



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Bater

**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 on 5 August 2022 to inform the Tribunal that they would not be any hearing to determine the issue of time and that the Tribunal rely on his written submissions dated 22 June 2022.
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.
5. On 1 June 2022, the Tribunal had asked the Claimant to:
  - a. Explain why it had not been reasonably practicable for them to present their complaint within the time limits; and
  - b. Provide an explanation of why they did not present their complaint until the date that they did in fact present their complaint;
6. 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.
7. 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.
8. On 28 October 2021, the Claimant began a period of early conciliation that ended on 2 November 2021.

9. On 29 November 2021, the Claimant filed an ET1 asserting he had been dismissed on 18 August 2020 bringing a complaint for a protective award under Section 188 of the TULR(C)A 1992.
10. 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 to the Tribunal of 22 June 2022 in response to the Tribunal's direction of 1 June 2022 which I accepted as the Claimant's written statement.

### The Law

11. 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.
12. 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.
13. 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.
14. 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** 1978 ICR 943, CA).
15. 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

16. Few findings of facts could be made but it appeared from his ET1 claim form that the Claimant asserted that he had been employed by Formation Furniture Limited, and had been dismissed on 24 August 2020. He stated he, and over 200 of his work colleagues, were made redundant and that *'It has since been to court with the administration company losing. I have been informed that we should have received a longer consultation period.'*
17. Within his email of 22 June 2021, the Claimant asserted that:
- a. At no point were they given guidance from R1 regarding their redundancy
  - b. The redundancy had happened at the height of the pandemic and the redundancy process had been carried out online with no opportunity to ask questions.
18. He also confirmed that he had contacted ACAS for advice and was told that there was nothing else that he could do and nothing else he was entitled to. He explained that this had an impact on his mental health as well as the stress of needing to find a job and that became his primary focus.
19. He explained that he did not know until November 2021 that he was aware that a large number of others had put in a claim and had been successful and that as soon as he knew about this he contacted the Tribunal immediately with the claim
20. I concluded that the Claimant had not complied with time limits set out in s.189 TULR(C)A 1992.
21. 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. 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 implies 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 knowledge of the Webb Judgment was a relevant new fact or reasonable explanation for the Claimant's delay;
22. Whilst it is possible 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.
23. The Claimant indicated that he had been in contact with ACAS who told him that there was *'nothing else he could do and nothing else he was entitled to*

*do*'. The Claimant has not provided any evidence as to whether or not he was told by ACAS that ACAS was an independent body not empowered to give advice.

24. I concluded that it was more likely than not that an organisation such as ACAS would inform callers such as the claimant of the limits on its role, and that it was further, more likely than not, that rather than tell the Claimant that there was nothing else he could do/ or was entitled to, that ACAS would have informed the Claimant that they were not empowered to advice.

25. Whilst the Claimant may very well have been ignorant of his right to claim for a protective award as he had never experienced litigation before, I have no evidence 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.

26. I was not persuaded that the focus on obtaining alternative employment or the stress of the redundancy rendered it not reasonably practicable for the Claimant to have presented his claim within the primary time limit.

27. On that basis, I concluded that it was reasonably practicable for the Claimant to have presented his claim in time. Time is not extended 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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