EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew F Veitch

Respondent: Ministry of Justice

Preliminary Hearing at: Edinburgh **On:** 12th October 2017

Employment Judge: Mr J Macmillan (sitting alone)

Representation:
Claimant: Mr Colin Heggie WS
Respondent: Mr Charles Bourne QC

RESERVED JUDGMENT

It is just and equitable for Mr Veitch's monetary complaint to be considered by the Tribunal notwithstanding that it was presented after the primary time limit had expired.

REASONS

Issues and background

1. Mr Veitch is a serving, salaried, District Tribunal Judge, sitting in the Social Entitlement Chamber of the First-tier Tribunal. He has an in-time claim in respect of his exclusion from the Judicial Pension Scheme during his period of service as a part-time fee paid judge in the same jurisdiction. His claim is therefore one of the very large multiple of claims brought by fee paid judicial office holders under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 [PTWR] following the success of the challenge by Mr Dermott O'Brien QC (***O'Brien v. MoJ*** [2013] UKSC 6) to reg 17 PTWR, which excluded part-time judicial office holders from the protection afforded by the Regulations, and of his contention that judicial office holders were 'workers' for the purposes of the Regulations.

2. Although Mr O'Brien's claim was in respect of pension rights only, many but not all judicial office holders who subsequently brought Tribunal claims included

complaints in respect of a range of other discrepancies between their terms and conditions of appointment and those of their full-time comparators. These discrepancies, which have usually been referred to during the litigation as the monetary claims, included the rates paid for attendance at training days, for decision writing and the daily sitting fee, non-payment of London weighting, holiday pay etc. During the course of the litigation many of the claimants who, like Mr Veitch had brought only pension claims, applied to amend their claims to include one or more monetary claim. In all such cases the application was granted subject to the respondent's right to take out of time points at a later date if so advised although in many cases the amendments were not out of time.

3. The respondents now wish to take the out of time points. They arise only in cases where the application to amend was made more than three months after the claimant had ceased to hold the fee paid judicial office in question (***Miller and others v. MoJ*** case number 1700853/2017 judgment dated 30th December 2013). Some 10 cases are now affected by this issue although originally the number was much higher. As each case is likely to some extent at least to be dependent on its own facts, Mr Veitch's case is not a lead claim for the purposes of rule 36 of the Employment Tribunal Rules of Procedure 2013 and the outcome will therefore not be binding on the parties in the other similar claims. It has however been informally designated as a 'beacon' case in the sense that it's outcome will give guidance in the remaining cases, particularly as the central plank of Mr Veitch's contention that it would be just and equitable for the Tribunal to consider his monetary claims notwithstanding their lateness, applies to all claimants in the group.

4. Although on the basis of my holdings in ***Miller and others v. MoJ*** as to when time starts to run in respect of a monetary claim, Mr Veitch's application to amend is out of time both parties accept that if the current appeal to the Supreme Court in ***Miller and others*** succeeds Mr Veitch's amendment would be in time. However, as that appeal has been stayed behind a further reference to the CJEU by the Supreme Court in ***O'Brien*** (on appeal from a decision of this Tribunal on the question of how far back pension rights can be dated; judgment dated 19th August 2013) and the outcome is unlikely to be known for perhaps another two years, given the sums of money involved, the fact that they would be payable immediately if the claim succeeds rather than be postponed until the claimant reaches pensionable age, and the strength of feeling about the issue among the group of affected claimants, all parties have agreed that the Tribunal should consider whether it is just and equitable to entertain the monetary claims as soon as possible. The principal consequence of the outstanding appeal in ***Miller and others*** is that if I am against Mr Veitch and hold that it is not just and equitable to entertain his monetary claim, the claim does not fail but remains stayed pending the judgment in ***Miller***.

The facts

5. There is no dispute about the facts although Mr Veitch doubts the explanation offered by the respondent for the occurrence of what he sees as the most important fact.

6. Mr Veitch was appointed as a fee paid chairman of the Independent Tribunal Service in 1993. He had practised at the Scottish bar doing criminal work for 5 years until 1998 when he became a full time mediator and mediation trainer alongside his judicial work. He has no knowledge of employment law. He

presented a pension only ***O'Brien*** type claim on the 23rd August 2011. He did so after being asked by a fellow SEC fee paid judge whether he had 'lodged an appeal' about his pension. Mr Veitch knew little or nothing about this and on his colleagues recommendation contacted Mr Heggie who appears for him today. Mr Veitch knew nothing about the possibility of bringing other claims. His contact with other judges was sporadic and he thought all he had to do was lodge a pension claim. The narrative of his claim on the form ET1 is very short. It refers to the fact that his full time colleagues had pension rights which he had been denied because of his part-time status, to the respondents obligations under the so called Framework Directive 97/81/EC and the PTWR by which the UK government transposed the Directive into UK law, and claimed pension rights or a cash equivalent.

7. On the 9th January 2012 he became a full-time, salaried District Tribunal Judge of the Social Entitlement Chamber. Following this Tribunal's judgment in ***Miller*** and applying it to the time limit provisions in the PTWR (reg 8(2)) the primary time limit for bringing any further claims in respect of his fee-paid service expired on the 9th April 2012. As a full time judge (he was initially appointed to Cardiff) his contact with colleagues was more regular and through informal discussions with them it gradually became clear that other claims would have to be made; for example, he was aware that as a fee paid judge he had only been paid ½ a days sitting fee for attending training while his salaried counterparts had attended training days in their normal working, and therefore salaried, time.

8. At some point, he suggests 2012 or 13 although 2014 seems more likely given the dates of the judgments of this Tribunal in first ***O'Brien*** then ***Miller and others***, he produced diaries and other information about sittings, training days etc which he understood would be passed on to the respondent to enable them to compute the amount of pension to which he would be entitled for his years of sitting as a fee paid judge. The information does not seem to have been provided in the context of making a monetary claim. He felt that at that time no-one quite knew what was happening with regard to these claims.

9. On the 12th February 2014 I held a preliminary hearing for the purposes of case management to consider how to address the numerous issues, including out of time and remedy issues, which remained to be determined following my judgment in ***Miller*** and the earlier judgment in ***O'Brien***. Comments made at that hearing by claimants' representatives give support to Mr Veitch's view that there was a lack of clarity about how to proceed. The question of just and equitable extensions of time and remedy issue were dealt with separately, the former at paragraphs 7 to 10 of the 'Issues' section of the order and 3.1 to 3.3 of the orders themselves, the latter at paragraphs 11 to 13 and 4.1 to 4.3. They were not expressly linked by anyone. The only overt concern of the parties on the question of just and equitable extensions of time was cases where the claim itself was out of time and whether it was proportionate, given the claimants stated intention to appeal the decision in ***Miller*** about the events which caused time to run, to begin to hear individual applications for extension of time on just and equitable grounds.

10. The main thrust of the sections dealing with remedies was the delay by the MoJ in honouring its obligations to serving and former fee paid judges following ***Miller*** and the mechanism for ensuring that judges received all of their entitlements under that judgment. The extracts below from the issues and order sections of the case management orders sent to the parties following the hearing gives a

flavour of the issues involved and the positions of the parties.

"11. There was much concern expressed on the claimants' side that the successful claimants seemed no nearer to obtaining compensation for what had been held to be the past failings of the respondent and it was not at all clear whether the respondent would be amending their rules for payment of fees for the future in the light of ***Miller and others.*** The paradigm case appeared to be the fee for attending training days which produced a clear cut result, equally applicable to all fee paid judges and was without administrative complication. Mr Bourne was not able to say at this stage whether the respondent would be reimbursing all judges who had in the past only received a half day fee for attending training, or only those judges who had made a claim in respect of training fees.

12. …

13. Ms Crasnow *[counsel for claimants represented by Browne Jacobson, solicitors]* submitted that the respondent really now must take the initiative and should produce a list showing what they were prepared to pay to each claimant following the judgment in ***Miller and others***. The Employment Judge thought that that was wholly unrealistic given the huge number of claims involved and the very limited resources available to the Treasury Solicitors, not to mention the likely paucity of record keeping by the respondent. It would certainly not be the case, as Ms Crasnow implied, that all judges scheduled to attend a training event would in fact have attended and records for attendance at regional training events were almost certainly not held centrally. Having taken instructions, Mr Bourne confirmed that that was the case. In the judge's view the onus, both as a matter of law and of sheer practicality, was on each individual claimant to provide the respondent with a calculation of the amount they now claimed to be due to them as a result of the judgment, broken down under various heads. One of the heads would be the historical underpayment of the daily sitting fee where a divisor of less than 1/220th had been used. …

….

4.3 By not later than 4.30pm on **Friday 28 March 2014**, any claimant who, as the result of the judgment in Miller and Others has a monetary claim against the respondent in respect of, for example, training days, decision writing (Social Entitlement Chamber judges only), holiday pay, London weighting, sick pay and the historical underpayment of the daily sitting fee and who has pleaded such a claim in their ET1, is to send full particulars of the amount claimed to the respondent at the following address:"

11. The order did not expressly require that any claimant who had not previously made a monetary claim but who now wished to do so should apply formally to amend their claim form although that appeared to be the implication of para 4.3. The respondent had not indicated how it might view any such amendment that was made out of time but had certainly not given any indication that it would not take time points in respect of them although the respondent's position has always been that it would take time limit points when these were available.

12. Apparently in response to that order, on the 11th March 2014 Mr Heggie's firm on behalf of Mr Veitch and 22 other fee paid Scottish SEC judges, presented an amendment to their claim forms adding claims in respect of fees for attending training days, for decision writing and the daily sitting fee. That claim was 23 months out of time in Mr Veitch's case. Despite the wording of paragraph 4.3 of the order, an unknown number of claimants merely informed the respondent by letter or email of their wish to bring monetary claims without making an

application to the Tribunal to amend their claim forms, a process to which the respondent raised no objection. Some of those informal amendments, as the respondent has described them, were also out of time.

13. The orders made at the preliminary hearing of the 12th February in respect of claimants seeking just and equitable extensions of time set out a timetable for them to notify the respondent that they intended to do so and to provide an outline of the grounds on which they would rely. The respondents were given until the 30th May 2014 to respond to those requests by way of two lists, one for claims where the application was not opposed, the other for claims where it was opposed (Order para 3.2). A further preliminary hearing was listed for the 19th June 2014 to devise a mechanism for disposing of applications to extend time and to list them for hearing. Paragraph 3.3 of the order provided that only representatives with clients on the 'opposed' list were required to attend the hearing. Mr Heggie's letter of the 11th March while not expressly applying for an extension of time in respect of the additional monetary claims concluded:

"We have intimated this request [to recall, i.e. to lift, the stay on each of the cases on the list attached to the letter and to make the proposed amendments] to Treasury Solicitors and all the represented parties and advised that any objections should be sent as soon as possible."

14. On the 10th June 2014 in belated compliance with para 3.2 of the Order of the 12th February, the Treasury Solicitor emailed to the Tribunal the requested lists, but rather than two there were 8. Lists 6, 7 and 8 related to monetary claim amendment applications. List 7 was those claims where a just and equitable extension of time application would be opposed. Three of Mr Heggie's clients including Mr Veitch appeared on that list. As I understand it the email to which the letter and schedules were attached was intended to be sent by the Treasury Solicitor to all known claimant's representatives but they failed to send it to Mr Heggie, (despite it being clear from the list that they knew that his firm was representing Mr Veitch) who in consequence did not realise that his clients' amendment applications were resisted. He therefore had no need to attend the preliminary hearing on the 19th June.

15. In response to an order of the Tribunal made at a preliminary hearing on the 14th March 2014, the time for compliance having been extended by further order dated the 3rd June, on the 26th of September 2014 the respondent produced a schedule of claims that were conceded. List 1 of the schedule included Mr Veitch's name. The letter accompanying the schedule said this of list 1:

'The MoJ accepts that those who appear on list 1 are due a payment in respect of their non-pension [*i.e. monetary*] claim against the MoJ. The MoJ will now commence the process of writing to each claimant on this list with an offer to settle that aspect of their claim against the MoJ'

16. By the 22nd January 2015 at the latest it had become clear that the respondent had made at least some errors in that schedule as Mr Bourne raised the issue at a preliminary hearing held that day. He mentioned three claimants by name and said that the respondent now wished to remove their names from the schedule because their amended claims had been made out of time. The ensuing discussion revealed that lead representatives had been puzzled by the inclusion of some other names in the schedule because they believed the amendments to have been made out of time in their cases as well. It appeared at that stage that perhaps 20 claimants had been included in error. The wording of the 14th March

2014 order had made it clear that the lists were of claims that were conceded. A further preliminary hearing using a Mr Gerrey as a typical claimant and a Mr Rose as an atypical claimant was therefore listed for hearing to consider the respondent's application for permission to withdraw the concession. Mr Heggie was not present at the preliminary hearing of the 22nd January and there was no reason for him to suppose that any of his clients were affected. On the 20th July 2015 I granted the respondents application to withdraw the concession that the claims listed in the schedule of the 26th September were conceded, a decision which was not appealed. The first indication that Mr Heggie had that Mr Veitch's monetary claim was to be challenged as being out of time was an email from the Government Legal Department (as the Treasury Solicitor was now styled) dated the 17th August 2015, a little over 17 months after the application to amend had first been made.

17. Mr Veitch is incensed by the fact that notwithstanding the realisation that many of the claims on the 26th September 2014 schedule were out of time and should not have been conceded and notwithstanding the successful application to withdraw the concession in respect of all typical cases in July 2015, the great majority of the monetary claims on the 26th September list have been settled. He is now the only Scottish SEC judge whose monetary claim has not been settled. A total of 66 claims where formal application to amend to add a monetary claim was made out of time and 16 informal amendment application claims which were out of time have been settled by the respondent. The respondent had therefore initially settled 82 claims out of what appears to have been a total of 94 out of time amendment claims notified to it either formally or informally. Three such settlements were made in 2014, another 50 in 2015 prior to the decision in ***Gerrey and Rose*** but after the problem of wrongly made concessions had been identified and another 29 in or after July 2015 following the withdrawal of the concession. The last claim was settled in 2017. Excluded from this list are two claims that were originally to be contested by the respondent alongside that of Mr Veitch but have since been settled on purely pragmatic grounds meaning that of the original 94 out of time claims 84 have been settled.

18. I have heard evidence from Mr Graham Driver who was at the material time a team leader in the respondent's Judicial Pay Claims Team which were responsible for settling the monetary claims arising from the ***O'Brien*** litigation. I accept his evidence that initially the claims were settled in error as a result of a widespread lack of understanding among those working in the team, who worked on secondment on an as and when basis and were scattered over up to 30 different locations, about how to check for out of time points where claims were added by amendment. There seems to have been a misunderstanding that provided the original claim was in time there was no issue over the later amendment. Guidance produced by the Government Legal Department was not circulated as widely as it should have been and may not have been properly followed. From July 2015 onwards he has been unable to find any obvious reason for the continuation of erroneous settlement payments.

19. Despite Mr Veitch's understandable incredulity that such a large scale error could really be just an error, I am satisfied that that is what it was. There was no change of policy and the MoJ did not act in bad faith. As Mr Bourne conceded, the errors were profoundly embarrassing but they were just errors. A decision has been made not to attempt to recover any of the overpayments, a decision which has also incensed Mr Veitch given the vigour with which the Department of Work and Pensions pursues the recovery of overpayment of very much smaller

amounts to benefit claimants in his jurisdiction. Mr Driver's explanation for this decision is rather unsatisfactory. He accepts that a letter dated 18th February 2016 from the then Deputy Director in Judicial Policy and Pay, Ms Abigail Plenty, written in response to a complaint by Mr Veitch about the respondent's handling of both his pension claim and his monetary claim, did mention that recovery of overpayments would be sought, but, he asserts, the reality was that without knowing to whom the overpayments had been made the money could not be recovered. While that is obviously true, it begs the question why the respondents did not know. The information was available, the list of those to whom payment was erroneously made having been very belatedly produced in May 2017 although I accept that much effort went into compiling it. Mr Driver is no doubt right that the decision not to pursue recovery of overpayments was made because of the time that had elapsed between payment being made and the error being identified. Mr Veitch's claim appears not to have been settled simply because it was clearly identified as being out of time in the list dated 9th June 2014, the list which, ironically perhaps, never reached Mr Heggie.

20. At a preliminary hearing on the 9th June 2015 which was held to resolve certain difficulties which had arisen in preparing for the ***Gerrey and Rose*** hearings, claimants representatives had expressed concern that there was still great uncertainty about which claimants were affected by the withdrawal of the concession and this had serious implications for them over the taking of instructions and assessing the costs of this discrete aspect of the litigation. In consequence the respondent was ordered to produce by Friday 19th June 2015 'a definitive list as it is currently possible to prepare' of claimants in respect of whom the concession is to be withdrawn and whose claims were wholly out of time. They were further ordered:

> "3. As soon as possible thereafter [to] serve as definitive list as possible of the following categories where it is sought to withdraw the concession.
>
> 3.1 Claimants before the Employment Tribunal whose claim in respect of which the concession is sought to be withdrawn was made by way of amendment"

21. That order was not complied with until the 24th of March 2017, some 21½ months later, by which time, because of the catalogue of errors by the team, only 12 out of time amendment monetary claims remained. Mr Driver can only speculate that the lengthy delay in producing the list may have been, at least in part, because of the increasing sickness absences culminating in a long term absence of the person charged with compiling it, although it certainly existed in a more or less complete preliminary form well before he went on long term sick leave.

22. These errors need to be given some sort of context. The Judicial Pay Claims Team has assessed 5,851 monetary claims in total, the majority of which have not been made through the Tribunal and did not need to be made through the Tribunal following the respondent's Moratorium in respect of non-pension claims. Of these, payments have been made in respect of 4,253 claims with a sum in the region of £112 million being paid out. The value of the 10 remaining claims represents about 0.42% of that total or around £470,000, the sum in dispute in Mr Veitch's case being £137,456.43. The value of the claims paid in error has not been computed but based on the value of the total claims settled and the 10 remaining claims seems likely to have been, very roughly, in the order of £3 million.

23. It does appear to be the case, as Mr Bourne has submitted, that the respondent

has correctly taken time limit points where the original claim form was presented out of time and has not (with possibly some very minor exceptions) erroneously settled wholly out of time claims. Such claims are now in the process of being struck out.

The law

24. Regulation 8 of the PTWR provides so far as material:

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months … beginning with the date of the less favourable treatment … to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment … the last of them.

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers it is just and equitable to do so.

25. I have previously set out the law with regard to just and equitable extensions in ***Miller and others*** and I adopt what I said there.

46. My starting point must be ***Robertson v. Bexley Community Centre*** which was a complaint under the Race Relations Act 1976 which an industrial tribunal had found to be out of time and had refused to exercise its discretion to extend time under the same just and equitable principle that applies to claims under the PTWR. In restoring the decision of the tribunal on an appeal from the Employment Appeal Tribunal (EAT), Auld LJ, who gave the judgment of the court, said this:

> *"24. The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition it is to be found in Daniel v. Homerton Hospital Trust (unreported, 9 July 1999, CA) in the judgment of Gibson LJ at p. 3 where he said:*
>
> > *'The discretion of the tribunal … is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong'*
>
> *25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

47. In ***Chief Constable of Lincolnshire Police v. Caston*** [2009] EWCA Civ 1298 at para 25 Sedley LJ explained this approach:

> *"… there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields … policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in* ***Robertson*** *that it either had or should. 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."*

48. In the earlier case of ***British Coal Corporation v. Keeble*** [1997] IRLR 336 EAT (which was not referred to in the judgments in either ***Robertson*** or ***Caston***) it was held that the discretion conferred by the corresponding provision in the Sex Discrimination Act 1975 was as wide as that conferred by section 33 of the Limitation Act in respect of which a mistake of law or inaccurate advice given by a lawyer as to the state of the law has been taken into account in exercising the discretion to disapply the limitation period. If the only reason for a long delay is a wholly understandable misapprehension of the law, that must be a matter which Parliament intended the tribunal to take into account.

26. Some additional points need to be made. The extract from the judgment of Sedley LJ in ***Caston*** was not that of the majority. Wall LJ at para 25 in giving the majority judgment said that the judgment of Auld LJ in ***Robertson*** was:

… in essence, an elegant repetition of well established principles relating to the exercise of a judicial discretion. What the case does, in my judgment, is to emphasise the wide discretion which the Employment Tribunal has … and articulate the limited basis upon which the EAT can interfere. Similarly, ***DCA v. Jones*** [2008] IRLR 128 approves the ***Keeble*** guidelines, but emphasises that they are fact/case specific.

27. The factors set out in sec 33 of the Limitation Act 1980, to which the Court of Appeal in ***Keeble*** said that this Tribunal could usefully have regard are:

(a) the length of and reason for the delay;
(b) The extent to which the cogency of the evidence is likely to be affected by the delay;
(c) The extent to which the party sued has co-operated with any requests for information;
(d) The promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
(e) The steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

28. Following ***Bowden v. MoJ*** UKEAT/0018/17/LA it is necessary for the Tribunal to consider not merely whether the claimant was aware of the factual basis giving rise to a cause of action but also of his knowledge of the right to make a claim.

29. Mr Bourne relies on an passage in ***Gerrey and Rose v. MoJ*** where I rejected a contention by counsel for Mr Gerrey that the withdrawal of the concession could amount to a new generic ground (i.e. one of universal application to all relevant out of time claims in the multiple) for granting extensions of time:

27. *The prejudice that may be caused to any person if the admission is withdrawn.*
… I cannot accept Mr Rogers' suggestion that the late withdrawal of the concession might be a new generic ground for granting extensions of time. Mr Bourne must be right when he submits that in such applications what is relevant is the reason for the claim being late which is wholly unrelated to the other parties post claim conduct. It seems highly likely that if there were circumstances in which the other parties post claim conduct were to be a relevant consideration in an application to extend time it would also be highly likely that that same conduct would militate against the granting of the application to withdraw the concession in the first place. But I accept Mr Bourne's submission that, in essence, the idea of the claimants' suffering prejudice is illusory as all they are losing is a windfall to which as a matter of law they were not entitled. I do not accept Mr Rogers counter argument that it is the respondent who gets the windfall

by not having to pay compensation to some of those it has discriminated against on the grounds of their part-time status. Such a submission ignores the rather obvious consideration that time limits are an essential ingredient in the principle of legal certainty which Mr Rogers has urged upon me. There is another very important consideration in play here but it also cuts across issues of conduct and to some extent does not sit comfortably in any of the listed factors though it is undoubtedly a circumstance of the case. This is not a case where the respondent has changed its mind about pursuing a limitation defence per se. The respondent has always, as all parties understood, made it clear that such a defence would be taken if available. That is why both Mr Gerrey and Mr Rose filed paper applications for extensions of time. This is just a case in which the respondent failed to identify that the defence was available to it in (in the context of this litigation as a whole) a very small percentage of the claims against it.

30. In ***DCA v. Jones*** it was said (para 44) that the prejudice which a respondent will suffer from facing a claim which would otherwise be time barred is 'customarily' relevant in cases concerning just and equitable extensions of time limits. In ***Thompson v. MoJ*** UKEAT/0004/15 which was heard together with ***Miller and others***, the EAT said that one factor which a Tribunal could take into account was whether advice received from a solicitor was negligent or equivocal.

31. Mr Heggie draws my attention to two authorities. The first is ***Rathakrishnan v. Pizza Express (Restaurants) Ltd*** [2016] IRLR 278 EAT in which the claimant presented a claim form including a range of complaints, one of which, a complaint of failure to make reasonable adjustments (the claimant being a disabled person) was 17 days out of time. Allowing the appeal from the refusal of the Tribunal to extend time HHJ Peter Clark made some observations of general application on which Mr Heggie relies:

14. What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see *Hutchinson v. Westward Television Ltd* [1977] IRLR 69) involves a multi-factorial approach. No single factor is determinative.

16. Taking account of the overall picture presented by the authorities, I am respectfully unable to accept the proposition, if it was intended to be so starkly put by the President in *Habinteg [Habinteg Housing Association Ltd v. Holleran UKEAT/0274/14/BA],* that a failure to provide a good excuse for the delay in bringing the relevant claim will inevitably result in an extension of time being refused. In short, I reject Mr Peacock's [for the respondent] principle submission that where an unsatisfactory explanation is given for the delay, how can it ever be just and equitable to extend time?

17. Turning to the particular facts of this case, it seems to be that the question of balance of prejudice and potential merit of the reasonable adjustment claim was a relevant consideration for the tribunal and they were wrong not to weigh those factors in the balance but instead to terminate the exercise having rejected the claimant's explanation for the delay.

32. The second is ***Ahmed v. MoJ*** UKEAT/0390/14/RN, HHJ Richardson:

62. The legal principles relating to section 123(1)(b) [of the Equality Act 2010] (the "just and equitable" extension) are well known. It is for the claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The

> Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension….

Submissions

33. Mr Bourne accepts that the situation is profoundly embarrassing for the respondent, with junior officials spread over many areas making mistakes about which claims were out of time over a sustained period of time. This was not a systemic problem and there is no obvious explanation for it. The question for the Tribunal might be said to be which injustice does it put right? It shouldn't compel the respondent to make one more mistake. There was an unambiguous decision in ***Gerrey and Rose*** that the respondent was not bound by its mistaken concession and the subsequent mistakes are not connected to the concession schedule. The Tribunal must remember how the chronology works. The most important thing is to look at what happened in the 23 months after the claim form was issued and nothing that happened in that time is connected to the subsequent mistakes.

34. In amendment cases it is much harder for a claimant to make out a case of reasonable ignorance of the right to bring a claim than in a whole claim case. The evidence is that the need to amend to add a pay claim filtered through gradually. But Mr Veitch is legally qualified and he should have understood that the legal right being asserted was to have the same treatment as full time colleagues. His claim form shows that he had knowledge of the PTWR. On the date that his amendment application was presented to the Tribunal, an application for a just and equitable extension of time was looking hopeless. Mr Bourne does not submit that the mistaken payments to others in the same position as Mr Veitch are legally irrelevant but he does submit that it would be very odd if they allowed a weak claim to be strengthened. Whilst it might be argued that it would be 'equitable' for Mr Veitch to be put in the same position as those who have received erroneous payments, it would not be 'just' because he would be being treated more favourably than the much larger number of claimants against whom out of time points have been successfully taken.

35. The correct approach for the Tribunal is to consider the length and reasons for the delay which was almost two years. No reason for the delay has been put forward other than that Mr Veitch has no working knowledge of employment law. In particular there is no explanation for why in August 2011 he knew he could bring a pension claim but did not also bring a monetary claim. There is no claim that he was ignorant of material facts. In particular he must have known about the less favourable remuneration for attending training days.

36. The only other relevant consideration is a weighing of the prejudice to the parties in granting or refusing the extension. Mr Veitch will suffer the loss of a claim to which there was a good jurisdictional defence. The respondent will suffer the loss of that defence.

37. Mr Heggie takes no point about the withdrawal of the concession in respect of Mr Veitch. He submits that it is very curious that the respondent should contend that Mr Veitch should have known about all of the claims he had from the outset. He only became aware of the right to bring a pension claim when a colleague asked him if he had already done so. There was no reason for him to go over all aspects of his fee paid service to see what else he could claim for, no reason to

be put on enquiry. Although he knew that he only got half a days fee for training there was no reason why he should have thought that he should be making a claim in respect of it. He only became aware in 2013 that other claims might be possible and he was not aware of any time limit issue. A case for reasonable ignorance can be made here.

38. There is no issue over lack of evidence because of the delay and no issues about the claim being met. While there is clearly some prejudice to the respondent if the claim is allowed to proceed, it is minimal to that which would be suffered by Mr Veitch given the very small percentage the outstanding claims represent of the total paid out. The respondent's mistakes have gone on since 2014 resulting in 82 erroneous payments and it is only in this and nine other cases that they are taking the time point.

39. It would be just and equitable to extend time given that a claim for reasonable ignorance can be made out and the multifarious mistakes made by the respondent which have led to many others being paid out. Mr Veitch is the only Scottish SEC judge not to have been paid. Mr Bourne's submission that the words 'equitable' and 'just' can be separated is artificial.

Discussion and conclusions

40. In ***Gerrey and Rose v. MoJ*** I was dealing with an application to withdraw a concession during the course of which a submission was made that the withdrawal of the concession might be the basis of a new generic extension of time ground (in ***Miller and others*** I had rejected the claimants' attempts to establish a range of so called generic grounds on which it would be just and equitable to extend time). My comments in para 27 of the judgment must be seen in that context. On reflection, I overstated the limitations faced by a claimant in seeking to rely on a respondents' conduct after the commencement of proceedings when contending that it would be just and equitable to extend time and I think that it must be right that in an appropriate case post commencement conduct can be a relevant circumstance for this purpose. Indeed, in ***McGuire v. MoJ*** (case number 2201084/2014) I granted an extension of time largely on those grounds – the facts bearing some resemblance to the facts relied on by Mr Veitch - a decision which the respondent did not appeal.

41. To borrow a phrase from the law of mortgages, the respondent seeks to rescue a plank from the shipwreck which is their mismanagement of the out of time monetary amendment claims, a shipwreck which is entirely of their own making. But in seeking to rely on the delay by Mr Veitch in adding his monetary claim to his in-time pension claim, the respondent hardly comes before this Tribunal with clean hands as Mr Bourne's apology, made in his written submissions, for the very late compliance with the order to provide a list of out of time amendment cases where the concession was to be withdrawn, tacitly accepts. As I explore in more detail below, that however is not the only example of a lengthy delay in complying with orders.

42. I do not accept Mr Bourne's submission that a just and equitable extension of time application if made when the amendment had been presented would have been hopeless. Mr Bourne equates the knowledge (or possibly the lack of reasonable excuse for lack of knowledge) of Mr Heggie with Mr Veitch. I am satisfied that Mr Veitch knew nothing of these matters until spoken to by a colleague in 2011. That was perhaps understandable given his positon as a full time mediator and trainer, rather semi-detached from the legal profession, and his rather intermittent interaction with fellow judges in the SEC. The knowledge

of the legal provisions in play revealed by the narrative in his claim form is almost certainly that of Mr Heggie, not Mr Veitch. Mr Heggie had been recommended to him and appeared to be representing many Scottish SEC fee paid judges. Although Mr Veitch did seem to become aware of the need to add monetary claims during 2013, it would, I think, be more appropriate to seek an explanation from Mr Heggie than from Mr Veitch for the absence of a monetary claim from the original claim form and the passage of 23 months before one was added, but none has been offered. When made, the application to amend was in respect of a total of 23 claimants all represented by Mr Heggie. In fairness to Mr Heggie the situation was fluid and the exchanges between counsel recorded in the order which followed the preliminary hearing in February 2014 shows uncertainty about how to proceed on both sides. Following ***Thompson v. MoJ*** if, as may have been the case, although I make no finding about it, the failure to plead a monetary claim from the outset and thereafter to amend timeously to add one, was attributable to Mr Heggie's lack of understanding of the full potential ambit of the less favourable treatment of SEC fee paid judges compared to their salaried counterparts or of the need specifically to plead it, then a viable just and equitable argument was available to Mr Veitch in March 2014.

43. The respondent's conduct of these proceedings has been less than satisfactory. I am very troubled by their failure to notify Mr Heggie in June 2014 that there was an objection on time limit grounds to Mr Veitch's claim and that of two of his colleagues, for two reasons. The first is that in failing to do so the respondent was in breach of an order of this Tribunal as the order required that the lists be sent to the Tribunal and to the claimant's representatives. The second is that the failure effectively deprived Mr Heggie of the opportunity to make representations about how out of time claims were to be dealt with and to challenge the application to withdraw the concession as he was unaware of the need to do so. While, with all due respect to Mr Heggie, there is little reason to suppose that his intervention would have had a material impact on the decisions as the interests of claimants were well represented despite his absence, to be deprived of the opportunity to do so was a significant denial of justice. Although the 21½ month delay in providing the list of late amendment claims in respect of which the concession was to be withdrawn was the most serious failure to comply with an order of the Tribunal to provide information, the respondent was not only 10 days late in complying with the order to produce lists of claims in which out of time point would be taken so far as the Tribunal and the other claimants' representatives were concerned, they did not comply with that order in respect of Mr Heggie's clients' claims until 2nd March 2016, another delay of 21 months.

44. There is no question of forensic prejudice to the respondent if I hold that it is just and equitable to consider Mr Veitch's monetary claim as the value of the claim has already been calculated to the last penny and no other defence to the claim appears to be available. No question of loss of cogency of evidence therefore arises. There is of course prejudice in the sense that a claim would have to be settled to which the respondent has a defence, albeit not a defence on the merits, but at first sight there is equal prejudice to Mr Veitch: both parties risk losing the same amount of money. But I accept Mr Heggie's submission that it is more appropriate to look at the prejudice in proportional rather than absolute terms. Mr Veitch will lose 100% of a claim to which there is no defence on the merits. The respondent will be required to pay a sum equivalent to an extra 0.12% or thereabouts (0.42% if one assumes that as a result of allowing Mr Veitch's claim to proceed the other outstanding late amendment claims will be settled) of the total they have so far paid in settling all monetary claims, in respect of a claim to which there is no defence on the merits. The balance of prejudice,

looked at in that way, comes down heavily in favour of Mr Veitch.

45. I also do not accept Mr Bourne's submission that it would be very odd to allow the respondent's post presentation conduct to strengthen what he submits is a very weak just and equitable application for extension of time. Reg 8(3) is clear – the relevant circumstances are 'all of the circumstances of the case'. I do not of course underestimate the enormous administrative burden that the ***O'Brien*** litigation has placed on the Government Legal Department or the respondent. But it is clearly a relevant factor in the exercise of my discretion that they have now settled 85% of the out of time monetary amendment claims. Whilst Mr Veitch's belief that he glimpses the shadow of something more sinister than serial incompetence in the settlement of these claims is understandable, I am satisfied that what he believes he glimpses is a chimera. To have failed to grasp how time limits work in amendment claims in the early stages of the settlement process might not have been surprising, but for the erroneous settlements to continue not merely after the problem was identified but even after permission had been given to withdraw the concession and continuing into this year is deeply concerning. Mr Heggie quite rightly points not merely to the very high level of settlements made erroneously but to the decision not to attempt to recoup the over payments, a decision which seems likely to owe something to the respondents internal delays in identifying those to whom the payments were made.

46. Whilst I take Mr Bourne's point that the respondent has appropriately and successfully taken the out of time point in many cases that were wholly out of time, I am not satisfied that that would make it unjust for time to be extended in this case. Mr Veitch's claim is one of a discrete group – claims added by way of amendment to out of time claims that were presented in time – and the circumstances which apply to that group do not apply to those whose claims were wholly out of time. The Government Legal Department appears to have correctly identified the circumstances in which such an amendment is out of time and may be challenged as such but the respondent failed to ensure that those charged with dealing with monetary claims understood how to identify the cases affected and in consequence the vast majority have slipped through the net. Instinctively, it seems unjust and inequitable that they should continue to refuse to make payments in the very small number of claims that they have successfully identified. That feeling is greatly enhanced by the way in which they have conducted these proceedings with the very late provision of information, in Mr Veitch's case in one instance, highly important information (I do not of course suggest that the information was deliberately withheld), the difference between their tardiness and Mr Veitch's tardiness being only that in the latter case disbarring is automatic subject to the possibility of just and equitable extension, whereas in the former it is without consequence in the absence of an 'unless order'.

47. All of those considerations, coupled with the balance of prejudice coming down heavily in Mr Veitch's favour, lead me to the conclusion that in all of the circumstances of the case it would be just and equitable for this Tribunal to consider Mr Veitch's monetary claim notwithstanding that it was presented after the time limit had expired.

Employment Judge Macmillan

21 October 2017