EMPLOYMENT TRIBUNALS

Claimants:
1. Miss Anastasia Gklantzouni
2. Mr Callum O'Neill
3. Mrs Carla Warrington
4. Mr Michael Holland
5. Mr John Bradley
6. Mrs Umelaila Hussain
7. Mr Mark Van Leeuwen
8. Mr Philip Cooke
9. Miss Hollie-May Dillon
10. Mr Sileshi Assefa Sileshi
11. Mr Benjamin Chadwick
12. Mr Owen Gregory
13. Mr Calum Stacey-Grant
14. Mrs Katrina Malley

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

Heard at: Manchester

On: 12-13 April,
14 April and 1 July 2022
(in Chambers).

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

1st Claimant: In person
2nd Claimant: In person
3rd Claimant: In person
4th Claimant: In person
5th Claimant: In person (by CVP)

6th Claimant: In person
7th Claimant: In person
8th Claimant: In person (by CVP)
9th – 14th Claimants: Not in attendance
1st Respondent: No appearance
2nd Respondent: No appearance

RESERVED JUDGMENT

1. Consideration of Ms Hollie-May Dillon's claim (2401577/2021) is postponed.

2. Mr Philip Cooke's claim (2402117/2021) is dismissed. It is a duplicate of an earlier claim (2206487/2020) issued in London Central Employment Tribunal.

3. The claims brought by the following claimants are dismissed. Their claims were brought out of time but it was reasonably practicable for their claims to have been brought in time.

- Mr Sileshi Assefa Sileshi (2401066/2021)
- Mr Benjamin Chadwick (2401603/2021)
- Mr Owen Gregory (2401615/2021)
- Mr Calum Stacey-Grant (2401625/2021)
- Mrs Katrina Malley (2402442/2021)
- Mr John Bradley (2401712/2021)

4. The claims brought by the following claimants are allowed to proceed. Their claims were brought out of time but it was not reasonably practicable for them to have been brought in time and they were brought within such further period of time as was reasonable:

- Miss Anastasia Gklantzouni (2401656/2021)
- Mr Callum O'Neill (2401586/2021)
- Mrs Carla Warrington (2401568/2021)
- Mrs Umelaila Hussain (2401694/2021)
- Mr Michael Holland (2401658/2021)
- Mr Mark Van Leeuwen (2402068/2021)

REASONS

Introduction

1. This was a public preliminary hearing held to decide whether the claimant's claims should be allowed to proceed despite having been brought outside the usual time limit. All the claimants were bringing claims for a protective award arising from the first respondent's failure to consult with them prior to their dismissal for redundancy on 2 September 2020. The first respondent is in liquidation, which is why the second respondent has been joined as a party.

2. The hearing took place by way of a hybrid hearing with some claimants attending in person and others attending by CVP video link. Neither of the respondents attended. The second respondent had provided written submissions which I took into account in reaching my decision.

3. I heard evidence and submissions from the claimants who did attend on 12 and 13 April 2022. To avoid any claimants having to attend for the whole of the hearing, I directed that the evidence be heard in batches of two or three claimants while making it clear that any other claimants were fully entitled to attend to observe those parts of the hearing in which they themselves were not giving evidence. I considered the case in chambers on 14 April and 1 July 2022.

The Issues

4. In relation to each claimant's claim I had to decide:

   (1) Whether it was reasonably practicable for the claimant to have brought their complaint within the usual three month time limit for bringing a protective award claim;

   (2) If it was not, whether their claim was presented within such further time as the Tribunal considers reasonable.

Relevant Law

Time limits in protective award cases

5. 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."

6. 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)."

7. 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.

8. An assertion of ignorance as to the right to make a claim or of the relevant time limit or procedure for making a claim is not conclusive as to whether it was reasonably practicable to bring a claim. The Tribunal has to be satisfied both as to the truth of that assertion and that the ignorance was reasonable (**Porter v Bandridge Limited [1978] ICR 943**).

Claimants who did not attend

9. Following the "in chambers" hearing on 18 November 2021, I directed that each of the claimants provide a witness statement and copies of any documents they wished the Tribunal to consider at the preliminary hearing. 9 of the claimants did so. All the claimants were warned by a letter from the Tribunal that if they did not attend to pursue their case, the claims would be dismissed. It was explained that this was because the onus was on a particular claimant to establish that it was not reasonably practicable for them to bring their claim based on the facts of their specific case.

Claimants who did not contact the Tribunal about non-attendance

10. The 10th to 14th claimants did not attend and did not give reasons for non-attendance. I am satisfied they had notice of the hearing. None of them had provided evidence in advance of the hearing. The onus was on the claimants to explain why it was not reasonably practicable for them to bring their claims. They have not done so and I therefore dismiss their claims. For the avoidance of doubt, this applies to the following claimants:

- Mr Sileshi Assefa Sileshi (2401066/2021)
- Mr Benjamin Chadwick (2401603/2021)
- Mr Owen Gregory (2401615/2021)
- Mr Calum Stacey-Grant (2401625/2021)
- Mrs Katrina Malley (2402442/2021)

Miss Dillon (2401577/2021)

11. Miss H Dillon was due to give evidence on the morning of 12 April 2022. She had provided a witness statement and documents in advance of the hearing. However, on the morning of the hearing she emailed the Tribunal to say that she could not attend due to "unforeseen circumstances". She provided some further information on request. I have directed that she provide further details and confirmation that she is still pursuing her claim. Consideration of her claim is postponed pending her response.

Claimants who did attend

12. I set out below my findings of fact based on the evidence I heard from the claimants and the documents they had provided. These findings of fact are divided into two parts. The first deals with the background facts common to all the claimants and the second deals with findings of fact specific to particular claimants. I set out my findings about the individual claimants in the order I heard their evidence.

Background Facts

13. The claimant's claims for a protective award arise from their dismissal for redundancy on 2 September 2020. It is common ground that there was a failure to consult prior to their dismissal.

14. The first respondent ceased trading at the end of August. At that point the majority of the first respondent's employees were on furlough. Those not on furlough were working from home.

15. The internal communications at this point were being sent to the employees' work emails. That meant that unless employees proactively logged on to those

emails (or had synced their email account on their phone) they would not necessarily receive all the updates automatically.

16. On 2 September 2020 there was a video call webinar for all employees. This was relatively short and involved the Chief Operating Officer of the first respondent reading out a statement confirming that the first respondent had ceased trading and that all employees were being made redundant on that date. The statement explained that ERA Solutions had been engaged to provide assistance to the employees with claims processing. There was no opportunity to ask questions during that webinar.

17. On that same day the employees were sent a letter confirming their dismissal. That letter was in standard terms. As well as confirming termination of employment it said that the employee "may be entitled to various claims such as notice pay, unpaid wages and redundancy payments (where applicable) which are authorised by the Department for Business, Energy and Industrial Strategy – Redundancy Payment Service ("RPS")". The letter said that ERA Solutions had been "engaged as Employment Rights Act specialists to assist employees with claims processing". The letter enclosed information "which will tell you what steps you now need to take and who to contact at ERA to assist you". It also advised employees to immediately check their eligibility for Jobseeker's Allowance so that they did not miss out on potential benefits.

18. That letter included a pack of information including a fact sheet from the Insolvency Service setting out what rights employees had and what they could apply for. That document refers to redundancy pay, holiday pay, "money you are owed by your employer, for example unpaid wages, overtime, commissions etc." and statutory notice pay. It advised that there were two separate applications which an employee had to complete online. The first was for redundancy pay, holiday pay and other money owed. The second was for statutory notice pay. There was a link to claim online. There is no reference in that fact sheet to a protective award or any entitlement to compensation for failure to consult.

19. There was also a letter and employee FAQ provided by ERA. The letter was in standard terms. It reiterated that ERA had been "engaged to assist you with making your claims for your outstanding statutory payments following your redundancy". It attached a copy of the RP1 online claims pack to enable the employee to make claims for their "arrears of pay, holiday pay, redundancy pay and payment in lieu of notice". There was then a series of FAQs dealing with matters such as how long it would take for the employee to get paid and when they would get an update on their claim. There is no mention of the protective award or compensation for failing to consult, nor to any requirement to bring Tribunal proceedings. A further DWP redundancy fact sheet provided information on where to find another job and on applying for benefits. The employee FAQ for STA Travel explained what an employee could claim on their RP1. That referred again to arrears of pay, holiday pay and redundancy pay but made no reference to the possibility of claiming for a protective award. That fact sheet ended with the question, "Who can I talk to if I have a question?" which referred the employee to

ERA Solutions Limited. A specific email address was given which I find directed enquiries to Dan Large, a manager at ERA.

20. In terms of further communications with ERA, some individuals did contact them direct. The only other generic response from ERA was an email sent by Mr Large on 16 October 2020. It provided an update on the process. It referred to the fact that there had been an error in an upload on the holiday section which meant that some employees' holiday pay had not been correctly calculated. It provided answers to some other general questions which had been sent by employees by email. This included confirmation that arrears of wages were only up to the date of dismissal not the end of the week of dismissal, and clarification of the way that redundancy payments had been calculated. In his email Mr Large said that he had "tried to cover the general queries that have been raised this week, however I have re-attached the general Q & A help sheet which does cover most queries". I find that is the FAQ that was sent with the original pack on 2 September. There is nothing in that "update" which refers to an entitlement to a protective award, the right to claim compensation for failure to consult or the need to make a Tribunal claim.

21. Around the end of August 2020 there had been a Facebook group set up for and by STA employees to communicate about issues arising from the redundancy situation ("the Facebook Group").

22. On 11 January 2021 a former employee of the first respondent, Gemma Grimley, posted on that Facebook page to say that she and a colleague had been awarded a protective award by a Tribunal in Nottingham. She reported that the Judge in that case had made a protective award in favour of all former STA employees. At that point the judgment in that case ("the Grimley Judgment") had not been sent to Ms Grimley. Subsequently, the Grimley Judgment was reconsidered by the judge in that case and varied to make it clear that it applied only to those claimants who had brought a claim for a protective award in that case, not all former employees of the first respondent.

23. On 3 February 2021, another former employee of the first respondent, Petra Phippen, posted on the Facebook Group a message saying that she had spoken to ACAS and the Employment Tribunals to try and clarify what the position was. She had then emailed the Insolvency Service who, to summarise, explained that she would need to make her own claim to the Tribunal for a protective award because she was not covered by the Grimley judgment. In her post she said that it looked like everyone would therefore need to proceed with their own claim and try and get them to link up with Ms Grimley's claim. There were then further Facebook posts and WhatsApp messages clarifying the steps exactly people needed to take to bring a claim.

Findings relating to individual claimants

Miss Gklantzouni

24. Miss Gklantzouni was on furlough when the redundancy happened. She received the standard information sent to employees by ERA. She was part of the

Facebook Group from around October 2020. She did see posts on it referring to something called a protective award. She understood it was a claim which those earning more than £538 per week could bring to the Tribunal to claim money above that statutory weekly cap payable by the Redundancy Payment Service. Her own weekly wage was below that figure so she did not think she could make a protective award claim. She saw the posts about the Grimley Judgment in January 2021 and understood it applied to all former employees. After seeing Ms Phippen's post in the Facebook Group, she contacted a colleague, Mr Kadri, by WhatsApp for advice on next steps. She contacted ACAS to begin Early Conciliation on 9 February 2021 and filed her Tribunal claim on 10 February 2021. Miss Gklantzouni had not gone through any kind of redundancy process like this before. Immediately after redundancy her focus was on trying to find another job.

Callum O'Neill

25. Mr O'Neill received the standard information sent to employees by ERA. He was not aware of anything called a protective award until the 11 January 2021 post from Gemma Grimley. He did not take action at that point because he thought the Grimley Judgment applied to all former employees. After seeing Ms Phippen's post on 3 February 2021 he contacted ACAS to start Early Conciliation that same day and filed his Tribunal claim on 5 February 2021. He felt he had been misled by ERA who had not mentioned a protective award in their documentation. He found the period from September to December 2021 very stressful because he was trying to find another job while still having rent and other living expenses to cover.

Mrs Warrington

26. Mrs Warrington was on maternity leave from November 2019 and had intended to return from maternity leave in November 2020. She had had no "keeping in touch" days so was in general "out of the loop" in terms of communication with colleagues at the time the redundancies took place. She received the standard ERA information. She also spoke to Mr Large of ERA 2-3 times and had numerous email exchanges with him about her holiday pay position which was complicated by her maternity leave. I accept Mrs Warrington's evidence that there was no mention of a protective award or an explanation of what that was during those exchanges. Mrs Warrington joined the Facebook Group at the end of August 2020, shortly after it was set up. She had a young child and therefore did not regularly monitor the Facebook Group or check up on the posts in it. To the contrary, she had actively "muted" it because of the number of posts. She was alerted to the Grimley Judgment by a WhatsApp group message by her former manager. Mrs Warrington then checked on Facebook and saw Ms Grimley's post. She was not sure what her position was because she was on maternity leave when the redundancies happened. She did not know what a protective award was and did not take any action because Ms Grimley said all former employees were covered by the judgment. After seeing Ms Phippen's post on 3 February 2021 she contacted ACAS to start Early Conciliation that same day and filed her Tribunal claim on 4 February 2021.

Mr Michael Holland

27. Mr Holland worked in the Operations Team at St George's House. He was on furlough from around the end of April 2020. He received the standard information from ERA. He was a member of the Facebook Group. He looked at that a couple of times a week. He was also involved in chats on the social media group that he had with his team colleagues about protective awards. I accept his evidence that he believed that a protective award was something only available to those earning more than the £538 a week weekly limit on statutory payments. He knew his manager had claimed for a protective award but did not think it applied to him because he earned less than £538 per week. He also understood that the protective award was something only those in teams of more than 20 people could apply for. As his team was smaller than that he did not think he could apply. After seeing Ms Phippen's post on 3 February 2021 Mr Holland contacted ACAS to start Early Conciliation on 8 February 2021 and filed his Tribunal claim on 9 February 2021. When made redundant Mr Holland had a mortgage and had been working for the first respondent for 12 years. It was therefore a very concerning time.

John Bradley

28. Mr Bradley's situation was different to his fellow claimants in that he accepted that he was aware of the right to claim a protective award for a failure to consult. He had searched on the internet to find out how to contact ACAS and initiated the early conciliation process on 4 September 2020. The Early Conciliation certificate was issued on 7 September 2020.

29. Also on 7 September 2020, Mr Bradley was sent a letter from ACAS's Insolvency Support team noting that it "would appear that your employer has become legally insolvent" and saying that in those circumstances "it is not appropriate for ACAS to get involved and therefore I will take no further action and close this case.".

30. The letter does not explain what the effect of ACAS "closing the case" is on a claimant's ability to present a claim at the Tribunal but goes on to say that the EC certificate has been issued to "confirm that you have complied with the requirement to notify us of your intention to make a claim". The letter goes on to explain the ability to claim certain moneys from the second respondent. It refers to the Employment Tribunal only in the context of an award for redundancy payment.

31. The Early Conciliation Certificate itself says that the claimant should keep the certificate securely as "you will need to quote the reference number in any Employment Tribunal application concerning this matter".

32. Mr Bradley received ERA's standard information and there was a lot of toing and froing between him and ERA both in relation to holiday pay and final pay. That was because his pay situation was complicated by an extra responsibility amount he was paid on a monthly basis but which was not recorded by the first respondent as part of his annual salary. The protective award was not raised during those exchanges either by Mr Bradley or ERA.

33. Mr Bradley did not file his claim until 11 February 2021. That was after he was alerted to Ms Phippen's post of 3 February 2021 by a colleague via Facebook Messenger. On 10 February 2021 he contacted ACAS by email to ask for an update, noting that colleagues had received notification that their claims had been referred to a judge. ACAS responded by email on the following day to say that when he received the Early Conciliation certificate, Mr Bradley should have filed an ET1. That advice was repeated when Mr Bradley wrote again to ACAS on 11 February 2021 to point out that he had been told that his "case was closed".

Mrs Umelaila Hussain

34. Mrs Hussain was on maternity leave and was therefore "out of the loop" when it came to conversations that were going on about protective awards. She received the standard ERA information. She was in the Facebook Group and her main point of contact with colleagues was via a WhatsApp group. She was in contact with Miss Gklantzouni (the first claimant). Mrs Hussain was aware from January 2021 that there was something called a "protective award" but understood that this was something which was relevant only to those earning more than the statutory limit of £538 per week. After becoming aware of the message from Ms Phippen she contacted ACAS to start Early Conciliation on 10 February 2021 and filed her Tribunal claim on 11February 2021.

Mr Mark Van Leeuwen

35. Mr Van Leeuwen received the standard ERA information. He joined the Facebook Group on 13 October 2020. He was aware there was something called a protective award but on making enquiries of his former manager understood that this related to those earning more than £538 per week. Mr van Leeuwen also relied on the information provided by ERA which did not mention anything about a protective award. After becoming aware of the post from Ms Phippen he contacted ACAS on 11 February 2021 to start Early Conciliation and filed his Tribunal claim on 19 February 2021.

Mr Philip Cooke

36. On hearing the evidence from Mr Cooke, it became apparent that he had lodged an earlier in time claim at London Central Employment Tribunal under case number 2206487/2020. It appeared that that claim had been struck out on the basis that it duplicated his claim in this case. Since that other claim preceded his claim in this case, I dismissed his claim in this case. His case will be dealt with under the claim he lodged in time at London Central Employment Tribunal (2206487/2020).

Discussion and Conclusion

37. I have dismissed Mr Cooke's claim and postponed consideration of Ms Dillon's claim. Of the other claimants who attended to give evidence, I find that their circumstances are essentially the same except for Mr Bradley's. I deal with his case separately below.

38. In relation to the other claimants, I find that the position is that they were ignorant of the right to bring a claim for compensation for a failure to consult. Some of the claimants were aware that there was something called a "protective award" from discussion in WhatsApp groups and Facebook groups of former colleagues. I find, however, that those employees believed that a "protective award" was something which employees paid more than £538 per week could bring to claim the difference between that amount and their actual week's pay when it came to arrears of pay and holiday pay.

39. I have considered whether in the circumstances they ought to have known of the right to claim a protective award for failure to collectively consult. In other words, were the circumstances such that they were put on notice that there was a potential right about which they needed to make further enquiry. In relation to these claimants I find that the answer is no.

40. I accept that the right to claim a protective award for a failure to collectively consult is not a widely known right. I find that is particularly the case in workplaces such as the claimants', which is non-unionised and where no employee representatives were in place. In addition, I take into account in this case that the employer appointed ERA Solutions to tell the claimants what their rights were. I am satisfied that ERA Solutions made no mention of the right to claim a protective award in the information provided to the claimants.

41. I have considered whether discussion of something called a "protective award" on the WhatsApp and Facebook groups of former employees was sufficient to put these claimants on notice that such a right existed. I find that this was not a case where they ought to have known of the right to claim a protective award, particularly where ERA Solutions, on whom they were relying for information, made no mention of the right to make a claim if there was a failure to consult.

42. In those circumstances in relation to this group of claimants I find that it was not reasonably practicable for them to have brought their claims in time. I am satisfied that they did bring their claims in such further time as was reasonable i.e. promptly after they became aware of the right to claim (and more specifically of the need for each employee to lodge their own claim) via Ms Phippen's post in the Facebook Group in February 2021. Their claims will be allowed to proceed. This applies to the cases of Miss Gklantzouni, Mr O'Neill, Mrs Warrington, Mr Holland, Mrs Hussain and Mr van Leeuwen.

Mr Bradley

43. Mr Bradley's situation is different. He had begun the process of applying for a protective award. He was aware that the right to make such a claim existed. The question is whether the letter from ACAS telling him his case was closed meant it was not reasonably practicable for him to bring his Tribunal claim in time. I do find that Mr Bradley was genuinely confused about ACAS's role and the significance of the ACAS letter "closing the case". The question is whether, being aware of his right to bring a claim and having initiated the process of making a claim for it by contacting

ACAS he ought reasonably to have known that the next step was to file a Tribunal claim or at least made enquiries to establish what the next steps were.

44. I note that Mr Bradley had used the internet to find out how to initiate Early Conciliation via ACAS. I find it would have been easy in practice for him to have made further enquiries to establish next steps on receipt of the ACAS certificate. I accept that the letter from ACAS could be better worded. It seems to me, however, that it would be reasonable to expect someone in Mr Bradley's position to make enquiries about what to do next either of ACAS itself or by visiting the government website for employment tribunals. At the very least, it seems to me he ought to have made enquiries to establish whether he could challenge the decision to "close the case". It also seems to me that Mr Bradley ought reasonably to have known that ACAS and the Employment Tribunal are separate bodies. It seems to me that he would not have contacted ACAS to initiate early conciliation unless he knew of the right to bring an employment tribunal claim. The wording of the Early Conciliation Certificate also makes clear the distinction between ACAS and the Tribunal, by referring to the need to quote the number "in any Employment Tribunal proceedings concerning the matter". He ought reasonably to have made enquiries to establish whether the ACAS letter prevented him from filing a Tribunal claim (especially when the certificate suggested it did not prevent him from doing so).

45. On balance, therefore, and even taking into account that I need to give the relevant legislative section a liberal reading in favour of the claimant, I find it was reasonably practicable for him to have brought his claim in time. He did not do so and so his claim is dismissed.

Next Steps

46. For those claimants whose claim I have allowed to proceed there is an outstanding issue to be decided, namely whether each claimant was employed at an establishment at which it was proposed to make redundant 20 or more employees triggering the entitlement to a protective award.

47. In relation to the claimants whose claims have been allowed to proceed who worked at St George's House, it seems to me there is no doubt that that was an establishment at which more than 20 employees were made redundant. In those circumstances it is not necessary for the Tribunal to hold a further preliminary hearing in relation to those claimants. A protective award will be issued shortly in relation to them.

48. However, in relation to Mr Van Leeuwen, who worked at the Chester branch, a preliminary hearing on the issue of "establishment" will be needed. That hearing will take place on 15 August 2022. Directions for that hearing will be given separately.

_____

Employment Judge McDonald

Date: 27 July 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
27 July 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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
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
2401712/2021	Mr John Bradley
2402069/2021	Mr Mark Van Leeuwen
2402117/2021	Mr Philip Cooke
2402442/2021	Mrs Katrina Malley