



EMPLOYMENT TRIBUNALS

Claimant: Mr P Thorne

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 22 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.

GMB Membership

7. The Claimant was a member of the trade union, the GMB and, on 20 October 2021 Mike Payne, Senior Organiser of the GMB had written to the Tribunal as follows:

‘I am writing to you with regards to the above Judgement to request that you allow an amendment to the Schedule to add an additional 21 claimants who at the time of the factory closure on 18th August 2020, worked for Formation Furniture Ltd, in Bridgend.

For background, the GMB had approximately 40 members at Formation Furniture, but did not have a recognition agreement in place, and so we did not have any statutory entitlement to be consulted.

I did however contact the administrator when we became aware of the closure and asked if they were consulting with members of staff regarding the closure and potential redundancies. I was advised that they were in fact consulting with members of staff, and so i took their word for this and concentrated on getting people registered onto the Welsh Governments React Scheme and ensured that they submitted their claims to the Redundancy Protection Scheme for their statutory payments.

Subsequently last week i have been advised that a claim for a protective award had been granted to other members of staff who were also employed by Formation Furniture because the full statutory consultation had not taken place.

I am therefore writing to advise that we have approximately 21 GMB members who should have been linked to this claim, but who were not made aware of it. Subsequently they have not received the Protective Award payments that their colleagues have now been adjudged to be entitled to.

Could I ask that my request be placed before the Employment Tribunal Judge who made the Judgement to request that we be allowed to:

- a. *Provide the additional names on behalf of our members so that the schedule of claimants be amended and allow them to receive the same awards as their colleagues, via the Redundancy Protection Service.*

- b. *Allow me to arrange for the individual claimants to write to the ET making this request individually or*
- c. *Allow me to arrange for a late claim to be submitted, using the judgement as a precedent for receipt of award.*

Finally, I have been in touch with both the Administrator PWC and the RPS via the administrator, who have both agreed that payments will be made if His Honour will agree to allow the Schedule of claimants to be amended.

I would respectfully request that agreement is given to allow the schedule to be amended and I look forward to hearing from the ET at your earliest opportunity.

Please do not hesitate to contact me if you require any further information.

8. On 29 October 2021, at my direction, the Tribunal wrote to Mr Payne responding that the application could not be considered as no claims had been lodged at the Employment Tribunal, providing a link for on-line claim submission.
9. On 3 November 2021, the GMB wrote to the Tribunal confirming that the GMB had written to potential claimants and asked that they register their claims with ACAS and for the individuals to register their claims with the ET asking that their names be added to the Webb Judgment schedule.
10. On 3 November 2021, the Claimant began a period of early conciliation that ended on 3 November 2021.
11. On 3 November 2021, the Claimant filed an ET1 asserting he had been dismissed on 22 August 2020 bringing a complaint for a protective award under Section 188 of the TULR(C)A 1992.
12. 28 June 2022, Adie Baker, GMB Senior Organiser had written in response to the direction of 1 June 2021 stating that claims could not be submitted within the primary three month time limit as:
 - a. The GMB had not been consulted on the redundancies as they had not been a recognised trade union;
 - b. that the GMB only became aware of a claim against Formation Furniture once the successful Tribunal claim (i.e. the Webb Judgment) had been published.
13. The letter also, incorrectly, asserted that it had been agreed with the Tribunal that:
 - a. the Tribunal would allow additional claims as long as the Administrators and the Statutory Fund agreed that they could be added; and
 - b. That the GMB should submit a collective ET application.

14. No such agreement or direction had been given.
15. On 4 July 2022, claimants were informed that any claim not listed in the schedule of claimants appended to the Webb Judgment were new claims and cannot and would not simply be added to the schedule.
16. On 27 July 2022, Adie Baker of the GMB wrote to the Tribunal confirming that the GMB were no longer pursuing a claim on behalf of its members, including the Claimant, had undertaken further investigation of the potential claims and concluded there were no longer reasonable prospects of success and asking the Tribunal to confirm in writing that the claims relating to GMB members had been withdrawn.
17. On 5 August 2022, the GMB were asked to clarify if they were coming off record or withdrawing the claims but no response was received and accordingly on 6 October 2022, the Tribunal wrote directly to the relevant claimants, which included the Claimant, to confirm whether they wished to continue with the claim, who responded on 11 October 2022 that they did.
18. On 29 October 2022, at my direction, the Tribunal wrote to Mr Payne responding that the application to add the claims to the Webb Judgment Schedule could not be considered as no claims had been lodged at the Employment Tribunal, providing a link for on-line claim submission.
19. 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 4 December 2022 in response to the Tribunal's direction of 4 July 2022 in which he stated that he had no documents available, no witness statements, that he was unable to join any hearing by video and that he was unable to attend any hearing. He wished for the judge to make a decision on his behalf.

The Law

20. 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.
21. 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.
22. 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.

23. 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 Bandidge Ltd** 1978 ICR 943, CA).

24. 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

25. No findings of facts could be made other than the steps that the GMB had taken on behalf of GMB claimants.

26. It appeared from his ET1 claim form that:

- a. the Claimant had named the GMB as his representative and
- b. that he wished his claim to be accepted as he was not aware of a claim until he became aware of the Webb Judgment. He stated the following: *'I am looking for his case to be 'co-joined with this case so that I am added to the Judgment Schedule'*;

27. 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.

28. 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.

29. 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 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;
30. 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.
31. Whilst the Claimant may very well have been ignorant of his right to claim for a protective award, 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. There was no evidence to indicate that he did take such steps.
32. 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.
33. Even if, taking a very liberal approach, the Claimant was reliant on the GMB, whilst the GMB was not a recognised trade union within R1, it was aware of the collective redundancies and there is a duty of care owed by trade unions to its members when advising and acting on employment disputes.
34. I concluded that even if the Claimant was relying on the advice of his trade union, as a trade union member in a collective redundancy situation, and even if the union did not advise the Claimant to bring a claim until November 2021, any remedy for the Claimant would lie against the union and the delay in the provision of that advice did not persuade me that it had not been reasonably practicable for the Claimant to have brought his claim within the primary time limits.
35. Where the Claimant had paid his membership to the GMB and they make a mistake regarding the time limits and present the claim late, his remedy is against them (**Dedman v British Building and Engineering Appliances 1974 ICR 53 CA**).
36. 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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