



EMPLOYMENT TRIBUNALS

Between:

Mrs M Wheeler

Claimant

and Mellors Catering Services Limited

Respondent

Heard at:

Leeds

on: 14 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 a catering assistant at Dinnington High School. After a period of early conciliation through ACAS from 19 June to 2 July 2021, she presented a claim to the Tribunal on 3 July 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. 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.
2. 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)).

3. 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).
4. 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).
5. There is nothing in the claim form to indicate the dates of the holidays that the Claimant says were underpaid, nor the dates on which the Claimant received her alleged underpayments of holiday pay. Nevertheless, 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 Respondent's pay date on 16 October 2020. As she did not contact ACAS under the early conciliation procedure until 19 June 2021, the period of early conciliation does not extend the time limit for her claim. The claim should have been made by 15 January 2021. It was not in fact made until over five months later.
6. 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 on Government and ACAS websites that are authoritative, free, and easy to access.
7. 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 witness statement. She did, however, attend the Preliminary Hearing and the Tribunal invited her to explain the timing of her claim. On the basis of that evidence, the Tribunal makes the following findings.

8. The Claimant and her colleagues queried their holiday pay with their manager in September 2020 when they returned from furlough. He had said that they were being greedy and that they were lucky they had jobs to come back to. She just accepted what he said. The catering contract at the School was taken over by a new contractor at the end of March 2021. The Claimant had a conversation with her new manager, who had previously worked for the Respondent. The manager said that she had made a claim for holiday pay and asked if the Claimant and her colleagues had. She explained how they could make a claim online. A week or two later, the Claimant filled in a form online to start a claim.
9. The Tribunal does not accept that it was not reasonably practicable for the Claimant to present her claim in time. By September 2021, she had formed the belief that she had been underpaid her holiday pay. When she raised it with her manager and he did not accept that she had been underpaid, she did nothing to check for herself whether her pay had been right. It was reasonably feasible for her to make enquiries about her rights to holiday pay and how they could be enforced by, for example, using the internet, with assistance if necessary, or by contacting ACAS for free advice.
10. The claim is therefore dismissed.

Employment Judge Cox
Date: 25 February 2022