



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Foster

**Respondent:** National Holidays Limited (in administration)

## VIDEO PUBLIC PRELIMINARY HEARING

**Heard:** Remotely (by video link) **On:** 20 May 2021

**Before:** Employment Judge S Shore

### Appearances

For the claimant: In Person

For the respondent: No Appearance

## JUDGMENT

1. The claimant did not present his claim for a protective award pursuant to section 189(1) of the Trade Union & Labour Relations (Consolidation) Act 1992 within the period of three months (including any pause in calculating time due to early conciliation) beginning with the effective date of termination, as required by section 189(5) of the Trade Union & Labour Relations (Consolidation) Act 1992 when it was reasonably practicable for him to have done so. The Tribunal therefore has no jurisdiction to hear this claim, which is struck out.
2. The claimant did not present his claim for breach of contract pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction Act (England and Wales) Order 1994 within the period of three months (including any pause in calculating time due to early conciliation) beginning with the effective date of termination, as required by Article 7 of the Employment Tribunals Extension of Jurisdiction Act (England and Wales) Order 1994 when it was reasonably practicable for him to have done so. The Tribunal therefore has no jurisdiction to hear this claim, which is struck out.

## REASONS

### Introduction

1. The claimant was employed as Coach Driver by the respondent from 26 July 2017 to 25 May 2020, which was the effective date of termination of his employment following his dismissal for the stated reason of redundancy. The claimant started early conciliation with ACAS on 4 November 2020 and obtained a conciliation certificate on the same date. The claimant's ET1 was presented on 5 November 2020. The respondent was a major provider of holidays.
2. The claimant presented claims for:
  - 2.1. A protective award pursuant to section 189(1) of the Trade Union & Labour Relations (Consolidation) Act 1992, and;
  - 2.2. Breach of contract pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction Act (England and Wales) Order 1994.
3. The respondent entered administration on 22 May 2020. On the same date, the claimant and his colleagues were told to join a telephone conference at which they were advised that the respondent was going into administration and that they were all dismissed for the stated reason of redundancy with immediate effect.
4. Whilst the administrators of the respondent took no active part in the proceedings, they wrote to the Tribunal on receipt of the claimant's claim and submitted that the claimant's claim was out of time. The case was then listed for this hearing to determine whether the claim was out of time and whether time should be extended.

### Law

5. The law relating to time limits for both claims is basically the same with one minor difference. The law relating to time limits in protective award cases is contained in section 189(5) of the Trade Union & Labour Relations (Consolidation) Act 1992, which states:

*"An [employment] tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*

*(a) before the date on which the last of the dismissals to which the complaint relates takes effect, or*

*(b) during the period of three months beginning with that date, or*

*(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the period of three months, within such further period as it considers reasonable."*

6. The law relating to time limits in breach of contract claims is contained in Article 7 of the Employment Tribunals Extension of Jurisdiction Act (England and Wales) Order 1994, which states:

*“An industrial tribunal shall not entertain a complaint in respect of an employee’s contract claim unless it is presented—*

*(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*

*(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or*

*(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.”*

6. The Employment Tribunal has little discretion in applying time limits because they are what known as jurisdictional matters. That means that if a case is found to be out of time and none of the exceptions apply, the Tribunal has no discretion to allow the case to continue.
7. No case management orders were made in preparation for this hearing, but Mr Foster was advised about the time issue and was asked to say why he thought it had not been reasonably practicable for him to submit his claim in time. He also produced some documents in support of his argument.
8. Mr Foster explained his position as follows:
  - 8.1. He had been given no prior notice of the respondent’s announcement on 22 May 2020;
  - 8.2. He never returned to work after the announcement;
  - 8.3. He made claims to the government’s Redundancy Payments Service (“RPS”) for notice pay and a statutory redundancy payment. Mr Foster produced a letter dated 18 June 2020 from the RPS notifying him of a payment in respect of his statutory redundancy entitlement and a letter dated 1 July 2020 from the RPS notifying him of a payment in respect of his notice pay entitlement;
  - 8.4. He was told by a manager at the respondent that he had to wait three months before making any claims, but he was told by a former colleague sometime in July 2020 about the possibility of making a claim for a protective award;
  - 8.5. Mr Foster told his friend that he had already contacted a firm of solicitors, Simpson Millar, about such a claim and was waiting for their response;
  - 8.6. He produced an email dated 28 July 2020 to Simpson Millar, which said:

*“I have been informed that I should have received an email from you about money owed to me. I was employed by National Holidays as a Coach Driver (part of the SLG group). Could you please advise me where I stand? I contacted Daniel O’Neil 03453579000, however, he was not available at the time. I passed on all my details and was informed I would get a call back but have not been contacted to date. I would appreciate a reply to this matter.”*

- 8.7. Mr Foster said that the email was sent after his initial call to Simpson Millar in July 2020. They had taken his details and he had waited some time for a response before being told to contact another solicitor; Daniel O’Neill;
- 8.8. He had contacted Mr O’Neill’s firm, but although someone took his details, they never got back to him;
- 8.9. He then sent the email and waited. In October 2020, he was advised by Simpson Millar that they could not deal with his claim because they were too busy;
- 8.10. He was told about the ongoing claims by a work colleague on 31 October 2020. He rang Citizen’s Advice, who told him to ring ACAS. He contacted ACAS on 4 November 2020. ACAS issued him with an early conciliation certificate on the same date; and
- 8.11. He issued his ET1 on 5 November 2020.

### **Findings**

9. I find that the effective date of termination of the claimant’s employment was on 22 May 2020. The claimant began early conciliation on 4 November 2020 and obtained a conciliation certificate on the same date. These dates were agreed by the claimant. I find that time for the presentation of the claim form expired at midnight on 21 August 2020.
10. I find that the claimant was aware of the time limit because he said he had been advised of the three-month limit by his former colleague in July 2020.

### **Assessment and Conclusions**

11. On my findings of fact, I conclude that it was reasonably practicable (and/or feasible) for the claimant to have presented the claim to the Tribunal by midnight on 21 August 2020. He did not do so, and so his claim was out of time and the Tribunal has no jurisdiction to hear it.
12. The reasons I make the finding that it was reasonably practicable for the claimant to have presented his claim on time are that:
  - 12.1. He was aware that he had a claim in July 2020;
  - 12.2. He attempted to instruct Simpson Millar to act for him in July 2020;

- 12.3. He presented no evidence that there were any medical reasons why he could not present the claim in time; and
  - 12.4. If the responsibility for the failure to present the claim in time lies with the claimant's former lawyers, then that is a matter between him and them.
13. I have a great deal of empathy for the position in which the claimant has found himself, especially as his claim for a protective award had merit, but if his claim was presented out of time, I have no discretion to extend time on the facts that he presented.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore  
21 May 2021