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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr G F Bowden	**AND**	1. Ministry of Justice 2. Department for Communities and Local Government.

Heard at: London Central **On**: 13 November 2017

Before: Employment Judge S J Williams (Sitting alone)

Representation

For the Claimant: Mr A Engel, Representative
For the Respondents: Mr C Bourne, QC

JUDGMENT

The judgment of the tribunal is that:

(i) The tribunal considers that it is just and equitable to consider the claimant's complaint despite the fact that it was presented outside the usually applicable limitation period;

(ii) The claimant's complaint will be considered and determined on its merits.

REASONS

Introduction

1. This is a complaint of less favourable treatment by virtue of the claimant's status as a part-time worker. The matter for decision is whether, notwithstanding its late presentation, it is just and equitable that the complaint be considered.

2. For the claimant Mr Engel adduced the evidence of the claimant whose evidence in chief was contained in a brief witness statement upon which he was cross-examined by Mr Bourne. Mr Engel also submitted a witness statement of his own which was not the subject of any cross-examination. Mr Bourne for the respondents adduced no evidence. Both representatives presented submissions in writing upon which they elaborated orally at the hearing.

3. This is a re-hearing following a remission by the Employment Appeal Tribunal following its allowing an appeal by the claimant against a judgment of the employment tribunal dated 21 October 2016 following a hearing on 5 October 2016. By its order sealed on 30 August 2017 the Employment Appeal Tribunal ordered that the appeal be allowed and that the matter be remitted for rehearing to a differently constituted employment tribunal which would form its own views on all aspects of the question whether it is just and equitable to extend time. I have been provided with a transcript of the judgment of the Employment Appeal Tribunal.

The law

4. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provide:-

5 Less favourable treatment of part-time workers

(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.

8 Complaints to employment tribunals etc

(1) … a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 …

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months … beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

17 Holders of judicial offices

These 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.

5. I was referred to the following authorities:

Wall's Meat Co. Ltd. v Khan [1979] ICR 52
British Coal v Keeble [1997] IRLR 336
DPP et al v Marshall [1998] ICR 518
Southwark London Borough Council v Afolabi [2003] ICR 800
Robertson v Bexley Community Centre [2003] ITLR 434
Marks & Spencer PLC v Williams-Ryan [2005] ICR 1293
O'Brien v Department for Constitutional Affairs 2006 ET
Department for Constitutional Affairs v Jones [2007] EWCA Civ 594
Christie v Department for Constitutional Affairs UKEAT/0140/07/ZT
Department for Constitutional Affairs v O'Brien UKEAT/0139/07/ZT
Averns v Stagecoach in Warwickshire UKEAT/0065/08/DA
Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327
O'Brien v Department for Constitutional Affairs [2008] EWCA Civ 1448
Edge v Department for Constitutional Affairs and the Ministry of Justice 2014 ET
Miller et al v Ministry of Justice et al UKEAT/0003 and 0004/15.

The facts

6. In his written witness statement the claimant set out limited details of his biography and career, upon which he expanded considerably in cross-examination. Having studied law at Oxford the claimant was called to the Bar in 1962 but did not at that stage go into legal practice. He joined an advertising business as an account representative, selling the agency's services. In around 1970 or 1971 he joined Land Securities working on the publicity side of the property business. In 1972 or 1973 he joined the teaching staff of South Bank Polytechnic, lecturing in property law to students of land management. In 1974 he became a fellow of the Royal Institute of Chartered Surveyors. In approximately 1977 he became an elected member of the Greater London Council and in 1983 he was elected to Parliament where he served as the member for Dulwich until 1992. He described himself as an active constituency MP and backbencher. He did not engage in any other work whilst he was a Member of Parliament.

7. In 1992 he joined chambers at 1 Paper Buildings practising at the planning bar and at the same time held a part-time appointment at Kingston University teaching property law to estate management students. In 1994 the claimant was appointed a fee-paid legal chairman of the Residential Property Tribunal Service (RPTS) formerly known as the Rent Assessment Committee and Leasehold Valuation Tribunal.

8. The claimant told me that the salaried staff of that tribunal consisted of a president and three vice-presidents, two of whom were valuer-members. Those salaried officers carried out predominantly administrative work and sat on cases only occasionally. The bulk of the hearings in the RPTS were presided over by fee-paid legal chairmen such as the claimant. The claimant was fully aware of the distinction between the fee-paid chairmen, on the one hand, and the salaried presidents and three vice-presidents on the other. The claimant's understanding was that the latter were effectively civil servants. Given that they were performing, at least from time to time, a judicial function, I entertain some doubt about whether that is an accurate description, but their precise status does not affect my decision in this case.

9. The claimant's recollection is that he sat as a legal chairman in the RPTS for the equivalent of two to two and a half days per week, less so in the academic term time and more so in the academic vacation so as to accommodate his teaching work. The claimant retired from chambers in around 1995.

10. From 1994, until his retirement, the claimant combined his academic work at Kingston with his judicial role in the RPTS. In 2006, the claimant retired from his judicial role in the RPTS by virtue of age. Since his retirement the claimant has not engaged in paid work. He has pursued other interests and has served in a voluntary capacity as trustee of several charitable trusts to which his experience in property management and property law is relevant. He has not maintained contact with practising lawyers or sitting judges.

11. The claimant stated that between his retirement in 2006 and 26 April 2016, he had no knowledge whatsoever that there was any question of any entitlement to pensions, or other ancillary payments, by fee-paid judicial office holders. He was entirely unaware of the attempts to assert such entitlement by Mr O'Brien and others. He acknowledged candidly that he was fully aware that the salaried president and vice-presidents of the RPTS received pensions on retirement, but he had always recognised and accepted that they were in a different category by virtue of their being salaried. He knew nothing of the re-designation of fee-paid legal chairmen as judges. His professional experience never touched on employment law or discrimination law at all. In the period under consideration, up to 26 April 2016, the claimant readily acknowledged that nothing would have stopped him from taking advice had he seen fit to do so. However, because he was entirely ignorant of the possibility of any such claim as he now brings, nothing prompted him to take any such advice.

12. In the winter of 2014-2015, the claimant was admitted to hospital with diabetes and jaundice. At that time he was diagnosed with pancreatic cancer, underwent a lengthy operation and had chemotherapy until January 2016. Since that time the claimant has been in poor health; he is frail and walks with a stick.

13. Because both were fee-paid legal chairmen of the RPTS, the claimant has in the past occasionally met Mr Engel. Mr Engel is familiar with the O'Brien litigation and presented his own claim under the Regulations of 2000 in 2011. Entirely by chance, in circumstances described by Mr Engel in his witness statement, the two men met at a charity concert which took place on 26 April

2016. In the course of a brief conversation Mr Engel asked the claimant whether he had made a claim for pension in respect of his service as a fee-paid legal chairman of the RPTS. The claimant said that he had not and that that was the first he had heard of even the possibility of an entitlement on the part of people such as himself to any pension or other ancillary payments.

14. The two men met again on 5 May 2016, the first available date on which Mr Engel, who lives in Warwick, was able to travel to London. It was then that Mr Engel explained to the claimant that he was entitled to make a claim and would need to make a further application for an extension of time. Through the agency of a firm of solicitors in which Mr Engel's brother is a senior partner, Mr Engel agreed to act for the claimant. He prepared the necessary paperwork which he posted to the claimant, since the claimant does not have email, and the engagement of Max Engel and Co LLP by the claimant became effective on 14 May 2016. On 15 May, Mr Engel notified the claimant's claim to the judiciary pay claim team of the Ministry of Justice. He received a response on 16 May to the effect that the Ministry of Justice considered the claim ineligible due to its being out of time and advising that if the claimant wished to proceed further he would need to make a claim to the employment tribunal and apply for an extension of time.

15. Also on 16 May, Mr Engel obtained the necessary early conciliation certificates. He then drafted and submitted the form ET1 which was received by the employment tribunal on 18 May 2016.

16. The claimant's retirement from judicial office took effect on 27 April 2006. The primary time limit for presentation of this claim therefore expired on or about 26 July 2006. The claimant's claim was therefore presented almost nine years and 10 months out of time.

Issues

17. The authorities to which I have been referred, and which I will discuss below, and in particular the guidance of the Employment Appeal Tribunal in its judgment on the appeal against the earlier employment tribunal's judgment in this case, identify a number of questions which this tribunal must answer:

(i) Is the evidence of the claimant truthful and reliable when he says that until 26 April 2016 he had no knowledge of the possibility of any such claim as the one he now brings?

(ii) To the extent that I find that the claimant was ignorant of his right to complain of less favourable treatment, was that ignorance reasonable?

(iii) What is the proper balance to be struck between, on the one hand, the prejudice to the claimant if the tribunal declines to consider his complaint and, on the other hand, the prejudice to the respondent if the tribunal does consider a complaint which is presented, prima facie, long out of time?

(iv) In the light of the answers to those earlier questions, and in all the circumstances of the case, is it just and equitable that the tribunal should now consider this complaint notwithstanding its late presentation?

Discussions and conclusions

The question of reasonable ignorance

18. Mr Bourne accepts that there is no evidential basis before this tribunal to support an assertion that the claimant's evidence was other than entirely truthful. That concession was properly made. I am completely satisfied that the claimant's evidence concerning the state of his knowledge, and of his ignorance, throughout the whole period under consideration in this case was entirely truthful and reliable. It is therefore clearly established that until his meeting with Mr Engel on 26 April 2016, the claimant had no knowledge whatsoever of even the possibility of an entitlement to a pension and other ancillary payments by anyone in his position, and no knowledge whatsoever of any prior litigation aimed at asserting such entitlement.

19. I turn to consider the question of the reasonableness of the claimant's ignorance. Mr Bourne submits that the claimant in this case acted unreasonably by not making enquiry at some, unspecified earlier stage. The claimant, on the other hand, says that there was nothing which put him on enquiry at any stage until his chance meeting with Mr Engel on 26 April 2016.

20. Referring to similar wording in the Sex Discrimination Act 1975, Morison J said in **DPP v Marshall** at page 527H:

> "… the court's power to extend time is on the basis of what is just and equitable. These words could not be wider or more general. The question is whether it would be just or equitable to deny a person the right to bring proceedings when they were reasonably unaware of the fact that they had the right to bring them until shortly before the complaint was filed. That unawareness might stem from a failure by the lawyers to appreciate that such a claim lay, or because the law "changed" or was differently perceived after a particular decision of another court. The answer is that in some cases it will be fair to extend time and in others it will not."

21. As is well-known, regulation 17 originally excluded fee-paid judicial office holders from the scope of the Regulations of 2000. This is an area in which the understanding of the law has changed over time. Early challenges to the exclusion of fee-paid judicial office holders were rejected in **Christie** by the Employment Appeal Tribunal in 2007 and in **O'Brien** by the Court of Appeal in 2008. It was not until the Supreme Court referred questions to the European Court of Justice in O'Brien's case that the tide appeared to be turning.

22. Set against that, Mr Bourne relies upon the undisputed facts that the claimant qualified in law over 50 years ago and in the course of a long career has

at various times taught law, practised law, sat in a fee-paid judicial capacity, as well as sitting for eight years in the House of Commons. The answer to the question, what would the claimant have been told if he had made enquiry at some earlier stage has to be that it depends on when and to whom he addressed his enquiry. In the years prior to and immediately following his retirement such enquiry would probably have been met with the answer that no such claim was possible. Between 2010 and 2013 the answer would probably have been that it was a moot point which depended upon the judgment of the European Court of Justice. It was not until 2013 with the judgment of the Supreme Court that clarity was obtained. Throughout that time, however, the fact remains that until 2016 there was nothing which came to the claimant's attention which caused him to make any enquiry at all. In the years following his retirement in 2006, the claimant was pursuing other interests and other activities and had practically no contact with anyone still active in the law. I have noted that in recent years the claimant's health has declined markedly although no particular emphasis was placed on that fact in argument before me. Specifically, the claimant does not say that his illness prevented him from making any enquiry which he would otherwise have made.

23. Considering the differently worded test of reasonable practicability in the context of an unfair dismissal claim in **Wall's Meat Co. Ltd v Khan** [1979] ICR 52, Brandon LJ said at p. 61A-C:

> "The present case is an example of a mistaken belief by an employee, reasonably held, constituting an impediment which prevented or inhibited him from presenting his complaint within the period of three months prescribed.
>
> With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned."

And at 61D-E he added:

> "Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it."

24. Notwithstanding that the test I have to apply in this case is not one of reasonable practicability, the reasonableness or otherwise of the claimant's ignorance of his right to bring the claim is centrally important, as the EAT said in its judgment on the appeal at paragraph 49:

> "These factors take on a great significance and call for quite a different exercise in the balancing of justice and prejudice if it is found that the claimant was reasonably unaware of his right to bring a claim."

25. I am not satisfied that merely because the claimant was a professional lawyer at various times and in various capacities he should be fixed with knowledge of a developing argument in a field far removed from his own and in which he had no experience. He was as a matter of undisputed fact completely ignorant of the possibility of making a claim and, that being so, there was in my judgment nothing which caused, or should have caused, him to make any enquiry of the kind Mr Bourne suggests. I cannot find that the claimant failed to make the kind of enquiry which a reasonable person would have made because in this case it is clearly established as a fact that nothing came to his attention which caused him, or should have caused him, to initiate any such enquiry. I therefore find that the claimant's ignorance of his right to bring the kind of claim which he now advances was entirely reasonable, and that that ignorance came to an end only on 26 April 2016 in the course of his chance meeting with Mr Engel.

The balance of prejudice

26. If the tribunal declines to consider the claimant's complaint he will suffer inevitable prejudice. Conversely, the respondent will suffer inevitable prejudice if the tribunal agrees to consider the complaint. Mr Bourne submits that the balance of prejudice may not lean clearly in either party's favour. That balance must nevertheless be carefully weighed.

27. It is conceded by the respondent that, apart from the question before me, the claimant has an unanswerable claim. The respondent has no defence to the claim save for limitation. **In DPP v Marshall**, Morison J said at p. 528B:

> "The industrial tribunal must balance all the factors which are relevant, including, importantly and perhaps crucially, whether it is now possible to have a fair trial of the issues raised by the complaint."

And at p. 528C-D:

> "The short period is a reflection of the desirability of evidence being heard as close to the events in question as is reasonable. Often, after any appreciable delay, a fair trial may become impossible. ..... If a fair trial is possible despite the delay, on what basis can it be said that it would be unjust or inequitable to extend time to permit such a trial?"

28. In this case, if the claim is allowed to proceed, there will be no trial on the merits. The only outstanding issue will be quantum: the valuation of the claim. The respondent concedes that it will suffer no forensic prejudice because documentary records exist which will enable the claimant's claim to be properly valued. The factor which Morison J regarded as "important[] and perhaps crucial[]" is therefore absent in this case.

29. On the other side, if the tribunal declines to consider this complaint then the claimant will be shut out from claiming money which, as the respondent concedes, he has already earned by virtue of his past service. That would be in my judgment a very significant prejudice indeed. In this context I agree with Mr Engel's submission, echoing the words of HH Judge Richardson in paragraph 49 of the EAT's judgment, that the time limit defence would be in the nature of a windfall for the respondent.

30. These considerations lead me to the view that the balance of prejudice in this case comes down in favour of permitting this claim to proceed and be considered by the tribunal.

Justice and equity

31. A period of almost ten years beyond the usual limitation period is a very long time after which to permit a complaint to be considered. On the other hand the Regulations do not stipulate any maximum period by which time may be extended. So far as delay is concerned, it seems to me that the relevant considerations are (i) the explanation for the initial period which has elapsed and (ii) whether the claimant acted promptly once he was aware of his right to claim.

32. The first of those questions has been answered above. The period of almost ten years elapsed because of the claimant's ignorance of his right to claim, which ignorance was in all the circumstances understandable and reasonable. As to the second question, the claimant became aware of his rights initially on 26 April and in greater detail on 5 May. His claim was presented to the tribunal on 18 May 2016. Whilst not overtly conceding the point, Mr Bourne accepted that this was not a case of 'dilly-dallying'. I accept that certain formalities had to be completed and that some small delay was caused by Mr Engel's need to travel to meet the claimant and by the fact that the claimant did not have email. Bearing those circumstances in mind, I do not find that there was any unreasonable delay by the claimant in bringing his complaint once he was aware of his right to do so. In the words of Morison J in **DPP v Marshall**, quoted above, the claimant was "reasonably unaware of the fact that [he] had the right to bring [proceedings] until shortly before the complaint was filed."

33. In **British Coal and Keeble** [1997] IRLR 336 the EAT (Smith J) noted at paragraph 8, that the EAT, in an earlier appeal in that case, had "advised that the industrial tribunal should adopt as a checklist the factors mentioned in section 33 of the Limitation Act 1980". I have accordingly considered the provisions of section 33 and, in particular, section 33(3). The factors set out at (a), (b), (e) and (f) are relevant to this decision and are fully canvassed above. Factor (c) does not arise in this case since there is no suggestion that any conduct by the respondents was causative of any delay. No reliance is placed by the claimant on any alleged disability, so that factor (d) is not relevant.

Conclusion

34. In the light of the above findings it is in my judgment just and equitable that the tribunal should consider the claimant's complaint notwithstanding its late presentation.

Employment Judge Williams on 22 November 2017