



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103190/2022 and 4103068/2022**

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**Held via Cloud Video Platform (CVP) in Glasgow on 17 August 2022**

**Employment Judge I McFatrige**

10 **Mrs J Doyle**

**Claimant  
In Person**

15 **Forth Care Limited (In Voluntary Liquidation)**

**First Respondent  
Not present and  
Not represented**

20 **Little Einsteins Nithsdale Nursery**

**Second Respondent  
Not present and  
Not represented**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that:

1. Claim number 4103068/2022 directed against Little Einsteins Nithsdale Nursery is dismissed.
2. The claimant was employed by Forth Care Limited (In Voluntary Liquidation).
- 30 3. The first respondent, Forth Care Limited (In Voluntary Liquidation), shall pay to the claimant a redundancy payment of £1359.32.
4. The first respondent, Forth Care Limited (In Voluntary Liquidation), shall pay the claimant the sum of £783.69 as damages for breach of contract (failure to pay notice pay).

5. As at the date of determination of the claimant's employment, the first respondent was due to pay the claimant the sum of £474.92 in respect of annual leave accrued but untaken. The first respondent, Forth Care Limited (In Voluntary Liquidation), shall pay to the claimant the sum of £474.92 in respect of this.

### REASONS

1. The claimant submitted a claim to the Tribunal against "Little Einsteins Nithsdale Nursery" and this was registered under reference 4103068/2022 and served. No response was made during the statutory period. The claimant then submitted a second claim under reference 4103190/2022 against the first respondent, Forth Care Limited (In Voluntary Liquidation). This was registered under reference 4103190/2022 and served on the first respondent. No response was received within the statutory period.
2. In each case, the claim form was identical in that the claimant was claiming for a redundancy payment, notice pay and accrued holiday pay following the termination of her employment. An employment judge decided that given the existence of two claims, it would be appropriate to have the matter dealt with at a hearing so that the correct identity of the employer could be established.
3. At the hearing, the claimant gave evidence on oath and lodged various productions. On the basis of the evidence and reductions, I found the following essential facts to be proved.

### FINDINGS IN FACT

4. The claimant commenced employment at Little Einsteins Nithsdale Nursery on or about 25 October 2018. The claimant was given a statement of particulars of employment which showed her employer as being the Little Einsteins Nithsdale Nursery (a division of Forth Care Limited). The claimant worked at the nursery. She worked 40 hours per week and received each month the sum of £1309 gross (£1132 net). This equates to £261.23 per week net and £302.07 per week gross.

5. The claimant understood that the owners of the entity which employed her changed in or about 2019. However, she was not given any fresh contract of employment and her terms and conditions remained as before. Her understanding was that Little Einsteins Nithsdale Nursery was effectively a trading name.
6. Her employers operated a holiday pay scheme where the holiday year ran from 1 January to 31 December in each year. Holiday pay was worked out on the basis of hours and on occasions the claimant would work extra hours and take time off in lieu. The claimant kept note of her holidays in a diary.
7. The claimant had arranged to take time off in December 2021 to use up the balance of her entitlement for 2021. She had arranged to take four days off on 24, 27, 28 and 29 December. In the event the claimant was unable to take these days as holiday as she had COVID. The total of 32 hours was therefore carried forward from her 2021 entitlement into 2022. In the period from 1 January 2022 onwards, the claimant was absent for a period of 7 hours for a funeral. Apart from that, she took no other paid holidays. The claimant was in fact off work for a planned holiday in early March but the claimant was never paid for this in her final payslip. The claimant was due a total of 47.73 hours holiday in terms of the Working Time Regulations from 1 January to 18 March 2022.
8. On 18 March 2022, the claimant was at work. From around 4pm in the afternoon onwards, the claimant was aware that staff were being called into the office for a discussion with the manager. When each member of staff, they indicated that they were not permitted to discuss what had taken place with any other member of staff.
9. The claimant was then called into the office and spoke to her manager at around 5-10pm. She was advised by the manager that while the manager was completing the respondent's annual return, she had discovered that the company did not have the necessary insurance in place to allow them to continue operating. She advised that in fact, this had been the case for some months. She advised that in the circumstances, the nursery would be closing

with effect from 6 o'clock that afternoon. The claimant was advised that her employment was being terminated. She was told that the company was actively trying to seek insurance and if they were able to sort matters out then they would be reopening and the claimant might be rehired.. Some weeks  
5 after this, the claimant was advised that in fact the company would not be reopening and she and other members of staff and customers were invited to attend the premises to remove their belongings. The claimant considered her effective date of termination of employment to be 18 March 2022. The claimant had not received any notice of termination nor pay in lieu of notice.  
10 The claimant received pay for the hours she had worked in March but as noted above did not receive any payment in respect of the holidays she had taken in March nor did she receive her pay in lieu of notice.

10. The claimant lodged her initial claim with the Tribunal against Little Einsteins Nithsdale Nursery. She then received a response which indicated that the  
15 correct name of her employer was Forth Care Limited and they were in voluntary liquidation. She was advised by ACAS to submit a further claim naming the correct employer.

### **Observations on the evidence**

11. I had no hesitation in accepting the claimant as being a truthful witness.

### **Discussion and decision**

12. The first matter which I required to determine was the identity of the claimant's employer. The claimant advised that her initial contract of employment gave her employer as against Little Einsteins Nithsdale Nursery and described this as being a division of Forth Care Limited. She was also aware that her  
25 employers also ran a care home from the same address. I noted that any order made against Little Einsteins Nithsdale Nursery would be unenforceable as there is no indication that this is a legal person. It appeared to me that Little Einsteins Nithsdale Nursery was simply a trading style of the first respondent, Forth Care Limited.

13. In the circumstances, I considered that the appropriate course of action was therefore to dismiss the first claim lodged and proceed solely with the claim against the first respondent.
14. I accepted the claimant's evidence as to her rate of pay and dates of service.  
5 I also accepted the evidence which related to her holiday entitlement. She confirmed that holidays were worked out on the basis of hours.
15. With regard to her entitlement to a redundancy payment, I calculated the claimant's gross pay as being £302.07 per week. The claimant had three full years' service as at the date of termination of her employment during all three  
10 of which she had been over the age of 41 years. The claimant is therefore entitled to a redundancy payment of £1359.32 ( $£302.07 \times 4.5$ ).
16. The claimant was entitled to three weeks' notice in terms of section 86 of the Employment Rights Act 1996. It was clear from her evidence that she had been given less than an hour's notice. She did not receive any pay in lieu of  
15 notice. I therefore consider that she is entitled to three weeks' pay in lieu of notice which is payable at her net rate of pay for which I calculate as being £261.23 per week based on the figures she gave of £1132 per month. She is therefore entitled to pay in lieu of notice of £763.69 on the basis that this is appropriate damages for breach of her contractual right to notice pay.
- 20 17. With regard to holiday pay, I considered that since the claimant had been unable to take her 2021 holidays due to COVID then she was entitled to carry these forward into 2022 as indeed had apparently happened within the organisation prior to her being dismissed. This amounted to 32 hours.
- 25 18. The claimant's entitlement to holiday pay in terms of the Working Time Regulations for the period from 1 January 2022 to 18 March 2022 amounted to 47.73 hours. This figure was obtained by inputting the appropriate details into the gov.uk online holiday pay calculator. The claimant had been off on 13 January 2022 for 7 hours to attend a funeral, for which she had been paid. Apart from that she had not used up any other paid annual leave. The  
30 claimant was therefore due a balance of 40.73 hours for the holiday year 2022. The total amount of holiday pay to which the claimant was entitled

therefore amounts to 72.73 hours. I calculate the claimant's net hourly rate at £6.53 per hour ( $£261.23 \div 40$ ). The claimant is therefore entitled to the sum of £474.92 in respect of annual leave accrued but untaken as at the date of termination of her employment ( $72.73 \times 6.53$ ).

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15 **Employment Judge: I McFatridge**  
**Date of Judgment: 17 August 2022**  
**Entered in register: 18 August 2022**  
**and copied to parties**