EMPLOYMENT TRIBUNALS

Claimant: Ms A Johnson

Respondent: Cornerstone Estate Agents (Yorkshire) Limited

JUDGMENT

1. The Respondent's application for reconsideration of the Remedy Judgment issued on 25th July 2017 and sent to the parties on 1st August 2017 is refused.

2. The Claimant's application for costs is refused.

REASONS

1. The Respondent has applied by letter dated 11th August 2017 for reconsideration of parts of the judgment. Under rule 70 of the Employment Tribunals Rules of Procedure 2013 that decision may be revoked and taken again where it is necessary in the interests of justice to do so. Whether it is in the interests of justice to revoke a decision in order to admit new evidence before taking that decision again requires me to have regard to the principles in Ladd v Marshall [1954] 3 All ER 745.

2. In connection with my finding that the Claimant was entitled to 7.11 days accrued holiday pay the Respondents have now produced documentary evidence which appears to show that the Claimant had booked significantly more leave than the 8 days only which she said – and which I therefore found as a fact – that she had taken in the relevant holiday year. On the Respondent's case this new evidence corroborates the assertion made at the remedy hearing, based upon a letter from its administration manager, that the Claimant had exceeded her pro-rata holiday entitlement by 4 ½ days.

3. I accept that this new evidence appears to be both credible and material and that it would therefore have had a bearing on my decision. It is not however incontrovertible evidence that the Claimant was not in fact due any outstanding holiday at termination; in particular I note that some of the pre-booked holiday was in September and may well therefore have been superseded by a period of sickness absence and I do not know whether the Claimant actually took all the other booked holiday.

4. However there is no good reason given as to why this evidence was not put before me at the hearing. After the liability hearing on the unfair dismissal claim I adjourned the determination on the holiday pay claim to the Remedy Hearing and gave directions. This was because neither side had in fact addressed this issue in the evidence at the first hearing. Although this evidence was available to the Respondent it chose not to detail it in accordance with the directions timetable nor to put it forward at the hearing but instead relied simply upon the assertion of its administration manager.

5. The Respondent therefore had the opportunity to deal with these matters before the adjourned hearing but did not do so. There must be finality to proceedings, particularly where there has already been one adjournment. To address this evidence at a further hearing would inevitably lead to further costs as well as delaying the outcome. In all the circumstances it is not in the interests of justice to revoke my original decision and reconvene the tribunal for a third time to deal with this issue.

6. The Claimant was entitled by reason of her length of service to a minimum of 6 weeks' notice (one week for each year of continuous employment: section 86 Employment Rights Act 1996). Even though the contract purports to state that she was only entitled to 4 weeks' notice there is therefore no prospect of my varying my decision on the damages for wrongful dismissal. In any event the 6 weeks' pay is subsumed into the compensation fro unfair dismissal so it would make no difference whatsoever to the outcome.

7. Nor is there any prospect of my varying my decision on the appropriate level of the uplift for failure to comply with the ACAS code of practice. This is a matter within my discretion having regard to what is just and equitable in all the circumstances: section 207A Trade Union & Labour Relations (Consolidation) Act 1992. I identified a number of serious breaches of the relevant code, as outlined in my oral judgment on liability, and decided, in the context of those findings to increase the awards by 15 percent, and not the maximum 25 per cent; that decision will not be varied (either to 5 per cent as the Respondent contends or to any other lesser figure).

8. I had already awarded costs in respect of the tribunal issue and hearing fees, though these will now be expected to be recoverable administratively from the tribunal service. By letter dated 9th August 2017 the successful Claimnt has also now applied for her other costs. The Respondent has provided written submissions in reply at the same time as making its application for reconsideration. As I had directed in the Remedy Judgment, in contemplation of such an application, this is now dealt with on the papers without a hearing.

9. In my judgment there is no basis for awarding further costs on the grounds either that the claim of unfair dismissal had no reasonable prospect of success from the outset or that the Respondent acted unreasonably in defending it.

10. Although I concluded that the Respondent had not established (the burden of proof being upon it: section 98 (1) Employment Rights Act 1996) a potentially fair reason for dismissal, and indeed on the evidence before me that I was able to conclude that the principal reason was in fact the breakdown in their relationship and the pressure applied by Kelly Day to dismiss the Claimant this remains a multi-faceted case. There was potentially, on the face of it, a valid redundancy situation underlying the dismissal process and there were also allegations of misconduct brought against the Claimant, some of which may well have warranted a sanction short of dismissal. The fact that I came to the conclusions

that I did after consideration of the evidence does not therefore mean that the Respondent must have known that the defence was hopeless from the start or that it acted unreasonably in defending this claim by putting its evidence to the test

11. Nor does the fact that there were substantial procedural defects which would also, as I found, have rendered the dismissal unfair mean that the threshold test for an award of costs is met. There were always potential "Polkey" arguments which meant that even if the substantive defence failed – as it did- there would have to have been consideration of the likelihood of dismissal having been effected in any event. There were also substantial arguments as to quantification of damages in general. A lay representative, as Mr Dugdale is, cannot in my view be expected in thee circumstances to appreciate the distinction between making an admission of liability and conducting the argument on remedy only and defending the whole case.

12. Furthermore the procedural defects have already been taken into account when awarding a substantial uplift. That would have been a factor which would have made me disinclined to exercise my discretion additionally to award costs on this basis had the threshold for consideration been reached.

13. In the event I do not need to consider whether I would have refused a costs order, or reduced it, on consideration of the Respondent company's ability to pay.

14. I add finally that I do not take into account the suggestion (disputed as it is) that Mr Dugdale refuse to engage in early conciliation. The conciliation process through ACAS is separate to tribunal proceedings and is confidential. An alleged failure to participate in this process, where there is no obligation to do so, by definition predates the issue of any claim and cannot be unreasonable conduct in the course of proceedings.

Employment Judge **Lancaster**

Date 6th September 2017