



EMPLOYMENT TRIBUNALS

Between:

Mrs J Lumley
Claimant

and Mellors Catering Services Limited
Respondent

Heard at: Leeds **on:** 15 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 as a chef at Meadowhead School. After a period of early conciliation through ACAS from 3 to 9 July 2021, she presented a claim to the Tribunal on 12 July 2021 alleging that the Respondent had failed to pay her the correct amount of holiday pay during furlough leave and that she had been underpaid for six days' work she did from 19 June. At the Preliminary Hearing, she confirmed that the shortfall in holiday pay and wages had in fact occurred in a period of furlough from 17 July to 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 is paid four-weekly. She did not identify in her claim form or at the Preliminary Hearing the dates of the holidays that she said were underpaid nor the dates on which she received her alleged underpayments of wages and holiday pay. Nevertheless, for the purposes of establishing whether the holiday pay claim has been presented in time, the Tribunal is prepared to assume in the Claimant's favour that her claim for holiday pay 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. The Tribunal is also prepared to assume in the Claimant's favour that the date of her underpayment of wages for the work she did in June 2020 was the end of July 2020. As she did not contact ACAS under the early conciliation procedure until 3 July 2020, the period of early conciliation cannot extend the time limit for her claim. It can safely be assumed that the claim for holiday pay should have been presented by the end of December 2020 but was not in fact made until over six months later. The claim of underpayment of wages in June 2020 should have been made by the end of October 2020 but was not in fact made until over eight 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 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. She did, however, give oral evidence at the Preliminary Hearing about the circumstances surrounding the timing of her claim. On the basis of that evidence, the Tribunal makes the following findings.
9. The Claimant realised when she received her July 2020 payslip that she had not been paid the correct amount for the six days' work she did in June. She raised this issue with a succession of area managers, who all told her that she would be paid the following month. It was not until she approached ACAS in July 2021, however, that she took any action in relation to enforce her right to these wages.
10. The Claimant and her colleagues took up the shortfall in holiday pay with their catering manager on their return to work after furlough leave in September 2020. The manager said that she would take it up with the Respondent's Human Resources department. Months passed and the Claimant heard nothing back. In around December 2020 she contacted her trade union, UNISON, for advice. The union sent her a form to fill in with information about her case and she did so. The union then contacted the Respondent to take up the issue, in around January 2021, but got no response.
11. Eventually the union told the Claimant that it could do nothing further about her case. The Claimant then approached ACAS under the early conciliation procedure on 3 July 2021.
12. When asked by the Employment Judge at the Preliminary Hearing why she had not thought about taking steps to enforce her rights earlier, the Claimant said that she had never been in a dispute about her pay before and she just went along with what her colleagues were doing.
13. From these facts, it is apparent that the Claimant believed as early as September 2020 that she had been underpaid holiday pay. She raised the matter with her manager but took no steps to find out about how to enforce her rights when the manager's efforts produced no results. She did not approach

her union for help with her holiday pay until December 2021. If the union did not advise her about the time limits for enforcing her rights in the Tribunal, it should have done so, as it would have been well aware of their importance. A Claimant cannot argue that it was not reasonably feasible to present a claim in time if that was due to a failure on the part of someone advising her. In those circumstances, the claim lies against the adviser.

14. The Claimant believed as early as July 2020 that she had been underpaid wages for her work in June. She took no steps to find out about how to enforce her right to be paid even though a succession of area managers had promised and failed to sort this out for her over a period of many months.
15. Taking all these matters into account, the Tribunal does not accept that it was not reasonably feasible for the Claimant to present her claim in time. She failed to take any active steps to find out about her rights and how to enforce them. The claim is therefore dismissed.

Employment Judge Cox
Date: 25 February 2022