EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew F Veitch

Respondent: Ministry of Justice

Employment Judge: Mr J Macmillan

Representation:
Claimant: Written representations
Respondent: Written representations

JUDGMENT

The claimant's application for costs is dismissed.

REASONS

The issues

1. On the 12th October 2017 I held a preliminary hearing in Edinburgh to determine whether it would be just and equitable to consider Mr Veitch's monetary or non-pension claims which had been added to his original, in time, complaint that he had been unlawfully excluded from the Judicial Pension Scheme, those claims having been added to the original by way of amendment some 23 months after the time limit applying to them had expired. In a reserved judgment dated the 21st of October I held that it would be just and equitable to extend time. As I understand it there has been no appeal against that decision by the respondent.

2. Mr Veitch, through his solicitor Mr Colin Heggie, now applies for an order that the respondent pay his costs in connection with these proceedings, an application that Mr Heggie had indicated many months ago that he would make in the event of the respondent unsuccessfully pursuing the out of time point to a hearing. Both parties have consented

in writing for me to deal with the application on the basis of written submissions.

The law

3. Costs in Employment Tribunals do not follow the event. An order that a party shall pay another party's costs can only be made in certain, limited, circumstances. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides so far as material:

> (1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that –
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> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.

4. The scheme of the rule is well established: an order for costs cannot be made unless either of the qualifying thresholds is crossed when it may be made in the exercise of the Tribunal's discretion. There is extensive case law on the factors to be taken into consideration when exercising that discretion. The starting point then is to consider whether either of the 'triggering' conditions of r. 76(1)(a) or (b) are met.

The submissions

5. Mr Heggie submits that the conditions of both sub-paragraphs (a) and (b) of the rule are met. So far as sub-paragraph (a) is concerned, he contends that the respondent acted unreasonably in defending the claim. He relies on two aspects of my reasons for allowing the claim to proceed: my criticisms (in particular para 43 of the Reasons) of the respondent's conduct of these proceedings including their lengthy delay in complying with two orders of the Tribunal, one of which misled Mr Heggie into thinking that no out of time point would be taken against Mr Veitch, and on my holding that the balance of prejudice very clearly favoured Mr Veitch (para 44). So far as sub-paragraph (b) is concerned, he submits that the catalogue of administrative failures by the respondent which I set out in the Reasons taken with my views on the balance of prejudice, meant that they had no reasonable prospect of successfully pursuing the out of time point.

6. Mr Heggie relies on four separate matters, only two of which were dealt with in my decision. The first is the failure by the respondent to notify him that Mr Veitch's claim was on a list of previously conceded claims in respect of which the respondent now wished to take out of time points and in respect of which they would seek the Tribunal's permission to withdraw the concession (reasons paras 14 -16). That failure deprived Mr Veitch of the opportunity to oppose the application. Mr Heggie relies on a passage from the judgment of Lord Steyn in ***R v. SSHD ex p. Anufrijeva*** [2003] UKHL 233 (AAC) para 26:

> Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the

decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principal of our legal system.

7. The second is the respondent's refusal to accept an offer to mediate the claim. The third is the respondent's failure to take account of the views of the Senior President of Tribunals, Sir Ernest Ryder, in a letter dated the 27th July 2016 to Scott McPherson, Director, Law, Rights and International at the respondent asking him to look into Mr Veitch's case. The thrust of the letter seems to be a request to Mr McPherson to look into the case because the different treatment being given to Mr Veitch was likely to impact on judicial morale as a result of what Sir Ernest described as 'a prime example of prima facie poor and demonstrably inconsistent handling on the Ministry's part…' The fourth is the 'precedent' as Mr Heggie puts it created by the respondent in settling many other out of time amendment claims which appeared to be on all fours with Mr Veitch's claim. Although he uses the sentence specifically in respect of the third point, Mr Heggie's submissions can be usefully summarised thus: it was unreasonable and not appropriate to continue to maintain an argument which their own actions had made indefensible.

8. In reply, the respondent denies that their defence of the claim had no reasonable prospect of success. The amendment to the original claim form adding the monetary claims was 23 months out of time despite the fact that Mr Veitch was legally represented throughout. Given that it is well established that the discretion to extend time should only be exercised exceptionally, Mr Veitch had significant hurdles to overcome. The matter was not straightforward and the Reasons show that the decision to extend time was only reached after careful consideration and weighing of the factors on both sides. The failure of the respondent to notify Mr Heggie that the out of time point would be taken prior to the hearing of their application to withdraw the concession was one of those factors.

9. The claim was clearly not suitable for mediation and it was perfectly reasonable for the respondent not to settle the claim despite the views expressed by Sir Ernest Ryder, given its responsibility as guardian of the public purse. Claims settled in error cannot properly be described as setting a precedent in the claimant's situation given that his monetary claims had been properly assessed as being out of time.

10. In response Mr Heggie notes (inter alia) that the respondent has failed to directly address the ***Anufrijeva*** point and in consequence have effectively conceded it so that costs should be awarded to Mr Veitch.

Discussion and conclusions

11. I remind myself of the provisions of reg 8 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

(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 … 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 … 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 it is just and equitable to do so.

12. The effect of this provision is clear: the Tribunal is prohibited from hearing an out of time complaint unless it considers that it is just and equitable to do so. In consequence, it is not for the respondent to satisfy the Tribunal that an out of time claim should not be heard. The onus is on the claimant to persuade the Tribunal that it should be: see ***Robertson v. Bexley Community Centre*** and the discussion in para 25 of the Reasons.

13. It is important to restate that the starting point for the hearing on the 12th October was that Mr Veitch's monetary claims had been added to his in-time pension claim some 23 months after the time limit for doing so had expired. As I noted in my Reasons for allowing the claim to proceed (para 42) no explanation for that delay has ever been offered. It would, in my judgment, be only in the most exceptional circumstances that it could be said that an objection on time grounds to a claim presented so long after the time limit had expired had no reasonable prospect of success, even where a full explanation for the delay had been offered at an early stage. Where none has been offered it is difficult to see any circumstances where that would be true. In my judgment it clearly cannot be said that the respondent had no reasonable prospect of successfully defending the claim on that basis.

14. In rule 76(1)(a) the word 'unreasonably' does not sit alone. It is immediately preceded by the word 'otherwise' which in its turn is preceded by the words 'vexatiously, abusively, disruptively or…' That context is important. The unreasonableness contemplated seems to be conduct which is comparable to behaviour which can be characterised as vexatious, abusive or disruptive. Declining to mediate a claim and declining to be swayed by a letter from the Senior President were perfectly legitimate options for the respondent who owed a duty to the public purse to defend defensible claims as this claim undoubtedly was – I repeat that at no time has an explanation for the very long delay in adding the monetary claims to the original in time claim been offered. Mr Heggie's first and fourth points were those which, together with the balance of prejudice argument, tipped the scales in Mr Veitch's favour. By themselves they do not signify that it was unreasonable to defend the claim on the time limit issue. The respondent is correct: as the length of the Reasons demonstrates, the matter was not straightforward and required a careful consideration and weighing of factors on both sides. This was by no means a case where the answer to the question appeared inevitable at an early stage. It therefore seems necessarily to follow that it cannot be said that the respondent was unreasonable in defending the claim.

15. Whilst I can appreciate that from Mr Veitch's and Mr Heggie's perspectives, the respondent's decision to continue to take the out of time point in this case while they were manifestly failing to take it in other seemingly identical cases, looks like a rank injustice. Had I concluded that there was anything other than what I described as 'serial incompetence' by low level administrative staff (Reasons para 45) behind that difference in treatment then I would have had little hesitation in deciding that the respondent's conduct of the proceedings had been unreasonable. But on the facts as I found them to be I am unable to conclude that any of the triggering factors in rule 76(1)(a) and (b) are present here. The application for costs therefore fails.

Employment Judge Macmillan on 13th December 2017