



EMPLOYMENT TRIBUNALS

Claimants: Mrs H Van Weerdenburg
Ms C Jones
Mrs V Coull-Middling
Mr G Middling

Respondent: Homecare Northwest Limited
(in Creditors Voluntary Liquidation)

JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

All claimants

1. The respondent has failed to present a valid response on time. Having considered the information provided by the claimants at the hearing on 7 December 2022 and in response to his case management orders made at that hearing, Employment Judge McDonald has decided that a determination can properly be made of the claims, in accordance with Rule 21 of the Rules of Procedure.

2. No order is made in respect of unpaid mileage, since the claim forms did not include claims in relation to unpaid expenses.

3. No award is made for loss of statutory rights, since this is a head of compensation which would be awarded as part of a compensatory award for unfair dismissal and the claimants have not brought claims of unfair dismissal.

Mrs H Van Weerdenburg

4. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of **£367.31**.

5. The claimant was dismissed in breach of contract in respect of notice and the respondent. The claimant's notice pay entitlement was **£2320.64** (Statutory notice of 8 weeks at £290.08 average

weekly pay) During that notice period the claimant mitigated her loss to the extent of **£1900.50** by earnings in her new employment. The respondent is ordered to pay damages to the claimant in the sum of **£420.14** (£2320.64 - £1900.50).

6. The claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of **£2,320.64** (1 week for every complete year of service when C was aged between 22-40: 8 x 1 x £290.08= £2,320.64).

7. The respondent has failed to pay the claimant's accrued annual leave entitlement and is ordered to pay the claimant the gross sum of **£1,812** (21.9 days accrued at average daily rate of £82.74).

Loss of Statutory Maternity Pay entitlement

8. No award is made for loss of statutory maternity pay. Employment Judge McDonald considered Mrs van Weerdenburg's submission that she should be entitled to be compensated for the difference between the SMP she would have been entitled to had she continued in employment with the respondent until the end of her notice period and the Maternity Allowance she actually received. Her submission is that there was a breach of contract and she is entitled to be put in the position she would have been in had the breach not occurred. Had it not, she submits, her employment would have continued beyond the date when she would have qualified for payment of SMP.

9. There are two reasons why that argument is rejected and no damages are awarded for loss of SMP entitlement. The first is that **The Wise Group v Mrs L Mitchell 2005 ICR 896, EAT** confirmed that if an employee is wrongfully dismissed before he or she has acquired the qualifying service required to claim unfair dismissal, he or she will not be entitled to recover common law damages from the former employer for the loss of the chance of bringing an unfair dismissal claim, notwithstanding that under the terms of his or her contract he or she could only lawfully have been dismissed after completing the necessary qualifying service.

10. Underlying that decision is the principle that where legislation sets out the circumstances in which a statutory right is acquired or lost, damages arising from loss of the right should not be awarded for breach of contract. In the case of SMP, the Statutory Maternity Pay (General) Regulations 1986/1960 regulation 3 provides that where an employer has terminated an employee's contract of employment solely or mainly for the purpose of avoiding SMP liabilities, she will still be entitled to SMP from the former employer, provided she has been employed continuously for at least eight weeks at the time of the dismissal. There was no suggestion that this was the situation here – Mrs van Weerdenburg's colleagues who were dismissed in the same circumstances were not pregnant. Applying the approach in **The Wise Group**, it would not be appropriate to award damages for lost SMP in the absence of a breach of regulation 3.

11. The second reason is that Mrs van Weerdenburg's contract entitled the respondent to terminate her employment by paying in lieu of notice. That means her employment could have been lawfully terminated before the expiration of the minimum period of service required to qualify for entitlement to SMP. Applying the principle in **Lavarack v. Woods of Colchester Ltd [1967] 1 QB 278**, damages are only recoverable against the respondent on the basis that it had fulfilled its legal obligations and no more: that is, that it had terminated the contract at the earliest moment it could lawfully do so by paying in lieu of notice. Had it done so, Mrs van Weerdenburg's employment would have ended lawfully before her entitlement to SMP arose.

Ms C Jones

12. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of **£476.44**.

13. The claimant was dismissed in breach of contract in respect of notice. The claimant would be entitled to the sum of **£2,863.84** (Statutory notice of 7 weeks at £409.12 average weekly pay) during her notice period. However, the claimant fully mitigated her loss during that period by earnings in her new employment of **£3123.05** so I make no damages award in relation to the breach of contract.

14. The claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of **£4,295.76** (1.5 week for every complete year of service when the claimant was aged 41 or older: $7 \times 1.5 \times £409.12 = £4295.76$)

Mrs V Coull-Middling

15. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of **£127.76**.

16. The claimant was dismissed in breach of contract in respect of notice. The claimant's notice pay entitlement was **£730.20** (Statutory notice of 5 weeks at £146.04 average weekly pay). During that notice period the claimant mitigated her loss to the extent of **£555.10** by earnings in her new employment. The respondent is ordered to pay damages to the claimant in the sum of **£175.10** ($£730.20 - £555.10$).

17. The claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of **£730.20** (1 week for every complete year of service when C was aged between 22 and 41: $5 \times 1 \times £146.04 = £730.20$)

Mr G Middling

18. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of **£173.01**.

19. The claimant was dismissed in breach of contract in respect of notice. The claimant's notice pay entitlement was **£3,280.27** (Statutory notice of 7 weeks at £468.61 average weekly pay). During that notice period the claimant mitigated his loss to the extent of **£2322.75** by earnings in his new employment. The respondent is ordered to pay damages to the claimant in the sum of **£957.52** ($£3280.27 - £2322.75$)

20. The claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of **£3,514.57** (1 week's pay for every complete year of service when C was aged between 22 and 41: $6 \times 1 \times 468.61 = 2811.66$ + 1.5 week's pay for every complete year of service aged 41 or older: $1.5 \times 1 \times 468.61 = 702.91$. Total $£2811.66 + £702.91 = £3,514.57$)

**Case No:2408083/2022
2408084/2022
2408085/2022
2408086/2022**

Employment Judge McDonald

Date: 17 February 2023

JUDGMENT SENT TO THE PARTIES ON

23 February 2023

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE

Case No:2408083/2022
2408084/2022
2408085/2022
2408086/2022



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case numbers: 2408083/2022, 2408084/2022, 2408085/2022, 2408086/2022

Name of cases: Mrs H Van Weerdenburg
Ms C Jones
Mrs V Coull-Middling
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(in Creditors Voluntary Liquidation)

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 23 February 2023

the calculation day in this case is: 24 February 2023

the stipulated rate of interest is: 8% per annum.

For the Employment Tribunal Office