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Dear Sirs

Miller & Others v Ministry of Justice

Withdrawal of the “Pay Claims Moratorium” after 31 May 2016

This letter confirms that the Ministry of Justice (MoJ) is withdrawing the moratorium in respect of non-pension claims (pay claims) after 31 May 2016 and what this will mean in practice. A summary note will also be placed on the MoJ website with a link to this letter.

Background

The MoJ’s legal representatives wrote to the Employment Tribunal on 3 June 2013 setting out the MoJ’s position on time limit defences to new claims for “pay” which set out:

“This concerns claims for the following heads of loss:

- *Payment in respect of training days*
- *Deductions in relation to pension contributions under the Judicial Pensions (Contributions) Regulations 2012*
- *No additional fee for writing up judgments*
- *Holiday pay*
- *Cancellation fees*
- *Sick pay*
- *Travel & subsistence*
- *Cost of running a home office*
- *London Weighting*
- *Parking*

If any such claim was time-bared on Monday 3 June 2013 the Respondents reserve the right to rely on the time limit by way of defence.

However, in defending claims for these heads of loss the Respondents will not rely on (and will invite the Tribunal, so far as it is able, to disregard) the passage of time from 3 June 2013 until further notice.

Simon Harker - Group Head

Zoe Palmer - Deputy Director, Team Leader Employment (E1)



The Respondents therefore do not require all claimants to apply to amend their claims if they wish to add a claim for any of these heads of loss. Test claimants will in due course be required to amend, if necessary, to add such a claim, but (as aforesaid) the Respondents in opposing such application or defending such claim will not rely on the passage of time from 3 June 2013 until further notice.”

On 27 May 2014 the MoJ also published the following statement on its website:

Non-pension related claims

On a number of non-pension items, the Employment Tribunal in Miller held (where there is a full-time comparator and a claim is within time) that there has been less favourable treatment without objective justification. The Ministry of Justice is not seeking to appeal against the judgment on these points and is developing policy for them. They are as follows.

(a) Annual leave – holiday pay, but only in the circumstances set out in the judgment (which dealt with claims made under the Working Time Regulations 1998 rather than the 2000 Regulations). The Ministry of Justice will write separately notifying fee-paid judges that holiday pay is included in the daily fee.

(b) Training – entitlement to a full day’s fee for a training day. The Ministry of Justice will develop a training fees policy with the senior judiciary and Judicial College that reflects final judicial decisions taken about past losses and what is appropriate for inclusion in the fee.

(c) Sick pay – the Ministry of Justice will develop a sick pay policy with the senior judiciary. This will reflect the Tribunal’s ruling that sick pay is due to a fee-paid judge who loses a day’s pre-booked sitting through illness or who is unable to sit because of illness for the minimum number of days guaranteed by his/her terms and conditions, where the sitting in question would not have been cancelled by the Ministry of Justice in circumstances disentitling the judge to a fee.

(d) London Weighting – the Ministry of Justice will develop a policy with the senior judiciary.

(e) Writing up fees in the Social Entitlement Chamber – the Ministry of Justice will develop a policy with the senior judiciary.

The Miller judgment includes an agreed declaration about the underpayment of daily fees in the Social Entitlement Chamber from 2000 to the present day and in the Employment Tribunal from 2000 to 31 March 2013.

Claims handling arrangements

In light of the Miller judgment in respect of past losses relating to paragraphs 9 and 10 above, the Ministry of Justice will implement a claims handling system for eligible fee-paid judicial office holders, as described in the Miller judgment, which will remedy the less favourable treatment.

Non-pension claim payments will only be made to claimants who have brought, or could bring, a claim in time (taking into account any extension) whose claim relates to payments due from 7 April 2000 onwards.

If you are a potential claimant and your non-pension claim would have been in time for the purposes of regulation 8(2) of the 2000 Regulations as at 3 June 2013, the Ministry of Justice invites you to particularise your losses and from 1 June 2014 to 31 August 2014 to submit your claim to the Judicial Pay Claims team at the contact address below. The Judicial Pay Claims team will seek to reconcile your claim with Ministry of Justice records in order to arrive at a settlement. This offer applies to eligible fee-paid judicial office-holders in England and Wales, Scotland and Northern Ireland insofar as their potential claim is against the Ministry of Justice.

The Current Position

The MoJ's decision (as set out in the letter and web page referred to above) not to take time points for non-pension claims ("pay claims") which would have been in time for the purposes of regulation 8(2) of the 2000 Regulations as at 3 June 2013 became known as the "Pay Claims Moratorium".

Since then, the MoJ has implemented new policies in respect of:

- Pay for attending training days – 1 July 2014
- Sick Pay – 1 August 2014
- London Weighting – 1 September 2014
- Writing up fees in a number of jurisdictions – SSCS 1 September 2014, ET 1 December 2014

The MoJ has also rectified any issues in relation to the calculation of a fee-paid judge's daily fee and confirmed to fee-paid judges that their daily rate is calculated to include rolled up annual leave under the Working Time Regulations 2000.

The MoJ has paid compensation to eligible fee-paid judges in respect of each of the above pay claims for service in the period from 7 April 2000 up to the implementation of the applicable new policies outlined above (which brought to an end the less favourable treatment). There are a small number of cases where payment has not yet been made because there is an outstanding issue which is pending determination by the ET. There were two mechanisms for these payments, depending on whether the less favourable treatment took place before or after the ET's judgment of 2 January 2014 in *Miller & Others v Ministry of Justice*:

- Payments for the period 7 April 2000 up to 2 January 2014 (the date of the ET judgment in *Miller & Others v Ministry of Justice*) have been made following applications by eligible fee-paid judges to the Judicial Pay Claims Team at the MoJ. In respect of service in this period, payments have been made only to those judges who brought an ET pay claim in time (taking into account any just and equitable extension of time) or who would have been in time to do so on 3 June 2013;
- Payments in respect of service from 2 January 2014 until the introduction of the applicable new pay policy have been made automatically (save for sick pay) by the MoJ to all judges who were treated less favourably in respect of any of the relevant types of pay in this period.

Withdrawal of the Pay Claims Moratorium

The MoJ hereby confirms that the Pay Claims Moratorium will be withdrawn with effect from 31 May 2016. For any pay claims issued in the ET after 31 May 2016, the MoJ will ask the ET to disregard the passage of time from 3 June 2013 until 31 May 2016 but the MoJ will not ask the ET to disregard the passage of time from 1 June 2016 (unless one of the exceptions set out below applies or the MoJ considers that it would be just and equitable on the facts of a particular case to do so). If the MoJ considers that it is not just and equitable to extend time from 1 June 2016 until the date of claim, the MoJ will ask the ET to dismiss the pay claim on ground that it is out of time. Further, MoJ's Judicial Pay Claims Team will not accept any new pay claims after 31 May 2016.

The pay claims moratorium was intended to assist judges and to reduce the administrative pressure on the ET. Instead of each judge having to present their pay claims to the ET, a number of test claims were decided by the ET in *Miller & Others v MoJ* on 2 January 2014. Other ET judgments resolved other pay issues, for example in respect of writing up fees for ET judges. In light of these judgments, the MoJ was able to identify the circumstances in which pay claims would succeed, introduce new pay policies during 2014, set up its Judicial Pay Claims Team and start making payments to compensate eligible judges. The MoJ considers that these policies brought any less favourable treatment in relation to pay to an end and therefore the time limits for bringing a pay claim began to run at that point (or earlier, depending on when the judge's eligible fee-paid appointment

ended). The original deadline for contacting the Judicial Pay Claims Team to register pay claims was 31 August 2014, but the team has continued to accept new claims.

The MoJ considers that eligible judges have now had sufficient time in which to present a pay claim to the ET or (relying on the pay claims moratorium) register it with the Judicial Pay Claims Team. It is important that any outstanding issues are identified, judges compensated and the process completed within a reasonable time period. For this reason, the MoJ is now giving reasonable notice that the pay claims moratorium will continue to apply in respect of the period from 3 June 2013 to 31 May 2016, but that:

- the MoJ's Judicial Pay Claims Team will not accept new pay claims after 31 May 2016; and
- if a new pay claim is presented to the ET after 31 May 2016, the MoJ will not ask the ET to disregard the passage of time from 1 June 2016 (unless one of the exceptions set out below applies or the MoJ considers that it would be just and equitable on the facts of a particular case to do so). If the MoJ considers that it is not just and equitable to extend time from 1 June 2016 until the date of claim, the MoJ will ask the ET to dismiss the pay claim on ground that it is out of time.

Unless and until the MoJ gives notice of any further change, the moratorium will continue to apply to pay claims which have already been intimated, either by way of an ET1 to the Tribunal or by the fee-paid judge registering a claim directly with MoJ's Judicial Pay Claims Team. In these cases the MoJ will continue to invite the ET to disregard the passage of time (including the passage of time from 1 June 2016) when considering whether it would be just and equitable to extend time limits. For the avoidance of doubt, the moratorium will continue to apply to all pay claims that have been registered with the Judicial Pay Claims Team, whether or not any sum has been paid out in respect of that pay claim and whether or not the claim has been accepted as eligible (including those claims which have been rejected by the Judicial Pay Claims Team because the MoJ considers that an ET claim on 3 June 2013 would have been out of time).

For the avoidance of doubt, the MoJ applies the time limits and moratorium to each pay claim separately and to each judicial appointment separately. Therefore the MoJ will take time points after 31 May 2016 in respect of judges who seek to amend their claim to include additional heads of loss.

If a judge has not yet issued a tribunal claim in respect of any non-pension payments and wishes to rely on the moratorium, they should contact the Judicial Pay Claims Team at judicialpayclaims@justice.gsi.gov.uk as soon as possible and in any event before 31 May 2016.

Where this letter refers to "Pay claims" and/or "non pension claims" this means those claims referred to in the letter of 3 June 2013 and website announcement of 27 March 2014, and any other claims under the Part-time Worker (Prevention of Less Favourable Treatment) Regulations 2000 for any other payments save for those for a pension.

Due to ongoing litigation in relation to the former Residential Property Tribunal Service, the pay claims moratorium will continue to apply beyond 31 May 2016 to former Chairs of the Residential Property Tribunal Service who continue to hold successor offices in the FTT Property Chamber Residential Property Tribunal. The MoJ will however take time points after 31 May 2016 in relation to claims by any former Chairs of the Residential Property Tribunal Service who have ceased, or cease to hold this or a successor office referred to above.

All Chairs or former Chairs of the Residential Property Tribunal Service are invited to submit any claims that they wish to make to the Judicial Pay Claims Team as soon as possible. For those who are no longer in office, if they do not submit a claim to the Judicial Pay Claims Team (or have not already submitted a Tribunal claim), then the MoJ will take time points after 31 May 2016. For any Chairs of the Residential Property Tribunal Service who leave a successor office after 31 May 2016

the MoJ will take appropriate time points if they have not submitted a claim to the Judicial Pay Claims Team (or the Tribunal) within three months of leaving office.

Devolved Administrations

The MoJ confirms that the pay claims moratorium and this letter apply to fee-paid judicial office holders engaged by the MoJ. It does not apply to judicial office holders who are engaged by devolved administrations.

Pension Moratorium continues

For the avoidance of doubt, the moratorium announced on 5 April 2013 in relation to claims for pension remains in effect. A copy of the pension moratorium and subsequent clarification document are available at the following links:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183123/obrien-moratorium-5-april13.pdf

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193524/230413-OBrien-Moratorium-clarification.pdf

Examples of how the withdrawal of the pay claims moratorium will work in practice

We have attached an Appendix which sets out examples of how the MoJ will approach the withdrawal of the pay claims moratorium in practice.

We confirm that we have copied this email to the lead representatives. We would be grateful if the Tribunal could forward copies of this correspondence to the unrepresented claimants.

Yours faithfully

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Appendix A

Examples of how the withdrawal of the pay claims moratorium will work in practice:

Judge A is a fee-paid judge who retired in August 2013 and has not issued an Employment Tribunal claim. Judge A has previously contacted the judicial pay claims team and has received an offer and a payment. The moratorium will continue to apply to Judge A. If Judge A presents an ET claim on 21 July 2016 in respect of the same pay claims (including in respect of the same judicial appointments) that he has registered already with the Judicial Pay Claims Team, the MoJ will invite the ET to disregard the passage of time from 3 June 2013 (including the passage of time from 1 July 2016) when considering any application for a just and equitable extension of time.

Judge B is a fee-paid judge who retired on 2 August 2012, has not issued an Employment Tribunal claim and has previously contacted the judicial pay claims team in June 2014. Judge B was informed that she would not be receiving an offer as the judicial pay claims team considered that her claim was out of time and therefore ineligible. The moratorium will continue to apply to Judge B's registered pay claims. The MoJ will ask the Tribunal to disregard the passage of time from 3 June 2013 when assessing if any future ET claim is in time and/or whether it is just and equitable to extend the time limits. As Judge B retired on 2 August 2012, the normal time limit for an ET claim would have been 1 November 2012. If Judge B presents an ET claim on or after 1 June 2016 in respect of the same pay claims (including in respect of the same judicial appointments) that he has registered already with the Judicial Pay Claims Team, the MoJ will invite the ET to disregard the passage of time from 3 June 2013 (including the passage of time from 1 June 2016) when considering any application for a just and equitable extension of time. However, the MoJ will ask the ET to consider the passage of time from 1 November 2012 to 3 June 2013. If the MoJ considers that it would not be just and equitable to extend time in respect of the period from 1 November 2012 to 3 June 2013, the MoJ will ask the ET to dismiss the claim on ground that it is out of time.

Judge C is still sitting as a fee-paid judge. Judge C has not issued an Employment Tribunal claim and has not contacted the Judicial Pay Claims Team. Judge C wishes to make a pay claim about the less favourable treatment in respect of training days before the new policy commenced on 1 July 2014. The normal ET time limit for the claim was 30 September 2014. If Judge C contacts the Judicial Pay Claims Team prior to 31 May 2016 then the moratorium will continue to apply to the training days pay claim and her claim will be considered. The Judicial Pay Claims Team will not accept any new pay claims after 31 May 2016. If Judge C makes a training fees claim to the ET after 31 May 2016, the MoJ will ask the Tribunal to consider the passage of time from 1 June 2016 (but not from 30 September 2014 to 31 May 2016) when assessing whether or not it is just and equitable to extend time. If the MoJ considers that it would not be just and equitable to extend time in respect of the period from 1 June 2016 to the date of issue, the MoJ will ask the ET to dismiss the claim on ground that it is out of time.

Judge D retired in 2009 (at which point the less favourable pay treatment ended) and submitted a claim to the ET in 2013. The MoJ considers that this claim is out of time. Judge D is awaiting the outcome of the EAT appeal on generic factors for just and equitable extensions of time. Judge D's ET claim will remain stayed pending the outcome of the relevant appeal(s).

Judge E would have been in time to make pay claims in the ET on 3 June 2013. On 7 January 2015 he made a claim to the ET in respect of training days and his daily fee. The JPCT has made him an offer in respect of this claim. The moratorium will continue to apply to these training day and daily fee claims. On 5 July 2016 Judge E writes to the ET with an application to amend his claim to include payments for writing up judgments. The MoJ will take time points in relation to this amendment, in respect of the period from 1 June 2016 to 5 July 2016.

Judge F was an Employment Judge from 2001 until she retired on 5 December 2013 and she was also a First-tier Tribunal Judge (Tax Chamber) from 2002 until 5 December 2013. She registered a claim about training day fees as an Employment Judge with the Judicial Pay Claims Team in June 2015. She has not registered a claim about training day fees as a Tax Judge. On 8 July 2016, she issues an ET claim about her training day fees in both jurisdictions. The normal ET time limit for both claims was 4 March 2014. The MoJ will ask the ET to disregard the period from 4 March 2014 to the date of issue (8 July 2016) in respect of the Employment Judge training day fee claim. However, the Tax Judge training day fees claim will no longer be covered by the

moratorium (because no claim was registered with the Judicial Pay Claims Team) and therefore the MoJ will invite the ET to disregard the period from 4 March 2014 to 31 May 2016 (only) in respect of this claim. If the MoJ considers that it would not be just and equitable to extend time in respect of the period from 1 June 2016 to 8 July 2016, the MoJ will ask the ET to dismiss the Tax Judge training day fees claim on ground that it is out of time.

Judge G was a Valuer Chair of the Residential Property Tribunal Service from 2002 until 9 September 2014. Judge G has not registered a claim with the Judicial Pay Claims Team and he has not presented an ET claim. He wishes to make a pay claim. The normal ET time limit for the claim was 8 December 2014. The Judicial Pay Claims Team has not made any payments to judges in this jurisdiction yet because there are outstanding pay issues to be determined in the litigation. If Judge G contacts the Judicial Pay Claims Team prior to 31 May 2016 then the moratorium will continue to apply to his RPTS pay claims and they will be considered in due course. If Judge G makes a pay claim to the ET after 31 May 2016, the MoJ will ask the Tribunal to consider the passage of time from 1 June 2016 (but not from 8 December 2014 to 31 May 2016) when assessing whether or not it is just and equitable to extend time. If the MoJ considers that it would not be just and equitable to extend time in respect of the period from 1 June 2016 to the date of issue, the MoJ will ask the ET to dismiss the claim on ground that it is out of time.

If Judge G continued to hold office in the First-tier Tribunal (Property Chamber) Residential Property, then the pay claims moratorium would continue to apply to him, although the MoJ invites these judges to submit their claims to the Judicial Pay Claims Team as soon as possible. If Judge G ceased to hold office on 1 September 2016, if he had not made a claim to the Judicial Pay Claims Team or the Tribunal within three months of leaving that office, then the MoJ would invite the Tribunal to consider the passage of time after 30 November 2016 when assessing when the claim is in time.