EMPLOYMENT TRIBUNALS

Claimant **Respondent**
MR. A. R. McCall V **Oak Capital LLP (in liquidation)**

Heard at: London Central **On: 25 October 2018**

Before: Employment Judge Mason

Representation
For the Claimant: In person
For the Respondent: No appearance or representation

RESERVED JUDGMENT

The judgment of the Tribunal is that the claim is dismissed by reason of lack of jurisdiction, it having been presented outside of the statutory timescale in circumstances in which it was reasonably practicable to have been presented it in time

REASONS

Background and procedure at the Hearing

1. In this case Mr. McCall ("the Claimant") seeks a declaration of a Protective Award having been dismissed by the Respondent by reason of redundancy on 15 August 2017 in circumstances where more than 20 other employees were also dismissed at the same time and with no prior warning or consultation.

2. On 25 September 2017, the Respondent went into administration and Mr Geoffrey Bouchier of Duff & Phelps Ltd (insolvency practitioners) was appointed Joint Administrator.

3. The Claimant presented this claim to the Employment Tribunal on 14 March 2018 and it was served on the Respondent on 4 July 2018.

4. On 5 April 2018, the Respondent went into liquidation (creditors voluntary) and Mr. Bouchier was appointed Joint Liquidator. On 10 July 2018, Mr. Bouchier wrote to the Claimant to advise that the liquidators had no objection to the claim for a Protective Award proceeding and on 19 July 2018, the liquidator wrote to the Tribunal on behalf of the Respondent to advise that the Respondent would not be defending the claim.

5. At the final merits hearing before me, there was no appearance by or on behalf of the Respondent. The Claimant was not represented. He had previously provided a witness statement (3 October 2018) and he gave further oral evidence in response to questions put to him by me and was given the opportunity to make any further submissions. The Claimant provided some copy documents

6. I reserved my decision which I now give with reasons.

Findings of fact

7. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities.

8. On 21 November 2016, the Claimant commenced employment with the Respondent as Lead Analyst. His annual salary was £80,000 per annum plus a "draw" of £35,000 to be paid over the first 12 months

9. On 15 August 2017, he was called to a meeting in the boardroom with all other employees. The Managing Director and Sian Jones (VP at insolvency practitioners Duff & Phelps) were also present. The Claimant and other employees were informed that they were all being made redundant with immediate effect. The Claimant and other employees were given no prior warning and this "came out of the blue"; they were advised to direct queries to Duff & Phelps.

10. On 5 September 2017, the Claimant and two other former employees met with solicitors, Hunters, to seek advice with regard to termination of their employment. Hunters' advice was subsequently set out in a letter dated 6 September 2017:

10.1 This states with regard to the Protective Award claim, *"... because the LLP has made more than 20 employees redundant but has failed to inform and consult employees' representatives, they may be entitled to what is called a "protective award" which is a discretionary amount determined at the discretion of the Employment Tribunal*".

10.2 It goes on to explain that certain claims, including a Protective Award, rank as preferential debts but subject to a maximum claim per employee of £800; the excess over £800 is unsecured.

10.3 The writer specifies the claims that can be made against the National Insurance Fund; Protective Awards are not mentioned.

10.4 Under the heading "Next Steps", the writer advises that all employees should respond to the redundancy letters and assert that they have been wrongfully and (if applicable) unfairly dismissed and that these *"claims should then be sorted out by the administrator or liquidator".*

11. The Claimant misunderstood and made a claim for a Protective Award to the Administrators because he thought this was the right channel; he did not realise at this point that he needed to present a claim to the Employment Tribunal. The solicitors' letter arrived when he was in Italy (a period of 10 days). Around this time he contacted ACAS; ACAS did not mention to him that he needed to present a claim to the Employment Tribunal for a Protective Award.

12. On 25 September 2017 the Respondent went into administration and on 2 October 2017, Mr Bouchier (joint administrator) wrote to the Claimant) enclosing a Creditor Questionnaire.

13. On 18 October 2017, the Claimant completed the questionnaire and itemised monies owed to him including a Protective Award in the sum of £20,000.

14. In about March 2018, a former colleague mentioned to the Claimant at a "chance meeting" that he needed to present a claim to the Employment Tribunal for a Protective Award.

15. The Claimant contacted ACAS on 13 March 2018 and an ACAS certificate was issued the same day by email. The Claimant presented this claim to the Employment Tribunal on 14 March 2018.

16. On 5 April 2018, the Respondent went into creditor's voluntary liquidation.

Statutory Framework

17. Section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULR(C)A") sets out the statutory duty on employers to inform and consult their workforce about proposed redundancies:

17.1 Section 188(1) TULRCA states that "*where an employer is proposing to dismiss as redundant 20 or more employee at one establishment within a period 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals*"

17.2 Section 188(1A) sets out minimum periods of consultation:

(i) where 100 or more redundancies are proposed at one establishment within a 90 day period, at least 45 days before the first of the dismissals takes place; and

(ii) otherwise, at least 30 days before the first dismissal takes effect.

18. A complaint that an employer has failed to comply with Section 188 of TULR(C)A should be brought under section 189. If a Tribunal finds that that the employer has acted in breach of section 188 it must make a declaration to that effect and may make a "protective award" under section 189(2) subject to a maximum of 90 days pay.

19. Section 189(5) TULR(C)A provides that an Employment Tribunal shall not consider a complaint unless it is presented to the Tribunal-

a) before the date on which the last of the dismissals to which the complaint relates takes effect; or
b) during the period of three months beginning with that date; or
c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the period of three months, within such further period as it considers reasonable.

20. The three month time limit is extended by the ACAS Early Conciliation period (in this case one month).

Conclusions

21. Applying the relevant law to the findings of fact to determine the issues, I have concluded that the Claimant's claim was presented out of time, the time limit having expired on 14 December 2017. I have also concluded that it was reasonably practicable for him to have presented it within time.

22. The relevant test is to ask whether, on the facts of the case, it is reasonable to have expected the Claimant to present the claim within time:

22.1 The Claimant was not ignorant of his right to make a claim for a Protective Award; he sought advice from solicitors shortly after his dismissal, he spoke to ACAS and made a claim to the Administrators. He was aware of this right from, at the latest, receipt of the letter from his solicitors in October 2017.

22.2 Whilst he did not appreciate that he was required to present a complaint to the Employment Tribunal until March 2018, he is an intelligent and well-educated man and ought to have known this; he had ample time and opportunities to clarify the advice he had been given and to make his own enquiries and investigations within the time limit. If a claimant it aware of his rights, ignorance of the time limit is rarely acceptable as a reason for delay as a claimant will generally be taken to have been put on enquiry as to the time limit. Once the Claimant knew of his right to claim a Protective Award, he was under an obligation to seek further information and advice about how to enforce that right.

22.3 He proceeded on a false assumption. To the extent that his mistaken belief arises from any fault on the part of his solicitors in not giving him such information as they should reasonably in all the circumstances have given him, his remedy is against them.

. Signed by:

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Employment Judge Mason

25 October 2018

Judgment sent to Parties on

29 October 2018