Appeal No. UKEAT/0156/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 December 2017
Judgment handed down on 23 March 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MR J DOWOKPOR — APPELLANT

MINISTRY OF JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS BARBARA ZEITLER (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR CHARLES BOURNE (One of Her Majesty's Counsel) and MS JENNIFER SEAMAN (of Counsel) Instructed by: Government Legal Department Employment Team One Kemble Street London WC2B 4TS

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Claimant was a part-time fee-paid judicial office holder who claimed a pension following the litigation in **O'Brien v Ministry of Justice**. His claim was presented more than five years out of time. In deciding whether it is just and equitable to extend time for bringing a claim under the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** the Employment Judge erred in treating as conclusive, in holding to be unreasonable delay after the Claimant first learned of the possibility of bringing a claim, his view that solicitors were not negligent when advising in 2011 that his claim would be out of time. The Claimant had not been advised that he could apply to have the time limit extended on just and equitable grounds. The Employment Judge erred in failing to decide whether such ignorance was the or a reason for the delay and having regard to the advice from the solicitors whether such ignorance was reasonable (**Averns v Stagecoach** UKEAT/0065/08 considered). Further, the Employment Judge erred, as he had in **Bowden v Ministry of Justice** UKEAT/0018/17, in relying on his decision in **Miller v Ministry of Justice** to dismiss the application when there were material differences between the facts relevant to the Claimant and those whose applications for an extension of time were dismissed in **Miller**. Appeal allowed. Application remitted to a differently constituted Employment Tribunal.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. This appeal raises the issue of whether Employment Judge Macmillan ("the EJ") erred in the exercise of his discretion in dismissing the application by Mr Dowokpor to extend on the grounds that it was just and equitable to do so the time for bringing proceedings to claim redress for denial of access to a judicial pension on the grounds of his part-time status as a fee-paid Judge. Mr Dowokpor ("the Claimant") appeals from the dismissal of his application and claim by the Judgment of the EJ sent to the parties on 20 July 2016.

2. The claim made by the Claimant was one of many made by part-time fee-paid judicial office holders for pro rata pension rights given by the Ministry of Justice ("the Respondent") to salaried judicial office holders.

3. As is now well known it was proceedings brought by a Recorder, Mr Dermod O'Brien QC and his ultimate success, which led the way for large numbers of claims by retired and existing part-time fee-paid judicial office holders. These claims have been heard by Employment Judge Macmillan who has considerable experience in handling multiple claims.

4. The **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("the PTW Regs") apply to the claim brought by the Claimant. Regulation 8 provides:

> **"(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 (or, in a case to which regulation 13 applies, six 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."**

Outline Relevant Facts

5. The Claimant retired after fourteen years of service as a part-time fee-paid Judge on 27 July 2007. He heard Child Support, Disability and Incapacity Appeals. The primary time limit for commencing his claim for a pension expired on 27 October 2007.

6. The EJ recorded that:

> **"3. … The whole of his [the Claimant's] argument that it would be just and equitable to extend the time, centres around an intervening event in the late summer or early autumn of 2011. …"**

That event was receipt of a communication from the SSCSA fee-paid Tribunal Judges/LQPN pensions group dated August 2011. The communication referred to the case of **O'Brien v Ministry of Justice** stating that it was understood that pending the outcome of the appeal in the Supreme Court after a reference back from the Court of Justice of the European Community:

> **"… any fee-paid tribunal judge approaching retirement who wishes to apply for a judicial pension should issue protective proceedings in the Employment Tribunal before retirement or within three months thereafter because any later claim is likely to be out of time."**

The communication informed readers that the SSCSA were not able to provide advice but stated that Mr O'Brien's solicitors, Browne Jacobson LLP, offer a fixed fee service to fee-paid Judges who wish to start an action with a view to having it stayed, and at a reduced fee of £63 plus VAT for submission of those who wish to join a multiple group.

7. The EJ held:

> **"11. Mr Dowokpor may well have had no knowledge of *O'Brien* until he received the paper from SSCSA fee-paid Tribunal Judges at a date towards the end of August 2011 but it looks as though he delayed possibly a month before doing anything about it. …"**

8. The Claimant contacted Browne Jacobson in late September 2011. They sent a letter with forms. Their letter of 27 September 2011 informed the Claimant that multiple claims are only appropriate for Judges if:

> **"you have not retired as a judge or you retired on or after 1 July 2011."**

The fee for those who satisfied the criteria for inclusion in the multiple claims was £63 plus VAT.

9. The Claimant completed some information on the Browne Jacobson form but did not confirm, as he could not, that he had not retired as a Judge or retired on or after 1 July 2011. He gave the date of his retirement as 27 July 2007. The Claimant sent the completed form to Browne Jacobson with a cheque for £63 plus VAT for joining the multiple claims. On 5 October 2011 the solicitors wrote to the Claimant:

> **"I note that you retired in July 2007. Unfortunately, it is necessary to make a claim within three months of the date of retirement and, therefore, I regret that I will be unable to progress your claim further.**
>
> **Thank you very much for your interest in this matter, however, and I return your cheque for £75.60. I apologise that I am unable to assist you further in this matter."**

10. The Claimant said that he was devastated when he received this letter from Browne Jacobson.

11. The Claimant was not contacted by Browne Jacobson again until 19 April 2013 when they suggested that they now took a more optimistic view. The EJ held that they considered:

> **"3. … it may well be that proceedings commenced within a very narrow window after that date, might be either in time or would be eligible to have the time extended on just and equitable grounds. …"**

The Claimant commenced proceedings within about fourteen days.

The Judgment of the Employment Judge

12. The EJ accepted at paragraph 3 that the Claimant had not heard of the **O'Brien** litigation until he was alerted to its existence by the communication from the SSCSA fee-paid Tribunal Judges/LQPN pensions group in August 2011. He observed at paragraph 11 that it looks as though he delayed possibly a month before doing anything about it.

13. The Claimant criticised Browne Jacobson for stating in 2011 that they could not act for him as he had retired in 2007. The EJ considered that this criticism was unjustified. He held at paragraph 7:

> **"7. … He must have known, if he had paid any attention to the documents that he received, that he was roughly speaking [four] years out of time by the time he instructed Brown[e] Jacobson, a proposition which I think he now accepts. Brown[e] Jacobson were therefore quite clearly and unarguably not negligent when advising him that his claim was out of time and they were in my judgment acting entirely appropriately in returning his money to him. They could have laid themselves open to charges of acting improperly had they taken his money believing the claim to have been hopeless. In their belief that the claim was hopelessly out of time they were entirely justified. That was the law then and it is the law now."**

14. The EJ held that the cases of Mrs Miller and Mr Robins who had contacted Browne Jacobson and whose claims they had successfully pursued were distinguishable. The EJ held at paragraph 8:

> **"8. … Mr Dowokpor was about four years out of time with no story to tell to explain why. Mr Robins was six weeks out of time and Ms Miller, three months out of time but with a history of catastrophic health problems. There are obvious differences - Mr Robins and Ms Miller, Brown[e] Jacobson correctly surmised, both had a very real prospect of persuading a Tribunal that it would be just and equitable to extend time. Mr Dowokpor did not."**

15. The EJ held at paragraph 10:

> **"10. … There is nothing really in Mr Dowokpor's background between 2007 and 2011 that would allow me to say it is just and equitable to extend time. At paragraphs 46-61 of *Miller & Others*, I dealt at length with both the law and the principals [sic] to be applied when deciding whether it would be just and equitable to extend time. The Employment Appeal Tribunal has held that my explanation of the law and the principals [sic] and my application of them were correct. I adopt what I said in those earlier proceedings."**

16. Further the EJ held that there was nothing preventing the Claimant from commencing proceedings or making necessary enquiries about whether proceedings might be appropriate. The EJ held that he knew all the relevant facts. He was aggrieved at not receiving a pension but did nothing about it. Nor did he start proceedings himself when Browne Jacobson told him in 2011 that they could not act for him.

17. The EJ observed at paragraph 12 that this claim was hopeless when the Claimant instructed Browne Jacobson in 2011. If proceedings had been issued then "*on the face of it [they] were doomed to fail*".

18. For all those reasons the EJ dismissed the application to extend time.

The Grounds of Appeal

Ground 1

19. Ms Zeitler contended that the EJ erred in failing to attach significance to the Claimant's ignorance until 2011 of his right to bring a claim for not being provided with a pension.

20. The EJ accepted that the Claimant had not heard of or may well have had no knowledge of the **O'Brien** litigation until August 2011. However he held that there was nothing in the Claimant's background between 2007 and 2011 that would allow him to say that it was just and equitable to extend time. Ms Zeitler contended that this approach is inconsistent with the judgment of the same Employment Judge in the case of Mr Robins in paragraphs 59 and 60 of **Miller & Others v Ministry of Justice** Case No 1700853/2007 & others, 2 January 2014.

21. Mr Robins retired on 15 October 2012. He was unaware of the **O'Brien** litigation until he read an article in the Law Society Gazette on about 13 February 2013 by which date his claim was already out of time. On learning of **O'Brien** Mr Robins immediately researched the case and contacted Browne Jacobson who issued a claim on 26 February 2013.

22. The same argument was raised by the Respondent in the claim of Mr Robins as it did before the ET in this case. It was said that as a fee-paid Judge he had known that he was treated less favourably than a salaried Judge but took no steps to ascertain whether he might have a remedy. He could have obtained specialist advice.

23. Ms Zeitler submitted that the relevant facts relating to treatment of the period of time up to the respective dates of knowledge by the Claimant and by Mr Robins of **O'Brien** that they may be able to bring a claim are materially indistinguishable. In the case of Mr Robins the EJ held that failure to act before learning of **O'Brien** was no bar to the extension of time to bring a claim. The EJ held that the areas of law in which he practised as a Deputy District Judge (Civil) made it understandable why Mr Robins might not have been aware of the **O'Brien** litigation.

24. The Claimant was not an employment lawyer. His judicial role was hearing Child Support, Disability and Incapacity Appeals. As in the case of Mr Robins the EJ accepted that he had not heard of **O'Brien** until it was drawn to his attention, in his case in August 2011.

25. The EJ referred to the fact that the Claimant was four years out of time when he learned of his right to make a claim whereas Mr Robins was only six weeks out of time. Ms Zeitler submitted that the EJ was wrong to say the Claimant had "*no story to tell to explain why*" his

claim was four years out of time. His reason was the same as that given by Mr Robins. He did not know that he had a right to bring a claim to comparable pension rights as those enjoyed by salaried Judges.

26. Ms Zeitler submitted that on the approach adopted by the EJ in the case of Mr Robins, if the Claimant had commenced proceedings in 2011 he would have been granted a just and equitable extension.

27. Ms Zeitler contended that the EJ erred in failing to consider and decide whether the Claimant was reasonably unaware of his right to bring a claim in respect of a pension until he was contacted by SSCSA fee-paid Tribunal Judges/LQPN pensions group in 2011. The relevance to the decision where it is just and equitable to extend time for bringing a complaint of whether a claimant is reasonably unaware of that right is stated by the Employment Appeal Tribunal ("EAT") in **DPP v Marshall** [1998] ICR 518 at pages 527H-528A. The EJ had accepted that the Claimant was unaware of his right to bring a claim until 2011. It was submitted that the EJ erred in holding in paragraph 8 that the Claimant had "*no story to tell*" to explain the delay in four years before being contacting solicitors. Reasonable ignorance of his right to claim is an explanation which should have been taken into account.

28. Counsel submitted that the EJ erred in relying on paragraphs 46 to 61 of his judgment in **Miller** to conclude at paragraph 10 that there was nothing in the Claimant's background between 2007 and 2011 that would allow him to say that it was just and equitable to extend time. In **Miller** the EJ held at paragraph 51 that all the lead claimants apart from Mr Robins and Mr Wain had become aware of the **O'Brien** litigation some years prior to the commencement of proceedings. Most of the lead claimants in **Miller** were in post in 2008. At

paragraph 51 the EJ held that he would find it difficult to accept that a Judge in post all that time could not have been aware of the **O'Brien** litigation, or that they "*most certainly should have been aware of it*" as their professional bodies were taking leading counsel's opinion. The Claimant was not in post in 2008. He had retired in 2007. It was not held by the EJ that he was aware or should have been aware of the **O'Brien** litigation or the legal advice given to Judges before he was contacted by the SSCSA/LQPN organisation in August 2011. He then contacted Browne Jacobson within a month.

29. Ms Zeitler submitted that the position of the Claimant was comparable to that of Mr Bowden. In **Bowden v Ministry of Justice** UKEAT/0018/17, 25 August 2017, HH Judge Richardson in the EAT held that the EJ in the case of Mr Robins had not regarded the fact that he must have known since shortly after his appointment that he did not have a pension and full-time District Judges did, as in any way decisive. Further, HH Judge Richardson held at paragraph 44 that both knowledge of relevant facts which could give rise to a claim and also knowledge of the existence of a legal right to pursue a claim in respect of those facts were to be taken into account in deciding whether it was just and equitable to extend time to bring a claim.

30. Ms Zeitler also relied upon the judgment of the EAT in **Averns v Stagecoach in Warwickshire** UKEAT/0065/08, 16 July 2008, in which in considering the "not reasonably practicable" test for extending time in unfair dismissal cases, Mr Justice Elias P (as he then was) approved a dictum of Brandon LJ in **Wall's Meat Co Ltd v Khan** [1978] IRLR 499 and page 503 in which he held:

> **"48. … 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 enquiries as to how, and within what period, he should exercise it. …"**

Ms Zeitler contended that if ignorance of the right to bring a claim was reasonable, the length of that ignorance causing delay was immaterial. Therefore the EJ erred in distinguishing the case of Mr Robins from that of the Claimant.

31. Mr Bourne QC for the Respondent listed seven considerations to be taken into account by the ETs in deciding whether to exercise their discretion to grant an extension of the time within which to present a claim. These were largely uncontroversial.

1. It is established by **Robertson v Bexley Community Centre** [2003] IRLR 434 that the burden is on a claimant to show that the time limit for presentation of a claim should be extended on a just and equitable basis.
2. It was emphasised by the Court of Appeal in **DCA v Jones** [2008] IRLR 128 that all the circumstances of the case are relevant.
3. It is not a requirement for the ET to go through all the matters listed in section 33 of the **Limitation Act 1980** (**Southwark LBC v Afolabi** [2003] ICR 800 at page 811 paragraph 33).
4. If the only reason for delay is a wholly understandable misapprehension of the law, that is relevant (**British Coal Corporation v Keeble** [1997] IRLR 336 paragraph 23).
5. Reasonable ignorance of the right to bring a claim and mistaken advice may render it just and equitable to extend time (**DPP v Marshall** [1998] ICR 518).
6. There is a need for legal certainty.
7. The length of delay before bringing a claim is material (**Afolabi** paragraph 45, **Bowden** paragraph 45).

32. Mr Bourne QC recognised that the EJ's conclusion that the Claimant had "*no story to tell*" in respect of delay in presenting a claim up to 2011 was "not a happy phrase". Counsel rightly said that this was not a good way of summing up the Claimant's case. The phrasing was "infelicitous".

33. Counsel contended that the EJ did not err in contrasting the case advanced by the Claimant with that of Mr Robins. Mr Robins was out of time by only six weeks. He had no relevant knowledge of his right to bring a claim and acted extremely promptly once he did. By contrast the Claimant was four years out of time when he learned of the right to bring a claim. The Claimant did not fall within the criteria for inclusion in the Browne Jacobson multiple claims and the Claimant did not come forward with anything which would enable them to advise that he may apply for a just and equitable extension of the time limit. Mr Bourne QC submitted that this was the permissible conclusion of the EJ. The Claimant sought no further legal advice after the rejection letter in 2011 and before Browne Jacobson contacted him again in 2013.

34. Mr Bourne QC recognised that if Browne Jacobson were at fault in not advising pursuit of a claim in 2011 this may have provided a reason for delay. However in light of the Claimant not providing information to them which could support a just and equitable extension the EJ did not err in not regarding the solicitors to be at fault.

Ground 2

35. Ms Zeitler submitted that the EJ erred in law in failing to appreciate that the advice given by Browne Jacobson in 2011 was inaccurate and incomplete. Counsel contended that the

A solicitors should have told the Claimant to begin proceedings and apply for a just and equitable extension.

B 36. Counsel contended that the EJ erred in holding at paragraph 7 that the solicitors acted entirely appropriately when returning the Claimant's money to him and in holding that their belief that the claim was hopelessly out of time was entirely justified. Browne Jacobson's letter of 5 October 2011 failed to inform the Claimant that he could apply for an extension of the time

C limit and that an EJ would decide whether it would be just and equitable to do so in the circumstances.

D 37. Mr Bourne QC contended that Browne Jacobson's letter of 5 September 2011 should have caused alarm bells to ring for the Claimant. He was told that there was a three month time limit after retirement within which a claim must be brought. It was submitted that the EJ did

E not err when commenting that the solicitors were clearly and unarguably not negligent.

38. It was submitted that the EJ was entitled to comment in paragraph 11 that the Claimant did nothing when Browne Jacobson returned his money. He did not start Tribunal proceedings

F himself or take the matter further at all.

Ground 3

G 39. Ms Zeitler contended that the EJ placed excessive reliance on his generic judgment to the exclusion of properly balancing the interests of justice in the Claimant's case.

H

40. At paragraph 10 the EJ adopted what he said in paragraphs 46 to 61 of **Miller & Others** commenting that the EAT had held that his explanation of the law and the principles and his application of them were correct.

41. Ms Zeitler contended that there were important differences between the factual basis for the generic claims and that of the Claimant. At paragraph 51 of **Miller** the EJ held that all the lead claimants apart from Mr Robins and Mr Wain had become aware of the **O'Brien** litigation some years prior to the commencement of proceedings. The Claimant was not aware of the **O'Brien** proceedings until contacted by the SSCSA fee-paid Tribunal Judges/LQPN pensions group in 2011. Unlike many of the lead claimants the Claimant was not in post at the time of the **O'Brien** litigation. The EJ in **Miller** held that the lead claimants should have been aware of the litigation as their professional bodies had taken counsel's opinion.

42. Ms Zeitler submitted that unlike in the case of the Claimant, in **Miller** it appears that none of the lead claimants had been given mistaken advice about the law. At paragraph 52 the EJ proceeded on the basis that he had little doubt that the Council of Immigration Judges and the Council of Employment Judges had been given advice that the fee-paid Judges had a good case but the issue would probably have to go to Europe to establish it. The EJ observed that if claimants had received an adverse opinion from counsel, that would have been relied upon in their application to extend time in which to bring their claims.

43. Ms Zeitler submitted that the Claimant had received an adverse opinion from Browne Jacobson. The EJ himself was of the view that the claim was "hopeless" in 2011. The Claimant should not be penalised for not putting in a claim in 2011 which solicitors told him

A was out of time and the EJ held was bound to fail. This was a different factual position from that of the generic claimants.

B 44. Ms Zeitler submitted that the EJ erred in adopting what he said in the **Miller** proceedings when the facts relating to the generic issues considered in the EAT were different from those in the Claimant's case.

C 45. Further Ms Zeitler contended that the EJ failed to consider or balance the prejudice suffered by the Claimant in not being able to pursue his claim against that of the Respondent if the claim were permitted to proceed.

D 46. Mr Bourne QC contended that by adopting what he said in **Miller** the EJ had incorporated the balancing exercise which he had undertaken in the generic cases. Counsel

E referred to the judgment of the EAT in **Miller** UKEAT/0003/15 in which Mrs Justice Laing held at paragraph 35:

> **"In my judgment the EJ was not required to say more about relative prejudice than he did. It is clear from the last sentence of paragraph 57 that he was alive to the prejudice which the Claimants would suffer if time was not extended, and that he took that into account. He was also entitled to take the view he expressed in paragraph 55 that the Respondent did not have to show specific prejudice."**

F

Counsel contended that the facts relevant to the case of the Claimant did not give rise to special considerations of prejudice.

G 47. Counsel for the Respondent contended that the EJ was entitled to conclude that the Claimant's case was not materially distinguishable from those the subject of the generic

H decision in **Miller**. Although until 2011 the Claimant lacked the knowledge that he was entitled to bring a claim, twenty months passed during which he had such knowledge before he brought

a claim in 2013. Mr Bourne QC submitted that the EJ did not err in adopting paragraphs 46 to 61 of his decision in **Miller** in his decision in the Claimant's case.

Discussion and Conclusion

48. Ms Zeitler, counsel for the Claimant, and Mr Bourne QC, counsel for the Respondent, agreed that it is for a Claimant to establish grounds upon which an Employment Tribunal is persuaded to exercise their discretion to grant an extension of time for presentation of a complaint on just and equitable grounds. It has long been established as explained in such authorities as **Robertson v Bexley Community Centre** [2003] IRLR 434 that the Appeal Tribunal can only interfere with the decision of an Employment Tribunal on the exercise of their discretion on whether in all the circumstances it is just and equitable to consider an out of time complaint if the Tribunal have applied the wrong legal principles or have reached a decision which no reasonable Tribunal properly directing themselves on the material before them could have reached.

49. It is for the Claimant to establish that it is just and equitable for the primary time limit of three months to be enlarged in their case. In commenting on the judgment of Auld LJ in **Robertson**, in **Chief Constable of Lincolnshire Police v Caston** [2010] IRLR 327 Sedley LJ held at paragraph 31:

> **"31. … He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them."**

50. The factors to be taken into account in deciding whether to extend time for presentation of a claim on a just and equitable basis depend on the particular facts of the case. In **Department of Constitutional Affairs v Jones** [2008] IRLR 128 Pill LJ stated that the factors

mentioned by Smith J (as she then was) in **Keeble**, having referred to section 33 of the **Limitation Act 1980**:

> **"50. … are a valuable reminder of factors which may be taken into account. Their relevance depends on the facts of the particular case. …"**

Those factors include the length of and reasons for the delay, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

51. Another factor referred to in **Keeble** at paragraph 25 which may be taken into account is the need for legal certainty and finality in litigation.

52. If the relevant facts bring a claimant to the threshold of a just and equitable extension of time, an Employment Tribunal will consider the balance of prejudice to the parties of respectively granting or refusing an extension of time as well as the strength of the factors relied upon to support an extension. All relevant circumstances are to be taken into account in deciding whether to exercise a discretion whether to extend time on a just and equitable basis to bring a complaint.

53. Some prejudice will inevitably be caused in every case to a claimant in not being able to pursue a claim and to a respondent in having to meet a case which otherwise would be time barred. In many cases prejudice may be felt by one or both parties through the loss of material evidence, including witnesses no longer being available or their recollections dimmed. Further, there may in addition be specific prejudice suffered in particular cases.

54. The following facts of the Claimant's claim for pension under the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** were clear and unchallenged. The Claimant was a fee-paid part-time Judge. He did not sit in an employment jurisdiction but heard Child Support, Disability and Incapacity Appeals.

55. The Claimant retired on 27 July 2007 after fourteen years' service. He was aggrieved by not receiving a pension as he would if he had been a salaried Judge. He gave the Ministry of Justice new bank details and invited them to pay a pension into his account. He was told there was no pension to pay. The EJ accepted in his recitation of the facts that the Claimant had not heard of the **O'Brien** litigation:

> **"3. … until he was alerted to its existence by a communication from the SSCSA fee-paid Tribunal Judges/LQPN pensions group, the communication being dated August 2011. …"**

56. The Claimant contacted the solicitors referred to in the communication in September 2011. Their letter to him of 27 September 2011 informed the Claimant that from the information he had given he may be able to be part of one of two "multiple" claims. The multiple claims were said to be suitable for Judges who had not retired or retired on or after 1 July 2011. The fee for inclusion in a multiple claim was £65 plus VAT. The letter stated:

> **"… If you will not be able to fit within one of these multiples, we can still act for you, but claims will have to be individually completed and the fee will be £165 plus VAT."**

57. The Claimant completed and returned the enclosed form together with a cheque for £65 plus VAT. He stated that he had retired on 30 July 2007. Browne Jacobson replied on 5 October 2011 stating:

> **"I note that you retired in July 2007. Unfortunately, it is necessary to make a claim within three months of the date of retirement and, therefore, I regret that I will be unable to progress your claim further."**

His cheque was returned.

58. The Claimant was not contacted by Browne Jacobson again until 19 April 2013 when they suggested that proceedings commenced within a narrow window after that date might be either in time or would be eligible to have the time extended on just and equitable grounds.

59. The Claimant commenced proceedings within about fourteen days of the letter of 19 April 2013.

Ground 1

60. The EJ held at paragraph 8 that the Claimant was about four years out of time "*with no story to tell*" when his instructions were rejected by Browne Jacobson in September 2011. The statement by the EJ that the Claimant had "*no story to tell*" for the four year delay was not just "infelicitous", the description used by Mr Bourne QC. It was wrong. The reason for the delay was that the Claimant did not know that he could bring a claim as a fee-paid part-timer for less favourable treatment than a full-time pensionable Judge.

61. As was established in **Wall's Meat v Khan** reasonable ignorance of a right to bring a claim renders it not reasonably practicable to bring a claim for unfair dismissal. Brandon LJ observed:

> **"49. … 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."**

This approach is also to be applied to the "just and equitable" extension of time to bring discrimination claims. That ETs should consider ignorance of rights as an explanation for delay which they should take into account in deciding whether it is just and equitable to extend time for presenting a complaint of discrimination was explained by Elias P (as he then was) in

Averns. The EAT held at paragraph 23 that the ET erred by finding that Mrs Averns had not acted reasonably and promptly without specifically focusing upon her lack of knowledge of her right to bring a claim.

62. In another part-time judicial pension case, **Bowden**, HH Judge Richardson allowed an appeal by Mr Bowden from the refusal by the same EJ, Employment Judge Macmillan, to extend time for presentation of his complaint. HH Judge Richardson illustrated why ignorance of the right to bring a claim is a factor in favour of granting an equitable extension of time. Of the hypothetical claimant he held:

> **"42. … 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? …"**

63. In **Bowden** HH Judge Richardson held of the judgment of EJ Macmillan:

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

64. In my judgment Employment Judge Macmillan fell into the same error in the Claimant's case as he did in that of Mr Bowden. Having accepted that the Claimant was ignorant of his right as a part-timer to bring a claim for a pro rata pension given to full-time Judges, the EJ erred in failing to decide whether that ignorance was reasonable. It was not accurate to say that the Claimant had "*no story to tell*". He had retired before the **O'Brien** case was a topic of

A conversation and interest amongst Judges. His statement that he did not know about it until the circular he received in late August 2011 was not doubted by the EJ. The EJ erred by failing to decide on the facts whether that ignorance was reasonable up to the date he received the circular in August 2011 and if so what weight it should be given and why in deciding whether it was just and equitable to extend time.

B

65. Ms Zeitler contended that refusing to extend time for the Claimant was inconsistent with agreeing to do so in the case of Mr Robins. Both were ignorant of their rights to do so, in the case of the Claimant for longer than Mr Robins.

C

D 66. Whilst the reason both the Claimant until August 2011 and Mr Robins until just before its presentation did not present their claims in time was the same - they did not know they could bring a claim for not receiving a pension when full-timers were - in my judgment the extension of time in the case of Mr Robins does not in itself undermine the decision to refuse to do so in the case of the Claimant. Some of the material facts relevant to both applications for an extension of time were different. The Claimant was ignorant of his right to bring a claim up to August 2011 but not for the two years thereafter until its presentation in 2013. Ignorance was an explanation for delay by the Claimant only until August 2011. Further, in paragraph 60 of **Miller** the EJ relied upon the fact that Mr Robins presented his claim only six weeks out of time. The Claimant presented his more than five years out of time. Although the reason for delay is material to the exercise of the discretion whether to extend time, so too can be the length of the delay. As explained by Smith J (as she then was) in **Keeble** at paragraph 25:

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> **"25. … it was right for [the Employment Tribunal] to bear in mind the need for legal certainty and finality in litigation, but that was only one factor to take into account when they had to consider what was just and equitable in all the circumstances."**

H

67. Whilst the reason for their delay in presenting their claims may have been the same for part of the delay in the case of the Claimant, the EJ identified another distinguishing material factor between the cases of the Claimant and Mr Robins: the overall length of the delay and promptness in taking action, to support a difference in treatment of the two cases. The EJ did not err in failing to grant the Claimant's application for an extension of time for presenting his claim whilst granting that of Mr Robins.

Ground 2

68. Elias J (as he then was) in **Virdi v Commissioner of Police of the Metropolis** [2007] IRLR 24 at paragraph 40 held that when assessing whether time should be extended on a just and equitable basis, the fault of the Claimant is plainly relevant. The EAT held:

> **"40. … So if the failings are those of the solicitor and not the claimant that is highly material … The relevance of the explanation here is that it indicates that the blame for the late claim cannot be laid at Sergeant Virdi's door. That is an important consideration in the exercise of discretion."**

Referring to this passage in **Virdi** HH Judge Serota QC in **Benjamin-Cole v Great Ormond Street Hospital for Sick Children NHS Trust** UKEAT/0356/09, 5 January 2010, held at paragraph 32:

> **"32. … It seems to me as a matter of general principle, where a client places her case in the hands of an adviser who is held out as competent to conduct proceedings on her behalf, I would not expect that such litigant would reasonably be expected to do such things in ordinary circumstances as to issue proceedings herself."**

69. The EJ held at paragraph 7 that Browne Jacobson were clearly and unarguably not negligent when advising the Claimant in 2011 that his claim was out of time. The EJ held that the solicitors were entirely justified in their belief that the Claimant's claim was "*hopelessly out of time*". Yet at paragraph 11 the EJ held:

> **"11. … He did nothing when Brown[e] Jacobson returned his money. He did not start Tribunal proceedings by himself, he did not apparently take the matter any further at all."**

70. The EJ appears to have relied upon the Claimant not issuing proceedings himself after Browne Jacobson stated they would not act for him in 2011. In deciding that he had no good reason for delaying after 2011 the EJ erred. The question for the EJ was what was the reason for the further delay and was it reasonable. If the reason were considered reasonable the EJ should then consider all relevant circumstances in deciding whether the Claimant has established that it is just and equitable to extend the time limit of three months.

71. The EJ made no finding of fact as to why the Claimant did not issue proceedings himself after Browne Jacobson returned his cheque in 2011. In my judgment the correct approach to the significance of not issuing proceedings after Browne Jacobson returned the cheque in 2011 is neither that advocated by Ms Zeitler nor that of Mr Bourne QC. The action of the solicitors did not absolve the Claimant of all responsibility for not issuing proceedings before 2013 nor did it inexorably lead to a negative answer to the question of whether the Claimant had a reasonable excuse for delay after 2011.

72. The Claimant had completed the Browne Jacobson form and submitted a sum in payment as if he were part of the multiple claim when it is strongly arguable that he should have known he was not. He had been informed that the multiple was for those still in post or within three months of retirement. Those claimants had no need of a just and equitable extension to the time for presentation of their claims. It could be said, as did the EJ, that Browne Jacobson did nothing wrong in returning the Claimant's cheque. However it is also arguable that faced with an unqualified statement from experienced solicitors that it was necessary to make a claim within three months of retirement, it was reasonable for the Claimant to take no further action himself. It also may be contended that by not referring in their letter of 5 October 2011 to the possibility of applying for a just and equitable extension to the time limit,

A the solicitors gave incomplete advice. By that date, in July 2010 the Supreme Court had referred questions relevant to the **O'Brien** case to the CJEU. The issue of whether part-timers were entitled to a pension was very much alive in 2011. The advice given by Browne Jacobson in 2011 was unqualified. However there was a possibility of lodging a claim and applying for a just and equitable extension of time for doing so. In my judgment the EJ erred in treating his opinion that Browne Jacobson were not negligent in telling the Claimant in 2011 that his claim would be out of time as a complete answer to the question of whether their advice should be taken into account in deciding whether the Claimant had a reasonable reason for the delay between 2011 and the lodging of his claim in 2013.

D 73. Whilst the Court of Appeal in **Wall's Meat** were considering a different statutory time limit test, that of "reasonably practicable", Elias P referred to it in **Averns** at paragraphs 19 and 20 in respect of ignorance of a right to make a disability discrimination claimas highly material in considering the just and equitable test. In **Wall's Meat** Brandon LJ considered that reasonable ignorance of a time limit should be taken into account in deciding whether it was reasonably practicable to make a claim in time. He held:

> **"47. … 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."**

In my judgment the EJ erred by failing to take into account not being advised of the possible extension of the time limit for bringing a claim in deciding whether delay after 2011 by the Claimant was explained and reasonable.

74. The EJ proceeded on the basis that Browne Jacobson advised the Claimant in 2011 that his claim was out of time. In my judgment the EJ further erred by failing to consider and decide why the Claimant did not present a complaint to an ET after the 5 October 2011 letter

from Browne Jacobson and whether that reason provided a reasonable excuse for not doing so. Such a decision is material to the reasonableness of delay in presenting a claim between 2011 and 2013.

Ground 3

75. As has long been established, judgments of ETs must contain sufficient findings of fact to enable parties to know why they have won or lost. Provided this requirement is satisfied there is nothing intrinsically wrong in incorporating, even by reference to paragraph numbers, a judgment given in another case. However this will not be appropriate if the relevant issues in the claim under consideration are different from those in the incorporated cases.

76. At paragraph 10 the EJ held:

> **"10. … There is nothing really in Mr Dowokpor's background between 2007 and 2011 that would allow me to say it is just and equitable to extend time. At paragraphs 46-61 of *Miller & Others*, I dealt at length with both the law and the principals [sic] to be applied when deciding whether it would be just and equitable to extend time. The Employment Appeal Tribunal has held that my explanation of the law and the principals [sic] and my application of them were correct. I adopt what I said in those proceedings."**

77. It is not clear why all of what the EJ said in paragraphs 46 to 61 of **Miller** was applicable to the case of the Claimant. Unlike most of the claimants in **Miller**, the Claimant did not know of the **O'Brien** litigation until August 2011. The findings by the EJ in **Miller** highlight that the relevant facts in those cases were different from those of the Claimant. The EJ held:

> **"57. … 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. …"**

78. In my judgment in relying on his earlier decision in **Miller** the EJ fell into error. An aspect of this error is the same as that identified by HH Judge Richardson in **Bowden**. The error is repeated by incorporating paragraph 50 of **Miller**. The judgment of HHJ Richardson at paragraph 45 clearly encapsulates the error.

> **"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."**

79. It is understandable and in some cases may be appropriate to incorporate by reference passages from a previous judgment. The EJ hearing this case has great experience and expertise in handling multiple and complex cases. However where the relevant facts are not all the same, the facts relevant to each case must be given individual consideration. It appears that this did not happen in the case of the Claimant.

Conclusion

80. Each ground of appeal succeeds. The error at the heart of each ground is the failure of the EJ to decide on the facts of this particular case in respect of the relevant periods the reason for the delay and whether in the light of that reason, the delay was reasonable. If the reason for the delay is found to be reasonable the EJ will decide, taking into account all relevant factors including the respective prejudice to the parties and the length of the delay, whether the Claimant has shown that it is just and equitable for time for presentation of his complaint to be extended in his case.

Disposal

81. The appeal succeeds. The Decision and Judgment of Employment Judge Macmillan dismissing the application by the Claimant for an extension of time for presentation of his claim and dismissing his claim is set aside.

82. This is not a case in which all the facts necessary to reaching a decision have been found. The EAT is not in a position to exercise its powers under section 35 of the **Employment Tribunals Act 1996** to substitute a decision.

83. For the reasons expressed by HH Judge Richardson in paragraph 51 of **Bowden** the claim is remitted to a differently constituted Employment Tribunal. In this case as in **Bowden** the EJ expressed himself in strong terms stating that the Claimant's case was hopeless when on the relevant tests there are sensible arguments both for and against an extension of time. The matter will be considered by a different Employment Judge and Tribunal who will make relevant findings of fact and form their own views on all aspects of the question of whether it is just and equitable to extend time for bringing the complaint. The new Employment Judge and Tribunal should not regard themselves as in any way bound by the generic views in **Miller**.