Case No: 2600417/2015

EMPLOYMENT TRIBUNALS

Claimant: Mrs J Farren

Respondent: United Lincolnshire Hospitals NHS Trust

Heard at: Nottingham **On:** 26 May 2017

Before: Employment Judge Faulkner (sitting alone)

Representation
Claimant: Mr A Ohringer (Counsel)
Respondent: Mr C Bourne (Counsel)

UPON APPLICATION by the Claimant's representative made by letter dated 23 March 2017 to reconsider the judgments sent to the parties on 22 December 2015 (liability) and 6 April 2016 (remedy) under rule 71 of the Employment Tribunals Rules of Procedure 2013,

JUDGMENT

1. The Claimant's application for reconsideration is refused.

2. The matter remains listed for a Remedy Hearing on 2 and 3 August 2017.

REASONS

Complaints

1. The Claimant's application for reconsideration was considered at a Hearing on 26 May 2017. The application was relevant to the Claimant's complaints both of unfair dismissal and breach of contract (wrongful dismissal).

Issues

2. After detailed discussion with both Counsel at the outset of the Hearing, it was agreed that the issues to be considered were as follows:

> 2.1. Is it in the interests of justice to reconsider the Tribunal's Liability Judgment dated 22 December 2015 ("Liability Judgment") and its Remedy Judgment dated 5 April 2016 ("Remedy Judgment") (together "the Judgments")?

2.2. If so, should either or both of the Judgments be confirmed, revoked or (in the case of the Remedy Judgment only) varied?

It became clear having heard the submissions of Counsel that if either Judgment were to be revoked, an additional issue to be decided is whether the Tribunal should take the decision again without hearing further evidence and/or submissions from the parties.

Facts

3. Following a hearing which took place from 9 to 11 November 2015, I found in the Liability Judgment that the Claimant had been unfairly dismissed but had not been dismissed in breach of contract. The Remedy Judgment followed a hearing on 29 February 2016. I ordered that the Claimant be re-engaged, and that the back-pay due to the Claimant consequent on that order should be reduced by one-third on the basis that the Claimant had by her conduct contributed to her dismissal. As far as possible I do not reproduce text from either of those Judgments in these Reasons, simply for the sake of efficiency. Those Judgments set out in detail the factual background to this matter. I have of course re-read them both.

4. The Respondent successfully appealed against the re-engagement order, the Employment Appeal Tribunal remitting the question of remedy to be considered by me afresh. Following directions given by REJ Swann, that remitted hearing had originally been due to take place on the date of this Hearing, 26 May 2017. With the agreement of the parties however, this Hearing dealt only with the Claimant's reconsideration application, which in summary arose from evidence given at a Nursing & Midwifery Council ("NMC") Conduct and Competence Committee ("CCC") hearing which took place from 13 to 15 March 2017.

5. The parties submitted an agreed bundle of 231 pages; page references in these Reasons are references to that bundle. The bundle included both the Liability Judgment and the Remedy Judgment (pages 11 to 55), the decision of the CCC promulgated on 17 March 2017 (pages 69 to 83), the Claimant's application for reconsideration dated 23 March 2017 (pages 56 to 60), the Respondent's reply dated 2 May 2017 (pages 61 to 64), correspondence from the Tribunal setting out my decision to extend time for the reconsideration application to be considered (pages 65 to 66) and further correspondence from the Tribunal regarding this Hearing at pages 67 to 68. All of this I had considered or reconsidered prior to the Hearing. Pages 85 to 222 is a transcript of the proceedings of the CCC. It was agreed that I should read pages 101 to 142 before hearing submissions from Counsel. Those pages set out Dr Naqvi's evidence to the CCC, including her prepared written statement, which was also separately included in the bundle at pages 228 to 231. It was agreed that there was no need for me to read the rest of the transcript, and so I have not done so. It was also made clear by Mr Ohringer that he was not asking me to re-read any of the evidence given at the original Tribunal hearings; I therefore rely on the findings in my original Judgments.

6. Having read this material, I then heard detailed submissions from both Counsel and received a skeleton argument from Mr Ohringer which I have since read. There was no oral witness evidence at this Hearing. As the relevant

factual findings in the earlier Judgments and the evidence of Dr Naqvi before the CCC are so intertwined with the parties' submissions, I deal with factual matters in so far as it is necessary to do so within my analysis of those submissions, rather than as separate findings of fact. At this point therefore, I simply state that the essence of the reconsideration application was that my analysis of Dr Naqvi's evidence had been essential to my finding in the Liability Judgment to the effect that the Claimant had not been wrongfully dismissed and to my finding in the Remedy Judgment that she contributed to her unfair dismissal, and that in the light of the proceedings before the CCC Dr Naqvi's evidence could not be relied upon.

7. Dr Naqvi had not given evidence at any stage in these proceedings; the evidence I had considered from her had been the written record of her contributions to the Respondent's disciplinary investigation, disciplinary hearing and appeal re-hearing. The Claimant gave evidence to the Respondent's disciplinary investigation and disciplinary hearing, and also gave evidence to the Tribunal both in a witness statement and oral testimony at the liability stage of these proceedings. An important factual issue in this case was whether on the night of 16th and 17th May 2014 the Claimant administered drugs without prescription and authorisation. It was the Respondent's conclusion that she had done so which in due course led to the Claimant's dismissal and it was my assessment of the events of that night which informed my findings that she had not been wrongfully dismissed and had contributed to her unfair dismissal. As part of my assessment of those events I found that Dr Naqvi's evidence was more specific and consistent than the Claimant's (see paragraph 100 on page 36). The findings of the CCC were that Dr Naqvi's evidence before them on the question of whether the Claimant had administered drugs without proper authorisation was confused, unreliable and inconsistent. The Claimant did not give evidence before the CCC about this matter, as the charge against her in that respect was dismissed by the CCC because after it heard Dr Naqvi's evidence it concluded there was no case to answer. It is said by the Claimant that the transcript of Dr Naqvi's evidence to the CCC shows that her evidence on that occasion was confused, unreliable and inconsistent, and that on the basis of that new evidence my findings of fact regarding the events of 16th and 17th May 2014 cannot stand.

Law

8. Rule 70 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("2013 Rules") states that a Tribunal may "reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision … may be confirmed, varied or revoked. If it is revoked, it may be taken again".

9. On the question of reconsideration, Mr Ohringer referred to and relies upon eight authorities and Mr Bourne one. I had read the first two prior to the Hearing, and have since read the others, plus two additional authorities, one of which has often been referred to in subsequent cases. It is necessary for me to assess these authorities and the principles emerging from them in some detail. Several of them are from the general civil rather than employment tribunal jurisdiction.

10. The starting point on the question of the admission of new evidence post-trial is **Ladd v Marshall [1954] 1 WLR 1489.** In that case, related to the sale of a

property, a key witness stated post-trial that the evidence she had given, on the crucial question of whether a sum of money had been paid or not, was false. Denning LJ stated, "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible". That three-stage test has been followed and approved numerous times in subsequent cases.

11. At the other end of the scale chronologically is the decision of the Employment Appeal Tribunal in **Outasight VB Limited v Brown [2014] UKEAT/0253.** The employee in this case was dismissed for theft, a director Mr Whittaker stating that a stock check revealed a significant shortage of particular items. The employment tribunal found that the employer had discharged the burden of showing that the employee was guilty of theft, and at a reconsideration hearing rejected further evidence the employee wished to introduce about the stock check on the basis that it could have been obtained in time for the original hearing and, in any event, would not have materially influenced the tribunal to a different view. The employee had also since the original hearing obtained evidence of Mr Whittaker previously being convicted of obtaining property by deception. The tribunal was not satisfied that there was any reason why this evidence could not have been placed before it at the original hearing but nevertheless concluded that it had a wider discretion under the 2013 Rules than under the preceding rules of procedure dating to 2004 ("the 2004 Rules), and so allowed the reconsideration application and revoked its decision.

12. The EAT made clear that there was no obvious reason why cases under the interests of justice limb of the 2004 Rules would not still be relevant under the 2013 Rules, nor why cases which would have fallen under any of the other limbs of the 2004 Rules – including limb (d), "new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time" – should not form the basis of an application under the "interests of justice" requirement of the 2013 Rules. In its judgment the EAT made several references to the decision in **Flint v Eastern Electricity Board [1975] ICR 395 QBD.** I therefore turn to deal with this case – the key additional authority I referred to above – before returning to the EAT's decision in **Outasight.**

13. The issue in **Flint** was whether the employee was entitled to a redundancy payment. The industrial tribunal held he was not, but Mr Flint applied for a review of that decision on the basis that his health meant that walking to the new place of work offered by the employer would not be practicable. Whilst it was accepted that if he had introduced such evidence initially, it may well have made a significant difference to the outcome, a majority of the tribunal held that there should be no review on the basis that there was no reason why this evidence could not have been introduced before. That decision was upheld by Phillips J on appeal. He cited several authorities where either unwittingly or by design a party had been misled as to the case that it should advance, and other authorities where evidence had been suppressed (including **House** referred to below). Phillips J said as follows:

> "It seems to me that all those cases … show that in the ordinary courts … there is plainly a residual class of unusual case where in justice it is right that there should be a re-trial to enable fresh evidence to be given, even though to some extent it may be said that the evidence was available".

In other words, there are exceptional circumstances where even though the evidence in question was available (such that former limb (d) could not be satisfied), justice means (because a party was misled or evidence was suppressed) a review should be granted under the "interests of justice" limb. Phillips J went on to say this:

> "I do think that it is necessary, in a case which otherwise falls within paragraph (d) — when I say "falls within" paragraph (d), I mean a case which would be put forward under paragraph (d) — to find some other circumstance, some mitigating factor, to make it such that the interests of justice require such a review. What are they [i.e. what are the interests of justice]? First of all, they are the interests of the employee. Plainly from his point of view it is highly desirable that the evidence should be given, because it follows, from what I have already said, that there is at least some, perhaps good, chance that if it is given his case will succeed. One also has to consider the interests of the employers, because it is in their interests that once a hearing which has been fairly conducted is complete, that should be the end of the matter. Although this is a case where one's sympathy is with the employee, because it is his claim for a redundancy payment and the employers have more money than he has, it has to be remembered that the same principles have to be applied either way because one day a case may arise the other way round. So, plainly, their interests have to be considered. //But over and above all that, the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is it should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry".

14. Returning to **Outasight,** Eady J in the EAT made clear at paragraph 34 that the "additional circumstance or mitigating factor" referred to in **Flint** (and in the EAT's decision in **General Council of British Shipping v Deria [1985] ICR 198**) had to be related to the failure to bring the matter within limb (d) of the earlier rules. In relation to an application to introduce fresh evidence, she stated at paragraph 49 that "the approach laid down in **Ladd v Marshall** will, in most cases, encapsulate that which is meant by the 'interests of justice'. It provides a consistent approach across the civil courts and the EAT … those principles set down the relevant questions in most cases where judicial discretion has to be exercised upon an application to admit fresh evidence in the interests of justice". She went on at paragraph 50 to say, "I allow that the interests of justice might on occasion permit evidence to be adduced where the requirements of **Ladd v Marshall** are not strictly met … that will inevitably be case-specific … [but] it might be in the interests of justice to allow fresh evidence to be adduced where there is some additional factor or mitigating circumstance which meant that the evidence in question could not be obtained with reasonable diligence at an earlier stage".

15. In saying that, Eady J was referring back to **Flint** and **Deria. Deria** is the

other additional authority I have considered. In that case, the introduction of new evidence was refused under limb (d) of the 2004 Rules because the documents the claimants sought to rely on were available at the time of the hearing, but was granted under limb (e), the "interests of justice", because there was an admitted act of racial discrimination within the documents which raised an issue of widespread public importance. The EAT overturned that decision. Referring back to **Flint,** it said that if the interests of justice as then embodied in limb (d) exclude a fresh evidence review, "it will require exceptional circumstances" before it can be just to allow it under limb (e). It went on to say this about **Flint:**

> "In each of the cases on which Phillips J's decision is founded, the "other circumstance" or "mitigating factor" considered was a circumstance connected with the failure to produce the evidence at the first hearing. In no case was it any other circumstance, such as the unusual nature or public importance of the case as a whole. In our judgment, the 'other circumstance' or 'mitigating factor' must relate to the failure to bring the matter within [limb (d) of the 2004 Rules]. There must be something which in the interests of justice must be available to temper in favour of the applicant the rigour of the terms of [limb (d)], designed as they are to do justice to both sides and to the community. In our judgment, in logic and in law this has to be geared to the [limb (d)] provisions and not to the nature of the dispute at large".

16. **House v Haughton Brothers (Worcester) Ltd [1967] 1 WLR 148** was a decision of the Court of Appeal, in a personal injury case against an employer where after trial three employee witnesses said that scaffold boards which the employer said at trial had been on site at the time of the accident had in fact only been brought on site for the later visit of a safety inspector. The witnesses said nothing about this at trial and were not asked to lead evidence on it, nor was the employer cross-examined about it. The Court of Appeal found the issue to be of the most essential importance to the case and stated, as an amplification of **Ladd v Marshall**, that a witness not being available at trial includes "where the situation is that although a witness is called at the trial and physically present in the witness-box, and although he gave evidence about some matters relevant in that trial, he had not told [the solicitors or party who called him] what he was able to say about some issue in the trial". In such a case, assuming the solicitors have not been neglectful, the evidence could not have been obtained with reasonable diligence.

17. **Mulholland and another v Mitchell [1971] AC 666** was another personal injury case, this time before the House of Lords. One of the appellants was seriously injured in an accident. He sought leave to adduce new evidence post-trial on the basis of a dramatic change – soon after the trial – in the circumstances based on which compensation was assessed, specifically the nursing and medical attention he would require. Under what was then RSC Ord. 59, the Court of Appeal had power to receive further evidence but only on "special grounds". Lord Hodson held that "it can be fairly argued that the basis upon which the case was decided at trial was suddenly and materially falsified by a dramatic change of circumstances. Lord Wilberforce said that new evidence may be admitted "if some basic assumptions, common to both sides, have clearly been falsified by subsequent events … [or] where to refuse it would affront common sense or a sense of justice".

18. **Qureshi v Burnley Borough Council [1993] EAT/916** followed an industrial tribunal decision in which the evidence of Mr Qureshi was preferred to that of the employers' witnesses wherever there was a conflict between them. On an application for review the employer produced evidence from another employee witness who said he had been told, in effect, by Mr Qureshi that he had lied at the hearing; the application was granted. The EAT held, "one of the classic examples where a review can properly be directed is where new evidence, not previously available, is discovered. That seems to us to be indistinguishable in principle from the discovery that some of the evidence that has been given at the earlier hearing is unreliable". The EAT saw no difference between another witness being found who was not originally available, whose evidence undermines the earlier decision, and discovering that a witness who did appear has given false evidence.

19. **Lifely v Lifely [2008] EWCA Civ 904** was a Court of Appeal decision concerning a dispute over the inheritance of businesses within a family after the death of the parties' father. Papers, in particular a diary belonging to one of the parties, were discovered amongst the father's belongings post-trial which shed a different light on the trial issues. The Court described the vital question as "whether or not this material could have been obtained with reasonable diligence for use at the trial".

20. **F & C Asset Management PLC and others v Switalski [2008] UKEAT/0423** concerned employment tribunal claims in which the employee's evidence as to her state of health and her plans in respect of her employment with the employer was called into question by emails and other evidence discovered after the relevant tribunal hearing, which showed that she had been engaged in clandestine discussions with a potential new employer. Mr Ohringer submitted that the case does not set out any clear statements of principle, but is a case which exemplifies the approach that should be taken to admission of new evidence. The tribunal refused a review application by the employer because it said the employer could have cross-examined the Claimant on these issues at the original hearing. The EAT overturned that decision and said that the relevant evidence "was not available, and … does not become reasonably available by virtue of the fact that [the employer] did not cross-examine [the employee], in the circumstances and in light of the evidence by the [employee]" to the effect that she had spoken to recruiters for reasons other than seeking new employment. As to the second limb of **Ladd v Marshall,** the new evidence not only called into question some of the tribunal's findings of fact, but put the employee's credibility "heavily in issue".

21. **Dickinson v Tesco Plc [2013] EWCA Civ 36** concerned what turned out to be wholly inaccurate expert evidence used to determine loss in claims following road traffic accidents. Mr Ohringer said that this too was a case that did not set out broad principles but demonstrates that there are circumstances where written evidence can be impugned under the **Ladd v Marshall** process. Commenting specifically on the second limb of that process, Aikens LJ found that "if the trial judge had had before him evidence of the wholesale unreliability and dishonesty of [the expert evidence], he would, in all probability, have rejected it".

22. Finally, Mr Bourne referred to another EAT judgment, **Bingham v Hobourn Engineering Ltd [1992] Pens. L.R. 151.** In that case the employee expressly fought the employment tribunal hearing on the basis that his pension with his new

employer, following a transfer of his pension from Hobourn, was not relevant to his unfair dismissal compensation. A letter from his new pension providers after the tribunal hearing revealed however that his position under that scheme was not as favourable as he had anticipated and, on this basis, he sought a review of the compensation awarded to him. The EAT held at paragraph 16, "when there is a deliberate choice not to use a particular category of evidence, it is of no avail to show that had a different choice been made some parts of that evidence could not have been obtained with due diligence because by definition, there has been no diligence whatever used to obtain that particular category of evidence".

Submissions

Claimant

23. Mr Ohringer summarised the cases by saying that whilst **Ladd v Marshall** seems to set out a precise test, it can be satisfied in a range of circumstances. What tribunals are required to do, therefore, is balance the correction of potential injustice against the other party's and the public interest.

24. On the first question under the **Ladd v Marshall** test, namely whether it is shown that the evidence could not have been obtained with reasonable diligence for use at the original hearings, Mr Ohringer submitted that the evidence Dr Naqvi gave to the CCC was obviously not available as it was only given by her in March 2017. As for calling her to the original Tribunal hearing in November 2015, she could have been called, but there are two reasons why that is not something that could reasonably have been expected in the normal course of litigation. First, the burden of proof on both now-disputed matters was on the Respondent and so it was for the Respondent to call Dr Naqvi; and secondly, it would be very unusual for an employee to "call her accuser", and of course she would not have been able to cross-examine Dr Naqvi had she done so.

25. On the second question under **Ladd v Marshall,** Mr Ohringer cited paragraph 98 of the Liability Judgment (page 35) to highlight the nub of the Claimant's application. In that paragraph I stated, having reached my conclusion regarding the initial discussion between the Claimant and Dr Naqvi on the night of 16/17 May 2014, "There follows the central conflict of evidence", namely that the Claimant said Dr Naqvi agreed to prescribe whilst Dr Naqvi says she was told that the patients had been "seen and sorted" and had to be reminded to write the prescriptions later. I did not and do not accept Mr Ohringer's submission that I indicated in paragraph 101 (pages 36 to 37) that the question of whose evidence to prefer was finely balanced. What I stated was that if there had been nothing else in the evidence to suggest a conclusion one way or another then the findings of the GMC against Dr Naqvi back in 2009 may well have led me to prefer the Claimant's account, but there were in fact other considerations that meant that in my view Dr Naqvi's evidence was to be preferred.

26. Referring to the "central conflict of evidence", Mr Ohringer accepts that I was entitled to find that Dr Naqvi's evidence was more consistent and specific than the Claimant's, based on an assessment of Dr Naqvi's various accounts to the Respondent as against a combination of the Claimant's accounts to the Respondent and her evidence before me under cross-examination, the latter of which he submitted often makes what a witness has to say more vague and inconsistent. Now that I am able to assess Dr Naqvi's evidence subject to the

same (or a similar) process however, Mr Ohringer says that it can be seen I would not have been able to prefer her evidence over the Claimant's. He referred to a number of examples within the CCC transcript to illustrate his point. I detail some of these below, though Mr Ohringer made clear that the reconsideration application is not based on an argument that I should make factual findings of a particular account of the events of 16/17 May 2014, but on the more general point that Dr Naqvi's evidence could not be said to be more consistent and specific than the Claimant's.

27. Mr Ohringer referred first to page 113 where Dr Naqvi was asked by the Claimant's representative when she was first told by the Claimant that the patients had been "seen and sorted". Dr Naqvi replied that she thought it was the third of four conversations with the Claimant on the night in question, namely at 1.30 am. Mr Ohringer submitted that this was inconsistent first of all with Dr Naqvi's written statement for the CCC at page 229 and secondly with her evidence to the Respondent. At paragraphs 7 and 8 of the CCC statement, Dr Naqvi used the phrase "seen and sorted" in relation to the conversations at 12.25 am and 2.30 am, whilst paragraph 34A of my Liability Judgment refers to her having told the Respondent's disciplinary panel that this phrase was used at 12.25 am.

28. Mr Ohringer then referred to Dr Naqvi's evidence to the CCC at page 123 to the effect, at paragraph A, that she had asked the Claimant for an opportunity to see the patients. This is what she said to the Respondent's disciplinary panel (see page 19, paragraph 34D of the Liability Judgment), though not to the disciplinary investigating officer. At page 123, paragraph F, after a short adjournment, Dr Naqvi was asked about this again and said, "I would like to say I don't remember exactly, so please refer back to my own statements. It is quite a while, so the best is to refer back to my statements …". When told that her written statement to the CCC did not mention making this request, she states, "If I have not said that then I will not say at this moment in time because I don't remember exactly".

29. At page 128, paragraphs F and G, it was suggested to Dr Naqvi before the CCC that, contrary to what she asserted to the Respondent's disciplinary investigation, disciplinary hearing and appeal re-hearing – and in her written statement to the CCC – she could not have been under the impression from speaking with the Claimant at 12.25 am on 17 May 2014 that her colleague Dr Rahim had seen the patients. Her answer was, "Yes, actually I was not thinking that somebody has seen or not seen. I was not clear at that point … I could not actually [at 12.25] clarify what she wanted actually, that she wanted me to see the patients or she wanted me to do the prescription". She added, at paragraph H on page 129, "Maybe the timings and the sequence might be wrong, but all the recollection I can say this is what has happened actually time wise basically".

30. At page 132, Dr Naqvi was asked to comment on when she says she completed the CAS cards. She initially agreed this was just after midnight, then said it was after or around 2.30 am.

31. At page 139, at paragraphs C and D, Dr Naqvi stated to the CCC that at around 1.30 am she believed that the Claimant had administered the drugs, whereas at least in the Respondent's disciplinary investigation she indicated that it was earlier in the night that she came to that conclusion.

32. With the benefit of this transcript, Mr Ohringer says, I could not have come to the conclusion that Dr Naqvi's evidence was more specific and more consistent than the Claimant's. At the very least, he submitted, it would have been an important influence on the outcome of the case, and in fact would have resulted in the disputed issues being decided in the Claimant's favour.

33. On the third limb of **Ladd v Marshall,** Mr Ohringer submitted that the question is whether the CCC transcript gives credible evidence that Dr Naqvi's evidence should not be relied upon, not whether Dr Naqvi's evidence is true as such – that is not the Claimant's case.

34. He concluded by stating that this case falls within what he called a "residual category" in which the interests of justice require a reconsideration. This is because two different tribunals/panels have reached two different decisions. He says that I had been required to consider the Claimant's conduct without all of the evidence before me, without any live evidence from Dr Naqvi and therefore with no opportunity for her to be cross-examined. Now that Dr Naqvi's evidence has been challenged (i.e. before the CCC), he says it has been shown to be plainly unreliable. On incomplete evidence, he says, my decision was probably wrong. The Claimant has had her good professional standing confirmed by the NMC, which had all of the evidence before it and was therefore in a better position than me to reach a conclusion. Notwithstanding that exoneration, the Claimant remains subject to an injustice because of my decision against her.

35. As to disposal, should I allow the application, Mr Ohringer submitted that if Dr Naqvi's account is removed from the equation, bearing in mind that in relation to wrongful dismissal and contributory fault the burden is on the Respondent to establish the Claimant's misconduct, on the basis of the evidence already before me and the arguments already heard, I should revoke the Judgments and rule in the Claimant's favour on both counts. Alternatively, there should be a re-hearing of the contested issues on the basis of the evidence already heard.

Respondent

36. Mr Bourne submitted that the application fails at the first hurdle. His case is that the evidence of Dr Naqvi could reasonably have been available at the original hearing. The Claimant's case at that original hearing relied, he says, on the strong assertion that Dr Naqvi's testimony could not be trusted, hence in the presentation of her case the reference to the GMC findings from 2009. She could therefore have asked the Respondent to make Dr Naqvi available for cross-examination, or otherwise applied for a witness order. Further, the Tribunal has power under rule 32 of the 2013 Rules to order a witness to attend, of its own motion. At the very latest, the Claimant could have applied for an adjournment of the original hearing to allow one of these steps to be taken. Relying on **Bingham,** Mr Bourne submits that if the Claimant considered any of these steps and decided not to take them, she must live with the consequences; otherwise, there is nothing to suggest that Dr Naqvi could not have been called with reasonable diligence.

37. As to the second limb of **Ladd v Marshall,** Mr Bourne says that paragraph 100 of my decision (page 36) shows that in reaching my decision as to whether the Claimant administered drugs without prescription, in addition to the evidence

of the Claimant and Dr Naqvi respectively, I also took into account the evidence of Ms Harvard, the state of the Claimant's record-keeping and the Claimant's personal reflections on the night in question. He also submitted that at paragraph 98 (page 35) I found Dr Naqvi's evidence to be more consistent than that of the Claimant; that does not equate to a finding that Dr Naqvi was wholly consistent in her evidence. He referred in addition to paragraph 96 of the Liability Judgment (page 35) where I found the Claimant's evidence in respect of her initial dealings with Dr Naqvi to be inconsistent as between what she said at the disciplinary hearing, in her Tribunal witness statement and in her oral evidence before me.

38. Mr Bourne also made a more general submission, to the effect that the Liability Judgment was more thorough than the CCC's decision, for two reasons: the first was that the Claimant was not heard by the CCC for the reasons I have explained, and the second was that I took into account the evidence of witnesses other than Dr Naqvi – again, he says, unlike the CCC.

39. Mr Bourne went on to submit that the evidence of Dr Naqvi relied on for this application was of course given at the date of the CCC hearing, whereas I was considering in the Liability Judgment the evidence she gave soon after the original events, including in a disciplinary hearing when she was available for questioning by the Claimant and/or her representative. Dr Naqvi is adamant, he submitted, that she heard the Claimant say the patients had been "seen and sorted" and did not retreat from that before the CCC, either in her written statement or in her oral evidence – see for example pages 229 (her statement for the NMC/CCC was written in August 2015), 117, 118 and 120. At page 107 she says that it is in March 2017 that she is uncertain of the timing of events nearly three years previously.

40. For these reasons, Mr Bourne submitted, the Tribunal cannot be satisfied that the evidence of Dr Naqvi would have had an important influence on the Judgments.

41. As to the third limb of **Ladd v Marshall,** Mr Bourne does not seek to go behind the veracity of the transcript of the CCC proceedings.

42. In summary, he sought to distinguish all of the cases Mr Ohringer relies upon, on the basis that they generally involve some form of deception on the court or tribunal (as in **Qureshi, Switalski** and **Dickinson**), or something that could not possibly have been known at the point of trial (as in **Lifely**).

43. As to disposal, his principal submission was of course that the application should be refused, but if the evidence is admitted, he argued that the decision should be confirmed for the reasons summarised above. Otherwise, the Respondent should be given an opportunity to test Dr Naqvi's evidence before the Tribunal, either by calling her or another witness to comment on her evidence.

Claimant's counter-submissions

44. On being given a brief opportunity to respond to Mr Bourne's submissions, Mr Ohringer made a number of short additional points, which I summarise to the extent that they were not covered in his initial comments.

45. First, he rejected the suggestion that the cases where reconsideration is granted are only those where some kind of fraud has been perpetrated on the court or tribunal. In his submission, unreliable witness evidence is sufficient.

46. Secondly, he submitted that **Bingham** is not a case about fresh evidence, as it concerns the employee's failure to pursue a particular argument first time round and his attempt to raise it on review. That is not what the Claimant is seeking to do in this case.

47. Thirdly, he argued that the suggestions made by Mr Bourne as to how Dr Naqvi could have been called to the Tribunal hearing in November 2015 were theoretical rather than real – what is required under the first step in **Ladd v Marshall** is reasonable diligence.

48. Fourthly, he submitted that Dr Naqvi's evidence was only insubstantially tested during the Respondent's disciplinary hearing; it was first rigorously tested before the CCC. He accepted that Mr Bourne's point about the passage of time between 2014 and 2017 was fair to some extent, but submitted that the degree of inconsistency in Dr Naqvi's evidence shows that there was more to it than that; moreover, the Respondent is content to rely on the inconsistencies in the Claimant's evidence given in November 2015, which was itself eighteen months after the event.

49. Fifthly, he submitted regarding disposal that a further hearing is unnecessary and would be futile on the basis that Dr Naqvi's evidence can never be relied upon in these proceedings. The Tribunal, he says, can decide how to dispose of the matter based on what it has already heard.

Analysis and conclusions

50. The first issue I have to decide is whether it is in the interests of justice to reconsider the Judgments. It is clear from all of the authorities that when, as here, the application for reconsideration is based on new evidence, the relevant test I am required to apply is that set out in **Ladd v Marshall.** The parties are agreed that the third limb of the test – "the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible" – is satisfied. In other words, it is not disputed by the Respondent that the transcript within the bundle sets out an accurate record of the evidence Dr Naqvi gave to the CCC in March 2017. I am therefore required to consider the first and second limbs only.

51. The first limb of the test is whether the Claimant has shown that the evidence she now seeks to rely on could not have been obtained with reasonable diligence for use at the Hearing in November 2015. In my judgment, this can be resolved very briefly. The simple fact is that the evidence of Dr Naqvi which the Claimant seeks to rely on, as to what she asserts to be its inconsistency and lack of clarity, was only given in March 2017. Plainly, it could not have been obtained for use at a hearing more than sixteen months previously.

52. That seems to me to be the end of the matter under the first limb. Even if that were not the correct analysis however, I would nevertheless accept Mr Ohringer's submissions on the question of whether the Claimant could reasonably have secured the opportunity to cross-examine Dr Naqvi at the hearing in November

2015. What **Ladd v Marshall** makes clear, and what is emphasised in subsequent authorities including **House, Lifely** and **Switalski,** is that the test is what could have been done with "reasonable diligence". The steps which Mr Bourne suggested the Claimant could have taken were theoretically available to her but, in my view, they were not steps the Claimant could reasonably have been expected to take. First, it would have been an extremely unusual step to have considered, let alone actually take, to ask the Respondent to tender Dr Naqvi for cross-examination and of course it is far from clear that the Respondent would have complied with such a request. Secondly, the Claimant could have sought a witness order for Dr Naqvi, but as Mr Ohringer points out that would not have created the opportunity for cross-examination (except in the very unusual situation of applying for and being granted the opportunity to treat her as a hostile witness). Thirdly, the Tribunal does have power to order the attendance of a witness under rule 32. This can be done either in response to an application by a party, which is the second option Mr Bourne suggested, or of its own motion. The Tribunal making a witness order of its own motion is again a very unusual step, and the fact is that I did not make such an order. If Mr Bourne is suggesting that the Claimant could have asked me to do so, that would have been tantamount to an application for a witness order, creating the issue just identified. For these reasons, even had the evidence of Dr Naqvi which the Claimant now seeks to rely on existed in November 2015 – which it did not – I conclude that the Claimant could not have obtained it with reasonable diligence for use at the original hearing.

53. The crucial question thus becomes whether the second limb in **Ladd v Marshall** is satisfied. The test is that "the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive", or to ask the question posed in **Dickinson** the issue is whether had this evidence been in front of me when making my decision in all probability it would have had an important influence on the outcome. I conclude that it would not, essentially for the reasons outlined by Mr Bourne.

54. First, whilst as stated in the Liability Judgment, the difference in the accounts given by Dr Naqvi and the Claimant was the "central conflict of evidence" on the question of whether drugs had been administered without prescription, as Mr Bourne points out it was not the only evidence on which I reached the conclusion, on the balance of probabilities, that the Claimant had done so. There was in addition the evidence of Ms Harvard which I found (paragraph 100 at page 36) was suggestive of the Claimant having fixed on a course of action when the two of them spoke about the matter; there was the fact of the Claimant's record-keeping on the night in question having departed so significantly from her normal practice which I found suggested that her treatment of the patients did so too; and there were the Claimant's comments about the night and her reaction to it, examples of which were (as cited in the Liability Judgment) "My mind was in pieces" and that helping the family "overrode everything else".

55. Secondly, without in any sense impugning the proceedings of the CCC, it is clear and agreed that the Claimant was not questioned during those proceedings regarding the question of whether she had administered the drugs without prescription, such that it is wholly unknown (to me at least) how her evidence at that time, on that occasion and on that issue, would have compared with the evidence I considered in reaching the Liability Judgment. In other words, it is unknown, again at least to me, what consistencies or inconsistencies would have

appeared in the Claimant's evidence to the CCC had she been cross-examined at that point. The CCC proceedings did not therefore incorporate the same comparative exercise that I was able to carry out in November 2015. Of course, as Mr Ohringer points out, Dr Naqvi did not give evidence at the Tribunal hearing which led to the Liability Judgment, which he in effect says means that I was not able to carry out a properly comparative exercise either. To that I would reply that the evidence of Dr Naqvi that I considered from the Respondent's disciplinary hearing and appeal re-hearing was a record of evidence – the accuracy of which records as I noted in paragraph 94 of the Liability Judgment was not materially challenged – which she was in fact questioned about, on the first of those occasions with the Claimant and her professional representative present. The assessment in the Liability Judgment was therefore a much more comparative exercise in my view than that which, because of the submission of no case to answer, took place before the CCC.

56. That leads to the third and most important point, which is that the new evidence is the testimony given by Dr Naqvi in March 2017, whereas the evidence she gave which I considered – and the evidence of the Claimant with which I compared it – was given significantly closer to the original events of May 2014. In her evidence to the CCC Dr Naqvi herself reflected on the difficulties this gave rise to in recalling events. At page 107 for example she said that it was sitting there in March 2017 that she was not sure about timings. This is an unusual case in that I cannot consider as such whether the evidence the Claimant now seeks to rely on would probably have had an important influence on the outcome of the case, because the evidence – i.e. the testimony that Dr Naqvi gave to the CCC in March 2017 – simply didn't exist at the date of the original hearing. It is of course wholly unknown what evidence Dr Naqvi would have given if she had been questioned on that occasion. If I consider therefore whether the new evidence the Claimant relies on would probably have had an important influence had I been considering the case at some point after March 2017, with all of the other evidence being as it was in November 2015, I conclude that I would have given it little weight given the significant passage of time and the inherent difficulty in recalling events that this gives rise to. I am not at all persuaded by Mr Ohringer's argument that there was more to Dr Naqvi's inconsistencies before the CCC than the passage of time. I take his point that the Claimant was herself cross-examined 18 months on from May 2014, i.e. in November 2015, but it is plain that the further passage of time – more than 16 further months – is even more inimical to accurate recall. Especially given the importance of the events in question for the Claimant, the issues I identified in respect of her evidence in the Liability Judgment are far more striking and of considerably more importance than inconsistencies in Dr Naqvi's evidence given nearly twice as long after the event.

57. For these three reasons, I conclude that in all probability the new evidence the Claimant seeks to adduce would not have had an important influence on the outcome of the case. It is a wholly different category of evidence in my view to that discovered, for example, in **Switalski.** In my judgment, therefore, the test in **Ladd v Marshall** has not been satisfied. For completeness, I add, in the words of the judgment in **Mulholland**, that the grounds on which I reached the Liability and Remedy Judgments have not been clearly or materially falsified by a dramatic change in the factual basis of the case, nor would not admitting the evidence affront common sense or a sense of justice, again for the reasons I have outlined.

58. That is not the end of the matter however because Mr Ohringer submits that there is a "residual category" of cases where, whether or not the **Ladd v Marshall** test is satisfied, the interests of justice require new evidence to be admitted. In this case, he says that this is because two different tribunals or panels have reached two different decisions. Plainly the fact of two different decisions (I might add in two very different contexts and at two very different times) is not of itself sufficient to establish that reconsideration is in the interests of justice, given the other interests I am enjoined by **Flint** to take into account, namely the interests of fairness to the Respondent and the strong public interest in finality of litigation. As for the residual category alluded to by Eady J in **Outasight,** by reference to the judgments in **Flint** and **Deria**, it is clear from my analysis of those three cases above that the "additional factor" or "mitigating circumstance" Eady J refers to at paragraph 50 of **Outasight** must be connected with the failure to produce the evidence at the original hearing. This point is made most clearly in **Deria,** which Eady J referred to, when it was said that there was not some other factor that could be relied upon in new evidence cases, such as the unusual nature or public importance of the case as a whole or the nature of the dispute at large. Accordingly, I do not accept the submission, if it was intended to be such, that the fact of the Tribunal and the CCC reaching different decisions, as unusual as that may be, is of itself at all a basis for saying that the interests of justice require a review of the case. There is no other additional factor or mitigating circumstance that I have been able to identify that would suggest the evidence should be admitted, the test in **Ladd v Marshall** not having been met.

59. For these reasons I reject the Claimant's application for reconsideration. If I had granted it, I would in any event have confirmed my earlier decisions, for the reasons given above.

60. The remitted Remedy Hearing is listed for 2nd and 3rd August 2017 in Nottingham. REJ Swann has, as I have said, given directions regarding preparations for that Hearing. Both Counsel assured me that no formal variation of those directions was required to enable the parties to prepare for that Hearing as there has been satisfactory co-operation between the parties in that regard to date.

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Employment Judge Faulkner 23/6/17

JUDGMENT SENT TO THE PARTIES ON
6 July 2017

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S.Cresswell

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FOR THE TRIBUNAL OFFICE