EMPLOYMENT TRIBUNALS

Claimant: Mr J McKeown

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: In person
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. 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;

4. 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.

5. 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.

6. The following is also relevant:

    a. The Claimant had, until their dismissal on 18 August 2020, been employed by Formation Furniture Limited;

    b. 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;

    c. 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”).

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 **2 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 **18 August 2021** bringing a complaint for a protective award under Section 188 of the TULR(C)A 1992.

12. On 28 June 2022, Adie Baker, GMB Senior Organiser had written in response to the direction of 1 June 2022 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 again 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. The Tribunal heard evidence from the Claimant and the following documents were before the Tribunal:

    a. The Tribunal file including the ET1 claim form and EC certificate;
    b. The Claimant's emails to the Tribunal of:
        i. 11 October 2022,
        ii. 3 January 2023 (enclosing copies of emails from PwC of August 2020); and
        iii. 11 January 2023 (enclosing a copy of the email to the Claimant from GMB of 2 November 2021).

The Law

19. 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.

20. 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.

21. 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.

22. 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).

23. 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

24. Since the commencement of the Covid-19 pandemic in March 2020, the Claimant had been on furlough under the government's Coronavirus Job Retention Scheme and had not returned to work as at the date of his dismissal.

25. He attended an online web-call meeting on 12 August 2020, when he was informed that he was being made redundant. He also received email confirmation of this fact and that he was entitled to a redundancy payment. None of the correspondence received from the Administrators referred to any claims for a protective award. Whilst he did contact the Administrator shortly after his dismissal to query the calculation of his redundancy entitlement, he did not think to ask if he was eligible for any other claim or award.

26. He received no correspondence or communication from the management at R1 regarding a possible claim for a protective award.

27. The first time that the Administrators informed him of a possible protective award was in the summer of 2022, after the Claimant had issued these proceedings.

28. The Claimant had been a member of the GMB union at the date of the termination of his employment on 18 August 2020. The GMB held a meeting a week or two after the Claimant's dismissal where, he understands, they discussed matters such as Jobseekers Allowance. The Claimant did not attend that meeting as he was self-isolating.

29. The GMB did not advise him of the ability to bring a claim for a protective award at that time.

30. The Claimant did not take any steps himself to contact the GMB (or indeed any other source of advice and support such as CAB or a solicitor) to ascertain if he was entitled to bring any claims as a result of his dismissal. He considered that as he had union representation, and had paid his union subscriptions, if the GMB had thought he had a claim, they would have ascertained this and contacted him. They did not.

31. Indeed the Claimant gave evidence that the GMB did not contact him until Mike Payne, Senior Organiser of the GMB, contacted him on 2 November 2021, over a year later. He provided a copy of an email sent by Mr Payne dated 2 November 2021 confirming that PwC had reassured them at the time

    '*that there was a group of employees that had been elected by the workforce, and they were being consulted with, and they in turn were keeping everyone up to date with regards to factory closure. Our legal advice at the time was that we had nowhere to go with regards to get Protected Awards on members behalf.'*

32. In September 2021 the Claimant was made aware that other employees had been successful in the employment tribunal in their claims for a protective

award (referring to the Webb Judgment) and that he would do his best to 'add on' the Claimant to that award.

33. Mr Payne asked the Claimant to re-join the GMB if he had ceased to be a member and to complete an ACAS early conciliation form and an on-line employment tribunal claim to ask for a protective award asking the tribunal to accept a late application and that he be allowed to be added to the schedule attached to the Webb Judgment.

34. This was the first time that the Claimant had been told by the GMB that he could bring a claim for a protective award in the employment tribunal.

35. The Claimant contacted ACAS that day, commencing the early conciliation process which ended on 3 November 2021 and submitted his online ET1 claim form, on 3 November 2021.

36. Until the contact from the GMB on 2 November 2021, the Claimant was unaware of the Webb Judgment, living some 26 miles away from his old place of work and out of contact with his previous work colleagues and potential claimants.

Conclusions

37. The Claimant did not bring his complaint for a protective award within the time limits set out in s.189 TULR(C)A 1992.

38. I concluded that it was reasonably practicable for the Claimant to have brought this complaint within the three month time limit 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 he didn't present his complaint. He did not persuade me that it had not been reasonably practicable for him to do so.

39. Whilst I accepted 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.

40. In these circumstances, the Claimant was represented by the GMB and did not attend a meeting convened by the GMB for those of its members made redundant by R1. Had he done so, he could have then sought their advice.

41. He did not at that time, or at any time after his dismissal, seek advice from his union representatives, instead assuming that if he had a claim, that the GMB would contact him.

42. He did not seek other sources of information and advice, such as Citizen's Advice Bureau or other legal advice.

43. I consider that an employee acting reasonably in these circumstances would have taken steps to contact his union, or indeed other sources of advice to

find out if he had rights. He did not. For that reason, I concluded that it had been reasonably practicable for the Claimant to have presented his claim within the primary time limit.

44. In addition, the Claimant relies on the fact that the GMB did not contact him until 2 November 2021 regarding a potential claim.

45. 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. The duty is to exercise reasonable care and skill in the provision of practical employment relations and employment advice being able to provide strategic and tactical advice on how to resolve a situation in the best interests of its members (**Langley v GMB and ors 2021 IRLR 309**).

46. Albeit not a recognised trade union, I concluded that the GMB had considered it part of their remit to members to consider and advise whether there was a protective award claim during this collective redundancy exercise as reflected in the email from Mr Payne of 2 November 2021. Again, as indicated in that letter, the GMB concluded that there was not and did not contact the Claimant shortly after his dismissal to advice him of the ability to bring a claim for a protective award.

47. They contacted their members in November 2021 to advise on bringing a late claim for a protective award only at that point after coming into knowledge that individual claimants, not represented by a trade union, had been successful in their complaints.

48. I concluded that where the Claimant was relying on the advice of his trade union, as a trade union member in a collective redundancy situation, and that 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.

49. 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**).

50. In those circumstances also, time is not extended.

Employment Judge Brace

Date: 13 January 2023

JUDGMENT and REASONS SENT TO THE
PARTIES ON
17 January 2023

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