



EMPLOYMENT TRIBUNALS

Claimant: Mr B Lewis

Respondent: Formation Furniture Limited (In Administration) (1)
Secretary of State for Business, Energy and Industrial
Strategy (2)

Heard at: Cardiff

On: 11 January 2023

Before: Employment Judge R Brace

Representation: Claimant: Did not attend
Respondents: Did not attend

JUDGMENT

The Claimant's claim for a protective award was brought out of time, time is not extended and the claim is dismissed for lack of jurisdiction.

Reasons

1. This preliminary hearing had been listed to consider:
 - a. whether the Claimant's complaint for a protective award for failure to consult brought under s.189 Trade Union Labour Relations (Consolidation) Act 1992 ("TULR(C)A 1992") and, if so,
 - b. should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it.
 - c. Further, or alternatively, because of those time limits (and not for any other reason) should the complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should a deposit be made under rule 39 on the basis of little reasonable prospects of success.

2. The Notice of Hearing for this preliminary hearing sent to the Claimant by email on 22 December 2022 had confirmed that hearings, to determine this issue for each claimant (out of 17 claimants who had brought similar claims against the same Respondents and whose claims were being considered

together,) had been listed over 2 days on 11 and 12 January 2023. Each claimant had been allocated a specific day and time to attend during those two days and a hearing allocation of 30 minutes, for each to give their evidence relevant to their specific claim on the preliminary issues of time/jurisdiction. Each claimant was requested to attend the tribunal in advance of their specific time slot on the given day.

3. None of the parties attended this hearing. The Claimant had not written to inform the Tribunal that they would not be attending.
4. Due to the time-table set, it was not considered practicable to make direct contact with all parties prior to the commencement of each allocated hearing time to ascertain the reason for their absence. The hearing therefore proceeded in their absence and a determination was made on the documents on the tribunal file, any further documents that the Claimant had sent to the Tribunal and taking the practicable steps of checking that:
 - a. on 1 June 2022, the Tribunal had asked the Claimant to:
 - i. Explain why it had not been reasonably practicable for them to present their complaint within the time limits; and
 - ii. Provide an explanation of why they did not present their complaint until the date that they did in fact present their complaint;
 - b. On 4 July 2022, the Tribunal had directed each claimant send to the Tribunal documents relevant to the issue for determination and any witness statement that they wished to rely on;
 - c. On 8 August 2022 a strike out warning email had been sent for failure to comply with the 4 July 2022 direction, repeating the directions given;
 - d. in the Notice of the Preliminary Hearing of 22 December 2022, the claimants had been notified that a Judge may make a determination based on the evidence before them, if they did not attend; and
 - e. the Claimant was not simply late, with the Judge and clerk remaining in the hearing room for the full period of 30 minutes that the Claimant had been allocated for their preliminary hearing.
5. Within the ET1 claim form the Claimant asserted that he had been employed by Formation Furniture Limited, that his employment had ended on 19 August 2020 and was claiming a protective award.
6. The following is also relevant:
 - a. On 30 June 2020, Peter Dickens, Julia Marshall and Ross Connock, of PwC accountants, had been appointed Joint Administrators of Formation Furniture Limited (In Administration), referred to as R1 in these Reasons. This was a finding of fact made by me in the case of

(Webb and others v Formation Furniture Limited (In Administration) case no 1601865/2020 and others) after a one day final merits hearing on 14 September 2021;

- b. In those claims, some 94 individual claimants, previously employees of R1 who had been dismissed on 18 August 2020, were given judgment on their complaints brought under s.189(1)(d) TULR(C)A 1992 (“Webb Judgment”); and
 - c. The Claimant was not one of the claimants within that Webb Judgment.
7. On 8 November 2021, the Claimant began a period of early conciliation that ended on 17 September 2021.
 8. On 22 November 2021, the Claimant filed an ET1 asserting he had been dismissed on 19 August 2020 bringing a complaint for a protective award under Section 188 of the TULR(C)A 1992.
 9. In reaching a determination of the claim on the papers, the following was considered:
 - a. The Tribunal file including the ET1 claim form and EC certificate;
 - b. The Claimant’s emails and letters to the Tribunal received on
 - i. 7 August 2022; and
 - ii. 9 August 2022 in which the Claimant indicated he had no witness statement.

The Law

- 10.A complaint under s.189 TULR(C)A 1992 must be made:
 - a. either before the date on which the last of the dismissals takes effect or
 - b. during the period of three months beginning with that date.
- 11.However, s.189(5) TULR(C)A 1992 provides that tribunals have a discretion to allow complaints within such further period as they consider reasonable if it was not reasonably practicable to present the complaint within three months.
- 12.The ACAS early conciliation scheme contained in s.18 of the Employment Tribunals Act 1996, which requires a claimant to contact ACAS before instituting tribunal proceedings, applies in respect of any complaint concerning a failure to comply with a requirement of s.188 or s.188A TULR(C)A 1992.
- 13.When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:
 - a. Section 189(5) TULR(C)A 1992) should be given a *‘liberal construction in favour of the employee’* (**Dedman v British Building and Engineering Appliances Ltd**) 1974 ICR 53, CA;

- b. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide;
- c. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. '*That imposes a duty upon him to show precisely why it was that he did not present his complaint*' (**Porter v Bandridge Ltd** 1978ICR 943, CA).

14. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented '*within such further period as the tribunal considers reasonable*'.

Facts and conclusions

15. Very few findings of facts could be made from the documentation.
16. In his ET1 claim form, the Claimant claimed that he had been told to claim protection as '*several ex colleagues of mine have been to tribunal and won the case*'
17. On the basis of the information before me I determined that the Claimant did not bring his complaint for a protective award within the time limits set out in s.189 TULR(C)A 1992 (whether the termination date was 19 August 2020 or 18 August 2020).
18. I then considered if the Claimant had demonstrated that it had not been reasonably practicable for him to present his complaint within the time limits. I concluded that he had not demonstrated that, for the following reasons.
19. Whilst I was prepared to give a liberal construction in favour of the Claimant, the burden is on the Claimant to show precisely why he didn't present his complaint in time. I concluded that he had not shown why he had not for the following reasons:
- a. The Claimant indicates that he did not bring a claim within the primary time limit as he did not know that he could bring such a claim until he became aware that others had brought protective award claims, namely the claimants in the Webb Judgment;
 - b. I did not consider that being informed of a successful complaint by an ex-colleague was a relevant new fact or reasonable explanation for the Claimant's delay;
 - c. There was no explanation from the Claimant to indicate what steps he himself took, if any during the primary limitation period, to ascertain if he had any right to bring a claim and what, if so, were the relevant time limits for such a claim;

20. Whilst I do consider it more likely than not that the Claimant did not know that he could bring a complaint for a protective award within the primary time limit,

I do have regard to what knowledge the Claimant should have had, had they acted reasonably in the circumstances.

21. Whilst the Claimant may very well have been ignorant of his right to claim for a protective award, I was not persuaded that there were any circumstances in this case to indicate that such ignorance was reasonable. He ought to have known of them had he taken any steps to find out that he had rights. There was no evidence to indicate that he did take such steps. His explanation that he had been out of work was insufficient to persuade me that it had not been reasonably practicable for the Claimant to have brought this complaint within the three month time limit.

22. In those circumstances, I do not extend time and the claim is dismissed.

Employment Judge Brace

Date: 13 January 2023

JUDGMENT SENT TO THE PARTIES ON
17 January 2023

FOR THE TRIBUNAL OFFICE

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