EMPLOYMENT TRIBUNALS

Claimant: Miss S Brown

Respondent: Spectrum Healthcare Domiciliary Care Limited

Heard at: **Cardiff Employment Tribunal (on papers)** **On: 18 September 2022**

Before: **Employment Judge E Macdonald**

JUDGMENT

1. The Claimant's application for a preparation time order dated 1 March 2022 is refused.

REASONS

Background

2. The Claimant's claim was heard on 31 January 2022. Judgment was sent to the parties on 4 February 2022 upholding the Claimant's claim for holiday pay in respect of holiday accrued but untaken at termination of employment. Written reasons were requested by the Claimant on 1 March 2022 (***"the Request"***) together with an application for a preparation time order (***"the Application"***). Neither the Request nor the Application were copied to the Respondent as required by r 92 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (***"the Rules"***)

3. Pursuant to r 6 of the Rules a failure to comply with any provision of the Rules does not of itself render void any step taken in the proceedings. In the case of non-compliance the Tribunal may take any action it considers just. I accordingly directed a copy of the request and the application to be sent to the Respondent.

4. Written reasons were sent to the parties on 21 April 2022.

5. The Respondent failed to respond to the Application. On 8 June 2022 the Tribunal therefore wrote to the parties to notify them that in the absence of

a response from the Respondent, the application would be dealt with on the papers.

6. On 8 June 2022 the Respondent wrote to the Tribunal stating *inter alia* that it had "no record of receiving any communication from the court in regards to expressing any views on the preparation time order submitted by Miss Brown".

7. The Tribunal by return provided copies of the Claimant's correspondence dated 1 March 2022 and enclosing the Request and Application. I directed the Respondent to respond to the Claimant's Application within 28 days indicating whether it objected to the making of such an order and, if so, the reasons for the objection.

8. The Respondent failed to respond to the Application within the deadline. No request for a hearing was received. I therefore decided to deal with the Application without a hearing.

Law

9. Rules 74 - 76 provide, insofar as is material, as follows:

> **Costs orders and preparation time orders**
> **75.**—
> **[.** . .]
> (2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.
> [. . .].
>
> **When a costs order or a preparation time order may or shall be made**
> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
> (a) a party (or that party's representative) 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; or
> (b) any claim or response had no reasonable prospect of success.
> [. . .]
>
> **Procedure**
> **77.** A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application

10. The Respondent has had a reasonable opportunity to make representations in writing in accordance with Rule 77.

11. A preparation time order *may* be made where the Tribunal considers that a party has acted "vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings . . . or the way that the proceedings . . .have been conducted" or where "any . . . response had no reasonable prospect of success."

12. The Claimant's application was made on the basis that the Response had no reasonable prospect of success.

13. I do not accept that submission. Having carefully considered the applicable law, I concluded that the Respondent's calculation of the Claimant's holiday entitlement was inaccurate. I also found that it was not reasonably practicable for the Claimant to have taken forward accrued but untaken annual leave in the relevant annual leave year, and that the Respondent had agreed (i.e. expressly authorised) that carry-over. Neither the factual findings on which the Judgment depends, nor the analysis of the legislation, are simple exercises. I do not consider that the Response can be said to have had "no reasonable prospect of success", notwithstanding that I considered the Respondent's position to be legally inaccurate.

14. Even had I considered the Response to have had "no reasonable prospect of success", I would nonetheless have declined to make a preparation time order in this case. I consider that the Respondent's Response was raised in in good faith, albeit that the Respondents' position was, in my view, incorrect; costs are the exception rather than the rule; and that it would not be just in the circumstances to make a preparation time order.

15. I therefore refuse the Claimant's Application.

Employment Judge **E Macdonald**

Date 30 September 2022

JUDGMENT SENT TO THE PARTIES ON 3 October 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

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