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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr T Bostock	**AND**	Ministry of Justice

Heard at: London Central **On**: 28 February 2019

Before: Employment Judge S J Williams (Sitting alone)

Representation
For the Claimant: In person
For the Respondent: Ms Seaman, of Counsel

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that the claimant is estopped from advancing the complaints in this claim, and the claim is struck out in its entirety as an abuse of the process of the tribunal.

REASONS

Introduction and preliminary application

1. The claimant, a qualified medical practitioner, sat as a fee-paid medical member in the Social Security Appeal Tribunal (latterly the Social Entitlement Chamber of the First-tier Tribunal) from 1992 until his retirement in 2018.

2. By this claim, accompanied by detailed particulars, presented on 4 June 2018, the claimant claims:

   a. That he was at all material times an employee of the respondent, and that he is entitled to a written statement of particulars of employment; and the claimant claims a declaration that was a member of the judiciary and compensation pursuant to the Employment Rights Act 1996;

   b. That he was a worker for the purposes of the EU Working Time Directive 2003/88 and the Working Time Regulations 1998, and that the respondent

failed to provide adequate facilities to enable him to exercise his right to paid annual leave and/or failed to pay him for the annual leave he took; and the claimant claims a declaration that he is entitled to holiday accrued but untaken and compensation pursuant to the 1988 Regulations and/or the Employment Rights Act 1996.

3. In its response the respondent asserts, by way of preliminary issues, that the claimant's above claims have already been raised in a previous claim presented by him on 27 August 2013 and subsequently dismissed (2204130/13), that the claimant is estopped from bringing the entirety of the present claim and that the present claim is an abuse of process.

4. This preliminary hearing has been convened to determine those preliminary issues.

5. By agreement, it was not considered necessary for the claimant to give evidence on oath. The tribunal considered the claimant's three undated witness statements and a further witness statement dated 14 February 2019, and was referred to a bundle containing pages 1-200 (including the skeleton arguments) and a bundle of fifteen authorities (separately indexed). The claimant and Ms Seaman had both prepared written skeleton arguments on which they elaborated orally.

6. At the outset of the hearing the claimant applied for an adjournment on the basis that he was not in an equal position, that he wanted more time to read the material presented by the respondent and, if necessary, wished to obtain legal advice.

7. The respondent objected to the claimant's application on the basis that directions had been given for this hearing on 26 November 2018, the claimant had legal advice before issuing his claim, skeleton arguments had been exchanged almost a week ago and the majority of the document in the hearing bundle emanated from the claimant.

8. The tribunal decided that the parties had had adequate time to prepare, that the case was ready to proceed and that no injustice would be caused to the claimant by proceeding today. The claimant's application for an adjournment was refused.

The Facts

9. I consider the appropriate starting point is to consider the ambit and history of the claimant's earlier claim (2204130/13) ('the 2013 claim'). That claim was presented by Messrs Leigh Day, solicitors, on behalf of the claimant and four other named claimants. As was indicated by the heading 'Grounds of Application for O'Brien Claim under PTWR', the 2013 claim formed part of a large body of litigation by fee-paid judges and members of tribunals against the present respondent in which a variety of claims were raised.

10. At paragraph 6 of the grounds it was pleaded that '[t]he claimants were/are therefore subject to a contract of employment or employment relationship with the Ministry of Justice and/or the Lord Chancellor.'

11. At paragraph 14 of the grounds it was pleaded that '[i]n addition the claimants did not receive paid annual leave in accordance with the Working Time Regulations 1998. They consider that they are entitled to paid annual leave in accordance with the Working Time Regulations 1998 and/or by comparison with comparable full-time judicial office holders who are entitled to paid annual leave.'

12. At paragraph 16 of the grounds it was pleaded that '[f]urthermore, the training days were not treated as a full day of service for the purposes of calculating the claimants' annual holiday entitlement.'

13. At paragraph 25 of the grounds it was pleaded that '[t]he complaint set out at paragraph 14 above in relation to paid annual leave is also contrary to the Working Time Regulations 1998.'

14. At paragraph 28 (i) of the grounds it was pleaded that 'failure to provide paid annual leave to the claimants … is …. a breach of the Working Time Regulations 1998; and that … they are entitled to (1) compensation for the failure to provide paid annual leave; and (2) paid annul leave.'

15. At paragraph 28 (v-vi) of the grounds it was pleaded that 'failure to provide correct holiday entitlement on a pro rata basis for training days sought above is a contravention of the Working Time Regulations 1998; and that for the period that they were or are fee-paid part-time judicial office holders, they are entitled to … compensation for holiday entitlement due but untaken.'

16. At paragraph 32 of the grounds it was pleaded that '[t]he claimants seek paid annual leave … holiday entitlement accrued but untaken, a full day's pay for each training day/course/conference they attended and to have these days treated as full days for the purposes of calculating holiday entitlement, and compensation for other payments due but not received.'

17. The claimant's 2013 claim was one of a large number presented to the employment tribunal and referred to collectively as '*O'Brien* claims'. On 3 June 2013 at a case management discussion Employment Judge Latham, President of the Employment Tribunals (England and Wales), gave directions in lead cases and further directed that other cases, including those received in future, be joined and stayed, subject to any application by an affected claimant for separate orders if thought appropriate (see the record of the case management discussion dated 4 July 2013 at paragraphs 3 and 47).

18. In accordance with those directions the claimant's 2013 claim was stayed. The claimant made no application for separate orders in his case.

19. At a preliminary hearing held on 10 October 2013 Employment Judge Macmillan directed that the issue of 'holiday pay including bother questions of

entitlement and quantification' would be determined at the hearing of *Miller and others* in December 2013.

20. The case of Dr Patricia Moultrie, a fee-paid medical member sitting in the War Pensions and Armed Forces Tribunal, was identified as one of the lead cases for medical members for the purposes of rule 36 of the Employment Tribunals Rules of Procedure. By a judgment sent to the parties on 14 November 2013 (Employment Judge Macmillan) Dr Moultrie's claim was dismissed. On the 14 December 2014 the Employment Appeal Tribunal upheld the judgment of Employment Judge Macmillan.

21. By a judgment sent to the parties on 2 January 2014 in *Miller and others* Employment Judge Macmillan found, inter alia, that, with one exception, the claims for holiday pay were 'entirely without merit' because 'all have been paid full holiday pay.' That was because fee-paid judges' remuneration is calculated, with minor exceptions, at 1/220th of the comparable salaried judge's salary. In the subsequent case of *Mistlin* (26 August 2016) Employment Judge Macmillan said that, had it been necessary, he would have found the respondent's notice on the judicial intranet notifying 'the judicial community as a whole' that the daily sitting fee for fee-paid judges included rolled-up holiday pay was an entirely appropriate method.

22. On 16 November 2016 the employment tribunal wrote to the claimant referring to his 'claim … complaining of your exclusion from the judicial pension scheme and making certain monetary claims,' and to the fact that 'your case was stayed behind that of Dr P A Moultrie and others whose cases were designated as lead cases under rule 36(1) for medical members for all tribunals.' The letter further referred to the dismissal of Dr Moultrie's case and the dismissal of the subsequent appeal, and concluded, 'As you did not apply in writing under rule 36(3) for an order that the decision in the lead cases should not apply to you, the decision is binding upon you and in consequence your claim is now dismissed.' A copy of the judgment dated 16 November 2016 dismissing the claimant's claim was enclosed.'

23. The claimant did not seek to challenge the dismissal of his claim whether by applying under rule 36(3), applying for a reconsideration, or by appealing.

Claimant's submissions

24. The claimant submits that he did not understand the effect of *Moultrie* on his non-pension claims, and that he had no intention of abandoning any of his employment rights.

25. Specifically relating to his holiday pay claim, the claimant states that he has never before raised the issue of part-time workers' entitlement to holiday pay, and asserts that *Miller* is not binding on him. Further, he does not accept that his daily fee included any element representing holiday pay, and was unaware of the respondent's notification on the judicial intranet. Further, he submits that, in the light of *King v The Sash Window Workshop Ltd and another*, *Miller* is no longer good law.

26. Concerning his claim to employment status, the claimant submits that it cannot be said that this argument could and should have been raised in the 2013 claim because the respondent had there conceded that the claimant had the status of a worker.

Respondent's Submissions

27. Ms Seaman submits that all matters raised in the present claim either were raised, or could and should have been raised, in the 2013 claim.

28. It must have been obvious to the claimant that his entire claim was dismissed by the judgment of 16 November 2016, yet he did nothing by any of the means at his disposal to challenge that outcome.

29. In so far as an issue now raised was raised and disposed of in the 2013 claim, that amounts to an issue estoppel. Ms Seaman submits that that applies to the holiday pay claim because it was raised in the 2013 claim and disposed of in *Miller and others* and because the claimant and Miller are privies. Alternatively, Ms Seaman submits that by his present claim the claimant seeks to mount a collateral attack on the decision in *Miller*.

30. In so far as an issue now raised was not raised, or not fully canvassed, in the 2013 claim, that amounts to *Henderson v Henderson* abuse of the process. Ms Seaman submits that that applies to the claim pursuant to section 1 of the Employment Rights Act because the existence of a contract of employment was pleaded in the 2013 claim and any matter arising from that should have been pursued in that claim.

Discussion and Conclusions

31. I deal firstly with the claims relating to holiday pay. The relevant allegations are set out in the Details of Complaint accompanying the present claim under the heading 'Claims arising – Failure to Provide Statutory Paid Holiday' at paragraphs 37 to 46 (see also paragraph 2(b) above). On alternative bases the claimant claims holiday pay.

32. In the 'Grounds of Application' accompanying the 2013 claim, under a heading 'PAID ANNUAL LEAVE' between paragraphs 14 and 32 *passim*, similar allegations are set out (see also paragraphs 11-16 above), culminating in the prayer at paragraph 32 '[t]he claimants seek paid annual leave'.

33. In my judgment, therefore, the claimant is clearly not correct when he asserts that he has 'never been aware of the rights of part-time workers to be granted holiday pay and [has] never before raised the issue' (see claimant's third witness statement, paragraph 4).

34. Employment Judge Macmillan directed that the claims for holiday pay would be determined by hearing the claims of lead claimants in *Miller and others*,

where they were resoundingly rejected. At that hearing the claimant's then solicitors, Leigh Day, represented a group of lead claimants.

35. Pursuant to rule 36(1) of the Rules of Procedure, the claimants in *Miller* were designated lead claimants whose claims gave rise to issues identical to those raised in many other claims, including the claimant's 2013 claim. Those other claims, including the claimant's 2013 claim, were stayed pending the result in *Miller.* The claimant made no application pursuant to rule 36(3) that his claim should be dissociated from *Miller* or otherwise treated differently.

36. In *Qantas Cabin Crew (UK) Ltd v Ms C Alsopp and others* 2013 WL 5338212, HH Judge McMullen set out at paragraphs 24-6 the authorities supporting his conclusion that the persons under consideration in that case were privies. In my judgment the like reasoning applies to this claimant and the lead claimants in *Miller.* I reject the claimant's argument that *Miller* is not binding on him. It does not seem to me to be germane to the present proceedings whether, ultimately, *Miller* proves to be good law or not. A litigant does not have the luxury of initiating the same claim a second time in order to take advantage of a favourable change in the law if so to do would otherwise be an abuse of the process or contrary to an estoppel.

37. Alternatively, the claimant now seeks to attack the *Miller* decision when he had full opportunity of contesting it at the time, either by applying for a separate consideration of his case (under rule 36(3)), or by applying to be a lead claimant, or by application for a reconsideration, or by appealing: *Martineau v MoJ* [2015] ICR 1122, or by opposing the dismissal of his case in 2016.

38. In *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, Lord Diplock stated:

> *The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.*

39. In my judgment this claimant is in the same position as the intending plaintiff in *Hunter.* I find that either because the decision in the lead claims in Miller was binding on the claimant or, alternatively, if it was not, because the claimant took no step to contest or challenge that decision at the proper time, the claimant is now estopped from pursuing his claims relating to holiday pay in the present claim, and that it would be an abuse of the process for him so to do. The claimant's claims relating to holiday pay are therefore struck out.

40. I turn to the claim under section 1 of the Employment Rights Act 1996. The relevant allegations are set out in the Details of Complaint accompanying the present claim under the heading 'Claims Arising – Employment Status' at paragraphs 26 to 36 (see also paragraph 2(a) above). The claimant claims a

statement of employment particulars and an award of compensation for failure to provide the same.

41. In the Grounds of Application accompanying the 2013 claim at paragraph 6 it is alleged that '[t]he claimants were/are therefore subject to a contract of employment … with the Ministry of Justice and/or the Lord Chancellor.' No specific prayer follows from this allegation.

42. There can be no doubt, in my judgment, that the claimant, who was in 2013 represented by solicitors, could at that time have raised any claim he wished which was founded on the pleaded allegation that his relationship with the respondent was governed by a contract of employment. The question is whether his failure to do so renders such a claim in the present proceedings an abuse of process.

43. The starting point must be the statement of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 that 'the court requires the parties to … litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward … but which was not …'

44. In *Johnson v Gore Wood* [2002] 2 AC 1 (HL) Lord Bingham, considering *Henderson*, said that it went too far to say that 'because a matter could have been raised in earlier proceedings it should have been,' preferring 'a broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is abusing or misusing the process of the court by seeking to raise before it the issue which could have been raised before.'

45. There is no doubt in my mind that the claimant understood that the judgment of 16 November 2016 – which, incidentally, further alerted him to the possibility of an application under rule 36(3) – was a judgment dismissing the whole of his case. The covering letter of 16 November referred expressly to 'exclusion from the judicial pension scheme *and making certain monetary claims'* (emphasis added).

46. I cannot find in this case any 'special circumstances' (per Wigram V-C) which ought to lead to the mitigation of the rule in the way suggested by Lord Bingham. The claimant, when represented, had the fullest opportunity to ventilate and argue any claim founded upon an alleged contractual relationship – and even went so far as to plead such a relationship - in his 2013 claim. The claimant's private interests were thus fully protected. The public interest that there should be finality in litigation, and that respondents should not have to answer the same claim on more than one occasion leads me to the view that the claimant should not be permitted a second opportunity to advance this claim. In my judgment, to bring forward those matters in this present claim amounts to an abuse of the process of the tribunal. The claimant's claims pursuant to the Employment Rights Act are therefore struck out.

47. The claimant's claim is struck out in its entirety.

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Employment Judge S J Williams

Dated: …21 March 2019……..……

Judgment and Reasons sent to the parties on:

……....26 March 2019.....

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For the Tribunal Office