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EMPLOYMENT TRIBUNALS

Claimant: Mr B McCarthy

Respondent: Initial Base Limited

UPON a reconsideration of the judgment dated 9 July 2019 on the Tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT

1. The complaint of unfair dismissal is well founded.
2. The Respondent was in breach of the Claimant's contract of employment by not paying wages due under the contract.
3. The claim for wrongful dismissal is well founded.
4. The Respondent is ordered to pay to the Claimant:
 - 4.1. **£4959.67** in damages for unpaid wages
 - 4.2. **£2,280.11** damages for wrongful dismissal
 - 4.3. **£8,926.20** basic award
 - 4.4. **£13,040.44** compensatory award.

Thus the Respondent is ordered to pay to the Claimant a total of **£29,206.42**.

5. Recoupment applies in this case and I refer to Annex 2 attached.
For the purposes of the Recoupment Regulations therefore:
 - 5.1. The monetary award is £29,206.42
 - 5.2. The prescribed element is £6,271.88
 - 5.3. The period to which the prescribed element relates is 18 January 2019 to 28 June 2019.
 - 5.4. The amount by which the monetary award exceeds the prescribed element is £22,934.54

REASONS

1. In this case, judgment was given orally on 28 June 2019 at the end of the hearing. Written judgment was sent to the parties on 9 July 2019. Written reasons were requested and provided in October 2019. At the same time I wrote to indicate that, of my own initiative, I might reconsider the judgment for three reasons, that:

- 1.1. I had overlooked the provisions of the Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322, which can be found at this website address (<http://www.legislation.gov.uk/ukxi/2014/3322/contents/made>). They impose a 2 year limit on the backdating of unlawful deduction of wages claim. The two years ends going back 2 years from the date of the presentation of the complaint.
- 1.2. If so, then the question may arise whether the claim for lost wages was also a breach of contract claim and whether losses going back more than 2 years can be claimed under this head of claim.
- 1.3. I made an arithmetical error in the calculation of net wages because 11% of £313.20 is £278.75 and therefore the calculation of losses may require arithmetical correction.

2. The Claimant wrote to the Tribunal in response saying that he did not consider a hearing was required as the facts were established at the original hearing.

3. I have now reconsidered the judgment and decide that the original judgment cannot stand because I overlooked the 2014 Regulations (above). If the claim had to be considered only as an unlawful deduction of wages claim then Mr McCarthy could only have claimed losses from 2 years from 31 January 2019 (the date of presentation of the claim).

4. The question arises, therefore, whether the claim could also have been read as a breach of contract claim. The Tribunal has jurisdiction to hear such claims arising or outstanding on termination of employment.

5. I have reviewed the ET1 claim form and it does not narrow the claim to one of unlawful deduction of wages. The claim for lost wages can be read in the alternative as a breach of contract claim. It is plainly a breach of contract not to be paid for the hours agreed to be worked. Equally, the claim that Mr McCarthy had not been paid the minimum wage can be interpreted as a breach of contract claim because there is implied in every contract of employment a term that the employee is paid at least the national minimum wage, see section 17(1) National Minimum Wage Act 1998.

6. The calculation of sums for the unlawful deduction of wages claim can therefore apply to the breach of contract claim save that I have applied the civil courts' limitation of 6 years to the claim from the date of claim. While it is arguable that this might not apply in the Tribunals, the extension of our jurisdiction is of a contract claim outstanding at termination. This contract claim, it seems to me, could not go further than that which could be obtained in the civil courts. Thus the claim for breach of contract for unpaid wages can go back to 1 February 2012 inclusive.

7. I have also reconsidered the calculation of loss on the basis that I made an arithmetical error in relation to the calculation of net wages because 11% of £313.20 is £278.75, not £277.99 as I had originally calculated.

8. I apologise to the Claimant for the errors in my first judgment and acknowledge that these mean he has had to wait far longer for his compensation payment than he might otherwise have done. But it is vital that when a judge sees an error she corrects it: I would not be doing justice otherwise.

9. I attach an amended schedule to show how the award has been calculated, underlining the figures that have changed for ease of reference.

Employment Judge Moor
Dated: 11 December 2019

Schedule

Amended Calculation of Award

Underlined figures are amended

Breach of Contract (damages for unpaid wages)

For the period 1 February 2012 to 1 April 2018

321.6 weeks.

2.5 hours wages per week deducted at £7.67 per hour

$2.5 \times 7.67 = 19.175 \times \underline{321.6} =$ 6,166.68

For the period 1 April 2018 to 23 November 2018

33.7 weeks

2.5 hours wages per week deducted at £7.83 per hour NMW

$2.5 \times 7.83 \times 33.7 =$ 659.68

Less £1,253.70 repaid by Respondent (1253.70)

Total gross loss 5572.66

Total Net loss (minus 11% i.e. 612.99) = 4959.67

Breach of Contract (damages for loss of notice)

Net weekly pay (40 x 7.83) = 313.20 minus 11% = 278.75

Plus pension contribution of 2% of gross weekly pay

313.20 x 2% = £6.26 pension loss per week

total net weekly loss = £285.01

8 weeks notice remaining

Damages for loss of notice = 285.01 x 8 = **2280.11**

Unfair Dismissal

Basic Award (as per the schedule of loss) **8,926.20**

Compensatory Award (loss up to 23 November 2019)

44 weeks after expiry of lawful notice on 21 January 2019

(before which is accounted for in wrongful dismissal damages)

Net weekly wages including pension loss: 285.01 x 44 = 12540.44

Loss of statutory rights 500.00

Total Compensatory Award **£13,040.44**

Total Amount Payable by Respondent **£29,337.52**

£29,206.42

(The prescribed element for recoupment uses basic wages and the period prior to the calculation date = 22.5 weeks x 278.75 = £6,271.88.)

ANNEX 2 RECOUPMENT

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance, Universal Credit and Income Support.

The Tribunal has awarded compensation to the Claimant but not all of it should be paid immediately. This is because the Department for Work and Pensions (DWP) has the right to recover (recoup) any Jobseeker's Allowance, income-related Employment and Support Allowance, Universal Credit or Income Support which it paid to the Claimant after dismissal. This will be done by way of a Recoupment Notice which will be sent to the Respondent usually within 21 days after the Tribunal's judgment is sent to the parties.

The Tribunal's judgment states the total monetary award made to the Claimant and an amount called the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the Respondent to the claimant immediately.

When the DWP sends the Recoupment Notice, the Respondent must pay the amount specified in the Notice by the Department. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the Respondent must pay the balance to the Claimant. If the Department informs the Respondent that it does not intend to issue a Recoupment Notice, the Respondent must immediately pay the whole of the prescribed element to the claimant.

The Claimant will receive a copy of the Recoupment Notice from the DWP. If the claimant disputes the amount in the Recoupment Notice, the Claimant must inform the DWP in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the Claimant and the DWP.