



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Frackowiak

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

Heard at: Cardiff

On: 12 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 written to inform the Tribunal that as they were away in Poland looking after their sick husband, they would not be able to attend.
4. 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 she had been employed by Formation Furniture Limited, that her employment had ended on 18 August 2020.
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 11 January 2022, the Claimant began a period of early conciliation that ended on 6 January 2022.
 8. On 26 January 2022, the Claimant filed an ET1 asserting she had been dismissed on 18 August 2020 bringing a complaint which was treated as 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 email to the Tribunal date 13 June 2022 which the Tribunal relied on as the Claimant’s 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 her ET1 claim form, the Claimant claimed that she wished to make this claim as she had been dismissed without notice. That was treated as claim for failure to consult.
17. In her email of 13 June 2022, the Claimant stated that she didn't present her complaint within the time limit as she wasn't aware by anyone of her right to complain; that she was an immigrant and she was not aware of the regulations.
18. On the basis of the information before me I determined that the Claimant did not bring her complaint for a protective award within the time limits set out in s.189 TULR(C)A 1992).
19. I then considered if the Claimant had demonstrated that it had not been reasonably practicable for her to present his complaint within the time limits. I concluded that she had not demonstrated that, as whilst I was prepared to give a liberal construction in favour of the Claimant, the burden is on the Claimant to show precisely why she didn't present her complaint in time. I concluded that she had not shown why she had not for the following reasons:
- a. The Claimant indicates that she did not bring a claim within the primary time limit as she did not know that she could bring such a claim;
 - b. There was no explanation from the Claimant to indicate what steps she herself took, if any during the primary limitation period, to ascertain if she had any right to bring a claim and what, if so, were the relevant time limits for such a claim;
 - c. Whilst I accept that as a Polish national, the Claimant may not have been as familiar of the UK employment tribunal system as those of UK nationality, the Claimant had familiarised herself with the tribunal process at some stage in order to bring this complaint. Her nationality did not prevent her from bringing a complaint.
20. Whilst I do consider it more likely than not that the Claimant did not know that she 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 her 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. She ought to have known of them had she taken any steps to find out that she had rights. There was no evidence to indicate that she did take such steps.
22. Her explanation that she had not been told was not sufficient to persuade me that it had not been reasonably practicable for the Claimant to have brought this complaint within the three month time limit.
23. In any event, even if I had been persuaded that the Claimant's ability to communicate in English delayed the ability to claim within the primary time period, I was not persuaded that this would have given rise to a reasonable explanation for the delay that was then occasioned in issuing a claim and I concluded, in the alternative, that the Claimant had not submitted her complaint within a reasonable time frame thereafter.
24. 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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