Jonathan Sumption’s appointment in January 2012 to the Supreme Court was a surprise. He was the first English barrister in decades to have been recruited to our top court without any previous period of full-time judicial service. Sumption is also the first judge in living memory to have had his appointment commented on by another senior judge, Sully LJ in the London Review of Books.

Part of the Sumption controversy rests in his own response to promotion, which was to give a public lecture called ‘Judicial and Political Decision-Making: The Uncertain Boundary’ criticising the previous judiciary for their supposed intervention in areas best left to Parliament. ‘English public law has not developed a coherent or principled basis’, Sumption told his listeners ‘for distinguishing between those questions which are properly a matter for decision by Parliament and the electorate, and those which are properly for decision by the courts’. The key task for the Judiciary, he argued, was to cease using a judicial position to rewrite the law, and to leave politics to Parliament.

Since his appointment, Sumption’s most controversial decisions have been in employment law. His first significant minority decision, Birmingham CC v Abdulla, arose in an equal pay case. The claimants brought an equal pay case in the High Court outside the ordinary employment tribunal time limit of six months but within the civil limitation period of six years. The employer defended the claim on grounds of jurisdiction. Until this case, it had been the established understanding of employment lawyers that equal pay claims, unlike all other individual claims, could be brought in either the civil courts or the Tribunal. Indeed this was buttressed by the clear words of section 2(3) of the Equal Pay Act 1970, which enables claims to be redirected from the tribunal to the civil courts if it would be more convenient to hear them there.

Birmingham drew an analogy with the ‘forum conveniens’ rules that operate in international law. We do not usually allow magnates with a strictly domestic dispute having no connection to Britain to sue in this country; the UK courts are not the ‘convenient’ venue. Birmingham argued that the same arguments applied to equal pay claims, which should always be heard in the Tribunal as the specialist court. Unsurprisingly, judges found this analogy a poor one. The reasons why non-UK cases are not heard in the UK courts are expense, lack of knowledge of the law and lack of authority; none of these problems applies to the High Court hearing employment claims. Accordingly, Birmingham’s appeal failed at each of the three tiers of the judiciary who heard it.

Sumption is an extremely bright judge, and had to find some reasons to justify a decision in favour of the employer. He held that: ‘The view that court proceedings in support of an equal treatment claim should rarely or never be struck out where they would be time-barred in an employment tribunal has the effect of making the statutory protection of the employer available to him only at the option of the employee.’ In other words, the protection of the employer through the Employment Tribunal’s narrow time limits is an overriding principle – it, and the employer’s general interests, for which it stands – should override anything, even the plainest, unambiguous words of a statute.

In December 2012, a further split Supreme Court decision again concerned the rights of employers. In Geys v Société Générale, a worker, Geys, was summarily dismissed by his employer in breach of his contract. He was later paid the notice pay to which he was entitled. His notice pay was however paid late, entitling him to further bonus payments for work he had done over the previous two years.

It has for 30 years been settled law that where an employer repudiates a contract of employment, this repudiation takes effect only from the moment when the employee accepts it. Sumption held that the common law should be rethought to prevent employees benefitting. It was ridiculous, he maintained, to think that an employer might be required to keep a worker in employment when that worker did not have any duties. But as any experienced employment lawyer could have told Lord Sumption, there are circumstances where an employer keeps a worker in employment, albeit without giving them any duties, and the employee is deemed to remain in employment – e.g. if she is incapable of work due to sickness or injury, see section 212(3)(a) of the Employment Rights Act 1996.

Again, we see an extremely bright judge trying to nudge his contemporaries into decisions which would alter the texture of settled areas of law – with no apparent motive other than an overriding need to promote the interests of the employers.

In both cases, Sumption was part of a losing minority. But readers should watch him with care: the anxiety must be that the legal left now faces a better-entrenched, more political antagonist than any we have known in 30 years or more.

David Renton

Socialist Lawyer February 2013