



# EMPLOYMENT TRIBUNALS

**Between:**

Mrs L Owen

**Claimant**

**and** Mellors Catering Services Limited  
**Respondent**

**Heard at:** Leeds

**on:** 17 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 an area support manager. After a period of early conciliation through ACAS from 15 to 22 June 2021, she presented a claim to the Tribunal on 22 June 2021 alleging that the Respondent had failed to pay her the correct amount of holiday pay during a period of furlough leave. At the Preliminary Hearing she confirmed that her claim related to the period from July to around 6 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. The Claimant did not specify the dates of her underpaid holiday or 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 Respondent's pay date on 18 September 2020. As she did not contact ACAS under the early conciliation procedure until 15 June 2021, the period of early conciliation does not extend the time limit for her claim. The claim should have been presented by 17 December 2020. It was not in fact made until around six 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 her lack of awareness of her right and the time limit was reasonable. The Tribunal takes judicial notice of the fact that information about the right to holiday pay and how to enforce it 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 did not submit a statement, but she did send an email on 13 January 2022 stating that she had not actioned the claim sooner for three reasons:

- 1. I was waiting to hear from the union.*
- 2. Mellor told us we wasn't entitled to it.*
- 3. Didn't know it was time sensitive.*

9. At the Preliminary Hearing, the Claimant gave oral evidence on the circumstances surrounding the bringing of the claim. On the basis of the Claimant's email and oral evidence, the Tribunal makes the following findings.

10. The Claimant first queried with the Respondent whether she was getting the correct rate of pay during furlough leave at around the end of July or beginning of August 2020. The Respondent told her that everyone was being paid at 80% through the school holidays and that that was correct. In around August 2020, she heard or took part in a lot of conversations with colleagues in the unit where she worked, some of whom had spoken to their union, and they all formed the view that they were in fact being underpaid.

11. At some point, the Claimant had a conversation with her union, UNISON, who told her about the three-month time limit for bringing a claim. The Claimant could not remember when this conversation happened, but she thought it might have been after the time limit for bringing her claim had already passed.

12. The Claimant contacted ACAS under the early conciliation procedure on 15 June 2021. She presented her claim on 22 June 2021. Her evidence at the Preliminary Hearing was that she had not brought her claim earlier because she was scared of losing her job. There was a lot of talk amongst her colleagues about bringing a claim, but she did not want to get involved. She brought her claim only when she was leaving the Respondent's employment.

13. In the light of these findings, the Tribunal does not accept that it was not reasonably practicable for the Claimant to bring her claim by 17 December 2020. She believed as early as August 2020 that she might be being underpaid her holiday pay. She was a union member and could have taken advice then about how to enforce her rights. She would then have been aware of the time limit for a claim and could have made one by the end of the year. In fact, she took no

active steps to enforce her rights until just before she left the Respondent's employment, even though by then she had heard about the time limit from her union. The Tribunal does not find credible the Claimant's evidence that she did not bring a claim earlier because she was scared of losing her job. She was not a junior employee who might be expected to feel vulnerable in challenging their employer, and she gave no evidence to explain why she believed the Respondent would dismiss her for enforcing her rights. Further, her email of 13 January 2022 makes no mention of this being a reason for her late claim.

14. As the Tribunal does not accept that it was not reasonably practicable for the Claimant to present her claims under Regulation 30 WTR and Section 23 ETA in time, they are dismissed.

### **Breach of contract**

15. A claim for unpaid holiday brought by a *former* employee can also be viewed as a claim for damages for breach of the employee's contractual right to holiday pay. The claim 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. 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 8B of the Order).
16. In her claim form, the Claimant said that her employment was still continuing. The Respondent's response also stated that she was a current employee. At the Preliminary Hearing, however, the Claimant said that she had left the Respondent's employment by the date she presented her claim. 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, including any contractual right to holiday pay, and her claim has been presented within the time limit. This issue will therefore need to be explored further, even though the claims under the WTR and ERA have been dismissed.

Employment Judge Cox  
Date: 25 February 2022