



# EMPLOYMENT TRIBUNALS

**Between:**

Mrs L Hardwick  
**Claimant**

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

**Heard at:** Leeds **on:** 16 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. At the relevant time, the Claimant worked for the Respondent as catering manager at Meadowhead School. After a period of early conciliation through ACAS from 2 July to 13 August 2021, she presented a claim to the Tribunal on 13 August 2021 alleging that the Respondent had failed to pay her the correct amount of holiday pay. At the Preliminary Hearing she confirmed that the periods during which she claimed she had been underpaid were two weeks at the beginning of April 2020, one week at the end of May 2020 and six weeks in July and 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. 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 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 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 of 18 September 2020. As she did not contact ACAS under the early conciliation procedure until 2 July 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 nearly 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, 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 sent in her statement on 9 January 2022, in the form of a letter. She also gave oral evidence at the Preliminary Hearing. Although the Respondent did not attend the Preliminary Hearing, it submitted in evidence a letter dated 9 December 2020 from the union UNISON to someone called Jenna, who works in the Respondent's Human Resources department. On the basis of that evidence, the Tribunal made the following findings of fact.
9. In June 2020 the Claimant received an email from her union, UNISON, saying that staff should be paid at 100% of their usual pay during their furlough leave. She replied that they were being paid at 80% only. She emailed the union in August 2020 raising that staff were still not getting 100% but got no reply. On 7 December 2020, the Claimant received an email from UNISON saying that it wanted to put a claim in about furlough pay but the claim had to go in by the next day. On 8 December 2020 the Claimant replied saying that she wanted to be included in the claim. The union replied something along the lines of "OK, will do". She did not hear anything further.
10. At some time in May 2021, the Claimant found out from a fellow manager that three members of staff at another school had been paid out for underpaid holiday pay. The Claimant's evidence was that that was the point at which she first came to believe that she herself had also been underpaid holiday pay. Before that, she said, she thought that the union was offering to support herself and other staff with a claim about furlough pay, not holiday pay. The Tribunal does not consider that evidence to be credible. The letter from UNISON to the Respondent dated 9 December 2020 raised two issues: failure to pay furloughed workers holiday pay and failure to pay the national minimum wage rate to furloughed workers. It is not credible that the Claimant would not have understood that the union's email to her of 7 December 2020 related to a claim for holiday pay. Even if she understood it that way, it would not have been reasonable for her to have done so.
11. In May 2021 the Claimant telephoned the union, who told her that she had not been included in the claim it had brought because her paperwork was missing. The Claimant was unable to explain what this paperwork was or might be. She asked the union how she should proceed but was told there was nothing the union could do as the claim had already gone through and her next step was to contact ACAS. The Claimant was unable to explain why she did not contact ACAS under the early conciliation procedure until 2 July 2021 or present her claim until 13 August 2021.

12. The Claimant's evidence was that she did not ever appreciate that the claim was "time sensitive". The Tribunal does not find that evidence credible. The union's email of 7 December 2020 to the Claimant explained that the claim had to go in the next day. It was clearly flagging up the need to observe a deadline.
13. The Tribunal does not accept that it was not reasonably practicable for the Claimant to bring her claim in time. The Claimant believed that the union was presenting a claim on her behalf, which would have been within the time limit, in December 2020. If the union was at fault in failing to include her in that claim, that give the Claimant cause for complaint against her advisor, but it does not mean that it was not reasonably practicable for her to bring her claim in time.
14. Even if the Tribunal had accepted that it was not reasonably practicable for the Claimant to bring a claim in time because the union misled her, it would not have accepted that the Claimant brought her claim within a further reasonable period. On her own evidence, by May 2021 she believed she had a claim for holiday pay, and she knew that the claim presented by the union had not included her. She knew from the union's 7 December 2020 letter that deadlines applied. Yet she still delayed until July to contact ACAS under the early conciliation procedure and did not present her claim for a further six weeks. She was unable to explain that delay.
15. The claim is therefore dismissed.

Employment Judge Cox  
Date: 25 February 2022