EMPLOYMENT TRIBUNALS

Second Claimant: **Ms Emma Sumner**

Third Claimant: **Mrs Karen Tomlinson**

Respondent: **Prime Care (UK) Limited t/a Sylvan Home Care Service**

JUDGMENT

The claimant's applications dated 18th December 2023 for reconsideration of the judgment sent to the parties on 4th December 2023 are refused.

REASONS

1. I have undertaken preliminary consideration of each of the claimant's applications for reconsideration of the judgment dismissing their claims. Although not strictly expressed in these terms, I have interpreted the documents provided as making four applications for reconsideration. Those applications can be summarised as follows:

    a. An application by the Second Claimant, Ms Emma Sumner in relation to the dismissal of her claim of constructive unfair dismissal.
    b. An application by the Third Claimant, Mrs Karen Tomlinson in relation to the dismissal of her claim of constructive unfair dismissal.
    c. An application by the Second Claimant, Ms Emma Sumner to adduce new evidence.
    d. An application by the Third Claimant, Mrs Karen Tomlinson to adduce new evidence.

2. I record for the sake of completeness, that no application for reconsideration is made by the First Claimant, Mrs Roberts.

3. References in square brackets (e.g. [25]) are references to paragraph numbers from the reasons promulgated with the judgment.

The Law

2. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is

final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

3. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

4. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> **"the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."**

5. Similarly in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

> **"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."**

6. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

7. Each application will be taken in turn. I am concerned that there is some confusion as to how the Claimant's cases have been put and will seek to dealt with matters as clearly as possible.

The First Two Applications

8. In relation to Ms Sumner, reference is made to the well known authority of **Western Excavating v Sharp [1978] ICR 221**. The Tribunal was aware of this authority. Having set out the authority, the application does not go on to state the basis upon which the decision should be reconsidered other than stating that para [92] of the written reasons is disagreed with. Para [92] is a clear conclusion in respect of the relevance of the earlier events. In terms of the relevant event, namely the suspension of Mrs Roberts, this was not sufficient to amount to a breach of the implied term.

9. The application refers to the on call phone. This is not expressly referred to as a breach in the list of issues and features at para 34 of Ms Sumners witness

statement. It is not referred to in the context of workload. In any event, there is no prospect of the Tribunal finding that requiring a Deputy Manager to make provision for an on call phone following the suspension of the Manager is capable of contributing to a fundamental breach of the implied term of trust and confidence.

10. In relation to Mrs Tomlinson, the application suggests regarding para [101] of the reasons:

"The Tribunal appears to have misdirected itself in taking the approach that Mrs Tomlinson's failure to put the complaints in writing or escalate them to Mr Borkhatria meant a breach did not occur."

11. Quite simply, this is not what paragraph [101] of the reasons state. At no time did the Tribunal treat the possibility of a written complaint as an absolute obligation. Para [101] is a finding of fact in relation to the perception of Mrs Tomlinson. It is relevant and permissible to take into account that written complaints were not made. Taking something into account is distinct from treating something as determinative.

12. In relation to both applications, there is no prospect of the original decision being varied or revoked.

The Applications to Adduce Fresh Evidence

13. Although this application is made on behalf of both Ms Sumner and Mrs Tomlinson, nowhere in the application is it set out how/why the fresh evidence that is to be adduced affects the case of Ms Sumner. Ms Sumner took the decision to resign upon being informed of her mother, Mrs Roberts suspension. Mrs Robinson only becomes involved in matters after the suspension of Mrs Roberts. Therefore, the application in relation to Ms Sumner is misconceived in that a) it does not set out the basis for the application and the basis for the interests of justice requiring the Judgment to be varied or revoked and b) on the chronology, it is not possible for evidence after the decision to resign to be part of the decision to resign.

14. Furthermore, the application does not address the test for adducing new evidence and is therefore silent on the points that I need to consider when considering new evidence.

15. I direct myself in accordance with principles in **Ladd v Marshall [1954] 3 All ER 745.**

16. The evidence that the two Claimants seek to introduce is evidence that Mrs Robinson remains employed by a company controlled by Mr Borkhatria.

17. This evidence could clearly have been obtained prior to the hearing. In particular:

a) Neither party called Mrs Robinson as a witness.
b) If the employment status of Mrs Robinson was relevant, this could have been dealt with through standard disclosure or if necessary, an application for specific disclosure.
c) The Claimants could have researched the matter and dealt with their

own understanding in their own witness statements.

18. In relation to relevance, this information is not of the of the significance that the applications appear to suggest. Again, neither party called Mrs Robinson as a witness. The Tribunals findings of fact were not influenced by the current employent status of Mrs Robinson. The Tribunal had the evidence of Mrs Tomlinson and made its findings of fact on that. In addition, if proven, the fact that Mrs Robinson remains employed in some form is not going to alter any of the other findings already made by the Tribunal. The Tribunal was not misled in any way and at no time did the Tribunal make a finding that Mrs Robinson was no longer employed in some form.

19. In so far as the application goes further than adducing the fact of Mrs Robinson's employment (and documents in support of that) and goes so far as to seek a witness order, this is a fundamental misunderstanding of the Tribunal process in more than one respect. Firstly, if this was a crucial witness then a witness order should have been sought in advance of the final hearing. Secondly, if the Claimants were to call Mrs Robinson, then they would be unable to cross-examine her and to ask non leading, open questions only.

20. In terms of credibility of the proposed evidence, the fact of Mrs Robinsons employment is prima facie credible, but the application fails on the basis of the first two limbs. The Claimant's fresh evidence is not admissible.

21. Finally, for the sake of completeness, I note that these were claims of constructive dismissal. The burden of proof is on the Claimant to prove the facts necessary to establish a fundamental breach of contract. There is no burden of proof on the Respondent in this respect. It is for the Claimant to take the relevant decisions in advance of a hearing as to how they discharge that burden of proof. These claims did not fail because the Respondent established a defence, they failed on the basis of the Claimant's case in respect of which the Claimant's bore the burden of proof.

22. In relation to both applications, there is no prospect of the original decision being varied or revoked.

Conclusion

23. Whilst I have considered the applications individually, I have also taken a step back and asked whether taken together the applications could be said to pass the preliminary consideration threshold. They do not.

24. Having considered all the points made by the claimants I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The applications for reconsideration are refused.

Employment Judge Anderson
DATE 2nd January 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 January 2024

FOR THE TRIBUNAL OFFICE