



EMPLOYMENT TRIBUNALS

Between:
Ms P Roper
Claimant

and Mellors Catering Services Limited
Respondent

Heard at: Leeds **on:** 23 February 2022

Before: Employment Judge Cox

Representation:

Claimant: In person
Respondent: Did not attend – written submissions only

RESERVED JUDGMENT AFTER PRELIMINARY HEARING

The claim is dismissed, having been presented out of time.

REASONS

1. The Respondent provides catering services to schools. The Claimant works for the Respondent as a general kitchen assistant at Rawmarsh Community School. After a period of early conciliation through ACAS from 9 to 15 June 2021, she presented a claim to the Tribunal on 18 June 2021 alleging that the Respondent had failed to pay her the correct amount of holiday pay during a period from March to September 2020.
2. The Tribunal has to decide as a preliminary point whether it has power to deal with the claim in the light of the date on which it was presented and the time limits for such claims.

3. The time limit for presenting a claim of underpayment of holiday pay is slightly different according to how the claim is categorised. If it is viewed as a claim under the Working Time Regulations 1998 (WTR) that an employer had failed to pay a worker any part of the amount due to her for a period of leave under Regulation 16(1) WTR, the claim must be made before the end of the period of three months beginning with the date on which it is alleged the payment should have been made (Regulation 30(2)(a)). The claim can proceed, however, if the Tribunal is satisfied that it was not reasonably practicable for the worker to present the claim by that date and she has presented it within a further period that the Tribunal considers reasonable (Regulation 30(2)(b)).
4. If the claim is viewed as a claim that the employer has made an unauthorised deduction from the worker's wages (which includes holiday pay), the claim must be made before the end of the period of three months beginning with the date of payment of the underpayment or, if there is a series of underpayments, before the end of the period of three months beginning with the last underpayment in the series (Section 23(3) of the Employment Rights Act 1996 – the ERA). If the Tribunal is satisfied that it was not reasonably practicable for the worker to present the claim by that date, the claim can still proceed if the Tribunal accepts that it was made within a further period the Tribunal considers reasonable (Section 23(4) ERA).
5. In either case, the legislation extends the time limit for bringing a claim to allow for the period of early conciliation through ACAS, but only if the worker contacted ACAS to start the early conciliation process within the basic three month time limit (see Regulation 30B WTR and Section 207B ERA).
6. For the purposes of establishing whether the claim has been presented in time, the Tribunal is treating the claim as one of an alleged series of unauthorised deductions from wages ending with a payday falling at some time in September 2020. As the Claimant did not contact ACAS under the early conciliation procedure until 9 June 2021, the period of early conciliation does not extend the time limit for her claim. Her claim should have been presented by the end of December 2020 at the latest. It was not in fact made until over five months later.
7. It is for the Claimant to establish that it was not reasonably feasible for her to present her claim within the usual three-month time limit. The fact that a Claimant does not know of her right to bring a claim or the time limit for bringing it does not mean it was not reasonably feasible for her to present the claim, unless it is reasonable for her not to know about her right and the time limit. The Tribunal takes judicial notice of the fact that information about how to enforce the right to holiday pay is readily available on the internet including, for example, on Government and ACAS websites that are authoritative, free, and easy to access.

8. On 21 September 2021, the Tribunal directed the Claimant to provide a statement setting out her evidence on why her claim was not presented earlier, 14 days before the Preliminary Hearing. On 26 November 2021 that direction was varied to require the Claimant to provide her statement 28 days in advance of the Hearing. The Claimant wrote to the Tribunal on 5 January 2022 explaining what she thought she was owed and why her claim was brought late. At the Preliminary Hearing, the Claimant gave oral evidence about the circumstances surrounding her claim. On the basis of that letter and oral evidence, the Tribunal makes the following findings.
9. When they returned to work in September 2020, the Claimant and her colleagues in the kitchen discussed whether the Respondent had paid them correctly over the summer. The Claimant raised the matter with her line manager, Ms Batty, who agreed that the payments did not look right and said she would take it up with her own manager, Ms Lax. She did so and Ms Lax said that she would look into it. At the half-term break from 23 October to 3 November 2020, Ms Lax changed the Claimant's time sheets to show the break as furlough and not holiday. At some time in the autumn 2020 term, the Claimant heard that two other former employees of the Respondent had received payouts from the Respondent.
10. The Claimant kept querying with her managers whether they had been paid correctly and the managers kept saying they would look into it, but nothing was done. The Claimant did not understand what was on her wage slips. She asked for further copies of her wage slips for the period at issue in her claim, but these were never provided.
11. Eventually, in June 2021, the Claimant and her colleagues discussed the matter between themselves and decided that they would bring a claim to the Tribunal to recover what they believed they were entitled to. That is when they contacted ACAS and, nine days later, made a Tribunal claim.
12. The Tribunal does not accept that it was not reasonable feasible for the Claimant to have presented a claim within the three-month time limit. By the time she discussed what she had been paid during the furlough period with her colleagues on her return to work in September 2020, she believed that she had been paid less than what was due to her. Later that term, and before the time limit had expired, she found out that two former employees of the Respondent had received payouts. In spite of this, the Claimant took no steps to find out about her own rights and how to enforce them. Although she took the matter up with her managers, when they did not give her any, or any satisfactory, answer she took no steps to pursue her rights. It was not until June 2021 that she did anything to progress a claim to the Tribunal.

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13. As the Tribunal does not accept that it was not reasonably practicable for the Claimant to present her claim in time, the claim is dismissed.

Employment Judge Cox
Date: 25 February 2022