



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr Alan Thomas Jenkins

AND

Ministry of Justice

Before: Employment Judge Macmillan (Sitting alone)

Representation

For the Claimant: Written submissions

For the Respondent: Written submissions

JUDGMENT

1. The claimant having failed to give adequate reasons to the contrary, the respondent's application to strike out the claimant's claim on the grounds that it has no reasonable prospect of success succeeds
2. The claimants claim is accordingly struck out

REASONS

Background and issues

1. Mr Jenkins presented two claims in the Judicial Pension Scheme multiple, both out of time. The first was a claim against the Department for Transport in respect of his service as a deputy Traffic Commissioner which ended on the 8th September 2009. The second is this claim which is in respect of his service as a deputy District Judge which ended on the 10th November 2010. Both claim forms were presented on the 31st May 2013. The claims are brought under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR). Under regulation 8(2) the time limit for commencing proceedings is three months from the act complained of or, if the act extends over a period of time, from the date it ceased. Both claims relate to Mr Jenkins exclusion from the Judicial Pension Scheme and so time runs from the end of his appointment. The claim against the DfT is therefore over 6½ years out of time: this claim is over 2 years and three months out of time. However, in error the DfT have conceded the first claim and as a matter of policy have decided not to withdraw the concession even though it was clearly made in error.

2. The MoJ on the other hand make no such concession and have applied for the claim to be struck out on the grounds that it has no reasonable prospect of success being substantially out of time. Mr Jenkins is not unnaturally a little perplexed and rather more than a little angry that the two claims are being treated differently. He was invited to give reasons why this claim should not be struck out. He did so briefly. In response to a request to clarify his position he merely repeated points he had made earlier. While I am satisfied that I would be justified in striking out the claim summarily on the ground that Mr Jenkins has failed to give reasons (show cause in the old parlance) why the claim should not be struck out, in view of the rather unusual circumstances I propose to give reasons but without holding a hearing.

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 appears to be Mr Jenkin's principle ground for resisting the respondent's application. One of the generic grounds which I rejected was that it was permissible for potential claimants not to commence proceedings until it had been established that they would succeed. 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 Jenkins 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.

Mr Jenkins' submissions

8. Mr Jenkins' makes two main but conjoined submissions. I quote from his letter of the 28th June 2017:

"5. With respect to have made a claim against the MoJ ... at the time of my retirement ... for a benefit that did not exist would have been foolhardy and pointless perhaps to the extent of being deemed an abuse of process.

6. Were it not for the moratorium and the decisions in O'Brien and Miller, my claim would not have been possible."

Conclusions

9. Mr Jenkins misunderstands the nature of the Moratorium issued by the respondent in March 2013. It effectively granted an amnesty on time limit issues but it clearly only applied to claims that had not been issued by that date but which if had been issued would have been in time. It only had the effect of not requiring a claim to be issued which would have been in time if issued. The Moratorium clearly and expressly reserved the respondent's right to take out of time points against claims which were already out of time. Mr Jenkins claim against the MoJ was already substantially out of time by March 2013 and so the Moratorium has no bearing on this application.

10. Mr Jenkins has not said in his submissions that he did not know that he was being treated less favourably than his salaried counterparts in the matter of pensions and other terms and conditions. Nor has he said that he was unaware of the O'Brien litigation. He has merely said that until O'Brien succeed he had no right to a pension and it would have been foolhardy and pointless to claim for something for which did not exist. But this claim is not an application for a pension and nor was Mr O'Brien's. They are both challenges to the legality of denying part time judicial officer holders a pension on the grounds of their part-time status. This point was run unsuccessfully in **Miller and others** and I am afraid that Mr Jenkins is bound by the outcome as **Miller** was a lead case under rule 36 on the point.

Employment Judge Macmillan
10th August 2017