Case No: 2203199/2011

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Brenda Hindley**

Respondent: **1. Ministry of Justice**
2. Department For Communities And Local Government

Costs application before Employment Judge Macmillan

Sitting at London Central on Tuesday 23rd January 2018

Representations:
Claimant: Mr Julian Parry, solicitor, written representations
Respondents Mr Dalbir Singh, solicitor, written representations

JUDGMENT

The claimant's application for costs is dismissed.
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REASONS

The issues

1. On the 21st October 2017 I gave a reserved judgment, following a hearing in Edinburgh, on an application by a Mr Andrew Veitch that the Tribunal should consider a complaint in respect of certain monetary claims arising out of his service as a fee paid District Tribunal Judge which had been added out of time by way of amendment to his in time claim in respect of his exclusion from the Judicial Pension Scheme (JPS). I upheld Mr Veitch's application but in a later judgment dated the 13th December 2017, I rejected an application for costs.

2. Mr Veitch's claim had been one of an originally much larger sub-group of the so called ***O'Brien*** or JPS litigation. At para 17 of my reasons in ***Veitch*** I briefly set out the history of how the original sub-group of some 94 had dwindled to just 10, the claims of two of the group having recently been settled by the respondent on 'purely pragmatic grounds' [para 17, final sentence]. Mrs Hindley's claim is one of those two. She now applies for an order that the respondents pay her costs to be assessed. In ***Veitch*** I set out at some length the history of this sub-group of the JPS litigation and I adopt what I said at paras 1 to 23 of the reasons in so far as the findings were not particular to Mr Veitch. As I

explained in paragraph 3, each of the surviving cases in the sub-group was likely to turn on its own facts to some extent at least and it is therefore necessary to make some additional findings in respect of Mrs Hindley.

The facts

3. Mrs Hindley presented her claim to the tribunal on the 10th of August 2011. It was brief in the extreme. It named the first respondent as the Residential Property Tribunal Service (now correctly identified as the second respondent to the claim) and the second respondent as HM Courts and Tribunal Service (now correctly identified as the first respondent to the claim). Mrs Hindley described her job only as 'Chair Tribunals' without identifying the offices which she held and the narrative explanation of her claim, in its entirety, was simply: 'This claim depends on the outcome of O'Brien v. MoJ'. Part 5.1 of the claim form required the claimant to tick one or more boxes to identify the type of claim being brought. Mrs Hindley ticked only the box which said 'I am owed … other payments.' There were no boxes on the form appropriate for a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 under which the JPS claims have been brought, or for loss of pension rights. As Mrs Hindley was still in post when the claim was presented it was in time.

4. On the 23rd April 2014 her newly appointed solicitor, Mr Julian Parry of Beers LLP, filed voluntary further and better particulars of her claim. These were in his firm's standard format for JPS claims and made it clear that Mrs Hindley was complaining not only of exclusion from the JPS but also of less favourable treatment on the grounds of her part-time status in respect of such matters as attending training, the fees she received for decision writing and non-payment of London weighting. I shall refer to these as her monetary claims. The further particulars also identified the offices that she had held: as a Chair of the Residential Property Tribunal Service (RPTS) from which she had retired on the 13th October 2011, and as a fee paid judge of the Mental Health Review Tribunal (MHRT) from which she had retired on the 23rd July 2012. If, therefore, as the respondents were subsequently to contend, this was not an exercise in providing particulars of an existing claim but an application to amend the claim, it was out of time by 18 months in respect of the MHRT claim and (as the law currently stands) over 27 months in respect of her RPTS claim.

5. Her name appeared in the respondents' schedule of conceded claims sent to all parties in the litigation on the 26th September 2014. Both her MHRT and RPTS claims were listed as conceded in both respects, that is both the pension and monetary claims. In July 2015 she received an offer to settle both aspects of the MHRT claim which she accepted. The settlement was implemented and the monetary claims paid in full. The offer letter had explained that the respondents were currently unable to deal with her RPTS claims because a number of important issues concerning that rather anomalous jurisdiction had not yet been settled.

6. It was not until the 7th of December 2016 that her solicitors were informed that no payment would be made in respect of her RPTS monetary claims as they had been made out of time although it is by no means clear that the concession made on the 26th September 2014 was ever formally withdrawn. Her claim was therefore identified as one in which the 'claims added out of time by way of amendment' point required judicial determination. The point was not regarded as an application by the respondent to strike out but a claim but an application by Mrs Hindley for (in rough terms) an extension of time on just and equitable

grounds. This therefore required her solicitors to prepare her case and in doing so incur significant costs. Her claim was listed for hearing on the 22nd August 2017 and case management orders were made on the 4th July requiring her to serve her witness statement and any documents on which she intended to rely by the 24th July. On the 4th August the respondent conceded her claim in the light of the content of her witness statement, which made it clear that when she commenced proceedings she had in mind not merely her exclusion from the JPS but what she and her colleagues regarded as the injustice of having to attend training without payment and indeed all the less favourable aspects of the terms of fee paid judges compared with those of salaried judges.

The law

7. Costs in Employment Tribunals do not follow the event. Rule 76 of the 2013 Rules of Procedure has the cross heading 'When a costs order … may be made'. It provides, so far as material, as follows:

"(1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that –

(a) a party (or that party's representative) has acted vexatiously, abusively or disruptively or otherwise unreasonably in either the bringing of the proceedings … or the way that the proceedings have been conducted; or

(b) any claim or response had no reasonable prospect of success: or

(c) ,,,"

8. This suggests a two stage process: a requirement to decide whether the conduct of the putative paying party falls within r. 76(1)(a) and if it does, the exercise of judicial discretion whether to make an award of costs.

Submissions

9. Mr Singh submits that the claim as originally presented could not reasonably be interpreted as including a monetary claim as Mr O'Brien was only bringing a claim in respect of his exclusion form the JPS and the tick by the 'other payments' box was not sufficient to encompass a monetary claim. The voluntary further particulars were therefore a disguised out of time application to add the monetary claim by way of amendment. The inclusion of Mrs Hindley's claims in the schedule of the 26th September 2014 had been erroneous as had the settlement of her MHRT claim. The respondents have belatedly settled her RPTS claim on purely pragmatic grounds as they recognised that Mrs Hindley's witness statement disclosed an arguable basis for a just and equitable extension of time. As the Tribunal's orders in this case, and all similar cases make clear, it is perfectly reasonable for the respondents to require to know the case they have to meet on just and equitable extension of time before finally determining their positions.

10. Mr Parry has maintained since December 2016 that the respondent has been acting unreasonably in claiming that the monetary claim was out of time as it was clearly part and parcel of the original claim. He submits that the respondent has unreasonably and vexatiously changed its position on Mrs Hindley's case without foundation. The claim form as originally lodged was deliberately broadly drawn and could not reasonably be said to have only been a pension claim. The RPTS claim was originally conceded and her MHRT claim has been paid out in full. The concession was never formally withdrawn.

Discussion and conclusions

11. Mr Parry has forcefully expressed his displeasure in correspondence at the respondent's continuing refusal to settle the RPTS claim and his frustration is understandable. But that does **not** by itself signify unreasonable conduct. A number of factors distinguish this case from Mr Veitch's, and no doubt most others, in the sub-group. The first is that the original claim was not expressly a pension claim. Indeed it was not expressly any sort of a claim at all but by implication it was fairly clearly a claim in respect of the less favourable treatment of a fee paid judicial office holder on the grounds of her part-time status. The reference to Mr O'Brien might suggest that it was a complaint about pension only but not necessarily so. The second factor is that Mrs Hindley's claim covered her service in two separate judicial offices. Some time after the issue of the erroneously made concessions first emerged the MHRT claim was settled in full. While that did not of course prevent the respondent from taking the out of time point in respect of her RPTS service it would, to say the least, make it rather embarrassing for them to do so as both claims were of equal status so far as time limits went.

12. I do not accept Mr Parry's apparent contention that the respondent has changed its mind about the monetary claim being out of time as they have given a different reason for finally conceding the claim, but the grounds on which they have conceded the claim do seem rather flimsy. Just because a claimant had certain injustices in mind when she started proceedings doesn't at first sight seem a compelling argument for extending time on just and equitable grounds when she later decides to add those injustices as new heads of claim: rather the reverse in fact. If his complaint is that they changed their mind about settling the RPTS claim, by itself that could not be unreasonable behaviour if, as was the case, the motive for so doing was the realisation that the original concession had been wrongly made. They have in any event been given permission to withdraw the concession in all such cases.

13. Rule 76(1)(a) speaks to the conduct of litigation while (1)(b) speaks to the merits of a party's position. Although my sympathies undoubtedly lie with Mrs Hindley, I do not think that it can be said that the respondents' contention that her original claim was a pension only claim had no reasonable prospect of success. When she presented her claim the only issue in Mr O'Brien's claim was exclusion from the JPS by virtue of his status as a part-time judge and by making express reference to his claim she does indeed appear to be stating that her claim is similar in nature. It follows that the contention that the voluntary further and better particulars were in fact an application to amend cannot be said to have been without merit either.

14. In rule 76(1)(a) the words 'or otherwise unreasonably' follow words descriptive of specific kinds of conduct that might be considered to be wholly unacceptable in the context of litigation before this Tribunal and they must therefore be taken to be a general rather than a specific description of other, similar, kinds of conduct. Although I have criticised the respondents mishandling of this sub-group of claims in ***Veitch*** it was administrative incompetence rather than deliberate deviousness that was the cause. I do not think that it can reasonably be said that administrative incompetence, even on this magnitude, amounts to vexatious or unreasonable conduct of the proceedings in the sense contemplated by rule 76(1)(a), particularly when the respondents' basic premise for continuing to defend this particular claim was not without merit.

15. As neither of the relevant triggering factors in rule 76(1) are satisfied I am

unable to make an award of costs and the application must therefore be dismissed.

Employment Judge Macmillan on 24th January 2018