



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr Derek Lambert

AND

Ministry of Justice

Heard at: London Central

On: 10 August 2017

Before: Employment Judge Macmillan (Sitting alone)

Representation

For the Claimant: Written submissions

For the Respondent: Ms Rachel Kamm of Counsel (written submissions only)

JUDGMENT

1. The claimant's application that the time for commencing these proceedings be extended on the grounds that it is just and equitable to do so is dismissed.
2. The claimants claim is accordingly struck out

REASONS

Background and issues

1. In these proceedings Mr Lambert complains that he has been excluded from the Judicial Pension Scheme (JPS) in respect of his service as a Deputy District Judge from an unspecified date in 1982 until his retirement at the age of 72 on the 2nd March 2010. The exclusion is said to be unlawful because the reason for it was his part-time status. The claim is therefore one of the very large multiple of claims known as the Judicial Pension Scheme litigation. It is before me today (both parties having consented to my disposing of the matter on the basis of written submissions and witness statements only) to consider whether it would be just and equitable to extend the time limit for bringing the claim, the claim not having been presented to the Tribunal until the 4th July 2012, a little over 2 years and one month after the 3 months time limit in regulation 8(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) had expired.

2. When originally presented to the Tribunal the claim (which was presented by Mr Lambert in person but may not have been drafted by him) was confined to a single complaint in relation to his exclusion from the JPS. By way of an amendment dated the 18th March 2014 he added a complaint in respect of the fees paid to Deputy District Judges for attending training days. By that time such a complaint was well over 4 years out of time. On the 26th September 2014 this element of Mr Lambert's claim was mistakenly included in a schedule of monetary claims conceded by the Respondent. Although the mistake was later recognised in respect of about 50 similar claims and the respondent was given permission to withdraw the concession in the cases of **Gerrey and Rose**, it was never withdrawn in Mr Lambert's case. In their written submissions for this hearing Ms Kamm on behalf of the respondent confirms that a payment has been made to Mr Lambert in respect of the training day element of his claim.

3. Emboldened by the respondent's original written submissions in support of their application to strike out the claim in which they accepted that the concession would not be withdrawn, in his final written submissions Mr Lambert apparently (it is not entirely clear) seeks to widen his non-pension claim to include a claim in respect of the daily sitting fee paid to Deputy District Judges. He bases this contention on paragraph 1 of the particulars of the claim form which he presented in 2012 in which he submits that he said that he was 'entitled on a pro rata basis to all the same benefits as full time judges.' That is a regrettably selective quotation from a sentence which in fact has the opposite meaning to the one now contended for. The sentence in full reads:

*"Throughout this period the Claimant was entitled on a pro-rata basis to all the same benefits as full-time Judges **with the exception of pension entitlement**"* [emphasis added]

That sentence can only reasonably be read as saying that the only difference in treatment was in respect of pension. If Mr Lambert does wish to pursue a claim in respect of the daily sitting fee he must apply to amend his claim but the respondent has already indicated that if he does they will object on the basis that it is now far too late to do so.

4, This application to extend time is therefore in respect of the original pension claim only.

The law

5. In **Miller and others v. MoJ** I considered a wide range of so called generic grounds on which it might be just and equitable to extend time for late claimants in this litigation. I rejected all of them except one which was based on one very narrow ground (that the claimant had placed reliance on the moratorium issued by the respondent) which does not arise here. All of my holdings on the generic grounds were subsequently upheld in the Employment Appeal Tribunal in **Miller and others v. MoJ** UKEAT 0003 & 4/2015/LA judgment dated 15th March 2016 and there have been no further appeals. The EAT confirmed that the correct statement of the legal principles to be applied when considering whether it would be just and equitable to extend time are to be found in the judgment of Auld LJ in **Robertson v. Bexley Community Centre** [2003] IRLR 434 at para 25:

“It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. 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 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. Caxton** [2009] EWCA Civ 1298, [2010] IRLR 327 the majority of the court, whose views were expressed by Wall LJ at para 25, accepted the accuracy of Auld LJs judgment describing it as:

“...in essence, an elegant repetition of well established principles relating to the exercise of a judicial discretion. What the case does, in my judgment, it to emphasise the wide discretion which the ET has ...and articulate the limited basis upon which the EAT and the court can interfere.”

7. The burden then is on Mr Lambert to satisfy me that it would be just and equitable to extend the time limit in his case on grounds which apply specifically to him.

The facts

8. Mr Lambert advances two grounds on which he says that it would be just and equitable to extend time. The first is his late wife's serious ill health which left him in the role of carer. He relies on my decision in the case of **Waring v. MoJ** in which I granted an extension of time on just and equitable grounds where throughout the relevant period Mr Waring's wife had been almost entirely dependent on him for her daily needs. I described his private life after his retirement as 'traumatic'. The second is that in reliance on the respondent's concession he made a number of payments of capital to members of his family and in consequence the respondent is estopped from now denying his entitlement to a pension.

9. In his witness statement Mr Lambert refers to his wife's long standing health issues; high blood pressure, difficulty in breathing and a family history of heart disease. In late 2009 or early 2010 it was discovered that she only had one kidney. From then until her death in October 2016 'she had frequent appointments at the renal clinic when reduced kidney function occurred'. His statement goes on:

“8. My wife suffered heart attacks in December 2015, January 2016 and July 2016 being hospitalized after each attack and died peacefully at home aged 77 years on 8th October 2016 after a final attack...”

9. I was the primary carer during those years when my culinary skills were tested to the full!”

10. I have not seen a copy of the concession (at least not in connection with this application) but in her written submission Ms Kamm quotes from the covering letter in which the respondent accepted *“that those who appear on list 1 are due*

a payment in respect of their non-pension claim against the MoJ. Mr Lambert has not suggested that that quotation is inaccurate or selectively misleading. In particular he does not expressly claim that a concession was made in respect of his pension claim.

11. Mr Lambert accepts that he had become aware of the **O'Brien** litigation in November 2008 when the Court of Appeal gave judgment dismissing Mr O'Brien's appeal (O'Brien is the case which eventually established the right of part-time judicial office holders to a pension by virtue of the PTWR) but he says that he thought that it was a contractual claim. He decided to await the final outcome [Particulars of Claim para 8]. He does not claim that he was unaware that Mr O'Brien's claim was about pension entitlement for fee paid judicial office holders or that its outcome would have some bearing on his own entitlement. Nor does he suggest that he was unaware of the difference in treatment between salaried District Judges and their part time Deputies in the matter of pension rights. He commenced these proceedings shortly after learning from 'a fellow member of the judiciary' that the O'Brien claim was 'proceeding under the jurisdiction of the Employment Tribunal'. Mr Lambert must be wrong about that as he commenced proceedings in July 2012 and it was not until February 2013 that the Supreme Court finally allowed Mr O'Brien's appeal and remitted it back to this Tribunal. What Mr Lambert was presumably told about was Mr O'Brien's success before the Court of Justice of the European Union to which the Supreme Court had referred some questions of European law (the PTWR being the UK's implementation of the Framework Directive [97/81/EC]).

Discussion and conclusions

12. The only conclusion that I can draw from the extracts from Mr Lambert's witness statement which I have quoted above concerning his wife's health is that he did not become her carer until some years after he had commenced these proceedings as she did not suffer her first heart attack until December 2015. Whilst I have every sympathy with Mr Lambert I am not satisfied that his wife's serious medical problems had any bearing on the delay in commencing proceedings.

13. Whilst I accept that Mr Lambert paid some quite substantial sums of money to members of his family following the inclusion of his name in the schedule to the letter of the 26th September 2014, both the concession and Mr Lambert's reaction to it are irrelevant for present purposes. The concession was clearly made in respect of his non-pension claims only, it has not been withdrawn and, according to the respondents, has been honoured in full. Mr Lambert does not claim that the concession was made in respect of his pension claim or even that he mistakenly believed that it was. It therefore cannot give rise to any kind of estoppel.

14. It is clear from Mr Lambert's own claim form why he delayed the presentation of his claim: he was waiting to see what finally happened in **O'Brien**. When it looked like Mr O'Brien was going to succeed he decided to commence proceedings. I dealt with this exact point in **Miller and others** rejecting the contention that because of the novelty of the claim potential

claimants were entitled to wait and see before commencing proceedings and that holding was upheld on appeal.

15. In short there are no grounds on which I could hold that it would be just and equitable to extend time. Two of Mr Lambert's contentions fail on the facts and the third (although it is unclear what if any reliance he actually places on it) had already been rejected by the EAT. The claim is therefore out of time and is struck out.

Employment Judge Macmillan
10th August 2017