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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mrs V M Garston	**AND**	Ministry of Justice

Heard at: London Central **On**: 3 July 2017

Before: Employment Judge Macmillan (Sitting alone)

Representation
For the Claimant: No attendance
For the Respondent: No attendance

JUDGMENT

The Claimant's application for a just and equitable extension of time in which to present this claim fails. The claim is therefore dismissed.

REASONS

Background and issues

1. In these proceedings, Mrs Garston complains that during her service as a fee-paid Judge of the First Tier Tribunal (Social Entitlement Chamber) and its predecessors, she was excluded from the right to a judicial pension whereas her salaried full-time colleagues were entitled to a pension and that in other respects the terms of her appointment were less favourable than theirs, in all cases because of her part-time status. The proceedings are bought under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The time limit for bringing proceedings under those Regulations is three months beginning with the date of the less favourable treatment complained of or, where that less favourable treatment extended over a period of time, when the less favourable treatment ended.

2. Mrs Garston who was born on 8 January 1939, took up her appointment as a fee-paid Tribunal Judge on 10 July 1995. She retired, having reached the compulsory retirement age of 70, on 8 January 2009 but she did not commence

these proceedings until 26 March 2013 just 12 days before they became four years out of time.

3. Her claim is part of the very large multiple known as the Judicial Pension Scheme, or O'Brien, litigation. At an earlier stage in the litigation, I gave Judgment in a case called ***Miller & Others v Ministry of Justice*** on a number of points concerning time limits. The first of those points was the date from which time for the purposes of bringing these proceedings began to run. My decision on that point is currently before the Supreme Court whose judgment is imminent. Most cases involving time limits within the JPS litigation are stayed behind the Supreme Court judgment. However, a small number of cases, including that of Mrs Garston, are not affected by the appeal to the Supreme Court. They are cases where time began to run against the claimant on the day on which she retired from all judicial office and the claimant is over 65 years of age. None of the issues before the Supreme Court in ***Miller & Others*** are able to affect claimants in that category. Mrs Garston falls within that category. A number of claimants in that category whose claims are out of time, including Mrs Garston, have applied for just and equitable extensions of the three month time limit.

4. The second issue on time limits which I dealt with in ***Miller & Others*** was to consider a wide range of so called generic grounds on which just and equitable extensions of time might be granted. With one very limited exception, I dismissed all of those generic grounds and my decision to do so was upheld by the Employment Appeal Tribunal. There has been no further appeal on the point. It is therefore, for individual claimants to establish, on evidence peculiar to their own cases, that there are just and equitable grounds for extending time in their case.

The law

5. I adopt what I said about the law in ***Miller & Others*** but I would repeat two passages from Court of Appeal authorities which are of particular relevance. The first is ***Robertson v Bexley Community Centre*** [2003] IRLR 434 CA, paragraph 25 the judgment of Auld LJ in which he said this:

> *"…When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

6. In ***Chief Constable of Lincolnshire Police v Caston*** [2009] EWCA Civ 1298, paragraph 25 Lord Sedley LJ said:

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> *"… there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields … policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in* ***Robertson*** *that it either had or should. He was drawing attention to the*

> *fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them."*

7. Mrs Garston has urged me to approach her application for a just and equitable extension of time in an equitable frame of mind and has quoted from Paton's Jurisprudence enjoining me to remember that rules must be so adapted that injustice is avoided.

8. In summary then, I am able to extend time for the bringing of these proceedings but only if it is just and equitable to do so and it is for Mrs Garston to satisfy me that it would be just and equitable to extend time .

The facts

9. Mrs Garston was in practice as a family law solicitor before becoming a fee-paid Judge in the predecessor of the First-tier Tribunal, Social Entitlement Chamber. I accept that she has no knowledge of employment law but as a practicing solicitor and member of the judiciary, she must have been aware both of the concept of time limits and the strictness with which they are applied in normal circumstances. She tells me in her written submissions, and I have no reason to doubt her, that on retirement she was in a very depressed state of mind. She is a single lady, wholly dependent on herself, both financially and for the management of her day to day affairs. She had just lost her only source of income and the country was going into a serious financial crisis. Some time prior to her retirement and continuing after it, she had been experiencing significant problems of loss of sight in her only good eye which was eventually corrected by cataract surgery in May 2009. I entirely accept that this was very worrying and distressing for her. She describes herself in the period immediately following her retirement and I think in the months thereafter as being 'inert' with regard to her personal affairs.

10. I accept of course that she will suffer significant prejudice through the loss of a pension if her claim is not allowed to proceed. Given the length of her judicial appointment and the frequency of her sittings, any pension that she would receive if these proceedings were successful would be substantial.

11. In her first written submission in support of her application for a just and equitable extension of time, Mrs Garston explained her knowledge of the O'Brien litigation (which gave rise to the whole of the Judicial Pension Scheme litigation). This is what she wrote:

> *'It is true to say that I had heard of Mr O'Brien at the date of my retirement. However, I knew nothing of the details of his litigation and, in any event, I did not relate his litigation to my own circumstances. I had always believed my part-time post did not carry a pension.*'

12. That is a somewhat puzzling statement which leaves many questions unanswered. But I think I can only conclude from it that she was aware prior to her retirement, although possibly only shortly prior to it, that Mr O'Brien was bringing proceedings in connection with the failure to pay him a judicial pension for his work as a recorder or to put it another way, as a fee-paid circuit Judge. Mrs Garston's contention that she did not relate Mr O'Brien's position to her own

is very surprising indeed as they were both holders of fee-paid judicial offices who had been told that their posts did not carry a pension. Their positions were therefore remarkably similar.

13. In a later written submission, she says that she believes the Tribunal may consider her to have had "constructive notice", words which she puts in inverted commas, of the O'Brien litigation at the time of my retirement. She goes on:

> *'If so I believe that I would have dealt with this knowledge exactly how I dealt with my financial affairs and my vision problem at the relevant time. Unable to deal with matters effectively and taking little or no action despite their obvious importance.'*

14. I do not think that there is any question of constructive notice here. It seems clear from her original submission that Mrs Garston had actual notice of the O'Brien litigation although I am quite prepared to accept that she may have known little about the details. I notice that she makes no claim not to have realised that while she was not in receipt of a pension, her full-time salaried colleagues were, from which I can only conclude that she was aware of that difference in treatment.

15. It was not until 2011 that she first took legal advice. That was after a chance meeting with a former judicial colleague who advised her to consult Messrs Brown-Jacobson, solicitors of Nottingham, one of the lead firms of solicitors involved in this litigation on behalf of claimants. Because only the year in which she took advice is given in her submission it is impossible to say just how out of time her claim was at that juncture but it must have been anything from just under two years to nearly three years. She was advised not to start proceedings as her claim was well out of time and there was an obvious risk of costs if she did. That advice was clearly correct at the time but it was changed by Brown-Jacobson after the judgment of the Supreme Court in ***O'Brien*** in early 2013 remitting the matter back to this Tribunal after holding that Mr O'Brien was entitled to a pension having been less favourably treated on the grounds of his part-time status. She commenced proceedings within a very short time of that change of advice.

Discussion and Conclusion

16. I dealt with the prejudice point in ***Miller & Others*** and my decision on it was not appealed. I held that in combating the prejudice argument, the Respondent does not have to do more than show that it would be required to defend a substantial clam which it would not otherwise have to do, the claim being time barred. All claimants in these proceedings will suffer prejudice if their claims do not proceed as, apart from the time limit issue, they normally would be entitled to succeed on the pension point. Some will suffer greater prejudice than others and I accept that the prejudice suffered by Mrs Garston is likely to be greater than in the cases of many of her judicial colleagues whose appointments were of shorter duration or who sat less frequently. But it would be a very serious anomaly if claimants whose cases I considered individually – one might call them the stragglers – long after I dealt with the point in ***Miller and others*** were in a better position on the prejudice argument than the claimants whose cases were considered as part of the generic whole in ***Miller & Others***. Put

another way, and I think the better way, the prejudice argument that Mrs Garston wishes me to consider has already been considered and disposed of in ***Miller & Others***. That is not to say that no prejudice argument can now be successfully run but I think it would need to be something more than the mere loss of the right to claim a pension to which the retired Judge would otherwise have been entitled.

17. I regret that there is nothing in the explanation that Mrs Garston has given to me about the reason for her very long delay in commencing these proceedings that could enable me to say it would be just and equitable to extend time. Not only does it appear that she was aware of the central salient fact, the less favourable treatment of fee-paid judicial office holders compared with that afforded to full-time salaried office holders – she was even aware, perhaps only in relatively vague terms, that a member of the fee-paid judiciary was doing something about it and had taken proceedings. Although she undoubtedly had some personal problems after she retired, her main worry, the cataract surgery to her eye and the risks inherent with it, would have been resolved soon after May 2009. There is no basis on which I could find - and Mrs Garston in fairness does not even claim - that her state of mind was such that she could not manage her own affairs. She appears simply to have done nothing about pursuing the possibility of securing a pension. She was not the victim of incorrect legal advice and even if the advice she initially received from Browne-Jacobson had been wrong, which it was not, her claim was already very out of time.

18. I accept of course the prejudice she will undoubtedly suffer in being deprived of a pension and I note her plea for me to abide by the spirit of Paton's injunction not to adopt a rigid stance in the face in injustice. But both parties are entitled to justice on connection with the extension of time limits and such limited arguments as Mrs Garston is able to advance are clearly outweighed, in my judgment, by the very considerable length of the delay in bringing the proceedings, the significant injustice to the Respondent if they were required at this late stage to have to defend a long out of time claim, and the absence of any really concrete basis on which I could hold that it would be just and equitable to extend time. The application for an extension of time on just and equitable grounds therefore fails and is dismissed from which it follows that the entirety of these proceedings are dismissed on the grounds that they have no reasonable prospect of success.

Employment Judge Macmillan
14 July 2017