



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Kendrick

**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 13 May 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 16 September 2021, the Claimant began a period of early conciliation that ended on 17 September 2021.
  8. On 17 September 2021, the Claimant filed an ET1 asserting he had been dismissed on 13 May 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 to the Tribunal of:
      - i. 1 June 2022;
      - ii. 6 June 2022; and
      - iii. 5 August 2022, which I accepted as the Claimant’s written 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 Bandidge Ltd** 1978 ICR 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:
- a. In his ET1 claim form, the Claimant claimed that his employment had ended on 13 May 2020, but also claimed that he had been made redundant *'out of the blue'* and that some employees had been *'getting 90 days pay'*, including a Lee Parry;
  - b. In his email of 1 June 2022, responding to why the complaint had been presented late, the Claimant asserted that he was not made aware that all his *'workmates had put in for a claim'*, that he had been out of work for 6 months and that it was only when he had *'started in ashwood designs, that he was told to put a claim in by my former boss Lee Parry'*; and
  - c. In his email of 6 June 2022, the Claimant again asserted that he had been out of work for 6 months, then had a major operation and had been in hospital for over 10 weeks and that when he was finally back in work his old boss had told him about his claim and that a lot more had been paid to him;
  - d. In his statement of 5 August 2022, the Claimant explained that he had been putting effort into getting back to work and had new employment 7 months later at ashwood designs, that his old boss informed him of his own claim, that he then had an operation and had been having financial concerns as his explanation of why he had not brought his claim within time.
16. 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 13 May 2020 or 18 August 2020).

17. 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.
18. The Claimant claimed in his ET1 that he had been dismissed on 13 May 2020. Administrators had not been appointed over the assets of R1 until 30 June 2020 and any dismissal on 13 May 2020 did not form part of the collective redundancy that had resulted in the protective award in the Webb Judgment.
19. Any claim for a protective award based on a termination date of 13 May 2020 was therefore out of time, and I declined to extend time as no explanation had been provided by the Claimant as to why a complaint could not have been brought within three months of that specific termination date.
20. However, I also considered the alternative, which was that the Claimant had been dismissed on 18 August 2020 as part of the collective redundancies following the appointment of the Administrators, not 13 May 2020 as claimed.
21. 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. The Claimant relies on being unaware of the ability to bring a complaint and of being told of the Webb Judgment, at some point after he started work at ashwood designs some 6/7 months after his dismissal. No evidence has been provided as to the date that he was informed of such a complaint;
  - c. 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;
  - d. Other than being out of work and looking for alternative employment for a period of 6/7 months following his dismissal, 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;
  - e. As the Claimant's hospitalisation had not arisen until significantly after the primary time period and as no medical evidence was in any event provided to me to indicate the Claimant's incapacity and period of incapacity, I did not take this into account.

22. 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.

23. 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.

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

Employment Judge Brace

Date: 12 January 2023

JUDGMENT SENT TO THE PARTIES ON  
17 January 2023

FOR THE TRIBUNAL OFFICE

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