Appeal No. UKEAT/0018/17/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 July 2017
Judgment handed down on 25 August 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR G F BOWDEN APPELLANT

(1) MINISTRY OF JUSTICE
(2) DEPARTMENT FOR COMMUNITIES & LOCAL GOVERNMENT RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ANTHONY ENGEL (Representative) Max Engel & Co LLP 53 Blacklow Road Warwick CV34 5SX
For the Respondents	MS RACHEL KAMM (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS

SUMMARY

PART TIME WORKERS

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Employment Judge did not apply correct principles of law when deciding whether it was just and equitable to consider the Claimant's claim out of time. He placed impermissible reliance on his decision in **Miller and Others v Ministry of Justice** and did not consider whether, in the Claimant's case, he was reasonably ignorant of his right to bring the claim, and how the prejudice to both parties should be balanced.

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HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr G F Bowden ("the Claimant") against a Judgment of the Employment Tribunal sitting in London Central (Employment Judge Macmillan sitting alone) dated 21 October 2016. The Claimant was a retired legal chair of the former Residential Property Tribunal Service. He brought proceedings under the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("the PTWR") alleging that he ought to have received a judicial pension and certain other improvements to his terms and conditions. He asked the Employment Judge to hold that it was just and equitable to consider his claim out of time. The Employment Judge declined to do so and dismissed his claim.

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2. Following a Preliminary Hearing on 29 March 2017 Kerr J directed that two grounds of appeal should proceed to this Full Hearing. The first question is whether the Employment Judge placed undue weight on his decision in **Miller and Others v Ministry of Justice** - a case in which he addressed "generic factors" applicable to a wide range of Judges who brought such claims. It is argued that he did not sufficiently address the particular circumstances of the Claimant. The second question is whether he carried out a proper exercise to assess and balance the potential prejudice to each side if he applied or did not apply the time limit.

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3. A key feature of the Claimant's case is that he was not aware that there was any possibility of pensions for part-time judicial office holders until 26 April 2016. He brought his claim promptly thereafter. As we shall see, the generic arguments in **Miller** were principally (though not entirely) concerned with Claimants who had been aware for some years of the possibility but had not brought their claims promptly.

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4. There were originally 19 grounds of appeal. Kerr J dismissed the remaining grounds, holding that they were for the most part restatements of the first two grounds in unacceptably prolix form and that as separate grounds they were not arguable. Mr Engel, who has appeared throughout for the Claimant, applied to me to reconsider the remaining 17 grounds. This application was misconceived. I pointed out to Mr Engel that I could not disregard the order dismissing the remaining grounds; the Claimant was far out of time to make an application to review the order, and in any event the Judge who made the order should generally hear such an application. Mr Engel wisely took the matter no further, and the hearing proceeded on the two grounds I have summarised.

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Statutory Provisions

5. Until the year 2000 there was no particular protection in English law for part-time workers. The **PTWR** came into force on 1 July 2000. They implemented a European Directive - the Part Time Workers Directive 97/81/EC - extended to the United Kingdom by Directive 98/23/EC. The **PTWR** provide that 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. In determining whether a part-time worker has been treated less favourably than a comparable full-time worker, the pro rata principle is to be applied unless it is inappropriate. The **PTWR** expressly did not apply to fee-paid part-time Judges: see regulation 17.

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6. Regulation 8 confers a right upon a worker to present a complaint to the Employment Tribunal that his employer has infringed a right conferred by the **PTWR**. The time limit is three months from the date of the less favourable treatment or detriment alleged or if the less favourable treatment or detriment comprises a series of acts or omissions the last of those acts

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or omissions: see regulation 8(2). The time limit may be extended by a short period to facilitate conciliation: see regulation 8A.

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7. The provision which is critical to this appeal is regulation 8(3). This provides that a Tribunal may consider a 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. This power to consider a complaint out of time on the basis that it is just and equitable to do so has been found in many other pieces of employment legislation, notably legislation against unlawful discrimination in the workplace now consolidated in section 123(2) of the **Equality Act 2010**.

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Part-time Judicial Pension Litigation

8. The leading case, **O'Brien v Department of Constitutional Affairs**, was brought on 29 September 2005. An ET found it was just and equitable to hear Mr O'Brien's case outside the primary time limit, which had started to run with his retirement as a Recorder on 31 March 2005. This finding was reversed by the EAT, but restored by the Court of Appeal. In the Court of Appeal, however, it was held that the underlying claim could not succeed because Mr O'Brien was not a worker for the purposes of European law. On 28 July 2010 the Supreme Court referred questions to the European Court. Based on the answers given by the European Court the Supreme Court held on 6 February 2013 that Mr O'Brien was entitled to a pension on terms equivalent to a circuit Judge (a comparable full-time Judge).

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9. Following this key decision litigation has progressed in the ET relating to various types of part-time Judges and a variety of issues. This litigation has largely taken place before Employment Judge Macmillan. In particular he presided over the hearing in **Miller** in December 2013 which included arguments on time limit issues. He held that for the purpose of

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pension issues time runs from the ending of the appointment in question. He then addressed the question whether it was just and equitable to extend time, largely dealing with generic issues, but also addressing certain individual cases which were put forward to him as being exceptional. I will return to this guidance later in my Judgment.

10. There is at the moment an appeal in the Supreme Court outstanding in the judicial pension litigation. The main point in the appeal relates to the question whether service prior to the year 2000 is to be taken into account in determining the pension entitlement of a part-time Judge. That question has been referred to the European Court: see **O'Brien v Ministry of Justice** [2017] UKSC 46.

The Claimant's Case

11. The Claimant was born in August 1935. In June 1994 at the age of 58 he became a part-time legal chairman of the Residential Property Tribunal Service. He retired on 27 April 2006.

12. In his succinct statement for the Employment Tribunal proceedings the Claimant said that he knew nothing about pensions for the part-time judiciary until 26 April 2016. None of his children or stepchildren was connected with the legal profession. It was put to him in cross-examination, and he agreed, that he knew that as a part-time legal chairman he did not have a pension and he knew that salaried Judges did have a pension. It was not put to him that he was at fault in failing to take advice or make further enquiries as to whether he was entitled to a pension because of his part-time work.

13. The Claimant explained that he met Mr Engel by chance at a fund raising event on 26 April 2016. That was when he learned that he might have a claim. He met Mr Engel more

formally on 5 May; the claim was issued on 18 May. He therefore brought his claim promptly after he became aware of his rights. There was no real prejudice to Respondent; and in all the circumstances it was just and equitable to hear the claim.

The *Miller* Judgment and Reasons

14. In order to understand the Employment Judge's Reasons in this case, it is necessary to refer first to his Reasons in **Miller**. As I have explained, he was asked to give guidance as to generic factors which could be taken into account in determining whether it was just and equitable to (as he put it) extend time for bringing claims. He expressed a note of caution about expressing views on generic grounds: see paragraph 29 of his Reasons. However he felt able to do so.

15. In his conclusions, after reference to **Robertson v Bexley Community Centre** [2003] IRLR 434 and **British Coal Corporation v Keeble** [1997] IRLR 336 he said the following about the generic cases with which he was concerned:

> **"49. These cases are not comparable with *DPP v Marshall*. In that case, as Mr Cavanagh graphically described it, the decision in *P v S* (Case C-13/94) [1996] ICR 795 ECJ which alerted Ms Marshall to the fact that she might have a case, came 'out of left field' in other words it took everyone completely by surprise. It did so for two reasons. It was an entirely novel attempt to construe the Sex Discrimination Act 1975 so as to permit a claim to be brought alleging discrimination on the grounds of gender reassignment and the reference to the ECJ had been made by an industrial tribunal in Truro. The differences between *Marshall* and these proceedings are therefore two-fold: in *Marshall* the ground of complaint was entirely novel; in these proceedings the ground of complaint was well recognised but subject to a blocking provision which needed to be disapplied, a very similar provision having been disapplied in *Percival-Price*. In *Marshall* there would have been no or almost no publicity prior to the judgment of the ECJ itself (with the possible exception of the Advocate-General's opinion); these proceedings were well publicised and much discussed from the time of the Court of Appeal judgment in 2008."**

When the Employment Judge says that the proceedings were "well publicised and much discussed" from 2008 I have no doubt that he means that they were well publicised and much discussed among those who were in the know - such as lawyers practising in this field or part-time Judges then serving. He was of course not suggesting that the proceedings were widely

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publicised or discussed by the public in general, or for that matter by retired people or retired lawyers generally.

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16. The Employment Judge continued:

> **"50. The claimants in these proceedings are all considerably more sophisticated and knowledgeable about the law than the average litigant. The fact that the majority are not employment lawyers is neither here nor there. All of the facts necessary for them to bring a claim will have been known to them from a relatively short time after their appointment, namely that as fee paid judges they were excluded from the judicial pension scheme whereas their salaried counterparts were not and that in certain other respects the terms and conditions of their salaried counterparts also seemed more favourable. None took advice to see whether they might have a claim and all must have been alive to the fact that if they did have a claim a limitation provision would apply to it, that being the invariable rule with regard to civil proceedings in this country. As Mr Cavanagh has pointed out, had they cared to research the topic there was ample material available, not just about the O'Brien litigation but on the subject of discrimination against part-time workers generally, Ms Kamm having produced a list of 23 articles or papers in the legal press on the subject since 2000.**

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> **51. All the lead claimants, apart from Mr Robins and Mr Wain, had become aware of the O'Brien litigation, albeit in some cases perhaps only vaguely, some years prior to the commencement of proceedings, most at around the time of the judgment of the Court of Appeal although at least two were aware of it from the outset. I find it difficult to accept that any Employment Judge or Immigration Judge in post in mid to late 2008 could not have been well aware of the litigation and most certainly should have been aware of it, as their professional bodies were both independently taking leading counsel's opinion and by mid 2010 the latter had formally intervened in the proceedings. The evidence from several of the lead claimants suggests that it was a topic of conversation among judges at least from time to time. A large proportion of the claimants in these proceedings in my judgment did know of the proceedings from around the time of the Court of Appeal judgment and almost all if not all of those who did not should reasonably have been aware of them given the publicity which they received."**

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17. Later the Employment Judge said:

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> **"56. I have come to the conclusion that whatever post hoc rationalisation has taken place, the most likely explanation for the delay is that given by Mr Peter Howarth 'I don't back losers'. It is no coincidence that as Mr O'Brien's chances of success seemed to improve the number of judges willing to overcome such scruples as they might have had about commencing proceedings, increased. The analogy to a horse race raised by Mr Howarth is apposite. It seems that we have a large crowd of onlookers knowing that if the outsider wins they will benefit greatly but, doubting his chances of success, they wait until he unexpectedly pips the favourite at the post only to object when the bookmaker refuses to accept bets on the entirely understandable grounds that the race is over!**

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> **57. In my judgment, Mr Cavanagh is right. Much of this is special pleading on the grounds that the claimants are judges and the respondent is the MoJ. In an ordinary case the claimants' position on these generic points would be hopeless: all relevant facts were known throughout; no-one was given incorrect legal advice about their prospects of success; the issues were clear and well defined from the outset but none of the claimants who are out of time sought their own legal advice until too late; in general terms the fact of the *O'Brien* litigation and its progress were known to most judges to a greater or lesser extent at least from 2008; the chances of success may have appeared slight at first but that is a risk attached to almost all litigation of this nature and by the date of reference to the CJEU in July 2010 things were looking up. The typical period of delay is measured in years rather than months. …"**

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18. He concluded that "there are no generic grounds on which I could find that it is just and equitable to extend time even though each claimant affected by this decision will suffer the prejudice of losing what would otherwise have been a valuable claim".

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19. I will return to the Employment Judge's reasoning in these paragraphs later in my Judgment. It is sufficient for the moment to note that, when he considered what explanation there was for delay, his key finding was "I don't back losers". This finding is plainly made in

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the context that the generic Claimants had generally been aware of the litigation since 2008.

20. The Employment Judge did give specific consideration to two cases where it was said

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that "special circumstances" applied. One of these was the case of Mr Robins. He had retired as a Deputy District Judge on 15 October 2012. He was unaware of the O'Brien litigation until February 2013. He took immediate steps to bring a claim. So he was only six weeks out of

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time. The Employment Judge allowed the claim to proceed, saying that "the areas of law in which he practised make it understandable why he might not have been aware of either the litigation or the issues behind it". I note that the Employment Judge did not regard the fact that Mr Robins must have known since shortly after his appointment that he did not have a pension,

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and full-time District Judges did, as in any way decisive; he did not suggest that those facts alone ought to have put Mr Robins on notice of the need to take advice.

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21. The decision in **Miller** was appealed to the Employment Appeal Tribunal and upheld by Laing J: [2016] UKEAT/0003/15. She paid tribute to the Employment Judge because he "produced an impressive Reserved Judgment at some speed". She agreed that **Marshall** was

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distinguishable because the decision "came out of left field" (paragraph 18). On the question of prejudice, she said that the Employment Judge had rightly held that the Respondent did not

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have to show specific prejudice, and he was alive to the prejudice the Claimant would suffer (paragraph 35).

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The Employment Judge's Reasons

22. The Employment Judge accepted that until 26 April 2016 the Claimant did not know of the O'Brien litigation or of the possibility of pensions for part-time judicial office holders: paragraph 6 of his Reasons. He said, however, that there was "one other important finding of fact": the Claimant knew at all material times that he did not have the right to receive a pension for his judicial work but that salaried Judges did (paragraph 6).

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23. After making these brief findings of fact the Employment Judge turned to what he described as "the length of delay" - which he took to be the lapse of time between the expiry of the primary time limit and the presentation of the claim form. This was 9 years and 10 months. Even if allowance was made for other factors - a period of illness and a promise by the Ministry of Justice related to a moratorium - at minimum that period was 6 years 7 months.

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24. The Employment Judge turned to his discussion and conclusions. He framed his conclusions to answer specific submissions made by Mr Engel; his reasons have to be seen in that light, but it is nevertheless necessary to take from them points which may be relevant to this appeal.

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25. In paragraph 11 the Employment Judge said the following when dealing with a submission that if Mr Bowden had taken legal advice it would have been negative and would have deterred him from taking proceedings:

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> **"11. In my judgment, that is not only an entirely irrelevant point but it is fanciful. It is irrelevant for the very simple reason that Mr Bowden did not at any time seek advice and was not deterred from bringing proceedings. I do not criticise Mr Bowden in the slightest when I**

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say that he did absolutely nothing after his retirement about the fact that he was not entitled to a pension. I am sure he was in the same position as many of his colleagues who retired at that time. It was not a matter which most retired fee-paid judicial office holders would have given a second thought [to]. …"

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26. Later, however, answering a different submission of Mr Engel, he addressed the "question of knowledge, diligence and prudence". He said the following in paragraph 15:

> **"15. … I held in *Miller* that the relevant knowledge is that of the facts which could potentially give rise to a claim not of the existence of a claim by others nor the existence of a legal right to pursue compensation in respect of those facts. This is clearly not … a *DPP v Marshall* ([1998] ICR 518 EAT) type of case where the existence of a cause of action came out of the blue. I dealt with this question in *Miller and Others* and my reasoning was expressly upheld by the EAT. The issue here is that fee-paid judges have been treated less favourably than salaried judges in the matter of pension entitlement. That was a fact which Mr Bowden knew all along. He made no attempt - again I do not criticise him, this is just a statement of fact - to pursue any possibility of redress. It never crossed his mind to do so."**

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27. Although the Employment Judge said that he did not criticise the Claimant, he went on in the next paragraph to say the following when addressing Mr Engel's specific submission that the Claimant had acted with diligence and prudence:

> **"16. … It is clear beyond argument in my judgment, that in the context of this litigation, Mr Bowden did not act with diligence and prudence. To hold otherwise, would both be to confuse the mere requirement to have knowledge of the basic facts which give rise to a cause of action with the requirement to have knowledge of the cause of action itself and to go against my holdings in *Miller and Others*. Mr Bowden knew he had been less favourably treated compared to salaried judges and that was all he needed to know to take appropriate advice."**

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28. Later in his Reasons the Employment Judge addressed an argument by Mr Engel that it did not make a difference whether the delay was 6 weeks or 10 years because the Claimant did not know of his rights. He rejected that contention saying that "it would make ignorance of the law almost a complete answer to an out of time contention. That very obviously cannot be right" (paragraph 19).

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29. The Employment Judge concluded as follows:

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> **"20. Having followed that rather torturous route we come back to the point at which I started. This application is hopeless. It has always been hopeless since my judgment in *Miller and Others* was upheld in the EAT and in the light of the consistent application of the [principles] which I there established in excess of a dozen applications for an extension of time in individual cases. Time will not be extended unless there are just and equitable grounds for**

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extending it and all such findings have been predicated on the existence of some actual factor of weight and significance (in nearly all cases where the delay has been lengthy the factor has been serious ill health of the claimant or a dependant) which pertains in the case of the individual claimant under consideration. Absent any such factor no amount of ingenious argument is ever likely to be sufficient. Lack of knowledge of the O'Brien litigation was clearly held not to be sufficient in *Miller and Others* and that is all I am offered by Mr Bowden to which Mr Engel adds speculation and some misconceived submissions. …"

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Submissions

30. On behalf of the Claimant Mr Engel submitted that the Employment Judge placed impermissible weight on his own reasoning in **Miller and Others**, decided in a different

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context. In particular he failed to take proper account of the undoubted fact that the Claimant did not know of the O'Brien litigation or even the possibility of part-time pensions. The question for the Employment Judge in such a case was whether the Claimant was reasonably

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unaware that he had a right to complain about the matter: see **Wall's Meat v Khan** [1979] ICR 52 and **Marks & Spencer plc v Williams-Ryan** [2005] ICR 1293 applied in the context of just and equitable extension by **Averns v Stagecoach in Warwickshire** [2008] UKEAT/0065/08.

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The Employment Judge was required to address that question specifically in the Claimant's case and should have found that he was reasonably unaware of his right. Indeed, submits Mr Engel, once granted that the Claimant had a good explanation for the delay, since his claim was undoubtedly sound in law the balance of prejudice was "all one way" - an expression he took

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from a decision of His Honour Judge Peter Clark in **Bahous v Pizza Express Restaurant Ltd** [2011] UKEAT/0029/11. Alternatively, there was no real balancing of prejudice in a case which specifically required a careful balance to be struck.

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31. On behalf of the Respondent Ms Kamm submitted that the Employment Judge had set out ordinary principles for exercising the discretion to extend time in **Miller v Ministry of**

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Justice. Those principles had been upheld by Laing J in the Employment Appeal Tribunal. He was entitled to apply those principles to the case of the Claimant; it was not an error of law to

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cross-reference to his earlier decision in **Miller** to explain them. As to the balance of prejudice, the Employment Judge found that the Claimant's application had raised the same issues as in **Miller**; that was a permissible finding, and it was therefore permissible to decide the case in the same way as **Miller**. He was entitled to hold that the Claimant had sufficient knowledge, namely knowledge that he had no pension whereas salaried Judges had pensions. While Ms Kamm acknowledged a degree of tension between the findings of the Employment Judge in paragraphs 11, 15 and 16, the key finding was in paragraph 16.

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Discussion and Conclusions

32. The process of asking a Judge to decide that it is just and equitable to hear a complaint out of time is almost always described by Judges and practitioners as making an application to extend time; and acceding to that application is frequently described as granting an extension of time. That is not quite how the legislation puts it; but the effect of the decision is to grant an extension of time and no harm is done by the common form of description.

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33. The decision is often described as an exercise of discretion; strictly it is better described as an evaluation or assessment, but there is little practical difference. In either case the Judge must apply the law correctly, taking into account that which it is essential to take into account and leaving out of account that which is irrelevant. If the Judge takes a decision in that way, and reaches a conclusion which is not perverse, the Employment Appeal Tribunal, which is empowered to hear appeals only on a question of law, must not interfere.

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34. In **British Coal Corporation v Keeble** [1997] IRLR 336 the Employment Appeal Tribunal recommended that Employment Tribunals should take into account the checklist of factors in section 33 of the **Limitation Act 1980**. This is not a requirement and an Employment

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Tribunal will only err in law if it omits something significant: **Afolabi v Southwark London Borough Council** [2003] ICR 800 at paragraph 33. Speaking for myself, I think an Employment Tribunal is indeed wise to address that checklist as an aid to good decision making, so long as it does not treat any checklist as exhaustive and pays attention to factors which are relevant to the circumstances of the case before it. It will of course take into account other leading cases on this question, in particular **Robertson v Bexley Community Centre** [2003] IRLR 434 as explained in **Chief Constable of Lincolnshire Police v Caston** [2009] EWCA Civ 1298.

35. The first factor in the checklist for consideration is the length of, and the reasons for, the delay on the part of the Claimant. This will be relevant in almost every case.

36. In this case the explanation given by the Claimant was that he was unaware of the O'Brien litigation or of the possibility of pensions for part-time judicial office holders. It was to my mind essential that the Employment Judge should apply correct principles of law when he evaluated this explanation.

37. A convenient starting point is the well-known dictum of Brandon LJ in **Wall's Meat**. He was addressing the stricter test for extension of the time limit applicable in unfair dismissal cases - namely, whether it was reasonably practicable to bring the claim in time:

> **"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.**
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> **For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant.**

> **While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. 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. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries.**
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> **To that extent, therefore, it may, in general, be easier for a complainant to avail himself of the "escape clause" on the ground that he was reasonably ignorant of his having a right at all, than on the ground that, knowing of the right, he was reasonably ignorant of the method by which, or the time limit within which, he ought to exercise it."**

38. These well-known principles are widely applied in unfair dismissal cases: see **Williams-Ryan** at paragraph 21, where the passage was specifically commended. But they are relevant when ignorance is the explanation in a case which is concerned with whether it is just and equitable to extend time: see **Averns** at paragraphs 20 to 23 (Elias J). They set out basic principles of justice which it is appropriate to apply in the context of a test which requires the Tribunal to decide what is just and equitable.

39. To similar effect is **DPP v Marshall** [1998] ICR 518. In that case the Claimant was unaware of the right to bring a complaint of transgender discrimination until a European Court decision came to his attention. He brought his claim promptly afterwards. The Employment Tribunal extended time; and the Employment Appeal Tribunal approved that decision. Morison J said (pages 527H-528B):

> **"In this legislation, the Sex Discrimination Act 1975, 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. 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. Reasonable awareness of the right to sue is but one factor."**

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40. Applying these principles, given that the Claimant was claiming ignorance of his right, the Employment Judge was required to consider whether he was truthful in what he said and whether he was reasonably ignorant of the right. For the reasons which Brandon LJ stated, it will be a rare case where it was reasonable to expect a Claimant to make inquiries about a right which he does not know he has.

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41. To approach the case in this way is not special pleading for Judges of the kind which the Employment Judge found in **Miller and Others**. Rather it is to treat the Claimant, a retired Judge, according to the same legal principles as any other person.

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42. Let me illustrate this with an example. Suppose a part-time employee works in a non-unionised factory until his retirement in 2006. He knows that his full-time colleagues are entitled to a pension and he is not. But he has never heard of any law about discriminating against part-time workers. His employers have heard of the law but wrongly thought it did not apply to them. Six years later he hears about it for the first time and promptly brings a claim which is, apart from the time limit point, unanswerable. If he was reasonably ignorant of the law about discriminating against part-time workers, he would surely have a strong case for an extension of time; why should he take advice about a legal right of which he had never heard? The extension would deprive the employers of a time limit defence, but they had unlike him heard of the law and not applied it.

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43. In the Claimant's case therefore it was not sufficient for the Employment Judge to say that the Claimant knew he was not receiving a pension and knew that full-time Judges were. He was bound to ask, given that the Claimant said he was ignorant of his right to bring a claim,

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whether he accepted this was the case and whether he accepted, given the Claimant's circumstances, that his ignorance was reasonable.

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44. There is, in my view, no doubt that the Employment Judge fell into error at this point. He said in paragraph 15 that he had decided in **Miller** that the relevant knowledge is that of the facts which could potentially give rise to the claim not of the existence of a legal right to pursue compensation in respect of those facts. For the reasons I have explained, both kinds of knowledge are relevant and to be taken into account.

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45. The Employment Judge, to my mind, relied impermissibly and inappropriately on his earlier decision in **Miller**. In that case it was in the main sufficient to point out that the generic Claimants knew that full-timers had a pension and they did not, because they also knew about the O'Brien litigation. In this case, where the Claimant did not know about the O'Brien litigation, it was essential to ask whether he knew or ought to have known about the existence of a legal right to claim a pension for part-time service.

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46. I am not sure that the Employment Judge was altogether correct in saying that he had decided conclusively in **Miller** that knowledge of facts which could potentially give rise to a claim was sufficient. I have already mentioned the case of Mr Robins. The Employment Judge took into account that it was "understandable" that Mr Robins might not have been aware of the litigation or the issues behind it given the areas of law in which he practised. In my judgment the Employment Judge was entirely right to take that factor into account; but it does not sit easily with the absolutist approach which he adopted in the present case.

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47. Likewise the Employment Judge was incorrect, in the context of this case, to dismiss the significance of **Marshall**. It is true as he said in **Miller** that the issue did not come "left field" to the vast majority of the generic Claimants; but here there was an issue as to whether, for the Claimant, the part-time worker legislation did come "left field". **Marshall** correctly drew to his attention the importance of considering whether the Claimant was reasonably unaware of his right.

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48. This leaves the question whether the Employment Judge did at any point consider whether the Claimant was reasonably unaware of his right. It might be thought that the finding in paragraph 15 that the Claimant did not act with diligence and prudence amounts to such a finding. But it is clear from the following sentence that the finding is based on the Employment Judge's erroneous understanding of the kind of knowledge which might be relevant. The Employment Judge's finding that the Claimant did not act with diligence and prudence is based on this misunderstanding. It had not been put to the Claimant that he had acted without diligence; only that he knew salaried Judges had a pension whereas he did not. And elsewhere in his Reasons the Employment Judge said he had no criticism of the Claimant. There is in my judgment no true consideration by the Employment Judge of the question whether the Claimant was reasonably unaware of his right.

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49. For these reasons I consider that the Employment Judge erred in law in his approach to the Claimant's case by relying impermissibly on what he understood to be the effect of his previous decision in **Miller and Others**. I would also accept the submission that the Employment Judge did not carry out the exercise of balancing the prejudice to each party in any coherent way in the present case. 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

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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.

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50. In my judgment, therefore, the appeal must be allowed and the matter remitted for entirely fresh consideration. The Employment Appeal Tribunal has jurisdiction to substitute its own conclusion only if, when the law is properly applied, only one result is possible: see **Jafri v Lincoln College** [2014] ICR 920. I do not accept Mr Engel's submission that the case is necessarily all one way. The remark of His Honour Judge Peter Clark, made in the context of the particular case before him, cannot be elevated to a proposition of law applicable in all cases. Whether it is just and equitable to extend time is a matter for decision by an Employment Judge or Tribunal after finding facts and applying the correct legal principles.

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51. This leaves the question whether I should remit to the same Employment Judge. Like Laing J, I am full of admiration for the Reasons he produced speedily and lucidly in **Miller and Others**. But he expressed himself very strongly in this case, saying that he regarded the Claimant's case as hopeless when it was certainly not. I consider that the matter should be remitted to a differently constituted Employment Tribunal. That Employment Tribunal should form its own views on all aspects of the question whether it is just and equitable to extend time. It should not regard itself as in any way bound by the generic views in **Miller and Others**.

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