



EMPLOYMENT TRIBUNALS

Between:

Miss S Reed
Claimant

and Mellors Catering Services Limited
Respondent

Heard at: Leeds **on:** 21 February 2022

Before: Employment Judge Cox

Representation:

Claimant: Did not attend

Respondent: Did not attend – written representations 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 based 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 of furlough leave 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 assumes 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 18 June 2021, the period of early conciliation does not extend the time limit for her claim. The claim should have been presented by the end of December 2020. 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 was reasonable for her not to know of her right and the time limit. 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 Tribunal confirmed that, if the Claimant chose not to attend the Hearing, any statement she submitted would be given less weight than if she were present at the Hearing to answer questions about it. The Claimant wrote to the Tribunal by letter received on 20 January 2022. She stated that she did not intend to attend the Preliminary Hearing, and she did not do so. The only evidence the Tribunal had, therefore, about the timing of her claim was the content of her letter. On the basis of that evidence, the Tribunal makes the following findings.

9. In September 2020, on returning to work at the beginning of the autumn term after a period of furlough, the Claimant was contacted by a former colleague who had left the Respondent's employment and considered that she had not been paid her correct holiday pay on leaving. The Claimant contacted someone in the Respondent's payroll department who confirmed that the ex-colleague had been paid the correct amount. She also said that she was lucky to have been paid while at home over the past three months and some people were not that lucky to have a job to come back to. When the Claimant reported this back to the ex-colleague, the ex-colleague told the Claimant that she would be taking it further and would let the Claimant know how she got on.
10. The Claimant did not hear again from her ex-colleague and assumed that what the Respondent had said was right. It was not until the Claimant met the ex-colleague again on a night out on 11 May 2021 that the ex-colleague mentioned that she had been "paid out" by the Respondent but had been told by the Respondent not to tell anyone. The following day, the Claimant 'phoned some of her fellow managers and found that a few staff who were in unions had been paid out, although they had been told by the Respondent not to tell anyone. She then emailed various managers to query the holiday pay and was again told that the Respondent did not owe her anything. When she said that she intended to take this further, her area manager told us not to while he looked into it. She emailed him several times.
11. The Claimant confirmed in her letter why she believed that she was owed holiday pay. She said that the Respondent's holiday year ran September to August and that she had paid sufficient into her holiday "pot" to cover the holidays for which she was claiming. On that basis, the Tribunal finds that she could reasonably have been expected to take steps herself to find out how to challenge her underpaid holiday and how to enforce her rights when she first became aware of the underpayments, which would have been by the end of September 2020 at the latest. The fact that the Respondent told her that it believed she and her ex-colleague had been paid correctly does not mean that it was not reasonably practicable for her to satisfy herself about her rights. Her letter says nothing about her having taken any steps to do so.

12. Even if the Tribunal had been satisfied that it was not reasonably practicable for the Claimant to bring her claim until it became apparent from her conversations with her ex-colleague and fellow managers on 11 and 12 May 2021 that the Respondent had made payments to some of her colleagues, the Tribunal would not have been satisfied that the Claimant made her claim within a further reasonable period. She did not present the claim until five weeks later.
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