

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 6 October 2017  
Judgment handed down on 6 February 2018

**Before**

**THE HONOURABLE MRS JUSTICE SLADE DBE**  
**(SITTING ALONE)**

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DR S DOSANJH

APPELLANT

NOTTINGHAMSHIRE HEALTHCARE NHS TRUST

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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Revised

## **APPEARANCES**

For the Appellant

DR SHAVNAM DOSANJH  
(The Appellant in Person)

For the Respondent

MR TIM SHEPPARD  
(of Counsel)  
Instructed by:  
Mills & Reeve LLP  
78-84 Colmore Row  
Birmingham  
B3 2AB

## **SUMMARY**

### **PRACTICE AND PROCEDURE**

The Employment Tribunal erred in refusing the Claimant's application for reconsideration of their Judgment dismissing her claims of wrongful and unfair dismissal when material referred to by her relating to the hearing by the professional body considering her fitness to practice was not taken into account. This material was relevant to the issue of whether the Claimant was guilty of falling below required professional standards for which she was dismissed. Further the Employment Tribunal erred in refusing the application in light of their omission to consider an important attachment to an email which was relevant to the adequacy of the Respondent's investigation and the fairness of the decision to dismiss. Application for reconsideration remitted to the Employment Tribunal for reconsideration.

**A      THE HONOURABLE MRS JUSTICE SLADE DBE**

**B**      1.      Dr Dosanjh (“the Claimant”) appeals the refusal by Employment Judge Heap and members (“the ET”) in a Decision sent to the parties on 6 October 2016 (“the Reconsideration Judgment”) to reconsider their Judgment sent to the parties on 16 March 2016 dismissing her claims for wrongful and unfair dismissal (“the Liability Judgment”).

**C**      2.      The Claimant’s Notice of Appeal from the Reconsideration Judgment was rejected on the paper sift. Following the hearing of an application by the Claimant under Rule 3(10) of the **D**      **Employment Appeal Tribunal Rules 1993** (as amended), the appeal was set down for a Full Hearing in respect of paragraphs 15 and 19 of the Reconsideration Judgment only. All other grounds of appeal were dismissed.

**E**      3.      The appeal was heard before me on 6 October 2017. In the grounds of appeal permitted to proceed to a Full Hearing the Claimant contended that the ET erred in refusing to reconsider their Liability Judgment by failing to take into account evidence she placed before them or referred to. It was said that this material undermined their refusal in paragraph 15 to reconsider **F**      their findings in paragraph 249 of the Liability Judgment. In that paragraph the ET held that the outcome of the referral of the Claimant’s case to her professional body, the Health Professions Council (“HPC”), which exonerated her, was not relevant to the information before either the **G**      Respondent’s disciplinary or appeal panel when deciding to dismiss her.

**H**      4.      Shortly before the Full Hearing before the Employment Appeal Tribunal the Claimant submitted some notes of the hearing before the HPC. These were of evidence given by Karen Hampson, Linda Braithwaite, Dr David Connelly and Andrea Ward of the Respondent. The

**A** purpose of submitting these notes was to demonstrate that the investigation by the Respondent  
into allegations against the Claimant was deficient and that it formed no proper basis for  
concluding that she was guilty of gross misconduct. The Claimant drew attention to passages in  
**B** the notes of cross-examination of the Respondent's witnesses at the hearing before the HPC.  
The evidence she referred to included that given by Ms Braithwaite to the HPC that she did not  
carry out an audit of the Claimant's files on patients.

**C** 5. Further the Claimant contended that the ET erred in refusing to reconsider their Liability  
Judgment by failing to take into account properly or at all the attachment to an email of 13  
August 2009 sent by the Claimant to Karen Hampson of the Respondent who was the  
**D** Claimant's team leader. It was contended that if the ET had read or properly considered the  
attachment to the email they should have reconsidered the conclusion reached in paragraph 166  
of the Liability Judgment. The Claimant contended that the attachment to the email showed  
**E** that she had informed her team leader that she was behind with her work. This undermined the  
finding of the ET in the Liability Judgment.

**F** 6. The Claimant also contended that paragraphs 15 and 19 of the Reconsideration  
Judgment did not give any or any sufficient reasons for rejecting her application.

**G** 7. In deciding whether the ET erred in failing to take into account material which was  
placed before them or arguments made to them, I deemed it necessary to know what material  
the Claimant submitted to the ET when making her application for reconsideration.  
Accordingly, following submissions by the parties on the appeal, consideration was adjourned  
**H** and an Order made for them to agree, as far as possible, a list of the documents which the  
Claimant submitted to the ET as the basis for her application for reconsideration of the Liability

**A** Judgment and for further steps to be taken. If agreement was not possible the parties were to  
prepare position statements to be submitted to the Employment Judge for comment. On 27  
**B** October 2017 the Claimant submitted a position statement which shows that there is a broad  
measure of agreement as to the documents sent by the Claimant to the ET in support of her  
application for reconsideration. On 22 November 2017 the parties made written submissions on  
those documents.

**C** **Outline Facts Relevant to Paragraphs 15 and 19 of the Reconsideration Judgment**

**D** 8. The Claimant was employed by the Respondent as a Clinical Psychologist in the Mental  
Health Services for Older People (“MHSOP”) Directorate from 2008. During September 2009  
Karen Hampson, her supervisor, started a performance review of the Claimant as there was  
some concern that files on her patients were not being kept up to date. The Claimant was  
signed off as competent. Following a serious incident outside work on 17 November 2009 the  
**E** Claimant started a period of sick leave. During that time it came to the attention of Dr David  
Connelly, her clinical supervisor, that a number of problems had arisen in relation to the  
Claimant’s files. The matter was passed to Andrea Ward, General Manager of MHSOP, to  
consider whether an investigation should be undertaken. At a meeting with Andrea Ward on 27  
**F** January 2010 the Claimant was told of six concerns about the record keeping of her files. The  
Claimant was told that she was not to remain in active clinical practice but was assigned to a  
research project.

**G** 9. During the meeting on 27 January 2010 the Claimant said that she had a number of files  
at home. The ET held at paragraph 113 that there is some confusion as to what precisely was  
said about the files, whether they only required a final report and/or were closed or whether  
**H** they were ongoing patient files.

**A** 10. Following the meeting on 27 January 2010 Linda Braithwaite, Performance Manager, was appointed to investigate the six allegations against the Claimant.

**B** 11. It came to the attention of Andrea Ward that the patient files the Claimant had at home were still live and their subjects potentially required further treatment or intervention. Accordingly Andrea Ward wrote to the Claimant on 11 February 2010 to inform her that the  
**C** issue regarding retention of files at home was also to be included as part of Linda Braithwaite's investigation.

**D** 12. The ET referred to a meeting on 11 February 2010 between the Claimant and Linda Braithwaite. The ET held at paragraph 162 that the Claimant gave information that she had fallen behind with her reports.

**E** 13. The ET held that some eight files from the Claimant's caseload were identified as having missing reports and that some of these were from before the Claimant's sickness absence. In relation to falling behind with reports the Claimant stated at the meeting that she had raised those matters with Karen Hampson and with Dr Connelly. Both were questioned  
**F** about this by Linda Braithwaite. The ET recorded that neither supported the Claimant's recollection and denied that they were aware of the position.

**G** 14. There was a further meeting between the Claimant and Linda Braithwaite on 25 February 2010. The ET recorded at paragraph 164 that at the interview the Claimant accepted that there was no evidence to support her contentions that her supervisors were aware that she  
**H** had told them that she was behind with her reports.

**A** 15. The ET held that after that meeting the Claimant forwarded to Linda Braithwaite an email which she contended supported her position that she had informed Karen Hampson that files were ongoing. The email was dated 13 August 2009 and had been sent by the Claimant to  
**B** Karen Hampson. The ET set out the email but not the reference in it to an attachment nor the important list which was attached which was sent to Karen Hampson and forwarded to Linda Braithwaite. The covering email quoted by the ET read:

**C** “Hi Karen

This is a bit rushed but I feel that I have everyone on the list (actually I have a sneaky feeling that I am missing one or two). IH [anonymised by the Tribunal in this Judgment for reasons of privacy of the patient] B50 and MB [anonymised by the Tribunal in this Judgment for reasons of privacy of the patient] B50 and maybe another one.

Kind regards S”

**D** 16. The ET held at paragraph 140 that the email does not set out anything which suggested that Karen Hampson should have been put on notice that the Claimant had files at home of patients who would benefit from a home visit. Further, at paragraph 166 the ET held that  
**E** nothing in the email came close to putting Karen Hampson on notice that the Claimant was behind with her reports.

**F** 17. Linda Braithwaite compiled an investigation report which she submitted to Andrea Ward. At paragraph 183 the ET stated:

“183. ... We are particularly satisfied that on each occasion that a point was raised by the Claimant, it was investigated and bottomed out by Linda Braithwaite. ...”

**G** The report included the email of 13 August 2009 from the Claimant to Karen Hampson omitting reference to an attachment and the attachment itself which listed files relating to patients and the work to be done.

**H**

**A** 18. As a result of the report produced by Linda Braithwaite, Andrea Ward decided there was a disciplinary case for the Claimant to answer. Andrea Ward wrote to the Claimant on 13 April 2010 outlining seven charges against her. The seventh was:

**B** **“7. Allegation that patient records held at home were not closed as described and remained in need of assessment and treatment, potentially placing patients at risk.”**

**C** 19. A disciplinary hearing took place on 30 June 2010. Following the hearing further investigation took place. A further report by Linda Braithwaite was concluded on 19 July 2010. This was not sent to the Claimant before the subsequent decision to dismiss her.

**D** 20. The disciplinary panel decided to dismiss the Claimant. She was so informed by letter written on 20 August 2010 incorrectly dated 2 October 2010. In relation to the seventh allegation it was stated:

**“7. Allegation that patient records held at home were not closed as described and remained in need of assessment and treatment, potentially placing patients at risk.**

**E** **You informed me that the records you held at home were closed cases. On that basis I agreed that you could complete the final reports required. During the process of the investigation it was evident that this was not the case and that you had continued to work on these cases and input into records.”**

**F** 21. The Respondent wrote that the Claimant had contravened many areas of the codes of practice of the HPC. The Claimant was dismissed with immediate effect.

**G** 22. The ET stated at paragraph 225:

**“225. The evidence of Andrea Ward ... was that she viewed each of allegations 1, 2, 6 and 7 of themselves [as] potentially constituting gross misconduct; ...”**

**H** 23. The Claimant appealed her dismissal. The appeal was heard on 14 and 15 April 2011 by Simon Smith, Executive Director of Social Services, with clinical and HR assistance. The appeal was a review of the decision to dismiss rather than a rehearing.

**A** 24. By letter dated 21 April 2011 Mr Smith notified the Claimant that her appeal was dismissed. The Claimant was informed that all seven allegations which formed the basis of the decision to dismiss her were upheld.

**B** 25. Both the Respondent and the Claimant referred her case to the HPC.

**C** 26. The Claimant and witnesses for the Respondent gave evidence to the HPC. Amongst others Dr Connelly and Linda Braithwaite gave evidence for the Respondent.

**D** 27. The ET recorded in paragraph 249 that the outcome of the HPC referral was to suspend the Claimant from practice for a period of 12 months. The ET observed:

“249. ... However, given that the decision of the HPC had not taken place before the decision to dismiss (indeed it could not as the referral came off the back of that decision) we say no more about it as it was not relevant to the information that was before either the disciplinary or appeal panels when making their determination on the Claimant’s case.”

**E**

**The Liability Judgment: Conclusions Relevant to this Appeal**

28. At paragraph 263 the ET held:

**F** “263. ... The investigations conducted by Linda Braithwaite were comprehensive and considered and looked into all points that the Claimant raised as to the allegations against her.”

At paragraph 269 the ET held in respect of the fifth allegation in relation to files the Claimant had at home which had not been completed:

**G** “269. ... There was no evidence to support the Claimant’s contention that she had advised either Karen Hampson or Dr Connelly that she had reports, or indeed other paperwork, outstanding in this regard or that Karen Hampson had told her that she “wasn’t bothered” about the reports. The email evidence that the Claimant had submitted in that regard did not support the basis of what she contended she had told Karen Hampson.”

**H**

**A** 29. In considering the seventh allegation, the ET held at paragraph 271 that the Claimant admitted and that the investigation showed that she had files at home for patients who required ongoing care. That was in breach of the Respondent's Clinical Records Management Policy.

**B** 30. The ET held that dismissal was within the range of reasonable responses of the Respondent and that whilst there had been some deficiencies in the disciplinary process these were rectified on appeal. If they had not found the dismissal to be fair the ET would have  
**C** reduced both the compensatory and basic awards by 100 per cent.

**D** 31. As for the claim of wrongful dismissal the ET at paragraph 291 directed themselves to consider whether on the evidence before them they were persuaded that the Claimant was in repudiatory breach of contract. Their answer was yes. They held at paragraph 292:

"292. On the files at home issue alone we were entirely satisfied that the Respondent had discharged that burden. ..."

**E** and at paragraph 295:

"295. We took the view that putting matters in their very base form, the Claimant, an experienced Band 8a practitioner dealing with some very vulnerable patients, did not complete the very paperwork and documentation that she knew that she was required to complete in order to document patient risk and care. As accepted by Barbra Jones in her evidence before us, that went to the core of the key competencies for a post that the Claimant held."

**F** 32. Accordingly the ET dismissed claims for unfair and wrongful dismissal.

**G** **The Application for Reconsideration**

33. By her email of 27 April 2016 the Claimant applied for a reconsideration of the Liability Judgment. She wrote in another email of that date:

**H** "... If Judge Heap had read the material that she was directed to she would have known that Linda Braithwaite the independent investigator NEVER audited my files, by her own admission she accepted the "audit" done by DC and KH and at the HCPC they both admitted that [there] was never an audit as such but just them quickly triaging what was to hand? ..."

**A** In an email of 28 April 2016 to the ET office the Claimant wrote:

**“... It is misleading in her judgement for her to just state I was suspended by my regulatory body as I made clear I was suspended after no misconduct was found purely on grounds of poor mental health. ...”**

**B** 34. In an email of 5 May 2016 to the ET (to which the Respondent objects in the position statement) the Claimant asserted:

**“If Judge Heap had read the evidence she was directed towards she would understand why I stated that LB [Linda Braithwaite] could not have had sight of those files as LB herself admits she did not do the audit but relied on DC and KH’s audit and in their testimony to the HCPC they make it clear that that was not an audit of my files. ...”**

**C**

35. By an email of 14 June 2016 the Claimant sent the ET her detailed challenges to the Judgment of the ET in support of her application for reconsideration. At paragraph 164 of her submissions she wrote:

**D**

**“164. I told LB [Linda Braithwaite] that I have an email that I sent to KH [Karen Hampson] detailing patients with outstanding reports so she knew of this and we met a few days after the email to discuss the email. Judge Heap was shown how LB altered my email and omitted the attachment in her report. I can’t believe that in her Judgment Judge Heap is doing exactly the same thing.”**

**E**

36. The email referred to is that of 13 August 2009 from the Claimant to Karen Hampson containing an attachment listing reports she had at home. The list informed Karen Hampson that some files were ongoing, some were new referrals and reports were outstanding on others. In her submissions in her support of her application for reconsideration the Claimant stated at paragraph 269:

**F**

**G**

**“269. I emailed KH on 13<sup>th</sup> August with a list of patients and at the side of the patient’s name I noted if a report was outstanding or not. I cannot understand why Judge Heap would state that KH did not know reports were outstanding.”**

37. The Claimant stated at paragraph 183 of her application:

**H**

**“LB claims DC and KH did a good review of my files and she saw no need to do it herself and included this review of theirs in her investigation report, DC is very clear that is not an audit or review of my files.”**

**A** At page 27, paragraph 298, Claimant stated of Employment Judge Heap:

“I do not understand why she believes LB bottomed out all my concerns when it was evidenced that she altered the 13<sup>th</sup> August 2009 email I sent to KH that informed her of all my patients which had reports outstanding ...”

**B** At page 28 the Claimant commented of the Liability Judgment:

“How can Judge Heap say the hearing at the HCPC did not look at the same issues when it did and the HCPC panel actually looked at the evidence which AW [Andrea Ward], SS [Simon Smith] or any Disciplinary or Appeal Panel and interrogated LB [Linda Braithwaite].”

**C** 38. The Claimant attached a number of documents to her application including a letter from Leigh Day & Co, her solicitors, dated 8 November 2012. She drew attention to their record of the finding by the HPC regarding the investigation by Linda Braithwaite. They wrote:

**D** “With regard to Linda Braithwaite, the Panel found significant weaknesses in the Trust investigation. These are outlined in the Panel’s decision. The Panel stated that it was unable to attach any weight to any of the investigation’s findings which were not substantially corroborated or confirmed by other evidence.”

**E** 39. In answer to the application for reconsideration the Respondent submitted that the Judgment was well reasoned and should stand. They expressed concern over the criticism of Ms Ward made by the Respondent as she had been seriously ill.

**F** **The Reconsideration Judgment**

40. The ET dealt with the Reconsideration application on 16 September 2016. They listed the documents they considered.

**G** 41. In accordance with the Order of Mrs Justice Laing on the Rule 3(10) Hearing, the Claimant’s appeal is limited to challenging paragraphs 15 and 19 of the Reconsideration Judgment.

**H**

**A** 42. In paragraph 15 the ET stated that the Claimant had submitted further documentation  
from/relating to the HPC and referred to findings made by them. The ET stated that they had  
made findings in paragraphs 247 to 250 of the Liability Judgment, with particular reference to  
**B** paragraph 249 on the relevance of the HPC findings to the decision to dismiss the Claimant.  
The ET held:

**“15. ... There is nothing within the additional documentation or the points raised by the  
Claimant in her application that alters the position as we found it to be within those  
paragraphs.”**

**C** 43. In paragraph 248 of the Liability Judgment the ET stated that they were satisfied it was  
reasonable for Andrea Ward to refer the matter to the HPC. They held:

**“248. ... The allegations which had been considered to have been made out by the disciplinary  
panel were serious and it is accordingly entirely unsurprising that they were provided to the  
HPC as they questioned the Claimant’s ability to undertake safe clinical practice. ...”**

**D**  
  
**E** In paragraph 249 of the Liability Judgment, upon which the ET placed particular reliance in  
paragraph 15 of the Reconsideration Judgment, the ET held:

**“249. ... given that the decision of the HPC had not taken place before the decision to dismiss  
(indeed it could not as the referral came off the back of that decision) we say no more about it  
as it was not relevant to the information that was before either the disciplinary or appeal  
panels when making their determination on the Claimant’s case.”**

**F** 44. Paragraph 19 of the Reconsideration Judgment is concerned with the 13 August 2009  
email from the Claimant to Karen Hampson which she had forwarded to Linda Braithwaite.  
The complaint made by the Claimant was that the ET had failed to consider or place any weight  
**G** on the evidence that Linda Braithwaite had removed the attachment to the email in making her  
report. The Claimant contended that the attachment showed that she had notified Karen  
Hampson that there was further work to be done on files she held in addition to writing reports  
**H** on their subjects. It was said that if the ET had paid proper regard to this evidence they could  
not have concluded that there was nothing to put Karen Hampson on notice that further action  
may be needed in respect of some of the subjects of the files held by the Claimant.

A 45. The ET held at paragraph 19:

“The 13<sup>th</sup> August 2009 email

19. There are several references to the above email within the application. We made our findings as to the content of that email, and, particularly, whether it was such as to place the Respondent on notice that the Claimant had files at home, at paragraph 166 of the Reserved Judgment. There is nothing within the application which renders it necessary for us to revisit that finding.”

B

46. In paragraph 166 of the Liability Judgment the ET held of the email of 13 August 2009:

“166. We accept the position of the Respondent that nothing within that email came close to putting Karen Hampson on notice that the Claimant was behind with her reports.”

C

**The Challenges to Paragraphs 15 and 19 of the Reconsideration Judgment: Submissions of the Parties, Discussion and Conclusion**

D

47. The decision rejecting the application for reconsideration challenged by the Claimant was made exercising powers under Regulation 70 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** which provides:

E

“A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.”

F

Paragraph 15

*Submissions of the Parties*

G

48. In her challenge to paragraph 15 of the Reconsideration Judgment the Claimant contended that the ET erred in failing to have regard to the admission by Linda Braithwaite in her evidence before the HPC that she had removed the attachment to the email of 13 August 2009 from the Claimant to Karen Hampson referred to in paragraph 164 of her application for reconsideration.

H

**A** 49. The Claimant also drew attention to the letter to her dated 8 November 2012 from her  
solicitors on the outcome of the hearing before the HPC which had been referred to in her  
**B** application for reconsideration. This showed that the HPC found significant weaknesses in the  
Respondent's investigation. They were unable to attach any weight to them unless they were  
substantially corroborated by other evidence. The solicitors wrote:

**C** "With regard to Linda Braithwaite, the Panel found significant weaknesses in the Trust  
investigation. These are outlined in the Panel's decision. The Panel stated that it was unable  
to attach any weight to any of the investigation's findings which were not substantially  
corroborated or confirmed by other evidence."

**D** 50. Shortly before the Full Hearing of her appeal before the Employment Appeal Tribunal  
the Claimant produced a bundle of extracts of evidence given before the HPC. The transcript  
contained passages which supported her contention that when producing her report for the  
Respondent Linda Braithwaite had removed the attachment to the Claimant's email of 13  
August 2009. The attachment to the email supported her assertion that she had informed Karen  
**E** Hampson that she had files on individuals in respect of whom further work was needed.  
Further, the transcripts contained evidence relevant to and supporting the solicitor's letter of 8  
November 2016 reporting on findings by the HPC of weaknesses in the Trust's investigation.

**F** 51. The Claimant submitted that in the light of her contentions and the material submitted  
with her application for reconsideration, the ET erred in paragraph 15 refusing to reconsider  
paragraphs 247 to 250 of the Liability Judgment. She submitted that the account in her  
**G** application of the evidence before the HPC and the report of her solicitors of the conclusions of  
that body regarding the investigation carried out by the Respondent should have led the ET to  
reconsider their Judgment. Further, they should have had regard to the finding of the HPC of  
**H** unfitness to practice was not on the basis of her conduct or performance but because of her  
mental health. The Claimant contended these matters were relevant to whether she was in fact

**A** in fundamental breach of her contract entitling the Respondent to dismiss her summarily and to the finding of the ET that her dismissal was fair which was founded on a conclusion that the decision to dismiss was taken after a fair investigation.

**B** 52. Mr Sheppard, counsel for the Respondent, submitted that as the extracts from the transcripts of the hearing before the HPC were not before the ET, either at the Full Hearing or produced by the Claimant in support of her application for reconsideration, they could not be  
**C** relied upon in support of her appeal. It was submitted that the Claimant could have provided the ET with the full HCP determination with her application for reconsideration. She did not do so, but instead provided a heavily redacted letter from her solicitors. Mr Sheppard observed  
**D** that the Claimant is seeking to undermine the Judgment of the ET on the basis of incomplete and selective evidence. It was said that the fact that she did not produce the HPC evidence to the ET shows that she did not place much weight on it. Further, Mr Sheppard contended that  
**E** the point on the wrongful dismissal claim considered before Laing J, that the issue was whether in fact the Claimant was guilty of a fundamental breach of contract, was not that advanced to the ET either at the Full Hearing or in the application for reconsideration. It was said that the Claimant merely made general assertions of unfairness and failure to investigate the complaints  
**F** against her. Counsel submitted that the application for reconsideration did not assert a failure on the part of the ET to engage with the issue of wrongful dismissal.

**G** 53. Turning to the paragraphs in the Liability Judgment referred to in paragraph 15 of the Reconsideration Judgment, the subject of the appeal, Mr Sheppard submitted that the focus at the Full Hearing was on the evidence of Andrea Ward. As for the observation of the ET at  
**H** paragraph 249 about the hearing before the HPC that they would say no more about it, Mr Sheppard accepted that there was some overlap between the matters considered by the HPC and

A those before the Respondent's disciplinary and appeal panels. That was necessarily the case as  
it is clear that the HPC from their letter of 19 July 2010 to Dr Connelly and Andrea Ward's  
B letter of 24 August 2010 that they were to consider whether the documentation, which included  
the investigation report into allegations against the Claimant, the notes of the disciplinary  
hearing and the dismissed letter, raised concerns regarding the Claimant's fitness to practice.  
Counsel recognised that in the light of this overlap a question could be raised about the  
observation of the ET in paragraph 250 that they:

C "250. ... observe again that the question of the Claimant's fitness to practice which was before  
the HPC was not the same question as that for the Respondent with regard to the disciplinary  
case against the Claimant nor were the findings of the HPC available to them at the time that  
that decision was taken."

D 54. Mr Sheppard contended that the ET did not fail to engage with the issue relevant to the  
wrongful dismissal claim: whether the Claimant was in fact in fundamental breach of contract  
rather than whether the Respondent believed her to be so. Despite some overlap the issue  
before the HPC, the fitness to practice, was different from the decision of the Respondent that  
E the Claimant was in fundamental breach of contract of employment. Nor did the ET err in  
concluding that the hearing and outcome of proceedings before the HPC were not to be taken  
into account in determining the claim of unfair dismissal. Accordingly it was submitted that the  
F ET did not err in paragraph 15 of the Reconsideration Judgment in deciding that the  
submissions and documentation relied upon by the Claimant in support of her application did  
not alter the position they took in paragraphs 247 to 250 of their Liability Judgment.

G *Discussion and Conclusion on the Challenge to Paragraph 15*

H 55. The reasons the Respondent dismissed the Claimant were set out in the letter of 21 April  
2011 confirming the dismissal of her appeal from the decision of the disciplinary panel. Mr  
Smith, who chaired the appeal panel, wrote:

**A**                    “The allegations upheld demonstrate that you failed to comply with the Trust’s Policy and Procedure on Clinical Records Management. It was also clear that you had failed to comply with the standards of proficiency for a practitioner Psychologist. Failing to comply with Trust policy and your professional standards could have resulted in harm to patients and also the reputation of the Trust and your profession. Your actions are considered to fall well short of what can reasonably be expected of a professional Psychologist. The panel also concur with the arguments put forward by management that the above meant that you presented too big a risk to be allowed to continue working as a Psychologist.”

**B**

56.     The Respondent reached their conclusion not on the basis of the Claimant’s health but on the basis of her performance as a Clinical Psychologist. The documentation relating to the disciplinary allegations against her, the investigation of those allegations, the conclusions of the Respondent’s disciplinary proceedings and their dismissal letter were all provided to the HPC. Whilst the issue before the HPC - the fitness of the Claimant to practice as a Clinical Psychologist - and the allegations which formed the basis of the decision of the Respondent to dismiss her were not the same, the factual basis for the consideration of the issue before each body overlapped to a considerable extent. Whether the conduct of the Claimant as evidenced in the seven allegations formulated by the Respondent fall below the standard required by a Clinical Psychologist.

**C**

**D**

**E**

57.     In a claim for wrongful dismissal the issue for the Court is whether the Claimant was in repudiatory breach of contract entitling the employer to dismiss the employee without notice. Unlike a claim of unfair dismissal the information known to the employer at the time of dismissal is not to the issue in the claim. Whilst in paragraph 291 of their Judgment the ET posed the relevant question - was the Claimant in repudiatory breach of contract - it appears from paragraph 249 that they did not or may not have considered all the relevant material in answering that question in determining the wrongful dismissal claim. The ET paid no regard to the proceedings or outcome of the hearing before the HPC because it was not information before the disciplinary or appeal panels.

A 58. The parties were asked to agree what information was placed before the ET for the  
determination of the Claimant's application for reconsideration. It was agreed that the Claimant  
B sent an email on 14 June 2016 to the Employment Tribunal accompanied by detailed challenge  
to numbered paragraphs in the Judgment of the Employment Tribunal. Some of these  
contained reference to a supplementary bundle before the Tribunal which contained parts of the  
C transcript of evidence given before the HPC. The Claimant raised in her challenges to  
paragraphs 64 and 269 of the Judgment of the Employment Tribunal the important contentions  
that Linda Braithwaite did not include in her investigation report for the disciplinary process the  
important attachment to the email of 13 August 2009 from the Claimant to Karen Hampson.  
The Claimant was relying on that email with its attachment to establish that she had informed  
D Karen Hampson of the state of the files of the twenty one individuals listed in the attachment.  
The list showed clearly that some cases were ongoing, there were some new referrals, as well as  
some cases in respect of which reports were outstanding. That contention was potentially  
E relevant to whether the Claimant was acting responsibly in informing the Respondent of the  
state of her files. Further it undermined the finding of the ET at paragraph 166 that:

**"166. We accept the position of the Respondent that nothing within that email came close to  
putting Karen Hampson on notice that the Claimant was behind with her reports."**

F 59. At paragraph 294 of her submissions in support of the application for reconsideration  
the Claimant asserted that all her process notes were written up. Inadequacy of keeping process  
notes formed the basis of the first disciplinary allegation considered by the Respondent.

G 60. The Claimant also relied upon the letter of 8 November 2012 to her from her solicitors  
to show that the HPC found significant weaknesses in Linda Braithwaite's investigation. The  
HPC stated that they were unable to attach any weight to any of the investigation's findings  
H which were not substantially corroborated or confirmed by other evidence. The solicitors wrote

**A** that the HPC found Dr Connolly to be a truthful witness but were of the view that the impact of his evidence was limited because he did not have the patient notes.

**B** 61. The ET held in respect of all seven disciplinary allegations against the Claimant:

**“263. We are satisfied that the Respondent conducted sufficient investigation with regard to those areas for the reasons we have already set out above. The investigations conducted by Linda Braithwaite were comprehensive and considered and looked into all points that the Claimant raised as to the allegations against her.”**

**C** 62. In my judgment the ET erred in holding they would not reconsider their decision in the light of the findings of the HPC for the reasons set out in paragraph 249 of the Liability Judgment. It was an error of law to reject evidence obtained at events after the decision to dismiss when considering the claim for wrongful dismissal. The issue to be determined by the **D** ET in deciding the wrongful dismissal claim was whether the Claimant was in fundamental breach of contract, not whether at the time the decision was taken the Respondent had reasonable grounds for that belief.

**E** 63. Further, the criticisms the HPC made of the investigation by Linda Braithwaite which the Claimant drew to the attention of the ET in her reconsideration application could have been **F** appreciated by the Respondent when they took their decision to dismiss. In my judgment the ET in relying upon the reasons they gave in paragraph 249 of the Liability Judgment erred in rejecting the application to reconsider their Judgment in the light of the HPC material upon **G** which the Claimant referred to in her application for reconsideration.

**H** 64. Accordingly the challenge by the Claimant to paragraph 15 of the Reconsideration Judgment in which the ET refused her application to reconsider the Liability Judgment in the light of the HPC material upon which she relied in her application succeeds.

**A** Paragraph 19

*Submissions of the Parties*

**B** 65. In paragraph 164 of her application for reconsideration the Claimant stated that Employment Judge Heap was shown at the Full Hearing how Linda Braithwaite had altered the Claimant's email of 13 August 2009 to Karen Hampson. She drew attention to the undisputed fact that in her investigation report Linda Braithwaite had omitted the attachment to the email. Accordingly the attachment was not given to the Respondent's disciplinary or appeal panels.

**C** The Claimant also drew attention to the deletion after it had been sent by her of the reference to an attachment in the covering email to Linda Braithwaite. The attachment was important as in it the Claimant informed Karen Hampson that the reports on certain patients were outstanding.

**D** This was relevant to the complaints against the Claimant. When setting out the email in paragraph 166 of the Liability Judgment the ET do not set out the reference to an attachment in the original, unaltered email, and do not refer to the important attachment.

**E** 66. Mr Sheppard contended that the significance of the email of 13 August 2009 was addressed fully by the ET in the Liability Judgment. Nothing new was brought to their attention in the reconsideration application. Counsel contended that although the ET made no

**F** express reference to the attachment to the 13 August 2009 email in the Liability Judgment they should be taken to have properly analysed the evidence relating to it.

**G** *Discussion and Conclusion on the Challenge to Paragraph 19*

**H** 67. In her submissions in support of the reconsideration application the Claimant asserted at paragraph 164 that she had shown Employment Judge Heap how her email of 13 August 2009 to Karen Hampson had been altered to remove the reference to attachments: "Attachments: Referrals to Psychology doc". The Claimant also reminded the ET that she had informed them

**A** at the Full Hearing that Linda Braithwaite had omitted the attachment to the email of 13 August from her investigation report and that her covering email to her had been altered.

**B** 68. In finding that there was nothing in her application for reconsideration which rendered it necessary to revisit their finding that the email did not put the Respondent on notice that the Claimant had files at home the ET relied upon paragraph 166 of the Liability Judgment. In  
**C** paragraph 165 the ET set out the email of 13 August 2009 which omits the reference to an attachment. The ET does not set out the content of the attachment or make any reference to it in paragraphs 165 or 166. The attachment makes it clear that the Claimant informed Karen Hampson that she was behind with her reports. She listed those which still had to be written up.

**D** 69. In my judgment the ET erred in holding in paragraph 19 of the Reconsideration Judgment that there was nothing in the application which rendered it necessary to revisit their finding in paragraph 166 of the Liability Judgment.  
**E**

### **Disposal**

**F** 70. The decisions of the ET in paragraphs 15 and 19 of the Reconsideration Judgment are set aside.

**G** 71. The refusal of the application by the Claimant for reconsideration of the Liability Judgment is set aside.

**H** 72. The application for reconsideration of the Judgment of the ET sent to the parties on 16 March 2016 is remitted for consideration by the same Employment Tribunal, if practicable, in

**A**      accordance with Rule 72(3) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

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