EMPLOYMENT TRIBUNALS

Claimant: Mrs P Willimott & Others

Respondent: Diamond Care (UK) Limited

JUDGMENT

The Respondent's application dated 7 March 2018 for reconsideration of the Judgment sent to the parties on 31 January 2018 is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked, because:

1. Following a hearing before me on 18 December 2017, a reserved judgment with written reasons was sent to the parties on 31 January 2018.

2. The case was listed for a remedy hearing on 6 March 2018. The Tribunal was given to understand that the Respondent had failed to engage with the proceedings following the reserved judgment and on that basis at the request of the Claimants' solicitors converted the remedy hearing on 6 March to a telephone remedy hearing. In the event Counsel was instructed to represent the Respondent and, for the reasons I gave in my Order following the hearing on 6 March 2018, the remedy hearing was adjourned to a later date. In the course of the telephone hearing on 6 March Counsel for the Respondent indicated that his instructing solicitors had submitted an application for reconsideration of the reserved judgment. When I informed the parties that no such application appeared to have been made, Counsel clarified that if in fact no application had been submitted, an application would be made imminently. An application for reconsideration was submitted to the Tribunal by email the following day.

3. Rule 70 of the Employment Tribunals Rules of Procedure empowers the Tribunal, either on its own initiative or on the application of a party, to reconsider any judgment where it is necessary in the interests of justice to do so. Rule 71 requires that any application for reconsideration must be presented in writing within 14 days of the date on which the written record, or other recent communication, of the original decision is sent to the parties or within 14 days of the date that the written reasons were sent (if later).

4. In its application for reconsideration the Respondent seeks an extension of time for making its application. Its only stated grounds for an extension of time are that the written reasons are said not to have been received by the Respondent until 20 February 2018, when it received an email timed at 12.15 from one of the Tribunal's administrative staff. The Claimants' solicitors have responded to the reconsideration application in a letter to the Tribunal dated 29 March 2018. They take issue with the Respondent's solicitors' claim that the written reasons were first received by the Respondent on 20 February. Specifically, the Claimants' solicitors state that they forwarded the judgment and written reasons to the Respondent's solicitors at their request on 1 February 2018. Attached to their letter of 29 March is an email exchange between Ms Piper of the Claimants' solicitors and Mr Whitehouse of the Respondent's solicitors which confirms that the judgement and written reasons were indeed copied to the Respondent's solicitors at their request on 1 February 2018. In which case, subject to any further representations the Respondent's solicitors might make, the application is misleading on this issue.

5. I am reminded by the Respondent's solicitors that Rule 5 (which empowers the Tribunal to extend the time limit specified in the Rules) must be exercised in accordance with the requirements of relevance, reason, justice and fairness inherent to all judicial discretions. Notwithstanding that there is no other obvious basis on which I should exercise the discretion available to me, I am content to proceed to consider the substantive application.

6. The starting point clearly has to be the decision I reached after the hearing on 18 December 2017. I have re-read it. I consider that I set out in detail my reasons for my reserved judgment. If these matters are examined on appeal, it will be for the higher Tribunal to say whether those reasons and my decision can stand. Any suggestion that I have erred in law is a matter for appeal.

7. Under Rule 70 of the Tribunal Rules of Procedure, the Tribunal may reconsider any Judgment where it is necessary in the interest of justice to do so. As Her Honour Judge Eady QC observed, in the EAT: “This can be contrasted with the rather more complex system laid down by the provisions of Rules 34-36 of the 2004 ET Rules, which govern the review of judgments and other decisions….." (***Outasight VB Limited v Brown UK EAT/0253/14***). However, Outasight makes clear that there are “broader interests of justice, in particular the interest in finality of litigation”. The case also confirms that the approach laid down in ***Ladd v Marshall [1954] 3 All ER 745, CA*** will in most cases encapsulate what is meant by "the interests of justice".

8. I can discern in the application for reconsideration no complaint regarding my behaviour or impartiality or that I missed important elements of the case. Instead the application largely rehearses issues and arguments which occupied the Tribunal on 18 December 2017 and in respect of which I gave a reserved judgment.

9. The application for reconsideration proceeds under two main strands headed "Unfair Dismissal: Polkey" and "Settlement Agreements".

Unfair dismissal: Polkey

10. The Respondent contends that the Tribunal fell into error in awarding the Claimant compensation of up to 36 days' remuneration in respect of their unfair dismissal. In its reconsideration application the Respondent asserts that the award is not consistent with the conclusions reached in relation to the protective award. The assertion is misconceived.

11. I reject the Respondent's submission that there would have been a 30 day collective consultation before 2 May 2017. I refer to paragraph 23 of the written reasons in which I found, as a fact, that by 25 April 2017 at the latest the Respondent was proposing to dismiss as redundant at least 39 employees, such that the section 188 duty to consult was triggered at that point. The submission at paragraph 11a of the application for reconsideration is not well founded. Collective consultation would not, as the Respondent contends, have commenced on 2 April 2017 given that the Respondent first proposed on or around 25 April 2017 to dismiss more than 20 employees by reason of redundancy. There is nothing in my judgment to support that the Respondent's proposal to make redundancies crystalised in late March or early April 2017.

12. The Respondent had no recognised trade union or established staff consultation body. Accordingly, before the Respondent could embark upon a 30 day consultation period, it needed to arrange the appointment/election of employee representatives in accordance with section 188(1B) of the Trade Union and Labour Relations (Consolidation) Act 1992. Had the Respondent embarked upon a fair and lawful collective consultation process, then as I found at paragraph 30 of the written reasons, the time between 25 April (when redundancies were proposed) and 2 May 2017 would have been used to appoint/elect employee representatives. Only then could the Respondent have embarked upon a 30 day consultation process.

13. Section 188(1A) provides that consultation must begin in good time and in any event at least 30 days before the first of the dismissals takes effect. Accordingly, the first of the dismissals could only have taken effect on 1 June 2017. As I set out in my written reasons, I concluded that the Respondent would not have dismissed the Claimants at the very first opportunity available to it, namely on Thursday 1 June 2017. Instead, I was of the view that, acting fairly and lawfully and following individual consultation, notices of redundancy would have been issued by the Respondent on Friday 9 June 2017. I note that in its application for reconsideration the Respondent

does not challenge my finding that a further period of 8 days would have elapsed from the end of the 30 day consultation period.

14. At paragraph 14 of the application for reconsideration the Respondent states that the Tribunal's decision has failed to take account of double recovery and that the judgment fails to address the duplicative nature of the protective awards under the 1992 Act and the compensatory awards under the Employment Rights Act 1996. Again, the submission is misconceived. A protective award is intended to punish an employer for not complying with its obligations under section 188 of the 1992 Act. It is not to compensate an employee for their individual financial loss (***GMB v Susie Radin Limited [2004] IRLR 400***). Consequently, receipt of wages or compensation for financial losses during the protective period will not reduce an employee's entitlement under a protective award.

Settlement Agreements

15. These proceedings were originally listed for a remedy hearing on 6 March 2018. The remedy hearing will now take place on either 20 April or 9 July 2018 (depending upon the extent to which the issues can be narrowed by agreement between the parties). Insofar as the Respondent contends that it would not be just and equitable to make any award to six of the Claimants by reason of the agreements they purported to enter into with the Respondent settling their claims, those are submissions that the Respondent is fully at liberty to pursue at the remedy hearing. However, they do not warrant reconsideration of the reserved judgment.

16. In all the circumstances I refuse the Respondent's application for reconsideration.

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Employment Judge Tynan

Date: …………………………………..

JUDGMENT SENT TO THE PARTIES ON
26 April 2018

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FOR THE TRIBUNAL OFFICE