



EMPLOYMENT TRIBUNALS

Between:

Mrs M Bentley
Claimant

and Mellors Catering Services Limited
Respondent

Heard at: Leeds **on:** 18 February 2022

Before: Employment Judge Cox

Representation:

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

RESERVED JUDGMENT AFTER PRELIMINARY HEARING

The claims for holiday pay under Regulation 30 of the Working Time Regulations 1998 and Section 23 of the Employment Rights Act 1996 are dismissed, having been presented out of time.

REASONS

1. The Respondent provides catering services to schools. At the relevant time, the Claimant worked for the Respondent as a General Manager. At the Preliminary Hearing, she stated that she left the Respondent's employment at some date at the end of May/beginning of June 2021. After a period of early conciliation through ACAS from 15 to 18 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. At the Preliminary Hearing, she confirmed that this related to a period from mid-July 2020 to 28 August 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.
4. If it is viewed as a claim under Regulation 30 of 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)).
5. If the claim is viewed as a claim under Section 23 of the Employment Rights Act 1996 (ERA) 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) 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).
6. If the claim is viewed as a claim for damages for breach of the employee's right to holiday pay, the claim can be brought only if the employee's employment has ended and must be made before the end of the period of three months beginning with the effective date of termination of the employee's employment (Regulation 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).
7. In all cases, 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, Section 207B ERA and Regulation 8B of the Extension Order).
8. It was not apparent from the claim form that the Claimant's employment had already ended when she presented her claim, the Claimant having failed to give the dates of her employment. It appears from the response to her claim, however, that the Respondent may accept that she was a "leaver" by the time her claim was made. If that is the case, then she is entitled to bring a claim for damages for any breach of contract that is outstanding on the termination of her employment and her claim has been presented within the time limit. This issue

will need to be discussed and determined at a further Hearing or Hearings. The Tribunal decided to proceed with its determination of the issue as to whether the claim had been presented in time if it the Claimant's right to holiday pay could be enforced only under the WTR or ERA.

9. The Claimant did not specify the dates on which she received her alleged underpayments of holiday pay. Nevertheless, for the purposes of establishing whether the claim has been presented in time, the Tribunal is prepared to assume in the Claimant's favour that her claim is of a series of unauthorised deductions from wages and that she did not receive the final instalment of underpaid holiday pay until the end of September 2020. As she did not contact ACAS under the early conciliation procedure until 15 June 2021, the period of early conciliation cannot extend the time limit for her claim. It can safely be assumed that the claim should have been presented by the end of December 2020. It was not in fact made until over five months later.
10. 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 her lack of awareness of her right and the time limit was reasonable. 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 on Government and ACAS websites that are authoritative and free to access.
11. 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. On 3 January 2022 the Claimant sent a letter to the Tribunal explaining the circumstances surrounding the presentation of her claim. She gave further oral evidence at the Preliminary Hearing. On the basis of that letter and oral evidence, the Tribunal makes the following findings of fact.
12. The Claimant first came to believe that she was being underpaid for her holidays at the beginning of August 2020, whilst on a period of furlough. She discussed her concerns with her line manager before she returned to work in around September 2020. She was then called to a meeting with her line manager and the senior operations manager. Her managers were dismissive of her concerns, confirmed that the Respondent was entitled to make the payments it had made and told her that the Claimant, and the staff she managed, were lucky still to have jobs.
13. The Claimant is a member of the union UNISON. At some point in December 2020 the union contacted her and told her that it was putting together a claim

against the Respondent in relation to the payments made during furlough, which included the July and August period to which this claim relates. The union asked her to complete a form with her details and return it without delay. The Claimant was not in the office at this time and did not find out until her return that the union needed to hear from her. She then spoke to her line manager again, who told her that it was a waste of time for her to pursue the issue through the union because the Respondent had done nothing wrong. In her letter to the Tribunal, the Claimant said that she was “made to feel like there would be repercussions” if she pursued the claim. When asked at the Preliminary Hearing what she meant by this, she said that her manager had been rude and dismissive towards her.

14. The Claimant’s evidence was that she was not aware that the claim to the Tribunal was time sensitive until she contacted ACAS under the early conciliation procedure on 15 June 2021. The Tribunal does not consider that evidence credible. The Claimant knew that the union was wanting a speedy response from her when it contacted her in December 2020. She also accepted that the union contacted her at some point and said that she might be able to challenge the underpayment by a claim in the County Court. If it did that, it would most likely have been because it knew that the Claimant had missed the time limit for a Tribunal claim. The Tribunal considers it more likely than not that the union explained to the Claimant that there was a three-month time limit for a claim to the Tribunal. If it did not, it should have done so. Even if the union did not tell her about the time limit when it contacted her in December, the appeal courts have confirmed that a Claimant cannot establish that it was not reasonably practicable to present a claim in time if the reason she has missed the deadline is that her union adviser has failed to give her that information. In those circumstances, her claim is against the union.
15. In any event, the Tribunal considers that the union’s December letter and later contact about County Court proceedings should have alerted the Claimant to the need to act swiftly, or at least to make her own enquiries about whether there were time limits that applied to the enforcement of her rights. She did not contact ACAS until June 2021. The only explanation she gave for this was that her managers were rude and dismissive of her concerns. The Tribunal does not accept that this was a good and sufficient reason for her delaying in enforcing her rights. She was well able to take steps to research and enforce her rights. The Tribunal is satisfied that, even if it had not been reasonably feasible for the Claimant to make her claim by the end of December 2020, she did not bring it within a further reasonable period.
16. For these reasons, the Tribunal does not accept that it was not reasonably practicable for the Claimant to present her claims under Regulation 30 WTR or Section 23 ETA in time. Those claims are therefore dismissed.

Case No: 1803294/2021

Employment Judge Cox
Date: 25 February 2022