



EMPLOYMENT TRIBUNALS

Between:

Mrs A Holmes
Claimant

and Mellors Catering Services Limited
Respondent

Heard at: Leeds **on:** 21 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 for the Respondent as a general kitchen assistant 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 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 three month time limit (see Regulation 30B WTR and Section 207B ERA).
6. At the Preliminary Hearing, the Claimant confirmed that the dates on which she believed she had been underpaid holiday pay were 1 and 29 May, 24 June, 24 July and 21 August 2020. For the purposes of establishing whether the claim has been presented in time, the Tribunal views this as an alleged series of unauthorised deductions from wages ending with 21 August 2020. As she did not contact ACAS under the early conciliation procedure until 9 June 2021, the period of early conciliation does not extend the time limit for her claim. Her claim should have been presented by 20 November 2020. It was not in fact made until nearly seven 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 about her right and the time limit. 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, 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 and some of her fellow Claimants did send in a letter in which they said that they were unaware of their rights “at this time”. They had discovered that an ex-colleague had put a claim in against the Respondent and been paid out but she had been told not to disclose this to anyone else. At the Preliminary Hearing, the Claimant gave oral evidence about the circumstances surrounding her claim. On the basis of that letter and oral evidence, the Tribunal makes the following findings.
9. When the Claimant was on furlough leave over July and August 2020, she and her colleagues queried with the Respondent why they were being paid the rate they were, which they did not think was right. Since April 2020, they had not been receiving wage slips. They had asked for copies, but have still not received them. But they still knew that the sums that were being paid into their bank accounts was less than they were expecting. They thought it would be sorted out on their return to work. When they returned to work at the beginning of the autumn term, in September 2020, the Claimant and her colleagues discussed that they felt their holiday pay had not been correctly calculated. They were not in a union. The Respondent did not allow them to take up this type of query directly with the Human Resources department, they had to raise it with their manager, so they did so. Their manager then wrote to the Respondent about their concerns but got no response.
10. The Claimant did nothing further until May 2021, when she found out through colleagues that a former colleague of theirs had been given a pay out by the Respondent. She had agreed not to disclose the amount she had received, so she did not say how much she had been paid. The Claimant and her colleagues then discussed this between themselves and decided that they would take a claim forward too. That is when they contacted ACAS and, nine days later, made a claim.
11. The Tribunal does not accept that it was not reasonable feasible for the Claimant to have presented a claim within the three-month time limit. She knew during July and August 2020 that she was being paid less than she considered was due to her, and this was confirmed when she spoke to her colleagues on her return to work in September 2020. The Tribunal accepts that the Claimant was not informed about her rights at this time, but she took no steps to find out about them and how to enforce them. Although she took it up with her manager, when there was no response from the Respondent, she took no steps to advance matters and it was not until several months later, on

discovering that an ex-colleague, who had brought a claim, had received a pay out, that she did anything to progress her claim.

12. As the Tribunal is not satisfied that it was not reasonably practicable for the Claimant to present her claim in time, the claim must be dismissed.

Employment Judge Cox
Date: 25 February 2022