

# Clocking off

Opening our new series of practical workshops is **Gregory Jones**, who tries to resolve public law's promptitude conundrum

**THE WAY TO** challenge a decision by a public authority thought to be unlawfully made is usually by judicial review. But it's no good having a case for judicial review if the claim is time barred. Under CPR 54.4, judicial review claims must be filed 'promptly' and "in any event not later than three months after the grounds to make the claim first arose".

Many lawyers make the mistake of thinking that a claim brought within three months will be in time. That is not so. The English courts have held that such claims may be too late because they are not 'prompt'. But what is 'prompt' depends upon the circumstances of the case. So, it is extremely difficult for practitioners to advise a client.

## The toolbox

In *LAM v UK* (Application No 41671/98) (5th July 2001), the ECtHR held that the promptness requirement was not in breach of article 6(1) of the ECHR.

But in *Hardy v Pembrokeshire* [2006] EWCA Civ 240, the Court of Appeal highlighted the ECtHR's reasoning that legal certainty does not connote "absolute certainty", and as such the degree of promptness required will vary from case to case.

A recent judgment from the CJEU, Case 407/08 *Uniplex v NHS Business Services Authority*, has set the matter ablaze again. On a reference by the High Court, the CJEU dealt with a time limit in regulation 47(7)(b) of the Public Contracts Regulations 2006. That rule, like CPR 54.5, required any proceedings brought under those regulations to be "brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose".

The CJEU held that expecting proceedings to be brought 'promptly' was not compatible with EU law, which requires that time limits

must be "sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations".

## Problem solved?

It is not clear whether *Uniplex* has settled the matter for the national courts; however, it seems that the English courts (at least at lower level) may not give up promptness without a fight. In *R (on the application of Carroll) v Westminster* (9 July 2010), Michael Supperstone QC, in refusing permission to bring proceedings for judicial review, expressed the obiter view that the *Uniplex* principle is restricted to EU public procurement cases.

That seems an unduly restrictive interpretation of the *Uniplex* judgment. If the promptitude requirement is insufficiently certain to guarantee EU rights under public procurement, it must be similarly uncertain in respect of other EU law rights. It is understood that Ms Carroll is seeking permission from the Court of Appeal to appeal the judgment.

Nonetheless, it is likely the promptness requirement under CPR 54.5 remains at high risk of breaching the principle of certainty in all EU-related cases.

## Delay and domestic rights

What about the position in respect of promptitude when there is no EU law right at stake? EU law does not require the domestic courts to change procedure to guarantee non-EU law rights, and the requirement of promptitude has been generally recognised by the domestic court as being sufficiently certain. It will nevertheless be odd if the effect of *Uniplex* is to create a two-tier system for claims brought in respect of EU rights and those which rely solely upon domestic grounds of review.

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## Checklist

Claimants who have filed their claim for judicial review within the outer three-month period, but against whom a 'promptitude' point is nevertheless being taken, should seek to rely on *Uniplex* in rebuttal.

The extent to which such a rebuttal argument will succeed is likely to turn, among other things, on the nature of the right which it is sought to protect through the challenge.

*Uniplex* appears to be of limited assistance in the context of the protection of ECHR rights, and is unlikely to be of value in cases concerning rights arising purely under domestic law.

*Uniplex* is clearly of great importance in the field of public procurement (which will be the subject of a forthcoming FTB workshop). However, its effect is likely to extend to any case in which it is being sought to protect a right arising under EU law.

## Time limit for filing claim form (CPR 54.5)

- (1) The claim form must be filed –
  - (a) promptly; and
  - (b) in any event not later than three months after the grounds to make the claim first arose.
- (2) The time limit in this rule may not be extended by agreement between the parties.
- (3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.

## Where to get it for free

European judgments are available to download from the court's web portal, along with Advocate General Kokott's opinion in *Uniplex*. Visit: <http://curia.europa.eu>