agreement on part-time work and the principle of non-discrimination, the different treatment of a part-time worker compared with a comparable permanent worker can only be justified on objective grounds.

In those circumstances, the concept 'objective grounds' within the meaning of that clause must be understood as not permitting a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. On the contrary, that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose (see, by way of analogy with Clause 5.1(a) of the Framework Agreement on fixed-term work, *Del Cerro Alonso*, paragraphs 57 and 58).

Since no justification has been relied on during the proceedings before the Court, it is for the referring court to examine whether the inequality of the treatment between full-time judges and part-time judges remunerated on a daily fee-paid basis may be justified.

It must be recalled that budgetary considerations cannot justify discrimination (see, to that effect, Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 85, and Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, paragraph 46).

Having regard to the foregoing considerations, the answer to the second question is that the Framework Agreement on part-time work must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

European Union law must be interpreted as meaning that it is for the Member States to define the concept of 'workers who have an employment contract or an employment relationship' in Clause 2.1 of the Framework Agreement on part-time work concluded on 6 June 1997 which appears in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC of 7 April 1998, and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81, as amended by Directive 98/23, and that agreement. An exclusion from that protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers.

The Framework Agreement on part-time work concluded on 6 June 1997 which appears in the Annex to Directive 97/81, as amended by Directive 98/23, must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine.

[Signatures]

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* Language of the case: English.