THE EMPLOYMENT TRIBUNALS

BETWEEN

Ms Samantha Zenda Ovies ***Claimant***

and

Mr Mahiul Muhammed Khan Muqit ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL UPON RECONSIDERATON

REGION: London Central **ON**: 22 August 2022
EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS: sitting alone**

Appearances:
For Claimant: In person
For Respondent: Mr A MacMillan of Counsel

RECONSIDERED JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Claimant is not entitled either to a basic award by reason of having received a redundancy payment that was the equivalent of the basic award to which she was entitled or to a compensatory award because, had the Respondent followed a fair procedure, the Claimant would still have been dismissed and therefore has suffered no loss.

REASONS

1. Judgment in this matter was delivered at the conclusion of a 3-day hearing conducted on the Cloud Video Platform (CVP) in December 2021, with the reasons being set down in writing on 7 January 2022.

2. The Respondent applied for reconsideration of the judgment on 20 January 2022 specifying four grounds.

3. The hearing today was again conducted on the CVP.

4. In respect of the first ground for reconsideration of the Judgment, Mr MacMillan brought to my attention the guidance published by HM Revenue & Customs on 26 March 2020 as last updated on 3 August 2020 entitled "Check if you can claim your employee's wages through the Coronavirus Job Retention Scheme". This was attached to the application for reconsideration as Appendix 1 and included in the Combined Bundle for today's hearing at pages 11 through to 22.

5. On the third page of Appendix 1 (page 13 of the Combined Bundle), under the heading "Who can claim", the following guidance is given:

> You can now only claim if you have previously furloughed your employee before 30 June and you have submitted a claim for this by 31 July. This may differ if you have an employee returning from statutory parental leave.

6. Later, on the fifth page of Appendix 1 (page 15 of the Combined Bundle), it is specified within the section headed "Agreeing to Furlough Employees" that:

> From 1 July, you will:
>
> - only be able to claim for employees who have previously been furloughed for at least 3 consecutive weeks taking place any time between 1 March and 30 June 2020
> - be able to flexibly furlough employees – this means you can bring your employees back to work for any amount of time, and any work pattern
> - still be able to claim the furlough grant for the hours your flexibly furloughed employees do not work, compared to the hours they would normally have worked in that period.
>
> If you flexibly furlough employees, you'll need to agree this with the employee (or reach collective agreement with a trade union) and keep a new written agreement that confirms the new furlough arrangement. You'll need to:
>
> - make sure that the agreement is consistent with employment, equality and discrimination laws
> - keep a written record of the agreement for 5 years
> - keep records of how many hours your employees work and the number of hours they are furloughed (i.e., not working).
>
> You do not need to place all your employees on furlough and you can continue to fully furlough employees if you wish. Employees cannot undertake any work for you during time that you record them as being on furlough.
>
> Flexible furlough agreements
>
> There is no minimum furlough period, agreed flexible furlough agreements can last any amount of time. Employees can enter into a flexible furlough agreement more than once.

7. The conclusion to be drawn from this guidance is that, had the Respondent in August 2020 sought advice concerning the Rules surrounding the flexible furlough scheme, he would have been advised that it was not open to him to place the Claimant on flexible furlough because she had not previously been furloughed for at least 3 consecutive weeks taking place any time between 1 March and 30 June 2020.

8. The Claimant responded to the Respondent's argument on that ground by saying that she had telephoned the HMRC helpline and had received advice to the effect that an employer who was a self-employed individual as opposed to a corporation would have had an application to place an employee on flexible furlough considered. The implication being that the self-employed employer would have had a better chance of placing on flexible furlough an employee than would a corporation. The Claimant accepted that she was able to produce nothing in writing that indicated a self-employed employer would have received such preferential treatment and she further accepted that Appendix 1 contained nothing to indicate any difference in the scheme's approach to corporations (by which term I understood the helpline advisor to have referred to both private and publicly listed companies) and self-employed employers.

9. A short adjournment to allow Mr MacMillan to ascertain whether he found any support for such differential treatment also permitted me to phone the HMRC helpline. The individual I spoke to explained he had only been trained to answer queries on the most recent variation in the furlough scheme but no part of what training he had received indicated that there was any difference between employers who were corporations and those who were self-employed.

10. Given the absence of any indication in Appendix 1 of employers being segregated into companies and individuals, I am driving to the conclusion that the advice that the Claimant received could not be correct. Such segregation does not fit with the repeated use of the term "employer" in the guidance of HMRC and, in these tribunals, it is axiomatic that there is no distinction to be made between an employer company and an employer individual.

11. The Claimant augmented her submissions by addressing me on the subject of whether there was, in fact, a real redundancy given how quickly the Respondent was employing temporary assistance, as indicated by his email of 22 October 2020 on page 154 of the main Hearing bundle, indicating his need of the password for the practice laptop previously used by the Claimant for the benefit of a person "starting work tomorrow", that being the day after the Claimant's employment had ended.

12. However, this was a point on which I had been addressed before I produced my judgment, which was that I had accepted there to have been a diminution in the requirement of the Respondent for work to be performed by the Claimant such that the definition of redundancy in section 139 of the Employment Rights Act 1996 was met. Nothing that was before me in this application for reconsideration provided additional material causing me to doubt my initial finding that the reason for dismissal was redundancy.

13. I had specified in my judgment that the consequence of the Respondent seeking advice on the flexible furlough scheme and applying it to the Claimant was the likelihood that "the Claimant would have worked part-time during the period when temporary agency staff were employed and would have resumed her full-time position as Practice Manager when the Respondent's income picked up which clearly must have been the case when the Respondent appointed a Practice Coordinator" – paragraph 28 of the Judgment.

14. If the Respondent could not have placed the Claimant on flexible furlough, that consequence would not have followed. The consequence of the Respondent not being able to place the Claimant must have been that she would have been dismissed at the same time as she was dismissed.

15. I have considered the point as to whether the process of seeking advice on the Coronavirus Job Retention Scheme would have delayed the dismissal. I cannot see that it would.

16. Therefore, although I declared the dismissal to be unfair because the Respondent did not seek such advice before dismissing the Claimant and thus did not follow a fair procedure, it is clear that the result of following a fair procedure would have been dismissal at the same time. The Claimant thus incurred no loss and applying the principle expounded by the House of Lords in ***Polkey v AE Dayton Services Ltd*** [1987] UKHL 8, the loss suffered by the Claimant must be reduced by 100% because the Respondent following a fair procedure would have produced the same outcome.

17. This means there cannot be a compensatory award and, of course, there can be no basic award because such basic award as the Claimant might be entitled must be reduced by the amount of any payment she received from the Respondent on the ground that the dismissal was by reason of redundancy, see section 124(4)(b) of the Employment Rights Act 1996.

18. Mr MacMillan did not pursue the other grounds for reconsideration once I had indicated my preliminary view.

19. Thus, I accept the need to reconsider the judgment. I maintain my view that the dismissal was unfair. The holiday pay and bonus payment that my judgment at items 2 and 3 indicated the Claimant was owed have both been paid. There is no need for a remedy hearing because, by reason of the receipt of a redundancy payment, no basic award is payable and because, by application of the Polkey principle, the compensatory award must be reduced by 100%.

22 August 2022

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Employment Judge Paul Stewart

DECISION SENT TO THE PARTIES ON

22/08/2022

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FOR SECRETARY OF THE TRIBUNALS