



EMPLOYMENT TRIBUNALS

Between:

Mrs Y Roddis
Claimant

and Mellors Catering Services Limited
Respondent

Heard at: Leeds **on:** 24 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 an assistant cook at Rawmarsh Community School. After a period of early conciliation through ACAS from 9 to 15 June 2021, she and a number of her colleagues presented a claim to the Tribunal on 18 June 2021 alleging that the Respondent had failed to pay them 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. If the claim is viewed as a claim for damages for breach of the employee's right to holiday pay, the claim can be brought only if the employee's employment has ended and 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).
6. In all cases, 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, Section 207B ERA and Regulation 8B of the Extension Order).
7. At the Preliminary Hearing, the Claimant confirmed that she retired from the Respondent's employment on 23 October 2020. The claim presented on 18 June 2021 could therefore be viewed as a claim for damages by a former employee for breach of her contractual right to notice pay.
8. Also 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 sake of simplicity, for the purposes of establishing whether the claim has been presented in time, the Tribunal is viewing this claim in the ways most advantageous to the Claimant,

namely either as an alleged series of unauthorised deductions from wages ending with 21 August 2020 or as a claim for breach of contract outstanding on the termination of her employment on 23 October 2021. As the Claimant 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 under the ERA should therefore have been presented by 20 November 2020. It was not in fact made until nearly seven months later. A claim for damages for breach of contract should have been made by 22 January 2021. It was not in fact made until nearly five months later.

9. 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 how to enforce the right to holiday pay is readily available on the internet, including, for example, on Government and ACAS websites that are free, and easy to access.
10. 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 the letter and the oral evidence, the Tribunal makes the following findings.
11. The Claimant was on furlough leave from around April to August 2020. She received 80% of her normal pay while on furlough and did not think at the time that this was incorrect. At some point in November 2020, after her retirement, she met for a meal with some colleagues who still worked in the kitchen. They told her that a former employee of the Respondent had made a Tribunal claim and had received some money, and that they could all be due some money too if they made a claim. The Claimant told her colleagues to get in touch with her about what would happen next and what they needed from her to make a claim. She assumed that Ms Batty, her former manager, would be sorting it all out. Several months later, in June 2021, she met one of her colleagues when she was out shopping, who told her that they had put the claim in, and she was included in it.

12. The Tribunal accepts that it was not reasonably feasible for the Claimant to bring her claim any early than the time at which she discovered that a former colleague had made a Tribunal claim and received a payout, which was sometime in November 2020. Before then, on her evidence, she had no inkling that she might have been underpaid holiday pay during the period of furlough. It was not, therefore, reasonably practicable for her to present a claim under the ERA for holiday pay within the time limit.
13. After that, however, the Claimant took no active steps to pursue a claim on her own behalf. She left it to her colleagues to take responsibility for putting a claim together and presenting it to the Tribunal. As she accepted in her evidence, she forgot all about a potential claim because she was no longer in the workplace. If she had instead taken reasonable steps to pursue her own claim, she would have looked into how a Tribunal claim is brought and would have discovered that there is a time limit. She would then have presented a claim herself within a short time of the November meeting with her colleagues, or else asked Ms Batty to present the claim promptly on her behalf, rather than leaving it to others to sort out. The Tribunal finds that she did not bring her claim under ERA within a further reasonable period.
14. For these reasons also, the Tribunal does not accept that it was not reasonably practicable for the Claimant to present a claim for damages for breach of contract by 22 January 2021. Had she taken reasonable steps to pursue her own claim after the meeting with her colleagues in November 2020, she could have met the three-month deadline.
15. As it was either reasonably practicable for the claim to have been brought within the three-month deadline or it has not been brought within a further reasonable period, the claim is dismissed.

Employment Judge Cox
Date: 25 February 2022