EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs P Willimott & Others	**v**	**Diamond Care (UK) Limited**

Heard at: Norwich **On**: 18 December 2017

Before: Employment Judge Tynan

Appearances
For the Claimants: Mr Ben Jones, Counsel
For the Respondent: Mr Singh, Director of the Respondent

JUDGMENT

1. The Eighth Claimant's claim (Case No. 3327671/2017) shall be consolidated with his claim to the Employment Tribunal under Case No. 3328319/2017, currently listed for hearing on 5 January 2018.

2. The Tribunal determines that the First to Seventh and Ninth to Nineteenth Claimants are each entitled to a redundancy payment pursuant to section 135 of the Employment Rights Act 1996.

3. The Tribunal further determines that the amount of the redundancy payments to which the First to Seventh and Ninth to Nineteenth Claimants are entitled is as follows:

   (a) The First Claimant, the sum of £11,736.00;

(b) The Second Claimant, the sum of £5,714.28;

(c) The Third Claimant, the sum of £1,191.29;

(d) The Fourth Claimant, the sum of £3,690.00;

(e) The Fifth Claimant, the sum of £1,637.04;

(f) The Sixth Claimant, the sum of £550.80;

(g) The Seventh Claimant, the sum of £891.44;

(h) The Ninth Claimant, the sum of £743.22;

(i) The Tenth Claimant, the sum of £2,135.12;

(j) The Eleventh Claimant, the sum of £216.00;

(k) The Twelfth Claimant, the sum of £3,032.30;

(l) The Thirteenth Claimant, the sum of £1,430.75;

(m) The Fourteenth Claimant, the sum of £599.55;

(n) The Fifteenth Claimant, the sum of £356.70;

(o) The Sixteenth Claimant, the sum of £8,934.00;

(p) The Seventeenth Claimant, the sum of £7,376.11;

(q) The Eighteenth Claimant, the sum of £239.07; and

(r) The Nineteenth Claimant, the sum of £974.01.

4. The Tribunal declares that the First to Seventh and Ninth to Nineteenth Claimants' complaints pursuant to s189 of the Trade Union & Labour Relations (Consolidation) Act 1992 are well founded.

5. The Tribunal makes a protective award in favour of the First to Seventh and Ninth to Nineteenth Claimants (and in favour of any other employees of the Respondent who may have been dismissed as redundant in consequence of the closure of the Pine Heath Care

Home, Cromer Road, High Kelling, Holt, Norfolk NR25 6QD), that the Respondent shall pay remuneration to them for the protected period of 90 days.

(a) The protective award for the First Claimant is the sum of £8,406.90;

(b) The protective award for the Second Claimant is the sum of £4,081.50;

(c) The protective award for the Third Claimant is the sum of £3,403.80;

(d) The protective award for the Fourth Claimant is the sum of £5,271.30;

(e) The protective award for the Fifth Claimant is the sum of £3,508.20;

(f) The protective award for the Sixth Claimant is the sum of £2,360.70;

(g) The protective award for the Seventh Claimant is the sum of £2,865.60;

(h) The protective award for the Ninth Claimant is the sum of £4,777.20;

(i) The protective award for the Tenth Claimant is the sum of £6,100.20;

(j) The protective award for the Eleventh Claimant is the sum of £919.80;

(k) The protective award for the Twelfth Claimant is the sum of £4,104.00;

(l) The protective award for the Thirteenth Claimant is the sum of £3,679.20;

(m) The protective award for the Fourteenth Claimant is the sum of £3,083.40;

(n) The protective award for the Fifteenth Claimant is the sum of £764.10;

(o) The protective award for the Sixteenth Claimant is the sum of £3,828.60;

(p) The protective award for the Seventeenth Claimant is the sum of £4,626.00;

(q) The protective award for the Eighteenth Claimant is the sum of £3,073.50; and

(r) The protective award for the Nineteenth Claimant is the sum of £4,174.20.

6. The First to Seventh and Ninth to Nineteenth Claimants were each unfairly dismissed by the Respondent.

7. The First to Seventh and Tenth to Seventeenth Claimants were dismissed by the Respondent in breach of contract as they were not given the full contractual notice of termination of their employment which they were each entitled to receive from the Respondent.

8. The First to Seventh and Ninth to Nineteenth Claimants' claims to holiday pay are not well founded and are dismissed.

REASONS

1. There are 19 Claimants and their claims are in identical form. They each claim to be entitled to a statutory redundancy payment, that their dismissal on grounds of redundancy was unfair and, further, that the Tribunal should make a declaration and a protective award pursuant to section 189(2) of the Trade Union and Labour Relations (Consolidation) Act 1992. A number of the Claimants also claim that they were dismissed in breach of contract as they did not receive the contractual notice of termination to which they were entitled and accordingly assert that they are owed the balance of their notice pay. All the Claimants claim unspecified sums in lieu of accrued but untaken holiday.

2. At the outset of the hearing I refused an application by Mr Singh to adjourn the hearing. The basis of his application was that there had been settlement discussions between the parties which he had hoped might resolve all outstanding claims. I made clear that I could not be told about any without prejudice negotiations if these had not resulted in a concluded agreement to settle the proceedings. The fact that there may be settlement discussions, and that one or both parties are hopeful these may lead to a resolution which obviates the need for a hearing, does not excuse either party from preparing their case for hearing or being ready to proceed on the day on which the case is listed for hearing. If the parties cannot reach an agreement, then unless both sides require further time to explore a resolution and this is agreed by the Tribunal, it is incumbent upon the Tribunal to hear the claims and come to a Judgment.

3. It was proposed on behalf of the Claimants, accepted by Mr Singh and agreed by me that the claims should proceed on the basis that Mrs Willimott would give evidence on behalf of all the Claimants. Mrs Willimott was the Respondent's longest serving employee, as well as its most senior employee and well placed therefore to do so. Her statement is dated 13

December 2017. Additionally, there were witness statements by 15 of the other Claimants, none of whom gave evidence at Tribunal but all of whom adopted Mrs Willimott's statement. Each of their statements are essentially in the same form: they each identify the notice to which they were contractually entitled, as well as their claimed statutory redundancy pay entitlement. Not all of the statements are signed by the maker of the statement. Accordingly, I shall make an order that Jacqueline Waller (Second Claimant), Emma Sullivan (Ninth Claimant), Aileen Findlow (Eleventh Claimant), Charlotte Hankins (Twelfth Claimant), Michael Stuart (Fourteenth Claimant) and Beryl Rossell (Eighteenth Claimant) shall each file and serve signed and dated statements as confirmation that the contents of their respective unsigned statements are true. There were no statements by Geraldine Cooper (Sixteenth Claimant) and Lillian Bond (Seventeenth Claimant). Mr Jones did not appear on their behalf, though his instructing solicitors continued to represent their interests. I shall further order that they each file and serve a signed and dated statement in support of their respective claims. I am content that their statements should be in the same form as for all the other Claimants.

4. Since the claims were issued it has come to light that one of the Claimants, Mr Pawel Makowski (Eighth Claimant), has in fact instructed Thompsons Solicitors to bring a claim on his behalf. The Tribunal file in relation to those proceedings was available to me from which I could see that Mr Makowski has presented his claim in essentially the same form as the claims are presented in these proceedings and that the claim is currently listed for hearing on 5 January 2018. I accept that his name was included as a Claimant in these proceedings as a result of a understanding on the part of Mr Jones' instructing solicitors that he wished to be part of this multiple claim. Mr Makowski was not present at Tribunal and was not represented. In the circumstances I could not proceed to determine his claim in his absence. However, my findings in these proceedings may inevitably have a bearing upon the resolution of his claims. Mindful that I should not prejudice those claims or their resolution on 5 January 2018, I shall order that Mr Makowski's claim in these proceedings (Case No. 3327671/2017) shall be consolidated with Case No. 3328319/2017. Hereafter,

and unless I indicate otherwise, when I refer to the Claimants, I am referring to the First to Seventh and Ninth to Nineteenth Claimants.

5. The Claimants' solicitors had prepared an indexed and paginated bundle of documents for the hearing comprising 25 documents running to some 140 pages. It was unclear what part, if any, the Respondent had played in preparing the claims for hearing. No witness statements had been filed on behalf of the Respondent. Nevertheless, I agreed to hear evidence from Mr Singh, notwithstanding the Respondent had failed to comply with the case management order in these proceedings regarding the service of witness evidence in advance of the hearing. I considered that the Claimants would not be materially prejudiced if Mr Singh was invited to adopt the Grounds of Response and to amplify these as necessary. Indeed, Counsel for the Claimants would have the opportunity to cross-examine Mr Singh if I allowed Mr Singh to give evidence.

6. Counsel for the Claimants, Mr Jones had prepared a proposed List of Issues which I was content to adopt. It is appended to this Judgment. I additionally identified that in the event I upheld the Claimants' claims that they were unfairly dismissed I would need to go on to consider whether they would have been dismissed in any event regardless of any unfairness, alternatively whether there was a substantial chance they would have been dismissed in any event and accordingly that any claimed compensation for unfair dismissal should be reduced to reflect my assessment of the likelihood of dismissal. This is in accordance with the well established principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8*.

Preliminary Issues

7. The Respondent operated a residential care home for the elderly, known as Pine Heath Care Home (the "Home"). The Claimants worked at the Home, in a variety of roles. The Home closed on 31 May 2017 and the Claimants were dismissed as a result of its closure. It was not in issue between the parties that the Claimants had all been dismissed by the

Respondent by reason of redundancy in consequence of the closure of the Home, and for no other reason. I refer in this regard to paragraph 17 of the Respondent's Grounds of Response. In his submissions at Tribunal, Mr Singh reiterated that the Claimants had all been dismissed by reason of redundancy and that the Respondent accepts that they are each entitled to a statutory redundancy payment. Their respective entitlements are set out at page 21 of the hearing bundle and are not disputed by the Respondent. The Respondent's concession is unsurprising. Section 139(1)(a)(ii) of the Employment Rights Act 1996 provides that an employee is to be taken to be dismissed by reason of redundancy if their dismissal is wholly or mainly attributable to the fact that their employer has ceased or intends to cease to carry on the business in which the employee was employed in the place where the employee was so employed. The Respondent ceased operating the Home and the Claimants were dismissed in consequence of that decision. That falls squarely within section 139(1)(a)(ii). As such, the Claimants were dismissed by reason of redundancy and, as they all had at least two years' continuous service, were each entitled to a statutory redundancy payment.

8. At paragraphs 1 and 2 of its Grounds of Response, the Respondent contends that seven of the Claimants entered into settlement agreements under the terms of which they agreed not to pursue any claims against the Respondent. At Tribunal, Mr Singh conceded that the seventh named individual, Mr Chris Scase (Thirteenth Claimant), had not in fact signed any such agreement. As regards the other six named Claimants (Geraldine Cooper, Emma Sullivan, Charlotte Hankins, Lillian Bond, Chloe Stuart and Sarah Stratton), they each apparently signed a document headed "Payment Confirmation", four copies of which are at pages 83 to 86 of the hearing bundle. Copies were not available for Miss Cooper (Sixteenth Claimant) or Miss Bond (Seventeenth Claimant). The documents are on the headed paper of Pine Heath Care Home. In each case the document records the relevant Claimant's name, address and date of birth and identifies that they have received a sum of money "*to settle my redundancy pay and other claims against the termination of my employment from Diamond Care UK Limited*". Further, there is a statement that the sum paid is in full and final settlement and that the Claimant will not make any further claims

against the Respondent or its Directors. In each the case the document is signed and dated.

9. By virtue of section 203(1) of the Employment Rights Act 1996, any provision in an agreement is void in so far as it purports to preclude a person from bringing any proceedings under the Act before an Employment Tribunal. Section 203(1) does not apply in certain circumstances, including if the conditions regulating settlement agreements under the Act are satisfied in relation to the agreement. The conditions regulating settlement agreements are contained in section 203(3) of the Act. Amongst other things, the agreement must relate to the particular proceedings (section 203(3)(b)), the employee must have received advice from a relevant independent advisor as to the terms and effect of the proposed agreement and, in particular, its effect on his/her ability to pursue his/her rights before an Employment Tribunal (section 203(3)(c)), the agreement must identify the advisor (section 203(3)(e)), and the agreement must state that that the conditions regulating settlement agreements under the Act are satisfied (section 203(3)(f)). None of these four conditions are met in relation to the agreements at pages 83 to 86 of the hearing bundle. As such, those agreements are void in so far as they purport to preclude the particular Claimants from bringing proceedings under the 1996 Act. However, I believe the Respondent is entitled to be given credit for the sums actually paid to the particular Claimants against any sums which are adjudged to be due to them.

10. Paragraphs 11 to 14 of the Grounds of Response refer to the alleged insolvency of the Respondent. In fact, the Respondent relies upon the appointment on 2 June 2017 of an administrative receiver over the Respondent's property at the Home. The Respondent contends that the appointment constituted an insolvency event for the purposes of section 183(1)(b) and (3)(b) of the 1996 Act. The Respondent's contentions are misconceived. Whether or not the Claimants have rights under Part XII of the 1996 Act to seek payments from the Secretary of State does not absolve the Respondent of its liability for sums due to the Claimants (including as a result of a Judgment in their favour by the Tribunal). Furthermore, there is no rule requiring a claimant to obtain the consent of an administrative

receiver or a court to initiate or continue proceedings against a company in respect of whom an administrative receiver has been appointed.

Findings

11. The Home was the only establishment owned and operated by the Respondent. Mrs Willimott was the manager at the Home. The details of the other Claimants, including their job title, number of years of claimed continuous service, claimed contractual notice entitlement and the notice they actually received, the notice pay claimed to be owing to certain of them, and their claimed statutory redundancy pay entitlement are contained in a spreadsheet at page 21 of the hearing bundle. The information contained in the spreadsheet, including the various sums calculated as owing to the Claimants, was not disputed by Mr Singh, save that he believed Mrs Willimott had 16 years' continuous service rather than 18 years as claimed. I note that there are certain discrepancies between the spreadsheet and the Schedule of Loss at page 69 of the hearing bundle (prepared in relation to the sixteen Claimants represented by Mr Jones) in terms of certain of the Claimants' claimed contractual notice entitlement. I shall return to this.

12. There was no recognised trade union at the Home and no collective agreements (as confirmed in the Claimants' contracts of employment – pages 88 to 91 of the hearing bundle). Mrs Willimott's evidence, which was not disputed by Mr Singh and which I accept, was that there were no workplace employee representatives and that none were elected or appointed in connection with the closure of the Home.

13. I find that all of the Claimants worked under the Respondent's standard terms and conditions of employment. A specimen contract of employment is at pages 88 to 91 of the hearing bundle. The notice of termination provisions are at clause 8 of the contract. Clause 8.1 provides:

"The notice of termination of employment which you are entitled to receive from the Company is one week during the first month of current employment, then two weeks in respect of the next five months of your continuous employment and thereafter an additional

one week's notice for each year of continuous employment up to a maximum of twelve weeks in total."

14. In the case of the First, Sixteenth and Seventeenth Claimants, I find that their employment transferred to the Respondent when it acquired the Home approximately 16 years ago. The evidence is limited, but ultimately I accept Mrs Willimott's evidence that she understood there had been no break in her (or their) continuity of employment. It seems to me that must be the case whether the Respondent acquired the Home through a share based acquisition or as a result of an asset based acquisition within the ambit of the TUPE Regulations.

15. In October 2016 there was an incident with the boiler at the Home which resulted in the Home having no heating. In November 2016, one of the female residents died in hospital. Concerns arose as to whether this may have been the fault of the Home and in particular whether it may have been linked to the lack of heating. It was subsequently established as a result of legal proceedings that this was not the case. However, it is clear that the Home came to the attention of the authorities and that it was giving cause for concern. On 10 and 15 November 2016, the Care Quality Commission inspected the Home. Mrs Willimott's evidence was that the Home was also visited during this period by Quality Assurance, Safeguarding, CID, Infection Control, Environmental Health and a number of health professionals.

16. In or around December 2016, the Home was barred from taking in new residents. Indeed the situation was more serious in that existing residents were prevented from returning to the Home if they left for any reason. It seems that these restrictions were in place as a result of an inspection report issued by the Care Quality Commission following its November 2016 inspection. A copy of the inspection report was not available to me, though I was told by Mr Jones that a copy is available on the Commission's website. The hearing bundle includes a copy of a subsequent inspection report following a further inspection visit on 28 March 2017 (pages 38 to 56 of the hearing bundle). There is a summary of the findings following the March 2017 inspection at pages 39 and 40 of the hearing bundle.

This summary refers to the previous inspection carried out on 10 and 15 November 2016 as having identified 8 breaches of regulations of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The summary also refers to the service as 'remaining' in 'special measures', from which I conclude that the Home had been placed in special measures following the November 2016 inspection. The summary of findings from March 2017 makes clear that services in special measures will be kept under review and that there is an expectation they will have made significant improvements when they are re-inspected. There is an explicit warning that if not enough improvement is made, such that the service overall or any key aspect of it continues to be rated as inadequate, the Commission will take action to begin the process of preventing the provider from operating the service. For adult social care services the maximum time for being in special measures is stated to be usually no more than 12 months. I conclude that the same warning was given to the Respondent in December 2016 following the November 2016 inspection.

17. During its March 2017 inspection, the Care Quality Commission found that little progress had been made at the Home. Considerable maintenance issues were found had not to have been addressed, including safety concerns relating to unlagged hot pipes and unprotected heated towel rails. Plans to identify and mitigate risk to people in relation to their health were not clear, with people not receiving prescriptions promptly. There was found to be substantial gaps in staff training and considerable poor practice was observed that was not respectful to people and did not uphold their dignity. People's care records were not clear, accurate or up to date. The provider, namely the Respondent and its Director Mr Singh, were assessed as minimally engaged in the day to day running of the Home. They were said to have failed to improve their oversight of the Home. The overall rating for the service was inadequate and it remained in special measures. The Commission's report was not published until 19 July 2017. The Home had in fact already closed by then.

18. On 25th April 2017 Mrs Willimott was blind-copied in to an email from Mr Singh to the Care Quality Commission (page 132 of the hearing bundle). Mr Singh wrote:

"*Hope all is well, I unfortunately would like to inform all parties that due to the issues in the last 6 months and the recent cqc report, I have come to the conclusion that the restriction on the home will not be cancelled in the near future. so can clearly forecast that within the end of next month the Home will fall under severe financial difficulties which in my opinion would jeopardise the care to residents.As the responsible person towards the home I cannot allow this to occur, as throughout the last 17 years my aim has always been to provide the best care possible for my residents & If I or my staff have failed in this task I deeply apologise.*

Today all staff/residents/families will be notified of the closure and to be fair to all parties I am pencilling in as a last day to be 31st May 2017 approximately 6 weeks from today

Finally I would like to thank everyone for there continuous support over the years it's been a pleasure working with you all."

I believe the reference to the "recent cqc report" is to a draft of the July 2017 report. In an email later on 25 April 2017, Mrs Willimott refers to such a draft report.

19. Mr Singh's email of 25 April 2017 was not circulated more widely. Contrary to his stated intention in that email to notify staff of the closure the same day, he instead instructed Mrs Willimott that she should not say anything to the rest of the staff as it would only cause concern. In his evidence at Tribunal Mr Singh explained that his concern was that staff might leave either without giving notice or giving perhaps as little as one week's notice as soon as they knew that the Home was closing. However, Mrs Willimott was concerned that staff should know the position and she therefore arranged a team meeting later the same day to tell staff about the email. She emailed Mr Singh at 3.10pm to inform him that she had read out the contents of his earlier email to the Care Quality Commission to staff. She wrote, "*I cannot lie to staff I have worked with for 18 years …*" (page 133 of the hearing bundle).

20. Thereafter there were no further communications from the Respondent to its staff regarding the future of the Home or their employment until 2 May 2017 when Mr Singh wrote to staff

giving them 4 weeks' notice terminating their employment. An example letter is at page 134 of the hearing bundle. The first part of the letter is in identical terms to the email of 25 April 2017 to the Care Quality Commission. In addition to being given four weeks' notice of termination of employment, staff were informed by Mr Singh that they would be paid their holiday pay on 31 May 2017. Staff were asked to contact Mrs Willimott or Mrs Waller, the Deputy Manager, if they required a reference. Mr Singh's letter was otherwise silent as to the balance of any notice entitlement which may be due and as to whether or not their statutory redundancy pay would be paid. Staff were not offered any right of appeal against their dismissal.

21. At page 87 of the hearing bundle is a list of employees as at the date the Home closed on 31 May 2017. In her evidence at Tribunal Mrs Willimott explained that she was asked by Mr Singh to prepare the list in connection with the Home's closure. The list comprises 49 named individuals. Mrs Willimott clarified that ten named individuals included on the list had in fact already left the Respondent's employment by the time the Home closed. Even assuming for these purposes that they were not dismissed by reason of redundancy (which is not clear), that still means that at least 39 employees of the Respondent were dismissed by reason of redundancy.

Law and conclusions

Redundancy

22. For the reasons set out above, the Claimants each have a right to a redundancy payment. The calculation of the redundancy payments due to each of them contained in the spreadsheet at page 21 of the hearing bundle is not disputed by the Respondent and accordingly I determine that they are each entitled to the amount specified in the spreadsheet against their name.

Sections 188 and 189 of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA")

23. By virtue of Section 188 of TULRCA, where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals. The consultation shall begin in good time and in any event, where fewer than 100 dismissals are proposed, at least 30 days before the first of the dismissals takes effect. Section 188(2) of TULRCA provides that consultation shall include consultation about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals. Consultation is required to be undertaken with a view to reaching agreement. Under Section 188(4) of TULRCA certain prescribed information is to be provided in writing to the appropriate representatives at the outset of the consultation process. In this case, by 25 April 2017 at the latest, the Respondent was proposing to dismiss as redundant at least 39 employees and the s188 duty to consult was thereby invoked. It failed to discharge its duty in this regard. Quite simply there was no consultation with staff or their representatives. The Respondent took no steps whatever towards compliance with section 188. There was no effort to appoint employee representatives, the information at section 188(4) of TULRCA was not communicated (whether to employee representatives or directly to the staff) and there was no consultation at all with staff about how any dismissals might be avoided, the number impacted reduced or how the consequences might be mitigated.

24. Section 188(7) of TULRCA provides:

"*If in any case there are special circumstances which render it not reasonably practicably for the employer to comply with a requirement of sub-section (1A), (2) or (4), the employer*

shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances."

25. Mr Jones drew my attention to the Court of Appeal's decision in *Clarks of Hove Limited -v- Bakers Union 1978 ICR 1076*, a case in which the Court of Appeal said that insolvency alone was not a special circumstance such as to render compliance with the duty in section 188 not reasonably practicable. The situation must be unexpected or have very specific and unusual characteristics. This is a case in which the Respondent was not insolvent. An administrative receiver was appointed on 2 June 2017, over five weeks after the Respondent had resolved to close the Home. At paragraph 19 of its Grounds of Response the Respondent refers to its 'insolvency' and the fact of the cancellation of its registration by the Care Quality Commission as having "mitigated against the formal consultation required by s188". In my judgment, the steps taken by the Care Quality Commission do not amount to special circumstances such as to absolve the Respondent of its obligations under section 188. On the contrary, the inspection visits and ensuing reports, together with the interest being shown by multiple other agencies, should have highlighted to the Respondent the pressing need to engage with its staff about the future of the Home. The situation developed over a number of months, it did not unravel within a matter of days such that the Respondent was caught by surprise. On the contrary, in placing the Home in special measures, the Care Quality Commission was potentially giving the Home up to 12 months in which to improve. Mr Singh's evidence at Tribunal was that a conversation he had with the Care Quality Commission in or around March 2017 had "caused alarm bells to ring". The Respondent could and should have engaged with its staff if alarm bells were ringing. Instead, the Respondent made a conscious decision to keep its staff in the dark as it was concerned they might leave (a concern that was not in fact borne out, as all those who were employed at 2 May 2017 remained with the Respondent through to the closure of the Home on 31 May 2017). By 25 April 2017, if not before, Mr Singh had concluded that the position was untenable. However much he may have desired to bring any trading losses to an end, there was no absolute imperative to do so such that the Respondent was justified in disregarding its obligations under s188. Mr Singh put commercial considerations ahead of the Respondent's legal obligations to its staff. The report of 19 July 2017 evidences that

the Home would not have been permitted to remain in special measures for longer than 12 months from when it was first placed in special measures in or around November 2016. In fact I conclude that the Care Quality Commission's concerns were such that action is likely to have been taken sooner than 12 months in line with the Commission's enforcement procedures to begin the process of preventing the Respondent from operating the Home. But that does not mean that the Home needed to be closed immediately and certainly does not explain or justify the Respondent's approach on 2 May 2017 or more generally. The Respondent bears the burden of establishing, on the balance of probabilities, the existence of special circumstances which rendered it not reasonably practicable for it to comply with the relevant requirements of section 188 of TULRCA. The Respondent has wholly failed to discharge that burden. In the alternative, even if special circumstances could be said to exist, the Respondent has not demonstrated that it took all steps towards compliance with section 188 as were reasonably practicable in the circumstances. On the contrary, the Respondent took no steps whatever towards compliance with section 188. As I have set out already, there was no effort to appoint employee representatives, the information at section 188(4) of TULRCA was not communicated and there was no consultation at all with staff about how any dismissals might be avoided, the number impacted reduced or how the consequences might be mitigated.

26. Mr Jones reminded me of the Court of Appeal's judgment in *Susie Radin Limited -v- GMB [2004] EWCA Civ 1980* in which the Court of Appeal confirmed that the purpose of a protective award is to provide a sanction for breach by the employer of its obligations in section 188 and is not to compensate employees for loss which they have suffered in consequence of the breach. The Tribunal has a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default which may vary from the technical to a complete failure to provide any of the required information and to consult. This case is one where there was a complete failure on the part of the Respondent. In *Susie Radin* the deliberateness of the failure was said to be potentially relevant. In this case I note that Mr Singh's instructions to Mrs Willimott were that she should not inform staff that the Home was to close. Mrs Willimott felt that she was being asked to lie to staff. She disobeyed the instruction she had been

given and shared the limited information she had with staff. Otherwise, however, they were not informed or consulted about the closure of the Home, certainly not in any meaningful sense. They simply received notice of termination of their employment, but even then without essential information as to the final payment of their wages, the balance of any notice pay due to them, and payment of their statutory redundancy pay. In my view this was about as serious a failure as it is possible to imagine. In *Susie Radin* the Court of Appeal said that a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction. I have concluded that I should make a protective award of the maximum period and that as the Respondent has not demonstrated the existence of any, or any sufficient, mitigating circumstances that I should not reduce it. Notwithstanding that the Home was in 'special measures' and prevented from admitting new residents, I see no reason why the Respondent could not have undertaken a 30 day consultation process. Accordingly I shall make a declaration that the Claimants' complaints are well founded and shall make a protective award in their favour, and in favour of any other employee who may have been dismissed as redundant in consequence of the closure of the Home, that the Respondent shall pay remuneration to them for the protected period of 90 days. As regards the Claimants, the amount of the protective award is as set out in the spreadsheet at page 21 of the hearing bundle against each of their names.

Unfair Dismissal

27. An employee with at least two years' continuous serve has the right not to be unfairly dismissed by his/her employer (sections 94 and 108 of the Employment Rights Act 1996). Fairness is to be determined in accordance with section 98 of the 1996 Act. It is for the employer to show a potentially fair reason for dismissal. As noted already, it is common ground between the parties that the Claimants were dismissed by reason of redundancy. For the reasons I have already set out at paragraph 7 above, I find that they were dismissed as redundant by reason that the Home closed. Pursuant to Section 98(4) of the 1996 Act, I must go on to consider whether the dismissals were fair or unfair, a question that depends on whether in the circumstances (including the size and administrative

resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating redundancy as sufficient reason for dismissing the employees. The question is to be determined in accordance with equity and the substantial merits of the case.

28. In its Grounds of Response the Respondent relies upon the situation with the Care Quality Commission and its claimed insolvency in resisting the claims of unfair dismissal. At paragraph 23 it asserts, "There was nothing unfair about their dismissal". However, in his submissions at tribunal, Mr Singh stated that the Claimants had been unfairly dismissed. Again, I think he was bound to make that concession. As I have set out above there was no collective consultation regarding the proposed closure of the Home or the impact of the closure upon its employees. Staff were not individually consulted about the closure, its timing or the impact upon them. Following Mr Singh's email to the Care Quality Commission on 25 April 2017 Mrs Willimott had endeavoured to apprise staff of the situation but the information available to her was very limited. There was certainly no consultation. Staff were simply informed that 31 May 2017 had been pencilled in as the day on which the Home would close. Thereafter they heard nothing further until 2 May 2017 when they were issued with four weeks' notice of termination of employment. Even then, those employees entitled to more than four weeks' notice were not told how the balance of their notice would be dealt with and there was no information as to their statutory redundancy entitlement or when their statutory redundancy pay would be paid. As I have noted already staff were not informed that they had any right of appeal against their dismissal.

29. In its report of 19 July 2017 the Care Quality Commission observed that the Respondent (and by implication, Mr Singh) had failed to provide appropriate oversight at the Home or sufficient support in order that the required improvements could be made. It is equally clear to me that Mr Singh also failed to oversee the closure of the Home or to provide support to Mrs Willimott so that the employment rights of its staff might be respected and given effect to. As the standards at the Home were adjudged by the Care Quality Commission to be inadequate, so too I find that the Respondent's handling of the Claimants' redundancies

was inadequate. The Claimants were dismissed without any attempt by the Respondent to consult them, collectively or individually, about the situation. Their thoughts, ideas and proposals were never heard. The Respondent could and should have consulted them before deciding to close the Home. Instead it treated them in complete disregard of accepted practice on redundancy. In my judgment the Respondent behaved unreasonably and, as a result each of the Claimants was unfairly dismissed.

30. However, it is equally apparent to me that the Respondent, through Mr Singh, was wholly incapable of effecting the significant improvements required by the Care Quality Commission and that the Home's closure was inevitable. Following the inspection visit on 28 March 2017 'the writing was on the wall'. The prescribed maximum time for being in special measures was usually no more than 12 months. However, by 28 March 2017 few improvements had been achieved and in my view the situation had become irretrievable. I accept that by 25 April 2017 Mr Singh had identified that the Home should close. Had the Respondent embarked upon a collective consultation process on or around 2 May 2017 (with the time between 25 April and 2 May being used to appoint/elect employee representatives) it would have been in a legal position to start dismissing staff on or around 1 June 2017, namely at the conclusion of the 30 day period of collective consultation. In fact, I consider that it is more likely that notices of dismissal would have been issued by the Respondent on 9 June 2017 had it acted reasonably and conducted individual consultation meetings following the conclusion of the 30 day collective consultation period.

31. The Claimants each claim two months' pay as compensation for unfair dismissal, though none of their statements address whether and, if so, when they secured alternative employment and accordingly the extent to which they may have mitigated their claimed financial losses. Subject to further evidence from the Claimants on the issue of mitigation, in my judgment any claims to compensation for unfair dismissal should be limited to 36 days' remuneration, being the duration by which each Claimant's employment would have been extended had the Respondent collectively consulted and followed a fair procedure before giving notice dismissing them on grounds of redundancy.

Notice Pay

32. The notice provisions in the Claimants' contracts of employment are worded such that in my judgment each Claimant was entitled to a minimum of three weeks' notice after one years' continuous employment and to an additional week's notice for each continuous year of service thereafter, up to a maximum of twelve weeks' notice in total. The entitlement to 3 weeks' notice is stated to be conferred in respect of "each year" of continuous employment, rather than "each additional year", meaning that the entitlement to notice increases from 2 to 3 weeks on completion of one year's continuous employment, rather than 12 months after each Claimant first became entitled to 2 weeks' notice, namely on completion of 18 months' employment. It follows that the Claimants' right to 4 weeks' notice accrued after two years' continuous employment, to 5 weeks' notice after three years' continuous employment and so on. In which case, the Claimants' notice rights are set out incorrectly in both the spreadsheet at page 21 of the hearing bundle and the Schedule of Loss at page 69 of the hearing bundle. The Claimants' rights, respectively, were to 12 weeks' notice (First, Second, Twelfth, Sixteenth and Seventeenth Claimants), 5 weeks' notice (Third, Sixth, Tenth, Eleventh and Fourteenth Claimants), 8 weeks' notice (Fourth Claimant), 6 weeks' notice (Fifth, Seventh and Fifteenth Claimants), 4 weeks' notice (Ninth, Eighteenth and Nineteenth Claimants) and 7 weeks' notice (Thirteenth Claimant).

33. Accordingly, with the exception of the Ninth, Eighteenth and Nineteenth Claimants, the Claimants were dismissed in breach of contract as they were not given the full contractual notice of termination of employment to which they were each entitled from the Respondent. They each received four weeks' notice terminating their employment. They respectively have a potential claim to the net pay and benefits for the balance of their respective contractual notice periods. However, in the absence of further evidence from each of them as to whether and, if so, to what extent, they have mitigated their financial losses, I am not in a position to make specific awards of damages to them for breach of contract. The matter may be resolved by agreement of the parties or failing such agreement at a subsequent remedy hearing.

Holiday Pay

34. The claims in respect of holiday pay are vague and asserted in the most general terms. At paragraph 6 of the Particulars of Claim it is said that the Claimants are unclear whether they have received the entirety of their accrued but untaken holiday and their rights are stated to be reserved. Mr Jones could not assist me further at Tribunal. The spreadsheet at page 21 of the hearing bundle notes that the numbers of days and sums outstanding are 'to be confirmed'. None of the Claimants address the issue in their witness statements and Mrs Willimott did not deal with the matter in her evidence to the Tribunal. Mr Singh's evidence was that he had arranged with the Respondent's accountant for its employees to be paid all holiday pay due to them with their final salary payment. Ultimately, it is for the Claimants to satisfy me on the balance of probabilities that holiday pay is due to them. Even allowing a degree of latitude where, as here, the employer has ceased trading and the available information may be limited, the Claimants have not put forward a positive case that they had not taken their accrued holiday and that sums are due to them in lieu of accrued but untaken holiday. Accordingly their claims in this regard fail and will be dismissed.

Remedy Hearing

35. Notwithstanding the number of Claimants, I believe that a one day listing will be sufficient for the remedy hearing in this matter. It has been listed at **Norwich Magistrates and Family Court Hearing Centre, Bishopgate, Norwich, Norfolk NR3 1UP** to start at 10.00am or so soon thereafter as possible on 6 March 2018.

ORDERS

1. On or before 19 January 2018, the Second, Ninth, Eleventh, Twelfth, Fourteenth and Eighteenth Claimants shall each file and serve signed and dated statements as confirmation that the contents of their respective unsigned statements are true.

2. On or before 19 January 2018, the Sixteenth and Seventeenth Claimants shall each file and serve a signed and dated statement in support of their Claims.

3. The First to Seventh and Ninth to Nineteenth Claimants are ordered to provide to the Respondent and to the Tribunal, so as to arrive on or before 9 February 2018, a Schedule of Loss, which in each case reflects the extent, if any, to which they have mitigated their claimed financial losses during the relevant period for which damages and/or compensation may be awarded by the Tribunal. They are ordered to include within the Schedule of Loss information relevant to the receipt by them of any state benefits. The Schedule of Loss shall also include a summary of all attempts by them to find alternative employment, and the loss and attempts shall be evidenced by the provision of documents; for example a job centre record, all adverts applied to, all correspondence in writing or by email with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips and work secured between 1 June 2017 and the date which is 36 days after the end of their contractual notice period.

4. The Respondent has leave to serve a Counter Schedule of Loss if it wishes or is so advised by 16 February 2018.

5. The order for disclosure of documents relevant to remedy, is made on the standard Civil Procedure Rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

6. The First to Seventh and Ninth to Nineteenth Claimants have primary responsibility for the creation of a single joint bundle of documents required for the remedy hearing and are ordered to bring sufficient copies (at least four) to the Tribunal for use at the hearing, by 9.30 am on the morning of the remedy hearing. They are further ordered to provide the bundle to the Respondent, to arrive on or before 23 February 2018. To this end, the Respondent should notify their solicitors of any documents to be included in the bundle at

its request. These must be documents to which it intends to refer, either by evidence in chief or by cross-examining them, during the course of the remedy hearing.

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Employment Judge Tynan

Date: 31/01/2018……..

Sent to the parties on: .....

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For the Tribunal Office