



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondent**

Ms Karolina Smarul

S8 Recruit Ltd

**REMEDY HEARING**

**HELD AT** Birmingham (via CVP) **ON** 21 June 2021

**EMPLOYMENT JUDGE** Choudry

**Representation:**

**For the claimant:** In person

**For the respondent:** No appearance

**JUDGMENT ON REMEDY**

1. The respondent is ordered to pay the claimant the sum of £3,234.46 in respect of notice pay in the sum of £769.24 (gross), holiday pay in the sum of £2,308.76 (gross); pension contributions in the sum of £156.46 as detailed in the Appendix.
2. The respondent is also ordered to pay the claimant the sum of £400 (10 hours work at £40 per hour) in respect of her preparation time.
3. The Recoupment Regulations do not apply.

## REASONS

### ***Background***

1. By a claim form issued on 26 January 2021 following a period of early conciliation from 27 November 2020 to 26 December 2020 the claimant commenced proceedings for notice pay, holiday pay, arrears of pay and other payments. This essentially related to the non-payment of her notice pay, holiday pay and pension contributions.
2. The claim was served on the respondent on 5 March 2021 and the respondent was required to file a Response by 2 April 2021. The respondent failed to file a Response and by a letter dated 1 May 2021 the respondent was advised that as it had not entered a Response, a judgment would now be issued and that the respondent would receive notice of any hearing but it would only be allowed to participate in any hearing to the extent permitted by the Employment Judge who heard the case. The respondent was further advised that a remedy hearing would take place today.
3. There was no appearance from the respondent today.

### ***Evidence and documents in relation to remedy***

4. I was presented with Schedule of Loss from the claimant and a copy of her witness statement which had attached to it 37 pages of documents including her contract of employment, her wage slips and copies of What's App.
5. I heard evidence from the claimant in relation to her employment and the losses she had incurred.

### ***Issues***

6. The issues for me to determine were:
  - 6.1 was the claimant entitled to any holiday pay, pension contributions, furlough pay and notice pay.

### ***Facts***

7. The claimant's commenced employment with an organisation know as Staffpoint on 8 May 2018.
8. On 23 September 2019 her employment transferred to the respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2016 after Staffpoint went into administration. As at the date of transfer she was entitled to £1,098.85 (gross) in accrued holiday pay, liability for which passed to the respondent.
9. The claimant's salary with the respondent was on an annual salary of £20,000 (gross), £17,240 (net). This created an effective hourly rate of £10.25 (gross). A weeks' net pay amounted to £384.62.
10. On 9 March 2020 the claimant was placed on furlough on 80 per cent of her monthly salary which amounted to £1,333 per month.

11. On 25 September 2020 the claimant was made redundant by the respondent. As at the effective date of employment she had accrued 118.04 hours holiday with the respondent which had not been taken at all. The claimant was not given any notice pay nor was she paid her pension contributions for the month of September (which amount to £156.46) nor her outstanding holiday pay.
12. The claimant received pay slips (but no pay) for October, November and December 2020 which seemed to suggest that the respondent was claiming furlough pay for her but not paying her. The claimant sought to claim this furlough pay if it was being claimed by the respondent.
13. The claimant made numerous attempts to make contact with the several individuals at the respondent including its director, Dawid Stawowy, and Matthew Brooks an employee of the respondent regarding the monies owed to her as set out in paragraph 11 above. Despite repeated assurances that she would be paid, the claimant never received the monies due to her. The respondent also failed to engage in early conciliation.
14. The claimant who is not legally represented also sought a preparation time order of £400 based upon 10 hours of preparation at the appropriate hourly rate of £40 per hour. These hours had been incurred as a result of the respondent failing to pay the claimant monies owed to her despite promising to do so leaving her with no alternative but to issue proceedings.

### ***Applicable law***

15. Section 86 of the Employment Rights Act 1996 provides:

*“(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*  
*(a) is not less than one week’s notice if his period of continuous employment is less than two years,*  
*(b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and*  
*(c) is not less than twelve weeks’ notice if his period of continuous employment is twelve years or more.”*
16. Regulations 14(1), 14(2) and 14(3) of the Working Time Regulations 1998 provides for an worker to receive a payment in lieu of any accrued but untaken holidays on termination. Regulation 14 (5) also provides for a payment in lieu to be made in respect of any outstanding leave for the previous holiday year which is carried forward.
17. An employment tribunal has a discretionary power to make a costs order under rule 76(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure Regulations 2013 (“the Rules”) where it considers that a party has acted ‘*vexatiously, abusively, disruptively or otherwise unreasonably*’ in either the bringing of the proceedings (or part) or the

way that the proceedings (or part) have been conducted.

18. The power to make a preparation time order (“PTO”) is contained in rule 76 (coupled with rule 75(2)). The grounds for making a PTO are identical to the grounds for making a general costs order against a party under rule 75(1)(a). Preparation time means ‘*time spent by the receiving party in working on the case, except for time spent at the final hearing*’ — rule 75(2).
19. A PTO is defined by rule 75(2) as ‘an order that a party... make a payment to another party... in respect of [that other] party’s preparation time while not legally represented’. The hourly rate of a lay representative is capped (as at 6 April 2018) at £38 (increasing by £1 each year on 6 April for the purpose of assessing costs under a costs order). This is the same hourly rate that applies for the purpose of assessing preparation time.
20. ‘Unreasonable’ has its ordinary English meaning. In determining whether to make an order under this ground, an employment tribunal should take into account the ‘nature, gravity and effect’ of a party’s unreasonable conduct’. The tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.
21. Under rule 76(2) of the Tribunal Rules an employment tribunal has the discretionary power to make a costs order or preparation time order against a party who has breached an order or Practice Direction.
22. The hallmark of a vexatious proceeding is that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the respondent/claimant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant/respondent, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.
23. If a tribunal considers that the case falls within one of the situations described in the Rules, it may make a costs preparation time order. In deciding whether to make a costs or preparation time order, or the amount of it, a Tribunal may have regard to the paying party’s ability to pay.
24. Rule 76(1) therefore imposes a two-stage test: first, a tribunal must ask itself whether a party’s conduct falls within rule 76(1)(a) of rule 75(2); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. Factors relevant to the discretion may include the fact that costs in the employment tribunal are still the exception rather than the rule. The fact that a party

is unrepresented can also be a relevant consideration in deciding whether to award costs against him or her. An employment tribunal cannot and should not judge a litigant in person by the standards of a professional representative.

25. Once an employment tribunal has decided to make a costs order, it must then go on to decide how much to award. The purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party. Given that costs are compensatory, it is necessary to examine what loss has been caused to the receiving party. Costs should be limited to those 'reasonably and necessarily incurred'. The amount awarded for a PTO must also exclude time spent at the final hearing.

### ***Conclusions***

12. In reaching my conclusions I have considered all the evidence I have heard and considered the documents to which I have been referred. I have also considered the very helpful oral made by the claimant.
13. I am satisfied on the evidence before me that the claimant should be entitled to her two weeks' notice pay in the sum of £769.24, her accrued holiday pay – both that accrued under the respondent and the liability which transferred from Staffpoint and her pension contributions for September 2020. I am not satisfied that the claimant is entitled to receive any furlough pay for any periods received by the respondent following the termination of her employment. I explained to the claimant that if the respondent had fraudulently claimed furlough pay then this was a matter that should be reported to Her Majesty's Revenue and Customs. As such, the respondent is ordered to pay the claimant a the sum of £3,234.46 (gross) as set out in the attached Annex.
14. I am also satisfied that the respondent has acted unreasonably in relation to these proceedings warranting a preparation time order of £400 in respect of 10 hours of the claimant's preparation time for preparing her statement, schedule of loss and other preparation in connection with the claim (but not the hearing)

Employment Judge Choudry  
on 21 June 2021

