



Ij

## EMPLOYMENT TRIBUNALS

BETWEEN

*Claimants*

*Respondent*

(1) Ms P Desai  
(2) Mr M Hindley

AND

Ministry of Justice

### PRELIMINARY HEARING

**HELD AT:** London Central

**ON:** 20 October 2021

**BEFORE:** Employment Judge S J Williams (sitting alone)

#### *Representation:*

**For the Claimants:** In person

**For the Respondents:** Mr A Allen QC

### JUDGMENT

The judgment of the tribunal is that the claimants' applications to amend their complaints are refused.

### REASONS

#### Introduction

1 By a notice of 12 August 2021 it was directed that there should be a preliminary hearing to determine the claimants' applications to amend their complaints to the tribunal so as to add further claims. This tribunal has been convened to determine that matter.

2 Each of the claimants submitted skeleton arguments, Ms Desai's largely following Mr Hindley's, and each confirmed on affirmation and was cross-examined on the factual matters there set out. Mr Allen called no evidence, but submitted a skeleton argument and authorities on behalf of the

respondent. All parties elaborated their arguments orally in closing submissions.

3 The hearing of these applications has been delayed for reasons personal to the claimants, by circumstances surrounding the Covid-19 pandemic and by operational difficulties affecting the tribunal's premises in London.

#### The facts

4 Both claimants held part-time judicial office in the Child Support Appeals Tribunal until they took up full-time salaried appointments as tribunal judges in the successor to that body: Ms Desai on 1 November 2007, Mr Hindley on 10 December 2007. Mr Hindley retired on 1 July 2021. Ms Desai has since been appointed a District Judge (Civil) and plans to retire soon. The claimants have no particular knowledge of employment law.

5 The claimants presented complaints to the employment tribunal, Ms Desai on 6 December 2012, Mr Hindley 29 April 2013, alleging less favourable treatment contrary to Regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR). Both claimants claimed entitlement to a judicial pension taking into account both their part-time and full-time periods of judicial service, as well as some ancillary claims. Mr Hindley claimed in addition compensation for an alleged underpayment for time spent on judicial training. Mr Hindley discovered only recently that this latter claim, which he had not intended to make, had been included by his then solicitors.

6 Both claimants' pension claims have been resolved to their satisfaction. The respondent does not challenge the evidence that the number of days' purchase each is entitled to by virtue of their part-time service has been agreed, and the appropriate pension will, in Mr Hindley's case, be paid imminently; in Ms Desai's case it will be paid when she retires.

7 By letters from their solicitors, Browne Jacobson, dated 21 May 2018 (Ms Desai) and 20 March 2020 (Mr Hindley) both claimants applied to amend their complaints to the tribunal to add monetary claims, i.e. non-pension claims, comprising payment for 'writing up' statements of reasons and for training days, a 'divisor' claim and a claim for an interest-like payment. Additionally, Mr Hindley applied to add a claim for London weighting.

8 Both applications are resisted by the respondent (in letters dated 22 May 2018 and 19 August 2020) on the basis that they are made considerably out of time, that the claimants were represented by solicitors throughout and that no explanation has been provided for the lateness in making the applications.

9 Ms Desai accepts that her original complaint was presented some 4 years and 2 months after she ceased to hold part-time office, and her application to amend a further 6 years and 4 months after that. Mr Hindley

accepts that his original complaint was presented some 5 years and 4 months after he ceased to hold full-time office, and his application to amend a further 6 years and 11 months after that.

10 The O'Brien litigation generated significant publicity, although some of the claimants' colleagues were reluctant to speak openly about their claims. Both claimants said that they became aware of the litigation in mid-late 2010. The claimants were aware that at that stage most fee-paid judges who were appointed to salaried office were putting in pension claims within three months of appointment and therefore had in-time pension claims. In 2012 and 2013 the claimants made their own original complaints relating to pension only (save for the matter discussed at paragraph 5 above). The claimants were close colleagues and at that time discussed matters relevant to the making of their claims. Pension was at that time their main priority.

11 In relation to monetary claims, Mr Hindley said that as judges became aware of the position, people began to think about their personal circumstances. He surmised that Ms Desai's claim may not have included a claim for training day payments (whereas his did) because her claim was presented some thirteen months earlier. He said that it must have been in 2014-15 that people, mainly fee-paid judges, were being paid for their monetary claims. One such person told Mr Hindley that he had received £200,000. Mr Hindley considered the respondent's moratorium on the presentation of new in-time claims, but he knew of **Miller** in the EAT, which was in 2015, and knew that the respondent was taking the time point. He knew that any such claim he brought would have been considered out of time and would not have benefitted from the respondent's moratorium.

12 In about October 2015 Ms Desai was offered by the respondent a payment of about £1,700 in respect of a 'divisor' claim, though she thinks it must have been for training. The offer was subsequently withdrawn.

13 In 2014 the employment tribunal decided the case of **Miller and others**. Following that decision, the claimants' solicitors wrote by email to ask whether they wished to be part of an amendment application to add monetary claims to their complaints. Mr Desai responded that she did, but her solicitors later said that they were not applying to add monetary claims which were made more than three months after salaried appointment had begun.

14 Ms Desai said that it was the case of **Veitch** (promulgated in October 2017) which gave her the impetus to apply to amend her complaint. In particular, she relied on the agreement recorded at paragraph 4 of the judgment, and the observation that if Mr Veitch was unsuccessful his claim would be stayed pending the outcome of the appeal in **Miller**. Ms Desai could not recall reading the case of Miller. She contacted her solicitors in December 2017 and instructed them to make the present application. Ms Desai ceased to be represented by solicitors earlier in 2021.

15 Mr Hindley said that in 2014-5 his reason for not seeking to amend was that the respondent was taking the time point, and he did not prioritise the

matter; he had 'other things to do'. He also said that what changed the position for him was the agreement recorded in **Veitch**, which he relied on not as law but to explain why he acted as he did. After **Veitch**, he said that he 'made a positive decision to wait for the decision of the Supreme Court in **Miller** and to rely on the agreement in **Veitch**' before contacting his solicitors, probably in 2019, for advice on his non-pension claim. He knew that Ms Desai had applied to amend after **Veitch** about six to nine months after she did so, that is to say in late 2018 or early 2019, but he was waiting for the **Miller** decision. His approach to his solicitors was prompted by Ms Desai's. His solicitors did not recommend making an application to amend, but Mr Hindley did not think their advice was 'considered'. At the time he did not think it was worth paying the costs his solicitors wanted to make the amendment application. His solicitors did not advise that his monetary claim was in time, nor did they advise relying on the agreement in **Veitch**, but he did so. When he made his application in 2020 he paid them £200. Mr Hindley agreed that the **Miller** decision related to pension claims only. He ceased to be represented by solicitors in late 2020 or early 2021.

16 Both claimants accept that the facts of their cases differ considerably from those in **Veitch**. As a district judge, Ms Desai is aware of limitation periods. In Mr Hindley's jurisdiction they are less significant, but he has a professional lawyer's knowledge of them.

17 It was agreed that the claimants' claims were sizeable, and their value would amount to some tens of thousands of pounds. The respondent did not advance any defence to the merits of the claims.

### The law

18 The PTWR provide:

### **8 Complaints to employment tribunals etc**

- (1) Subject to regulation 7(5), a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 or 7(2).
- (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.

19 I was referred to, and have considered, the cases of **Veitch** (judgment promulgated 25 October 2017), **Miller and others v Ministry of Justice**

[2020] ICR 1143, **Ministry of Justice v O'Brien** [2019] ICR 505, **Bowden v Ministry of Justice and another** UKEAT/0018/17/LA, **Vaughan v Modality Partnership** [2021] ICR 535, together with the extracts of other authorities referred to in those cases.

20 Both claimants rely on paragraph 4 of the judgment in **Veitch**, the relevant parts of which are as follows:

‘Although on the basis of my holdings in **Miller and others v MoJ** as to when time starts to run in respect of a monetary claim, Mr Veitch’s application to amend is out of time both parties accept that if the current appeal to the Supreme Court in **Miller and others** succeeds Mr Veitch’s amendment would be in time ..... [I]f I am against Mr Veitch and hold that it is not just and equitable to entertain his monetary claim, the claim does not fail but remains stayed pending the judgment in **Miller**.’

### Submissions

21 Mr Allen submitted that, even if these new claims were added by amendment they would still be out of time, because the complaints were already considerably out of time when originally presented. By contrast, in **Vaughan** the original public interest disclosures were in time, and in **Veitch** the claimant could have made an in-time monetary claim when he presented his original complaint. The tribunal should consider the short primary limitation period of three months for such complaints, and give weight to the principle of finality.

22 By about 2013-14 Ms Desai knew or could have known that she could present monetary claims. By 2014-15 Mr Hindley was similarly aware of that possibility; he knew of someone making a claim in 2014 but took no action. He knew Ms Desai had made an application but did nothing; then went to his solicitors and did nothing, citing cost. Mr Hindley relied on **Veitch** but he knew that **Miller** was concerned with pension claims not monetary claims. The claimants had no sufficient reason not to act before they did.

23 The central question was the balance of hardship caused by granting as opposed to refusing the application. The respondent would suffer the hardship of having to deal with this very late claim. Mr Allen did not rely on any difficulty in gathering relevant evidence. The claimants had disclosed some of the legal advice given to them, but the tribunal should treat that evidence with caution since it was not clear that all of the advice had been disclosed.

24 Mr Hindley submitted that he decided to act in relation to his pension claim when he heard about **O'Brien** in about 2010. So far as monetary claims were concerned he was reasonably entitled to rely on **Veitch**, even if the recorded agreement was based on error. On the question of hardship, he referred to the very large sums already paid out by the respondent compared to the relatively small sums involved in these claims. The hardship for the

respondent, he submitted, was that they might have to pay what they owed him, whereas he stood to lose a substantial sum. It seemed unjust that others had been paid and he had not.

25 In his written skeleton, Mr Hindley submitted that now that it had been established that his pension claim was in time, that meant that he was 'applying to amend an in-time claim. My claim is no longer to be considered as wholly out of time.'

26 Ms Desai submitted that her claim differed from others in that it was a claim against the state as employer by contrast with an *inter partes* claim. It was galling that her employer should refuse to pay what they owed on a 'technical basis.' When the possibility of a claim came to her attention she took all the steps she could, and left it with her solicitors. She did choose to claim, but relied on advice. Later she instructed them to make the amendment. Ms Desai also relied on the passage quoted from **Veitch**, and adopted Mr Hindley's submissions where relevant.

27 Finally, Ms Desai prayed in aid her position as a carer who was able to work only part-time, the position of women's pensions generally and the complaints by a group known colloquially as the 'WASPI' women.

#### Discussion and conclusions

28 The short primary time limit for making monetary claims arising out of the claimants' part-time judicial service expired on 1 February 2008 for Ms Desai, and on 10 March 2008 for Mr Hindley. These are therefore applications to amend complaints which were themselves originally presented long out of time: 3 years 11 months in Ms Desai's case, 5 years and 1 month in Mr Hindley's. As Mr Allen submits, had the monetary claims the subject of these applications been included in the claimants' original complaints, they would already have been, and would remain, long out of time.

29 I have been referred to cases dealing with late presentation of a complaint followed by an application for an extension of time on just and equitable grounds (**Bowden**) and cases in which the original complaint was presented in time and followed by an application to add a further claim which was by then *prima facie* out of time (**Veitch** and **Vaughan**). The source of the law is regulation 8(3) of PTWR and the principles I have to apply have been repeatedly stated. I have to approach this matter by considering 'all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension': **Ahmed v MoJ**.

30 I have had regard to the factors set out in section 33 of the Limitation Act 1980. It is not now suggested by the respondent that the cogency of relevant evidence is likely to be affected by the delay. This is because the respondent does not challenge the claimants' evidence that all necessary calculations have already been made. Nor is there any complaint of failure by the respondent to co-operate in the provision of information. The factors which are in issue before me are:

- (a) the length of and reason for the delay;
- (b) the promptness with which the claimants acted once they knew of the facts giving rise to the cause of action;
- (c) the steps taken by the claimants to obtain appropriate professional advice once they knew of the possibility of taking action.

31 I have in mind also the factors set out in **Selkent** specific to amendment applications, in particular the nature of the amendment. A further factor specific to this case is the extent, if any, to which and purpose for which the claimants were entitled to rely on the matters recorded in paragraph 4 of **Veitch**.

32 The proposed amendments would add claims for payments which fell due during the claimants' part-time service. It does not avail Mr Hindley to say that his pension claim has now been found to be in time, and that he is therefore applying to amend an in-time claim. In a pension case the Supreme Court in **Miller** held that detriment was suffered on retirement when the pension fell to be paid but was not. The same cannot be said of sums due but unpaid during service; it is common ground that **Miller** has no relevance to monetary claims. Regulation 8(2) is clear: time runs from 'the date of the less favourable treatment or detriment to which the complaint relates or, where the act or failure to act is part of a series ... the last of them.' The nature of these amendments cannot be said to be 'part and parcel', as Mr Hindley put it, of the claimants' pension claims. They would add entirely new claims founded on quite different allegations of less favourable treatment or detriment.

33 In **Bowden** HHJ Richardson, referring to the exercise of balancing the prejudice to each party, said at paragraph 49:

'It is one thing to deprive the respondent of its accrued time limit defence where litigants have brought late claims because they "did not back losers". Part of the purpose of the time limit is to prevent unreasonable delay in the bringing of claims, and to disapply the time limit in such a case would deprive the respondent of a significant part of the benefit of the time limit. But if there has been no unreasonable delay, and the claim has been brought as soon as it can be, it may be thought that the time limit defence is rather more in the nature of a windfall for the respondent, especially where there is no forensic prejudice to the respondent. These factors take on great significance, and call for a quite 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.'

34 The factor at paragraph 30 (c) above takes on some significance because both claimants instructed solicitors for all of the material time in this case. Ms Desai relied on their advice; Mr Hindley was not particularly

convinced by it, but was unwilling initially to pay the solicitors' costs for making an application to amend. Yet in the end both did instruct their solicitors to make the applications. Though neither has specific knowledge of employment law, both claimants are legally sophisticated and were able to approach critically the advice they were given. They are both very familiar with the principles underlying the law of limitation and are used to evaluating the merits of cases.

35 Given all that they knew about **O'Brien's** case, all that they had discussed with each other and with colleagues, what their solicitors wrote in 2014, and their legal sophistication, there is no doubt in my mind that by about 2014 at the latest both claimants knew that monetary claims could be made. They knew both the relevant facts, namely that they had been paid differently from a comparable full-time judge, and that those facts gave rise to a cause of action in law. The question in their case is, why Ms Desai waited another four years and Mr Hindley another six years before applying to add a monetary claim to their complaint to the tribunal.

36 There is no specific period of time after which either a late amendment or an application for a just and equitable extension of time will not be granted. Even if the period is very long, ten years in **Bowden's** case, the question remains whether the delay was reasonable. That said, when a long period has already elapsed since the accrual of the cause of action, it may be reasonably expected that a claimant should act the more promptly once all the necessary information is to hand.

37 Other events happened in the period 2015 to 2018. In 2015 the claimants became aware of the **Miller** decision at first instance and Ms Desai was made an offer, later withdrawn; they were both aware of the **Veitch** judgment and relied on it; and in 2018 Mr Hindley knew that Ms Desai had applied to amend but decided to do nothing until the Supreme Court's judgment in **Miller** was known. Both relied for some time on their solicitors' advice, but in the end rejected it. It is clear to me that during most of the relevant period of delay, 2014 to 2018 in Ms Desai's case and 2014-2020 in Mr Hindley's, both claimants thought that their monetary claims would be ruled out of time and that it was therefore not worth bothering to do anything. Ms Desai left the matter in her solicitors' hands; Mr Hindley was unwilling to pay the costs of an application and had other things to do. Ms Desai acted only after **Veitch**, Mr Hindley only after **Miller**.

38 A further question which arises in this case is whether **Veitch** gave the claimants any reasonable cause for continued delay. It is now clear that the employment judge in that case was wrong to say that if the appeal to the Supreme Court in **Miller** succeeded then Mr Veitch's monetary claim would be in time. But the judge had the disadvantage of not being able to foresee precisely the ambit of what the Supreme Court would say, whereas that court's judgment can now be read with the benefit of hindsight. Further, the facts of **Veitch** are significantly different from the instant cases. Mr Veitch's complaint was presented in time both for pension and, if amended, monetary



claims. Further the respondent's conduct in that case was infected with embarrassing error.

39 By the time the judgment in **Veitch** was promulgated ten years had passed since these claimants ceased to hold part-time judicial office. They knew that Mr Veitch had had to apply for a discretionary extension of 1 year and 11 months to amend his complaint. That was a call to act, not to delay further. Ms Desai did act, though it took her more than a further 6 months to make her application. I cannot understand why Mr Hindley thought that **Veitch** provided a reason for further delay. The latter part of the passage relied on was, if anything, a further prompt to make an application as soon as possible. It is possible, though I make no finding about it, that if Mr Veitch had been unsuccessful, his claim and other similar claims would have been stayed pending the judgment in **Miller**. If so, given that **Miller** did not ultimately assist him, his claim and those others would have been dismissed at that point. The claimants of all people know that cases are decided not generically but on their own facts; theirs and Mr Veitch's were different. The claimants must both have appreciated that an already late claim needed to be made promptly. **Veitch** provides no satisfactory explanation for further delay by Mr Hindley.

40 Mr Allen has laid no particular stress on the claimants' delay in the period 2007 to 2014, during which it has not been disputed that the claimants and many others were uncertain about the claims that might be brought within the scope of this complicated litigation. In my judgment that period is relevant as background: significant past delay makes it all the more reasonable to expect promptness and the avoidance of further delay. After 2014 Ms Desai delayed 4 years and Mr Hindley 6 years before taking action. They did so, I am sure, because they did not think much of their chances. Like Mr Howarth, quoted in **Miller** at first instance (see **Bowden**, paragraph 17), they thought they were onto a 'loser'. But such delay could only make matters worse when they finally did act. I am driven to conclude that the claimants' delay in making these applications to amend their complaints has not been reasonably explained.

41 As is clear, the facts of the two cases are similar, though not identical: in particular, Ms Desai's application was made 1 years and 10 months sooner and was prompted by different considerations. They have been heard together as a matter of convenience to all, but they do not necessarily stand or fall together.

42 I do not consider it right to treat the respondent differently from any other respondent because it is an emanation of the state, as Ms Desai has invited me to do. By the same token it would not be right to treat the claimants any more or less favourably because of their positions. Nor can I accept that Ms Desai's submissions on behalf of carers, or women more generally – however soundly based they may be – are relevant to my determination. Those matters go beyond what it is proper for me to take into account.

43 The balance of prejudice to the claimants by refusing, or to the respondent by granting these applications is in my judgment a fine one. If the applications are refused, the claimants stand to lose the value of their claims. If they are granted, the respondent will have to deal further with claims which are long out of time and may have to face a liability to the claimants. Those are the ordinary consequence of the application, or disapplication, of a limitation period, 'part of the purpose of [which] is to prevent unreasonable delay in the bringing of claims', per HHJ Richardson in **Bowden**, at paragraph 49. Had I been satisfied that the delay from 2014 onwards, or a significant part of it, was reasonably explained by ignorance on the part of the claimants of relevant facts or of the right to bring a claim, then the result would have been different. I could have found that such delay was reasonable. I can make no such finding in this case. The claimants' delay from 2014 onwards has not been reasonably explained. I find that the balance of prejudice falls against them.

44 I have considered whether a distinction can properly be drawn between these two claimants' cases. Mr Hindley's delay was the more egregious, Ms Desai's somewhat less so by comparison. In both cases, however, the delay was long and without satisfactory explanation. I am unable to draw any proper distinction. Both of these applications are therefore dismissed.

---

Employment Judge Williams

---

Date 12 November 2021

JUDGMENT SENT TO THE PARTIES ON

.....26 November 2021.....

.....  
FOR THE TRIBUNAL OFFICE