



# EMPLOYMENT TRIBUNALS

**Between:**

Mrs L Whitehead  
**Claimant**

**and** Mellors Catering Services Limited  
**Respondent**

**Heard at:** Leeds **on:** 23 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 and baker 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 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 the claim as an alleged series of unauthorised deductions from wages ending at the end of 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. 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 how 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 wrote to the Tribunal on 14 December 2021 setting out why she had made a late claim and what she believed she was owed. 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 in March to September 2020, she did not query her rate of pay because she understood that, as she was on furlough, she was being paid at the furlough rate (80% of her normal pay). On her return to work in September 2020, however, she and her colleagues in the kitchen discussed what they had been paid and felt that it was wrong that none of the furlough leave had been treated as holiday and paid at their normal rate of pay. The Claimant spoke to her manager about this and she agreed that it did not seem right but could not explain what the payments should have been. She took it up with her own manager, who confirmed that the Respondent believed that the Claimant and her colleagues had been paid correctly.
10. At the October half-term break (23 October to 3 November 2020) the Claimant's manager's manager changed the timesheets of the kitchen staff to show the break as furlough leave, not holiday. The Claimant and her colleagues again felt that this was not right. The Claimant's manager said the Respondent was looking into this and that it would be sorted out.
11. Throughout this period, the Claimant's wage slips were not clear about what the payments she was receiving related to, but she felt that the adjustments that were being made were not correct.
12. The Claimant took no further action until June 2021, when she found out that a former colleague had received a payout from the Respondent for holiday pay but had been told to keep quiet about it. At around the same time, another colleague of the Claimant's had found out from working in another school that an employee there had also received a payout. At that point, the Claimant and her colleagues discussed the issue and decided that, if some people had been paid out, they all should be making a Tribunal claim. They contacted ACAS on 9 June and made their claim on 18 June 2021.
13. 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 first started to believe that she had not been paid correctly for her holidays when she spoke to her colleagues on her return to work in September 2020. She took no steps to find out about her rights and how to enforce them. Although she took it up with her manager, when the Respondent stated that it believed she had been correctly paid, she did not take any steps to check whether that

was in fact the case. At the October 2020 half-term break she again believed she had been paid less than what she was owed but took no steps to enforce her rights. She left it to the Respondent to sort the matter out. She continued to believe, however, that her pay was not being correctly adjusted. It was not until several months later, on discovering that two former employees of the Respondent had received a pay out, that she did anything to progress her own claim to the Tribunal.

14. 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