Neutral Citation Number: [2022] EAT 126

Case No: EA-2021-000977-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 July 2022

Before:

HIS HONOUR JUDGE SHANKS

- -

Between:

MINISTRY OF JUSTICE **Appellant**
- v -
MS J MCGRANDLE **Respondent**

- -
- -

Alexander Line (instructed by **Government Legal Department** for the **Appellant**
Jonathan Cook (instructed by **Beers LLP**) for the **Respondent**

Hearing date: 26 July 2022

- -

TRANSCRIPT OF JUDGMENT

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SUMMARY

Practice and Procedure/Part Time Workers

The Claimant was a retired chairman in the Residential Property Tribunal Service. On 20/10/11 she brought a claim against the MOJ as part of the O'Brien/Miller litigation claiming that in receiving no pension she was being subjected to discrimination as a part-time worker. Her claim was stayed pending the outcome of other cases.

On 25/2/16 she withdrew her claim and a judgment was issued dismissing her claim pursuant to rule 52 of the ET Rules on 16/3/16.

Following relevant decisions of the Supreme Court and the CJEU, on 6/3/20 she applied for reconsideration of the dismissal judgment. The reconsideration application was determined on the papers and a judgment issued by the EJ on 3/6/21 revoking the dismissal judgment. Part of the factual matrix considered by the EJ was that the Claimant's husband had died shortly before the dismissal of the claim.

The MOJ appealed against the EJ's judgment of 3/6/21 on a number of grounds and the Claimant cross-appealed on the basis that she had not unambiguously withdrawn the claim.

On the Friday before the hearing the Claimant's solicitors informed the MOJ that in fact her husband had died in 2010, a year before she had brought the claim and 5 or 6 years before she withdrew it. The EJ had therefore proceeded on a false factual basis put forward by the Claimant or her solicitors and the appeal was therefore allowed and the judgment of 3/6/21 set aside. Although it was unnecessary to decide other points raised in the appeal, some were arguable and in the circumstances the EAT remitted the reconsideration application to be heard de novo by the EJ.

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HIS HONOUR JUDGE SHANKS:

Introduction

1. This is an appeal by the Ministry of Justice ("MoJ") against a judgment of Employment Judge SJ Williams sitting in London Central which was sent out on 3 June 2021. EJ Williams decided on the papers to revoke a judgment of EJ McMillan sent out on 16 March 2016 which itself dismissed Mrs McGrandle's claims against the MoJ following her withdrawal of those claims. There is a cross-appeal by Mrs McGrandle by which she challenges the validity of the withdrawal of her claim.

2. Before going any further, I should make it clear that, like many judges of my generation, I was part of the so-called **O'Brien/Miller** litigation which arose out of my appointment as a recorder and part-time tribunal chair before my appointment to the circuit bench in 2009. As I will describe in a moment, the claimant's claim in this case arises in the same general litigation and I raised this matter with the parties at the outset but on objection was raised and it was agreed all round that I can continue to hear the case.

Background facts

3. Mrs McGrandle was born in 1936 and is now 85 years old. She served as a part-time valuer chairman of the Residential Property Tribunal Service from 7 July 1981 until her retirement on 28 April 2008. She was not afforded any pension rights arising from that service.

4. On 20 October 2011 she brought proceedings against the Ministry of Justice on the same basis as those bringing the so-called **O'Brien/Miller** claims based on the allegation that this amounted to discrimination against her as a part-time worker. The MoJ in response relied, among other points, on

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an allegation that her claim was out of time and that issue at least will remain in play in her particular case, whatever happens today. Her claim was stayed, as were many others, pending resolution of certain lead cases. On 25 February 2016, the claimant wrote to the tribunal an email which is at page 77 of the bundle which said as follows:

> **Dear Mr Parris**
>
> **Kindly note that on 25 October 2015 I informed Julian Parry at Beers Solicitors that I was withdrawing from the class action and I asked him to inform you accordingly.**
>
> Mr Paris responded later the same day as follows:
>
> Dear Ms McGrandle,
>
> Unfortunately, we had not received notification of your withdrawal from Beers Solicitors. However, I will treat this email as notification of your withdrawal. A judgment dismissing the claim will be issued in due course.
>
> I am copying the Respondent's solicitors in to this email.
>
> Yours sincerely
> M Parris.
> …

As indicated and as is normal under the **Rules of Procedure**, on 16 March 2016 a judgment was issued which simply said "The proceedings are dismissed following a withdrawal of the claim by the claimant."

5. Following that judgment, there were a number of developments in the **Miller/O'Brien** litigation. They are listed at page 6 in the Ministry of Justice's skeleton argument for the purposes of this appeal. First, by a reserved judgment dated 12 July 2017, the Supreme Court decided that a reference should be made to the European Court of Justice in **O'Brien v Ministry of Justice (No.2)**. The question referred related to whether the effect of **Directive** 97/81/EC was to require periods of service prior to the deadline for transposing the **Directive** into domestic law to be taken

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into account when calculating the pension entitlement of a part-time worker. I have given the dates of the claimant's service and it will be seen that this decision would have been of significance in relation to her claim. Second, on 7 November 2018 the CJEU provided its ruling in the **O'Brien**, the effect of which was to answer the above question in the affirmative. Third, the Supreme Court handed down judgment in **Miller v Ministry of Justice** [2019] UKSC 60 on 16 December 2019. This confirmed that a part-time judge may properly make a claim regarding his/her pension rights during service or at the point of retirement. That was probably not particularly relevant to this claimant who had retired some time before she brought her claim.

6. On 6 March 2020, so just under three months after that Supreme Court decision, the claimant applied for a reconsideration and for the revocation of the judgment that had been issued on 16 March 2016 nearly four years before. The application was supported in the first instance by an email from Mrs McGrandle's solicitors dated 6 March 2020. After an introductory paragraph, there was a heading "Mitigating circumstances" and the first paragraph read as follows:

> **Before the dismissal of her claim, the Claimant's husband sadly passed very suddenly from a gastric haemorrhage. Due to the nature of his passing, the Claimant had no time to put any plans in place in relation to her late husband's estate. This in turn, left the Claimant very financially vulnerable. It was around this time that she feared escalating legal fees with no certainty of a successful outcome and thus instructed us to come off the record of the tribunal as her representative.**
>
> **At the time her claim was dismissed she was a litigant in person. She describes being under a lot of stress whilst dealing with her late husband's estate, as well as trying to grieve for her husband. The decision by the Tribunal to dismiss her claim was made during a very difficult and emotional time for the Claimant. The Claimant did not appeal as she could not afford legal advice and secondly there was no glimmer of hope on the horizon in terms of the lead case was not dealt with until sometime after her appeal period ended.**
>
> **The Claimant, during her time as a litigant in person, had nobody to advise her of the prospects in O'Brien and Miller and the impact this would have on her claim, as matters progressed and changed. We believe it reasonable to suggest that it would have been extremely difficult for a Claimant who had been retired from legal practice for some 9 years to accurately assess her prospects of success years before any judgment was to be passed down. The Claimant subsequently self-assessed her case and concluded that her case posed a serious financial risk with no guaranteed or foreseeable outcome, especially as Counsel's opinion up to the point she came off the record (and up until recently) was that the appeals were unlikely to succeed and**

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had a low chance of success.

Further, *Miller* was largely in its infancy as a case in 2016 and as a retired, recent widow, it would be unreasonable for her to be able to pour resources both financially, and in relation to her own time, into being fully involved in proceedings in which she thought her claim to be dismissed. Had the Claimant been represented, she would have realised the huge impact that *Miller* and *O'Brien* would have on her particular claim. Given the large number of other judges who had been retired for some years and acted as soon as they became aware and whose circumstances are currently being accepted by the MoJ, it is likely that the Claimant's claim would have been accepted and had a high prospect of success. Further, as soon as the Claimant became aware of the ruling in *Miller*, she acted quickly and reinstructed her representatives.

7. The employment judge dealt with the application to reconsider and to revoke the dismissal of the claimant's claim on the basis of written submissions. In paragraph 8 of his judgment, he referred to the terms of the email which I have just read and he said this:

The letter set out mitigating circumstances relating to the claimant's loss of her husband, who died shortly before her claim was dismissed, her difficult financial circumstances at that time and the fact that she was acting in person because she could not afford legal advice.

The judge extended time for the reconsideration application which, under the rules, should have been made within 14 days, rather than 4 years. He then set out the relevant rules (which I am not going to repeat) in particular rules 51, 52 and 70 of the **Employment Tribunal Rules** and he also referred to the relevant law at paragraphs 20 to 24. The reasons for his decision to revoke the dismissal judgment are really at paragraphs 26, 27 and 28 of his judgment:

26. I have dealt above with the question of time, and turn to deal with the parties' arguments on the merits of the application. I accept that the claimant's withdrawal was unambiguous, and that the tribunal was not obliged to make enquiries at the time. Those matters go to the correctness of the original decision to dismiss, which is not challenged before me, and with which in any event I have no power to interfere. But they do not mean that it is not in the interests of justice to reconsider when fresh, relevant information comes to light: Campbell.

27. That the claimant wrote to the tribunal in person in February 2016 supports her contention she was then acting without legal assistance, and probably had been for some time, though I cannot be certain exactly when she ceased to be represented. I accept that the claimant was in personal and financial difficulty at the time and that those matters affected her judgment. I have a high degree of confidence that if the material which is now put before me had been before an employment judge considering the claimant's withdrawal, he or she would have thought it not in the interests of justice to dismiss the claim at that time.

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> **28. It cannot in my judgment be an abuse of process to make an application expressly permitted by the tribunal's rules. I accept the respondent's submission that the litigation between the present parties had been finally concluded. That is the effect of the withdrawal: rule 51. That principle must be balanced against the prejudice to the claimant from the loss of a potentially valuable claim, a balance which, in my judgment, though not all one way, tells in favour of revoking the dismissal.**

8. There is a cross-appeal by the claimant which it is convenient to deal with first. She seeks to say that the claim was not in fact validly withdrawn in 2016. She says that the withdrawal was ambiguous because all that the email to the tribunal that she wrote said was that she had asked her solicitors to inform the tribunal that she was withdrawing from the class action

9. The first point taken against the cross-appeal is that this was not a point taken below in the tribunal. Paragraph 31 of the claimant's submissions put before the employment judge said this:

> **C became, for a short while, a litigant in person. C subsequently wrote to the Tribunal to withdraw her claim on 25 February 2016, in error and without knowledge of the consequences of withdrawal or the implications of staying her claim, whilst acting as a litigant in person.**

It seems from that, and there are other indications, that it was in fact the claimant's case that she had withdrawn her claim, albeit without understanding properly the consequences of doing so. The employment judge recorded the issues and what was said by the claimant at paragraph 13 of the judgment, stating:

> **The claimant contends that the judgment of 16 March 2016 should be reconsidered and relies on the following matters:**
>
> **(a) at the time she withdrew her claim she had suffered recent bereavement, was in financial difficulty and could not afford representation;**
>
> **(b) her withdrawal was irrational, made in error and without appreciating the consequences of a withdrawal as opposed to stay her claim;**
>
> …

At paragraph 26, as I have already read, the judge says, "I accept that the claimant's withdrawal was unambiguous." That part of paragraph 26 was a reflection of the position being put forward by the MoJ relating to a different point and I am quite clear that it was not in issue before the employment

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judge whether the withdrawal was unambiguous or not.

10. Given that conclusion and all the surrounding circumstances, this is not a case where the claimant should be allowed to run this point in the EAT. In any event, as indicated in argument, looking at the exchange of emails which I have read out, I can see no realistic basis for the suggestion that there was any ambiguity and, furthermore, in any event, as I have just read, the employment judge found as a fact that the withdrawal was unambiguous. So I am not allowing the point to be run, and I am quite clear that if it was run, it would fail. That is the cross-appeal.

11. The appeal raises six grounds. I can say very quickly that those based on the extension of time, the abuse of process and the suggestion that the employment judge's decision was perverse all seem to me hopeless and I am not really going to say any more about them.

12. However, there was a significant development in the case on Friday last, 22 July 2022. The claimant's solicitors wrote to the MoJ to inform them that in fact, contrary to the impression created before the employment judge, the claimant's husband died in 2010. That is a year or more before she started her claim and five or six years before she withdrew it, not, as the employment judge thought, shortly before her claim was dismissed. Given the basis of the employment judge's decision at paragraph 27 of the judgment and the way the application was advanced, that seems to me a very material factual error which was induced by either the claimant or her solicitors (it does not matter which). That is, in my judgment, a good ground for allowing an appeal in this kind of case, namely that the judge has taken into account something which is factually wrong which has been put forward by one of the parties and which is material.

13. Although there has been no formal amendment to the notice of appeal, I am quite satisfied that it sufficiently comes within the spirit of the appeal as originally contemplated and that I should

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allow the point to be advanced and, indeed, allow the appeal on the basis for this point and accordingly set aside the reconsideration decision. All are agreed that, if the reconsideration decision is set aside, the matter should be remitted to EJ Williams who has, as it happens, been assigned to deal with all this litigation because (I think I am right in saying) he has already retired and therefore has no possible conflict of interest.

14. That conclusion means that I do not need to decide the remaining grounds of appeal but I can say, I think, that there are some arguable errors that have been raised and that it would be in the interests of justice if the reconsideration exercise was undertaken by EJ Williams completely ***de novo*** taking into account any evidence or arguments which the parties see fit to advance hereafter.

15. I would also mention at point which seems to have been overlooked by the parties up till now and which could impinge on the decision on reconsideration: it seems to me arguable that, even if the dismissal were to be revoked, the original claim would remain "at an end" and that the claimant would need, if she was going to proceed with this matter, to start a new claim in any event. That could itself be relevant to the decision whether to revoke the dismissal judgment as well as introducing new factors into the general litigation.

16. As I said in argument, I also think it would be a good idea if all outstanding issues between Mrs McGrandle and the Ministry of Justice could be dealt with at one hearing at which she could, if so advised, give evidence on one occasion. Such a hearing could include the question of reconsideration of the dismissal judgment, any question of extending time for the claims and also could probably bring into play a new claim if the claimant was advised to bring such a claim in order to protect her position. Those, however, will all be matters for the employment judge to consider at a directions hearing, which I hope can be held as soon as possible.

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17. In the meantime, all I need to do is to allow the appeal and remit the reconsideration application to be considered ***de novo*** by EJ Williams.

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