EMPLOYMENT TRIBUNALS

Claimants: Mr S A Sileshi & others (see attached schedule)

Respondents: 1. STA Travel Limited (In Creditor's Voluntary Liquidation)
2. Secretary of State for Business, Energy and Industrial Strategy

Heard at: Manchester (in Chambers) **On:** 18 November 2021

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimants: No appearance
Respondents: No appearance

JUDGMENT

1. The claim brought by Mr D Orrell (case number 2401701/2021) is struck out because it was presented outside the relevant time limit for bringing a claim and there is no reasonable prospect of the claimant satisfying the Tribunal that it was not reasonably practicable for him to present the claim within the time limit.

2. The claims of the other claimants in the attached schedule are not struck out. It cannot be said that there is no reasonable prospect of them satisfying the Tribunal that it was not reasonably practicable for them to bring their complaints in time, and that they brought their claims within such further period of time as was reasonable. Their cases will be listed for a preliminary hearing on the time limit issue.

REASONS

Background

1. This was a preliminary hearing held in chambers without the parties present. It was held to decide whether any of the claimants' claims should be struck out. A

claim would be struck out if there was no reasonable prospect of the claimant showing their claim was brought in time or within any extension of the usual time limit allowed by the Tribunal because it was not reasonably practicable for the claim to have been brought in time.

2. The claimants were all employed by the first respondent. They were all made redundant on 2 September 2020. There was no consultation prior to the redundancies. The claimants say that breaches the duty to consult in s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). They each seek a protective award under s.189 of TULRCA for the maximum amount of 90 days' pay. The first respondent is in liquidation and has not entered a response to the claims. The Secretary of State has made written submissions.

3. Some of the claimants ticked boxes on their claim form to say they are bringing claims for unfair dismissal, unlawful deduction of wages, breach of contract, redundancy payment or failure to pay holiday pay. However, the narrative parts of each of their claim forms seems to me to confirm that the only claim being brought by each is for a protective award. As I understand it, the claims for other payments have already been resolved by payments made by the Redundancy Payments Service.

4. If I am wrong about that, and some claimants are indeed bringing claims other than for a protective award, my decision would have been the same. The reason for that is because the same time limits and reasons for extension apply to the majority of those other claims, i.e. three months unless it was not reasonably practicable to bring claims in time. A different time limit (six months) applies to claims for a statutory redundancy payment but none of the claimants who have ticked the "redundancy payment" box appear to me on a reading of their claim form as a whole to be claiming a statutory redundancy payment. Mr Orrell, the only claimant whose claim I have struck off, only claims a protective award in his claim form.

5. Each of the claimants issued their claims in this case outside the usual 3-month time limit. Because the Tribunal considered that these claims were potentially out of time, it issued a strike out warning on 22 July 2021. That strike out warning said that the Tribunal on its own initiative was considering striking out the claims because there was no reasonable prospect of each claimant showing that they had filed their claim form with the Tribunal within the time limit relevant to the claims. The claimants were given until 12 August 2021 to object to the strike out proposal, giving reasons or requesting a hearing.

6. The claims of those claimants who did not respond to the strike out warning were struck out by a Judgment dated 23 September 2021 which was sent to the parties on 24 September 2021. Those claimants who did respond to the strike out warning are listed in the attached schedule. This judgment records my reasons for deciding to strike out Mr Orrell's claim but not to strike out the claims of the other claimants listed in the schedule. In reaching my decision I considered the claim form for each claimant, their early conciliation certificate and also the written representations which were made in response to the strike out warning. I also took

into account the written submissions made on behalf of the Secretary of State to the extent they were relevant to the issues I was deciding.

The Issues

7. To strike out a claimant's claim I would need to be satisfied that there was no reasonable prospect of that claimant satisfying the Tribunal that:

(1) Their claim was presented within the three-month time limit set out in section 189(5) of the TULRCA,

(2) Or, if it was not, that their claim was presented within such further time as the Tribunal considers reasonable in a case where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Relevant Law

Time limits in protective award cases

8. Section 189(5) of TULRCA provides:

"An [Employment Tribunal] shall not consider a complaint under this section 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."

9. Section 189(5A) of TULRCA provides:

"Where the complaint concerns a failure to comply with a requirement of section 188, section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(b)."

10. The Court of Appeal in **Marks and Spencer PLC v Williams-Ryan [2005] EWCA Civ 470** sets out a number of legal principles to consider in relation to time limits. The principles were set out in relation to a claim for unfair dismissal but as the same test applies in relation to claims under section 188, they are equally relevant. The principles to consider are as follows:

- [The relevant section] should be given a liberal interpretation in favour of the employee.

- Regard should to be had to what, if anything, the employee knew about the right to complain to a Tribunal and of the time limit for doing so.

- Regard should also be had to what knowledge the employee should have had, had they acted reasonably in the circumstances. Knowledge of the right to make a claim does not, as a matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the employee to prove that their ignorance was reasonable.

- Where a claimant retains a solicitor and fails to meet the time limit because of the solicitor's negligence, the claimant cannot argue that it was not reasonably practicable to submit the claim in time.

11. The Employment Appeal Tribunal in the case of **Adams v British Telecommunications PLC [2017] ICR 382** held that it is an error of law for a Tribunal to treat the fact that a claimant has presented a claim in time (albeit a defective one) as meaning that a second claim raising the same complaint could reasonably practicably have been presented in time. Instead the focus should be on the second claim and whether there was any impediment to timely presentation of that claim.

Striking out

12. Rule 37 of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") gives the Tribunal the power to strike out all or part of a claim:

> "37.— Striking out
>
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

13. In this case, the Tribunal is considering striking out each of the claims on the basis they have no reasonable prospect of success (ET Rules 37(1)((a)) on the time limit issue.

14. ET Rules 37(2) says that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

15. In **Abertawe Bro Morgannwg University Health Board v Ferguson [2013] I.C.R. 1108** the Employment Appeal Tribunal warned that "in a case which is always likely to be heavily fact sensitive….the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts." However, in **Ahir v British Airways Plc [2017] EWCA Civ 1392** the Court of Appeal said that "Tribunals should not be deterred from striking out claims….which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary….being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored….Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high'".

Findings and Conclusions

16. The claimants' effective date of termination was 2 September 2020. As such, any claims with a three-month time limit should have been presented to the Tribunal by 1 December 2020. Even taking into account any extension for early conciliation the claims brought by all the claimants in these proceedings were brought outside the relevant time prescribed by s.188(5)(b) TULRCA.

17. Apart from Mr Sileshi, the trigger for the claimants in both categories for filing their Tribunal claims in these proceedings was the decision of Employment Judge Britton in Nottingham Employment Tribunal to make a protective award in the cases brought by Ms Gemma Grimbley and Ms Claire Treacy (case numbers 2603282/2020 and 2603288/2020). I refer to that below as "the Nottingham decision". The original Judgment in that case dated 11 January 2021 and sent to the parties on 13 January 2021 made a protective award in relation to all the first respondent's employees. On reconsideration, Employment Judge Britton limited the award to the two individual claimants in the Nottingham decision. The decision to limit the award to the claimants in the Nottingham decision meant that all other former employees of the first respondent would have to bring their own claims for a protective award. That seems to have been communicated to a number of the first respondent's former employees by the claimants in the Nottingham decision by way of a Facebook group for the first respondent's former employees in early February 2021. Not all the claimants in this case were on social media and so some of them learnt of the need to bring their own claims a few days later.

The 2021 Early Conciliation claimants

18. The claimants in this case fall into two broad categories. The first category in terms of size is those claimants who did not start the ACAS early conciliation process until February 2021. These claimants say that it was not reasonably practicable for them to have brought their claims before they did because they did not know about their entitlement to claim a protective award until the Nottingham decision.

19. Although their submissions on this point are not identical, the common thread is that they say that the first respondent appointed a third party, ERA Solutions Limited, to assist the first respondent's former employees in making claims for redundancy payments and other monies from the Redundancy Payment Service. Some of the claimants say that they were not told by ERA Solutions Limited that there was a right to claim a protective award for failure to inform and consult. Others say that they were told that they could not claim a protective award because they were earning below £538 per week (or in one case were told that it was because they were earning below £500 per week). The claimants falling within this category are set out in the table below.

Case Number	Claimant Name
2401568/2021	Mrs Carla Warrington
2401577/2021	Miss Hollie- May Dillon
2401586/2021	Mr Callum O'Neill
2401603/2021	Mr Benjamin Chadwick
2401615/2021	Mr Owen Gregory
2401625/2021	Mr Calum Stacey-Grant
2401656/2021	Miss Anastasia Gklantzouni
2401658/2021	Mr Michael Holland
2401694/2021	Mrs Umelaila Hussain
2402069/2021	Mr Mark Van Leeuwen

20. Within this category of February 2021 EC claimants there is a sub-category. Mrs Warrington and Mrs Hussain were both on maternity leave when they were made redundant. They both say that their absence on maternity leave meant that they had little contact or information from the first respondent and that this contributed to their being unaware of their ability to claim a protective award.

21. As this is consideration of whether to strike out the claims, the relevant test I am applying is whether there is no reasonable prospect of a claimant showing that their claim was brought in time. In practice, that means in this case that there is no reasonable prospect of a claimant showing that it was not reasonable practicable for them to bring the claim within the usual time limit, and that any claim was brought within such reasonable time after it was reasonably practicable to do so.

22. In relation to all these February 2021 EC claimants, it will be necessary to hear evidence so that findings can be made about what and when each of them

knew (and should have known) about the right to bring a protective award claim and whether they acted reasonably in light of that knowledge. There will also need to be findings about the extent, if any, to which they are fixed with the knowledge of those who were advising them, i.e. ERA Solutions Limited. Without hearing that evidence, I cannot say on the basis of the papers before me that there is no reasonable prospect of their showing that it was not reasonably practicable to bring their claims in time.

23. In relation to these claimants, therefore, there will be a preliminary hearing to decide whether or not it was reasonably practicable for them to bring their claims in time and, if not, whether their claims were brought within such further period as was reasonably.

The 2020 Early Conciliation claimants

24. The second broad category of cases includes those claimants who did initiate ACAS early conciliation in September or October 2020 but then did not lodge their claims in these proceedings until 2021. As with the February 2021 EC conciliation claimants, I am satisfied that the claims were brought outside the three-month time limit even allowing for the extension of that time limit triggered by the early conciliation process. The claimants concerned are those set out in the table below:

Case Number	Claimant Name
2401066/2021	Mr Sileshi Assefa Sileshi
2401701/2021	Mr Domonic Orrell
2401712/2021	Mr John Bradley
2402117/2021	Mr Philip Cooke
2402442/2021	Mrs Katrina Malley

25. As my Judgment makes clear, I have decided to strike out Mr Orrell's claim. I set out the reasons for that below. In relation to the other claimants in this category, the reasons why they say it was not reasonably practicable for them to bring their claims until February 2021 (or in one case March 2021) are slightly different. Mr Bradley and Mrs Malley say that they understood from what they were told by ACAS that it was not possible to proceed with claims against the first respondent because it was in liquidation.

26. Mr Cooke says that he submitted a claim on 1 October 2020. He says he received a reference number when he submitted the form online and therefore assumed his claim was proceeding. His case is in essence that it was not reasonably practicable for him to file a second claim because he thought he already had a valid first claim lodged with the Tribunal. Mr Sileshi's submission is that he was not in a position to proceed with filing his Tribunal claim because of his state of mind and his family circumstances.

27. In relation to each of those, I find that I will need to hear evidence in order to decide whether they can substantiate their submissions that it was not reasonably practicable for them to bring their claims until February 2021. I therefore do not

strike out their claims because I cannot say there is no reasonably prospect of them satisfying the Tribunal that it was not reasonably practicable to bring their claims in time. Their cases will proceed to a preliminary hearing on time limits.

Mr Orrell

28. I have decided to strike out Mr Orrell's claim as having no reasonable prospect of satisfying a Tribunal that it was not reasonably practicable for him to bring a claim in time.

29. Mr Orrell started early conciliation on 4 September 2020 and the early conciliation certificate was issued on the same day. The relevant time limit for bringing a claim for a protective award expired on 1 December 2020.

30. Mr Orrell explained in his written submissions that he had attempted to bring a claim in time in the Central London Employment Tribunal under case reference 22012854900 in September 2020. His claim was rejected because he had not obtained an ACAS early conciliation certificate so had no number to insert in his claim form. Mr Orrell then obtained an ACAS early conciliation certificate and emailed the details to Central London Employment Tribunal.

31. He says that two months later, on 5 November 2020, he received an email saying that his claim was not accepted because it did not have an ACAS early conciliation number. That notification told him he could apply to reconsider the decision within 14 days. In his written submission, Mr Orrell said that he tried on a number of occasions to telephone the Employment Tribunal but could not get a response. He accepts that he "gave up" and did not apply for reconsideration. On Mr Orrell's own account, therefore, he knew about his right to bring a claim in September 2020 and indeed presented a claim but then did not pursue it further when it was rejected (for example, by seeking a reconsideration of the rejection of his claim form in November 2020).

32. I remind myself that **Adams** means my focus should be on Mr Orrell's second claim and whether there was any impediment to timely presentation of that claim. In this case, Mr Orrell has not set out what impediment there was to him bringing a second claim. As I have said, it is apparent from his own account that he knew of the right to bring a claim and of the process for doing so. He had received notification of rejection of his first claim by 5 November 2020. This was not, therefore, a case where he thought he had already lodged a valid claim. There were three weeks from the rejection of his first claim until the time limit for bringing a claim ran out. He has not set out any impediment which made it not reasonably practicable for him to file his second claim in time. On that basis I find that there is no reasonable prospect of Mr Orrell satisfying a Tribunal that it was not reasonably practicable for him to bring his claim in time. I therefore struck out his claim.

Summary

33. Mr Orrell's claim is struck out. The other claimants' claim will be listed for a preliminary hearing at which a Judge will decide the time limit issue having heard evidence from each claimant. A Case Management Order will be sent to the

claimants setting out the steps they need to take to prepare for that preliminary hearing.

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Employment Judge McDonald

Date: 23 November 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
3 December 2021

FOR THE TRIBUNAL OFFICE

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ANNEX
Schedule of Claimants

Case Number	Claimant Name
2401066/2021	Mr Sileshi Assefa Sileshi
2401568/2021	Mrs Carla Warrington
2401577/2021	Miss Hollie- May Dillon
2401586/2021	Mr Callum O'Neill
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