



EMPLOYMENT TRIBUNALS

Between:

Miss A Whitehead
Claimant

and Mellors Catering Services Limited
Respondent

Heard at: Leeds **on:** 23 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. The Claimant was one of twelve Claimants who presented their claims on the same claim form. At the time when they presented their claim, they worked at Rawmarsh Community School. The period of early conciliation through ACAS lasted from 9 to 15 June 2021. The Tribunal claim was presented on 18 June 2021. The Claimants alleged 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. 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 this claim has been presented in time, the Tribunal has interpreted the claim as one of a series of unauthorised deductions from the Claimant's wages ending with a payday sometime in September 2020. 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 should have been presented by the end of December 2020 at the latest. 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 about 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 Claimant did not submit a witness statement or otherwise correspond with the Tribunal.

9. The Claimant did not attend the Preliminary Hearing, which took place by video link. The Tribunal had converted Preliminary Hearings for several of the Claimant's colleagues to be conducted by telephone, because they had informed the Tribunal that they could not manage a video Hearing. The Claimant did not inform the Tribunal that she had any difficulty with a Hearing by video. The Tribunal checked that the video link that the Claimant had been sent was correct and confirmed that it was. The Tribunal had no telephone number for the Claimant on file and so it was unable to contact her to find out whether she had had difficulty with the video link. The Tribunal also checked its email inbox for last-minute emails from the Claimant but none had been received. The Tribunal therefore decided to continue with the Hearing in the Claimant's absence.
10. It is for the Claimant to show why it was not reasonable feasible for her to have presented a claim within the three-month time limit. The Tribunal has received no evidence from her. The Tribunal cannot, therefore, be satisfied that it was not reasonably practicable for her to present her claim in time. Her claim must be dismissed.

Employment Judge Cox
Date: 25 February 2022