Appeal No. UKEAT/0032/17/DM

# EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 2 February 2018
Judgment handed down on 19 February 2018

**Before**

**HER HONOUR JUDGE EADY QC**

**(SITTING ALONE)**

---

MR K SCRANAGE — APPELLANT

ROCHDALE METROPOLITAN BOROUGH COUNCIL — RESPONDENT

---

Transcript of Proceedings

JUDGMENT

---

## APPEARANCES

| | |
|---|---|
| For the Appellant | MR KEVIN SCRANAGE<br>(The Appellant in Person) |
| For the Respondent | MS LOUISE QUIGLEY<br>(of Counsel)<br>Instructed by:<br>Rochdale Metropolitan Borough Council<br>Floor 2<br>Number One Riverside<br>Smith Street<br>Rochdale<br>OL16 1XU |

**SUMMARY**

**PRACTICE AND PROCEDURE - Review**

**PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke**

*Reconsideration - new evidence -* ***Ladd v Marshall*** *- adequacy of reasons*

The Claimant had applied for a reconsideration of an earlier Employment Tribunal Judgment dismissing his claims. His application was made on "new evidence" grounds; specifically he relied on a Judgment of the Crown Court in subsequent criminal proceedings which raised questions as to the credibility of two of the managers who had initiated the disciplinary investigation against the Claimant that had ultimately led to his dismissal by a different manager. The ET rejected the reconsideration application, holding that the new material could not have had an important influence on the original hearing. The Claimant appealed.

Held: *dismissing the appeal*

The ET had been entitled to conclude that the new evidence would not have had an important influence on the original hearing given that it did not impact upon the decision to dismiss, which had been taken by a different manager, who was not tainted by the Crown Court's findings.

**HER HONOUR JUDGE EADY QC**

## Introduction

1. This appeal concerns a Reconsideration Decision relating to "new evidence" in the form of a Crown Court Judgment, highly critical of the Respondent in respect of matters that arose out of the Employment Tribunal ("ET") proceedings to which the current appeal relates. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the Manchester ET (Employment Judge Sherratt sitting alone), by which his application for a reconsideration of the ET's earlier Judgment was refused. The earlier Judgment had been sent out to the parties on 14 July 2011, after a Full Merits Hearing over seven days in April and June 2011 before a three-member panel (Employment Judge Sherratt presiding), by which the ET dismissed the Claimant's claims of unfair dismissal, sex, race, and disability discrimination. The Claimant's appeal against that Judgment was dismissed by the Employment Appeal Tribunal after a hearing under Rule 3(10) **EAT Rules 1993** (as amended), before His Honour Judge Richardson on 15 August 2012. The current appeal is thus not directly concerned with that Judgment but with the subsequent refusal of the Claimant's application for reconsideration, sent out to the parties on 16 November 2016.

2. The Claimant's current appeal was permitted to proceed to this Full Hearing on the basis of amended grounds of appeal, prepared by counsel who appeared for the Claimant *pro bono*, under the Employment Law Appeal Advice Scheme, on an earlier Appellant-only Preliminary Hearing on 21 June 2017. Today the Claimant appears in person, as he did in the ET proceedings. For its part, the Respondent was represented by counsel below, albeit not by Ms Quigley, of counsel, who appears on this appeal.

## The Relevant Background

3. The Claimant was employed by the Respondent as a Senior Trading Standards Officer. He was a disabled person for the purposes of (at the relevant time) the **Disability Discrimination Act 1995**. As the ET records (see paragraph 5 of its substantive Judgment) the Claimant had been diagnosed as suffering from Anankastic Personality Disorder, Obsessive Compulsive Disorder, Bi-polar Disorder and Paranoid Personality Disorder. That said, he had been assessed by the Respondent's Occupational Health advisors as fit for his appointment and he commenced his employment on 6 April 2004.

4. At the relevant time, the Claimant's line manager was Ms Michaela Monk, a Principal Trading Standards Officer, who, in turn, reported to Mr Andrew Glover, a Public Protection Manager.

5. From quite early on, issues had been raised with the Claimant about his communications with others and that continued to be a theme during his employment. For his part, the Claimant considered he was not provided with adequate support and, more specifically, that Mr Glover disliked him and wanted him out. The ET, however, did not find that there was any evidence that Mr Glover was doing anything to try to get the Claimant dismissed.

6. It was against that background that, in March 2009, the Respondent received a complaint from a shop called Aria, relating to the Claimant's conduct. The shop was not in the Respondent's area and the complaint related to the Claimant's conduct when he had been shopping on a personal basis in Manchester and had challenged what he considered to be a breach of trading standards action. Mr Glover raised this matter with the Claimant at a meeting on 17 March 2009, when the Claimant accepted he had raised an issue with the shop but said he

was acting in a private capacity as a consumer. It seems, however, that the Claimant's clock card indicated he was at work at the time and that was seen as raising a further issue regarding the Claimant's timesheet recording. On 1 April 2009, Mr Glover told the Claimant these matters would be the subject of a disciplinary investigation. That triggered a stress reaction for the Claimant, who went to see his GP the same day and was then signed off work with stress.

7. I pause at this stage to note that, in its substantive Judgment, the ET expressed the view that Mr Glover's investigation of the Aria complaint might have been "*zealous*" and he might have made some further procedural errors in that matter. That said, the ET did not consider this detracted from the fact that Mr Glover had not himself solicited the complaint, which had followed from conduct of the Claimant (see the ET's substantive Judgment at paragraph 156).

8. Returning to the chronology, the Claimant's period of ill-health continued and it was after he had been absent for just over two months that Ms Monk accessed his work email account, ostensibly to check whether any messages had been received that needed to be progressed. Having done so, she reported to Mr Glover as follows:

> **"As you know, I recently requested access to [the Claimant's] email account, as he is still off sick and we're unsure when he will be returning. I requested access through ICT so that I could put an 'out of office' message on his account … I also needed to check his emails since that date, as we had become aware of at least one safety issue referral which had been sent to him and not been dealt with and potentially there could have been other similar referrals.**
>
> **ICT gave me access to his account yesterday for a limited period of time. Since the 1st April [the Claimant] had received over 450 emails and only 3 of these required me to take further action. Whilst there were other work related emails in his account (primarily from myself and Lucia) there were a large number of emails that seemed to indicate that [the Claimant] was using his work email address to register with non work related websites for updates, notifications etc and conduct none [sic] work related correspondence.**
>
> **I'm unsure of what constitutes appropriate use of the work email, but I was surprised by the number of these types of emails [he] was receiving.**
>
> **Thought I should let you know."**

9. Ms Monk's raising of concern in this regard led Mr Glover to also access the Claimant's account, undertaking an analysis of the email traffic for an earlier period, from the beginning of

January 2009 to 18 March 2009. The ET considered the Claimant's allegation that Mr Glover had conspired with Ms Monk to cause his emails to be investigated but found Ms Monk's explanation for accessing the emails to be plausible and credible and found no evidence that she had conspired with Mr Glover to set the investigation in motion (see the ET's substantive Judgment at paragraph 157). That said, the ET described Mr Glover's investigation as "*a remarkably zealous analysis*", although it observed that he was not responsible for the content of the Claimant's inbox and his sent items (ET substantive Judgment at paragraph 158). What Mr Glover reported, however, then led to a formal disciplinary process, looking into whether the Claimant had sent inappropriate emails (the emails in question falling within the earlier period investigated by Mr Glover rather than for the period checked by Ms Monk).

10. Those allegations were joined with the earlier disciplinary charges and heard by one of the Respondent's Executive Directors, a Mr Andy Zuntz, who found that charges were made out in relation to the Aria complaint and the Claimant having sent inappropriate emails during work time (the email issue identified on Mr Glover's investigation), but did not find the timesheet issue to amount to more than an error. He concluded that the Claimant was guilty of gross misconduct in respect of three of the six allegations made against him: specifically, that he had brought the Respondent into disrepute, had sent 286 personal emails in work time and had sent 38 inappropriate emails. Having regard to that conduct, Mr Zuntz considered the Claimant should be dismissed. The Claimant appealed but was unsuccessful.

11. In his subsequent ET claim the Claimant complained of unfair dismissal and of various forms of unlawful discrimination. He made clear he considered he had been the subject of a malicious course of action, with Ms Monk and Mr Glover deliberately looking for material to ensure they could get rid of him from his employment: accessing his emails had been a fishing

A expedition and Ms Monk's account was both misleading and untrue. He sought disclosure of the emails relied on by Ms Monk but that was refused to him, it being said that these were unavailable as the Respondent had a 90 day policy of deleting old emails.

B

12. As I have already noted, the ET did not accept the Claimant's case of a conspiracy between Ms Monk and Mr Glover and expressly accepted Ms Monk's explanation for accessing his emails, rejecting the suggestion that she had conspired with Mr Glover to set an

C investigation into motion. The ET further accepted Mr Zuntz's account that he had an honest and reasonable belief in the three matters he had found to constitute gross misconduct and concluded that the dismissal of the Claimant had been fair, albeit following "*perhaps rather*

D *more investigation into the matter than might have been reasonable in all the circumstances*". It further rejected the Claimant's claims of discrimination.

13. In his appeal against the ET's substantive Judgment, the Claimant sought to rely on new

E evidence in the form of the emails that would have been seen by Ms Monk and which had, by then, been disclosed to him by the Greater Manchester Police in separate criminal proceedings. Those proceedings had been pursued against the Claimant for harassment in relation to Mr

F Glover and Ms Monk. He was initially convicted by the Bury and Rochdale Magistrates Court on 17 December 2014 but then appealed to the Manchester Crown Court. It is the Judgment given by the Crown Court, allowing that appeal, that led to the reconsideration application with

G which I am now concerned.

14. In the meantime, on 15 August 2012, HHJ Richardson considered the Claimant's appeal against the ET's substantive Judgment at a Rule 3(10) Hearing. On the "new evidence" ground,

H he noted the Claimant was contesting that there were 450 emails - there were only 239 - and

only a handful were non-work messages. Although the Claimant had not adduced the emails in question at the Rule 3(10) Hearing, he had produced a schedule, identifying the address of the sender. Having considered this material, HHJ Richardson dismissed this ground of appeal, making the following observations:

> **"21. The Claimant's argument in his Notice of Appeal, with respect to him, misrepresents what Ms Monk said in her email, which I have quoted. She did not say there were 450 problem emails, she did not say that all but 3 were non-work; to the contrary, she said there were other work-related emails in his account, largely from herself and another employee called Lucia, but that there were large numbers of emails which seemed to indicate that the Claimant was using his work address to register with non work-related websites.**
>
> **22. I have looked at the schedule which the Claimant has prepared of emails sent to him from 1 April onwards while he was absent from work. These include emails from ticketing agencies and from a number of other organisations. There is nothing to suggest that Ms Monk was dishonest when she formed the view that the emails seemed to indicate that he was using his work email address to register with non work-related websites.**
>
> **23. It is important to keep in mind that the Claimant was not dismissed on the basis of what Ms Monk found in his inbox. Ms Monk's email was simply the trigger which led the Respondent to investigate the emails which the Claimant had himself sent when he was at work, full details of which were provided by Mr Glover. In these circumstances I consider that the new material is of marginal relevance and I consider that it would certainly not have had an important influence on the hearing."**

15. HHJ Richardson also considered the Claimant's further argument that the recovery of the emails from the police showed that there must have been bad faith on the part of the Respondent's witnesses, as they had said the emails had been deleted. Again, however, he rejected the point, reasoning:

> **"24. It is also said today that the recovery of the emails from the Greater Manchester Police shows that there must have been bad faith on the part of the Respondent's witnesses, since it seems they said that the emails had been deleted. I consider that there is no sensible basis for reaching a conclusion on such a serious matter in the evidence before me. What can be recovered in a police investigation and what is available to an employee or even upon a reasonable search may be two quite different things. It is not appropriate to bring an application to adduce fresh evidence simply upon possibility or supposition in the way this application is brought."**

## The Reconsideration Applications and Decisions

16. As well as seeking to appeal against the ET's substantive Judgment, the Claimant had sought to pursue an application for review. His first application was refused in September 2011. Subsequent to the EAT's ruling on his appeal, however, in April 2016 the Claimant applied again for a reconsideration of the ET's Judgment, this time on the basis of new

A evidence in the form of a transcript from a Crown Court interlocutory hearing dealing with an application for disclosure. On 18 May 2016, the ET refused that application as it considered the matters raised did not go to the three matters that constituted the Respondent's reason for dismissing the Claimant. When the Claimant succeeded in his appeal against conviction, however, he sought to make a yet further application for reconsideration, this time relying on the transcript from the Manchester Crown Court (His Honour Judge Lever, sitting with lay magistrates) allowing the appeal. It is the ET's Decision in relation to this third reconsideration application that is at issue in the current appeal.

17. It is, I think, fair to say that this Judgment of the Crown Court is fairly damning in terms of the criticisms it makes of Ms Monk and Mr Glover, and, to some extent, of the Respondent more generally. In particular, having identified that the Court was concerned with whether allegations made by the Claimant against Ms Monk and Mr Glover were defamatory (which they could not be if they were, or might be, true), HHJ Lever (giving Judgment for the Court) made the following observations:

> **"<u>It is simply UNTRUE that [the Respondent] had a 90 day deletion policy on emails. We take a serious view of this and Mr Scranage and the Tribunal being misled.</u> Although Rochdale MBC is not a party to this appeal, we gave them the opportunity to refute the evidence we had heard about the Tribunal and Mr Scranage being given untrue information which blocked his right to disclosure. The Corporation did not exercise the right we gave them to be heard or to call any evidence in rebuttal, but sent a message that it arose innocently by Mr Glover, Miss Monk and the Corporation's solicitor misunderstanding a message from the IT department, due to "Chinese whispers". Of even more concern, Mr Glover and Mrs Monk had been tasked to inquire into how the mistake occurred. We feel it was completely inappropriate for Mr Glover and Mrs Monk to investigate the false information when Mr Scranage was alleging they were the two people responsible for the misconduct and misinformation.**
>
> **In the absence of disclosure Mr Glover and Mrs Monks gave evidence on oath about these c450 emails, a significant number of which related to personal matters, not work. When this appeal came before me and 2 lay jj, we decided the issues in this case were mixed law and fact and I ordered Rochdale MBC to make disclosure. Special counsel Mr Welch was engaged for disclosure by Rochdale MBC and after three disclosure hearings, the "non existent" emails were disclosed. These consisted of 235 different emails of which a very small proportion were private and even those were sometimes not indicative of private use by Mr Scranage at all but unsolicited. For example, a fellow employee sent an unsolicited joke around the office, which would count as a non work email but for which Mr Scranage could not be blamed. The sender of the joke was not disciplined. The evidence to the Tribunal about 450 emails of which a significant number were private which Mrs Monk could not help noticing as she skimmed them, looking for work emails in need of attention and Mr Glovers evidence about 450 emails is <u>simply NOT TRUE</u>**

> **Mr Scranage claims that Mrs Monk and Mr Glover were maliciously going on a fishing expedition to try and find grounds for dismissing him. The Tribunal disagreed. "*We found Mrs Monk's explanation for assessing the Claimant's emails plausible and credible and we do not find any evidence that she conspired with Mr Glover to set in motion the investigation.*" We, unlike the Tribunal, eventually had the emails Mr Scranage was blocked from obtaining and we therefore were able to measure Mrs Monk's evidence against the documented facts and far from finding her plausible and credible, we found her evidence to us not correct and in places frankly nonsense. Had the Tribunal had the emails to which Mrs Monk claimed she had access, which were blocked, they may have come to the opposite conclusion.**
>
> **…**
>
> **The central issue in this appeal is that the appellant has formed the view that there was a conspiracy between Mrs Monk, his manager and Mr Glover to get rid of him. What Mr Scranage claims is a minor argument with a shop … was used as a catalyst to Mrs [Monk] and Mr Glover, contrary to data protection, applying for leave from IT to access his work emails to look for evidence against him.**
>
> **We find that there is at the very least a reasonable doubt as to whether Mr Scranage's stark and controversial allegations against Mr Glover and Mrs Monk are defamatory and so the charges against Mr Scranage must be dismissed and this appeal allowed.**
>
> **It is not within our remit to decide positively whether Mr Glover and Mrs Monk told deliberate lies thus committing the offence of perjury or conspired together to get Mr Scranage unfairly dismissed. They are not on trial in this Court and accordingly they were not legally represented. However we have not and do not disguise our concern about the conduct of Rochdale MBC and its senior employees giving the Employment Tribunal untrue information as set out hereinabove." (Emphases within the original)**

18. As recorded, the Crown Court thus concluded that there was, at the very least, a reasonable doubt as to whether the Claimant's allegations against Mr Glover and Ms Monk were defamatory and, on that basis, allowed his appeal.

19. In making his further application for reconsideration, the Claimant had relied on the transcript of the Crown Court that had been handed to him at the Court hearing itself; it was unsigned and had no Court seal but, although Employment Judge Sherratt remarked on this fact, I do not read the ET's refusal of the application to have been made on that basis. Rather, Employment Judge Sherratt referred to the transcript of the Crown Court's Judgment but nevertheless confirmed the ET's earlier Judgment, ruling as follows:

> **"4. Having considered the judgment of the Crown Court referred to above and the comprehensive written representations from the parties and having reconsidered this Tribunal's original judgment sent to the parties on 14 July 2011 and my 18 May 2016 reconsideration judgment I confirm the reconsideration judgment.**
>
> **5. I remain of the view that the matters raised by the claimant and the findings of the Crown Court do not affect the findings of this Tribunal that the claimant was fairly dismissed for gross misconduct involving bringing the council into disrepute, sending 286 personal emails in works time and sending 38 inappropriate emails."**

20. The Claimant has since obtained a signed copy of the Crown Court Judgment transcript (signed in manuscript by HHJ Lever). It appears there may be some minor differences in this copy to that provided to Employment Judge Sherratt but it is not suggested that these are in any way material and the Respondent has taken no point in this regard.

**The Relevant Legal Principles**

21. The ET was concerned with an application for reconsideration made under Rule 70 Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), which provides:

> **"70. *Principles***
>
> **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."**

22. The test for reconsideration under the **ET Rules** is thus straightforwardly whether such reconsideration is in the interests of justice (see **Outasight VB Ltd v Brown** UKEAT/0253/14 (21 November 2014, unreported). The "interests of justice" allow for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

23. Where the application for reconsideration is made on the basis of "new evidence", the test the ET will apply remains that laid down by the Court of Appeal in **Ladd v Marshall** [1954] 3 All ER 745, [1954] 1 WLR 1489 (**Outasight**, paragraph 49), which provides that three conditions must be met, as follows:

(1) that the evidence could not have been obtained with reasonable diligence for use at the original hearing;

(2) that it is relevant and would probably have had an important influence on the hearing; and

(3) that it is apparently credible.

24. As to what might have had an "important influence" on the hearing, the words used make clear that does not require that the new material would necessarily be determinative. As to whether it would probably have had such an influence, it seems to me that will (1) depend upon the issues that were live at the original hearing, and (2) generally be a matter the first instance tribunal is best placed to assess.

25. In the present case, the key question for the ET was what was the reason for the Claimant's dismissal? That was an issue relevant to each of his claims. That thus required the ET to determine what was the set of facts known to/beliefs held by the decision-taker (here, Mr Zuntz), which had caused him to dismiss the Claimant; see per Cairns LJ in **Abernethy v Mott, Hay & Anderson** [1974] IRLR 213 CA. The focus - whether considering this question in relation to the unfair dismissal claim or as relevant to the discrimination claims - had to be on the subjective mental processes of the decision-taker; to attribute the discrimination or unfairness to the employer, it would need to arise from the decision taken by the individual deputed to carry out the relevant act (here, to take the decision whether or not the Claimant should be dismissed); see **Orr v Milton Keynes Council** [2011] IRLR 317 CA, **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562 CA; **Royal Mail Ltd v Jhuti** [2017] EWCA Civ 1632.

**The Appeal and the Parties' Submissions**

26. The Claimant's appeal was permitted to proceed to this Full Hearing on the following amended grounds (I summarise): (1) that Employment Judge Sherratt erred in law by failing to properly apply the test in **Ladd v Marshall** when refusing the Claimant's application for reconsideration; and (2) erred by failing to consider the three criteria laid down in **Ladd v Marshall** or to provide adequate reasons for his conclusion if he had considered each of the three criteria; and, further (3) had Employment Judge Sherratt properly applied the **Ladd v Marshall** test, he would have found that each of the three criteria were met and that, given the credibility issues arising in this case, the ET might have reached a similar conclusion to that reached by the Crown Court as to Ms Monk's evidence thus making it much more likely that the ET would have accepted the Claimant's case.

27. The Respondent resists the appeal, essentially relying on the reasoning of the ET and contending that Employment Judge Sherratt had permissibly concluded that the interests of justice did not support the application for reconsideration in this instance.

*The Claimant's Case*

28. In addressing me at the oral hearing of his appeal, the Claimant relied on two further documents recording his written submissions and also asked me to have regard to copies of examples of non-work emails that had been found on his account but which evidenced a culture of use of work email for non-work use (other employees having included the Claimant as a recipient to emails relating to personal, non-work matters). Having subsequently had disclosure of these emails, he was thus able to make good his point (part of his case before the ET) that what Ms Monk had seen would have given rise to no particular cause for concern; it could not have been a genuine trigger for Mr Glover to investigate further, not least as the sample emails

showed that Mr Glover was himself included as a recipient and was thus aware of the private use of work email accounts. The Claimant further asked me to take into account his skeleton argument for this hearing and the written submissions he had made at various stages of the ET proceedings. Reserving my Judgment on the appeal to make sure I could fully complete this task, I can confirm that I have done so.

29. Returning to the specific issues raised by the grounds of appeal, the Claimant observes that the Crown Court's finding contradicts what had been said in evidence before the ET by Ms Monk, Mr Glover and Mr Zuntz, all of whom he believed (from recollection) gave evidence on oath that emails had been deleted after 90 days. As he says in his submissions at this hearing: "*Central to my appeal is the issue of the council's credibility or rather lack of it*". He further makes the point that he had asked for disclosure of the emails reviewed by Ms Monk repeatedly in the ET proceedings (no fewer than 17 times) but the Respondent had "*deliberately lied and invented the claimed 90 day deletion policy to avoid disclosing the emails which proved they were lying*", contending that could not have been a mistake - it must have been a deliberate lie.

30. The ET had concluded that Ms Monk and the other witnesses for the Respondent were "credible" but it was now apparent they were anything but. The Crown Court had further recorded that the evidence of the 450 emails apparently uncovered by Ms Monk was also "*simply NOT TRUE*".

31. Notwithstanding those strong criticisms of the Respondent and its witnesses by the Crown Court, in considering the application for reconsideration, the ET had apparently remained of the view that this did not affect its findings, concluding that the new evidence did not meet the second of the tests laid down in **Ladd v Marshall** (there did not seem to be any

real issue that the first and third of the **Ladd v Marshall** criteria were met). Ms Monk's report on the email traffic she had allegedly uncovered had, however, fed into the decision to dismiss - her report having been the catalyst for the further investigation and thus relevant to the Claimant's case before the ET that this was a malicious investigation: Ms Monk and Mr Glover effectively conspiring to look for material which could then lead to the Claimant's dismissal. There were issues of credibility relating to the evidence regarding the 90 day deletion policy and more generally as to the Respondent's conduct in pursuing its investigation against the Claimant.

32. The Claimant further complains that the ET's reasoning was inadequate, the reconsideration application effectively being rejected in a very short four-line paragraph, which had to be contrasted with the very serious findings of the Crown Court.

33. Otherwise the Claimant essentially repeats the points he made before the ET at the Full Merits Hearing in 2011. In doing so, his submissions have taken me through the detailed history that has followed since his dismissal by the Respondent and the various ET, Magistrates' Court and Crown Court proceedings that followed.

*The Respondent's Case*

34. By way of general observation the Respondent makes the point that the ET's discretion whether or not to allow an application for reconsideration is very wide, and that must be particularly so in a case such as this where the Claimant was seeking reconsideration of a Judgment reached some five years previously (albeit that was not a reason provided by Employment Judge Sherratt for refusing the application).

35. Turning to the points raised by the amended grounds of appeal, the Respondent accepted that the first and third conditions laid down by **Ladd v Marshall** were met in this case; the issue was whether Employment Judge Sherratt erred in determining that the second condition was not met. In reaching his decision in this regard, Employment Judge Sherratt had referred back to the earlier refusal of the April 2016 application for reconsideration - refused on 18 May 2016 - "*because the matters that were raised by the claimant did not seem to me to relate to the three reasons for the respondent's decision to dismiss him*" (paragraph 1 of the 16 November 2016 Reconsideration Judgment). In addressing the subsequent application, Employment Judge Sherratt made clear he remained of the view that the findings of the Crown Court did not affect the findings that the Claimant had been fairly dismissed (and not subjected to discrimination) for bringing the Respondent into disrepute, sending 286 personal emails in work time and sending 38 inappropriate emails. Although not expressly citing the second condition of **Ladd v Marshall**, Employment Judge Sherratt had properly directed himself to that aspect of the test and his reason for refusing the application showed he had correctly applied the law, having both considered the relevance of the new evidence and the potential impact on the finding as to the reason for the dismissal.

36. Moreover, it was obviously correct that the existence of the "450 emails" and the lack of a "90 day deletion policy" could not have a bearing on the grounds for dismissal - Employment Judge Sherratt's reasoning that such evidence could not have "an important influence" on the outcome aligning with that of HHJ Richardson in the EAT on the first appeal. Specifically, the emails were irrelevant to the first reason for dismissal (the Claimant's unprofessional conduct in relation to the Aria matter - which had been triggered by a third party complaint). As for the second and third matters, these were objective and admitted: the Claimant *had* sent private/non-work emails in work time and the content of 38 emails had been objectively inappropriate. The

"new evidence" related to the "450 emails" which had been the trigger for the further analysis which had then led to additional disciplinary allegations; those emails did not form part of the disciplinary procedure, were not considered by Mr Zuntz and thus did not constitute the reason for dismissal (see per Cairns LJ in **Abernethy**). Moreover, the ET had found that Mr Zuntz had reached the decision to dismiss alone (paragraphs 160 to 161 of the substantive Judgment) and was not influenced by either Ms Monk or Mr Glover; it had accordingly focussed on Mr Zuntz's actions and decision-making when determining fairness and Employment Judge Sherratt had been entitled to adopt the same approach on the reconsideration application and had reached a permissible conclusion that the "new evidence" would not have had an important influence on the outcome and that it was not in the interests of justice more generally to reconsider the Judgment.

37. The views expressed by HHJ Lever in the Crown Court as to the credibility of Ms Monk and/or Mr Glover were thus irrelevant for the purposes of Employment Judge Sherratt's decision. First, because Employment Judge Sherratt was obviously best placed to consider the credibility of the parties and the potential impact of the new evidence. Second, even taking HHJ Lever's conclusions at their highest and thus assuming that there were grounds to find that Ms Monk and/or Mr Glover had misled the ET and had, moreover, sought to construct a basis for Claimant's dismissal, that would still not have had a potentially important influence on the outcome of the claim: the focus for section 98 purposes was on the reason for dismissal and the disciplinary process that had led to it; the motive of the complainant or the circumstances in which the misconduct was initially identified were not relevant, provided the **Burchell** test was satisfied. It would be wrong in law if an employee, guilty of misconduct, could argue that their dismissal was unfair simply because the misconduct should never have been brought to light in the first place; see **Orr v Milton Keynes** and **Royal Mail v Jhuti**. And that, ultimately, was

the point: even if Ms Monk and/or Mr Glover had been found to have given misleading instructions on the disclosure of the emails (the 90 day deletion policy), any finding as to their credit still could not go anywhere: the emails in question (those seen by Ms Monk) would still have been irrelevant and could not have infected the mind of the decision-taker (Mr Zunzt) as he had had no regard to them (see **Jhuti**, in particular at paragraphs 60 to 62). Even if this was seen as a case concerned with false or misleading evidence (**Jhuti** paragraph 62), it would still be limited to Ms Monk's involvement; at most Mr Glover might be said to have deliberately looked for issues to dismiss on the basis of Ms Monk's false report, but the material he found - which actually led to the decision to dismiss - would not have been impugned.

38. As to the adequacy of reasoning point; this was a decision that met the requirements of Rule 62 **ET Rules 2013** and was "**Meek** compliant" (see **Meek v City of Birmingham District Council** [1987] IRLR 250 CA): Employment Judge Sherratt had identified the issue and had provided brief reasons why he had rejected the Claimant's case on that issue. Given the earlier ET's Judgments and reasoning, the rationale was clearly understandable by the parties and it was obvious why the application had been rejected.

*The Claimant in Reply*

39. In responding to the Respondent's submissions, the Claimant reminded me that Ms Monk and Mr Glover had both specifically said in evidence in the ET (and in the Crown Court) that there were over 450 emails and only three were work related - that had been a deliberate lie. Mr Zunzt may also have given evidence to that effect. Furthermore, all three - Ms Monk, Mr Glover and Mr Zunzt - had said on oath that there was a 90 day deletion policy - so they had all lied about that. As to whether Mr Glover had, or had not, viewed the 450 emails: if he had not (as was suggested) then that would itself suggest he had not acted fairly given that he had

proceeded to carry out an incredibly zealous investigation (as the ET found) and then relied on emails that largely arose from on-going discussions with another employee who was not treated in the same way. Within the internal disciplinary process, Mr Zunzt had refused to let the Claimant ask questions of Ms Monk about whether she had sent private emails. Ultimately he considered that he had been dismissed because the Respondent was deliberately looking for reasons for getting rid of him from the outset and had relied on deliberate lies in justifying the decision to dismiss.

40. As for HHJ Richardson's ruling, that had been made on the basis that special measures had been taken by the police to retrieve the emails seen by Ms Monk (i.e. that may not have been available to the Respondent) but it was now apparent that was not so: from the Crown Court proceedings it was apparent it was simply that the 90 day deletion policy had been false.

41. The new evidence in this regard thus went directly to the credibility of the witnesses: it was not just a statement made by the Respondent's solicitor to the ET, the witnesses had said in evidence, under oath, that there was a 90 day deletion policy.

**Discussion and Conclusions**

42. The appeal before me relates solely to the ET's Reconsideration Decision of 16 November 2016. For the Claimant this is another step in the long-running history of his attempt to reveal the truth of what he considers has been done to him by the Respondent's managers and he inevitably wishes to make me aware of the fuller picture. As he will appreciate, however, my role at this stage of the proceedings is a very limited one; I am concerned only with whether the ET erred in law in refusing the Claimant's third reconsideration application.

A

43. The application in question asked the ET to reconsider its earlier Judgment after a Full Merits Hearing of the Claimant's substantive claims in 2011. The application was made on the basis that there was new evidence in the form of a Crown Court Judgment that raised questions as to the credibility of the Respondent's witnesses and their evidence before the ET. Employment Judge Sherratt was thus concerned with the test laid down in **Ladd v Marshall**. More specifically, it being accepted that the new material upon which the Claimant sought to rely had not been available before and was apparently credible (the first and third conditions laid down in **Ladd v Marshall**), the issue for the ET was that raised by the second condition, that is *whether the new material would probably have an important influence on the result of the case*.

B

C

D

44. Although Employment Judge Sherratt did not set out the three conditions relevant to a new evidence reconsideration application, given only one question was actually in issue, I do not consider it was an error of law for him to omit to refer to that which was irrelevant as not being in dispute (that is, the first and third conditions in **Ladd v Marshall**). As for the second condition, although not expressly identified, I am satisfied that Employment Judge Sherratt had this in mind when considering the Claimant's application; that much is apparent from the reference in the first, fourth and fifth paragraphs, where it is clear that Employment Judge Sherratt was focussed on whether the new material might have any impact upon the original decision. To the extent that the appeal is founded upon a reasons challenge - the failure to set out the relevant test - I am satisfied it discloses no error of law.

E

F

G

45. In any event, in addressing me on his appeal, it is fair to say that the Claimant has kept his focus on the substance of the point at the heart of his challenge, specifically whether Employment Judge Sherratt ought properly to have recognised the potential influence of the

H

new material given that it went to the evidence of the Respondent's witnesses before the ET and to the credibility of those witnesses more generally.

46. As the Respondent has observed, in considering the Claimant's original appeal against the ET's substantive Judgment, HHJ Richardson had previously considered a "new evidence" challenge, in which the Claimant had made a not dissimilar assertion, albeit at that time the Claimant was only able to rely on the disclosure he had received from the police, he did not then have the findings of another Court, reached after hearing evidence from Ms Monk and Mr Glover once that further disclosure was available. Specifically, HHJ Richardson had been concerned that what might be available (after a reasonable search) to an employer might not be the same as that recovered as a result of a police investigation (see paragraph 24 of HHJ Richardson's Judgment); on that basis, he did not consider it appropriate to found a "new evidence" appeal on this material.

47. As the Claimant has pointed out, however, what the Crown Court proceedings went on to identify was that the new evidence did not result from any greater investigation carried out by the police: it could always have been disclosed by the Respondent because there was no 90 day deletion policy and the Respondent would thus always have been able to access the emails in question, contrary to what the Claimant and the ET had been told. It is that further step in uncovering the truth of the position that meant it was open to the Claimant to make this new application for reconsideration: the "new evidence" gave rise to a new issue that went to the credibility of what the ET had been told.

48. The Respondent further objects that, to the extent that the "new evidence" comprised the emails seen by Ms Monk (that being the additional material disclosed by the police), it was

simply irrelevant: those emails had simply been the catalyst for Mr Glover's own investigation of the Claimant's email account, they formed no part of the decision to dismiss. Moreover, as HHJ Richardson had previously identified, the Claimant was simply wrong in his characterisation of what Ms Monk had said; as her email to Mr Glover had made clear, she had not said there were 450 problem emails or that all but three were non-work related. Ultimately the picture created by the new material (the actual emails) did not undermine Ms Monk's report in any material way.

49. If the point the Claimant was seeking to make in his third reconsideration application was simply that the Ms Monk's report was undermined by the emails that had now been disclosed to him then I would agree with the Respondent - that point would already have been answered by HHJ Richardson's Judgment. That, however, was not how the application was being put: the position had since moved on and, given the Crown Court's Judgment, the Claimant was not seeking to rely simply on the fact that the picture created by Ms Monk's email to Mr Glover was not corroborated by the emails (although he still contended that was obviously the case). Given the findings made by the Crown Court, the Claimant was now making the new point that Ms Monk and Mr Glover had allowed the ET to be misled as to the availability of the emails, apparently allowing it to proceed on the understanding that there was a 90 deletion policy when that was not true. On the basis of that new material, the question for the ET was whether, if *that* information had been available at the Full Merits Hearing, that would probably have had an important influence on the result such that it would be in the interests of justice to reconsider the decision?

50. For the Respondent is contended that in answering that question the ET would have been bound to find that it was, in any event, not in the interests of justice to reconsider a

decision reached some five years previously. Again, I am unable to accept that submission. First, because, given the seriousness of the findings of the Crown Court, I am not at all sure that it would have been appropriate to find that mere delay tipped the balance in this case. In any event, however, the simple answer to the point is that this was not relied on by Employment Judge Sherratt as a reason for his decision.

51. Returning then to the issue Employment Judge Sherratt had to consider, the new material relied on by the Claimant - taken at its highest - raised the question whether Ms Monk and Mr Glover had sought to mislead it in terms of the 90 day deletion policy. That was a potentially serious matter (allowing for the explanation given of a misunderstanding arising from "*chinese whispers*" in giving instructions, apparently not accepted by the Crown Court). It might seem to raise the question why the ET had been misled in this way - whether that might suggest that there was, after all, something in the Claimant's conspiracy allegation. Allowing that this might be a permissible inference from the Crown Court's Judgment, did Employment Judge Sherratt err in failing to see that this had the potential to have an important influence on the ET's decision?

52. At this point, it is necessary to return to the issue at the heart of the ET's substantive Judgment in 2011. Key to its decision was its determination of the reason for the Claimant's dismissal; that went to the unfair dismissal claim and to the various complaints of unlawful discrimination. Notwithstanding certain criticisms of Mr Glover's investigation, the ET was satisfied that the dismissal of the Claimant was for a fair reason. In reaching that conclusion, the ET focussed on the mental processes of the decision-taker, Mr Zuntz (see paragraph 160 of its substantive Judgment): it had heard from Mr Zuntz itself and was satisfied that he had had an open mind, had listened to the evidence and made his decisions on it, his decision having

A been based on his reasonable belief in the guilt of the Claimant in respect of three of the six allegations against him. There was nothing to suggest that Mr Zuntz had had regard to the emails seen by Ms Monk or to her report to Mr Glover; he was concerned with the matters that formed the six disciplinary charges and they did not include the matters raised by Ms Monk. The question is, therefore, whether Employment Judge Sherratt erred in concluding that the new material - the Crown Court Judgment – would not have an important influence upon the ET's substantive Judgment given those findings?

B

C

53. For completeness, I should further observe that, although, in oral submissions on this appeal, the Claimant suggested that Mr Zuntz might also have given evidence about the non-availability of the emails seen by Ms Monk (and I make clear that the Claimant was not suggesting he had a definite recollection in this respect, it was something he thought he could recall), that is not something that can be derived from the Crown Court's Judgment and I cannot see that the ET could be said to have erred by not having regard to that possibility. The credibility issue raised by the Crown Court's Judgment could, therefore, only reach to Ms Monk and Mr Glover; there was no basis for thinking that it extended to Mr Zuntz.

D

E

F

54. Allowing for that difficulty, might it not be said that Mr Zuntz's decision was nevertheless potentially tainted by the earlier involvement of Ms Monk and/or Mr Glover, whose evidence could be seen as thrown into question by the Crown Court's Judgment? The answer to that question is, however, made apparent by the cases of **Orr v Milton Keynes Council** [2011] IRLR 317 CA; **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562 CA; and **Royal Mail Ltd v Jhuti** [2017] EWCA Civ 1632: the relevant decision-taker in this case was Mr Zuntz and there was nothing to taint his decision with anything untoward on the part of Mr Glover or Ms Monk. And that would remain the position even if the Claimant's conspiracy

G

H

case relating to Ms Monk and Mr Glover was taken to be made out (given the additional substance that might be derived from the Crown Court's Judgment): given that the evidence still did not demonstrate that either conspirator had responsibility for the decision to dismiss, the new material could not have an important influence on the ET's decision. Although there might be cases where another manager has essentially participated in the findings of fact relied on for the dismissal, such that responsibility for the decision can be seen to be shared (see paragraph 62 **Jhuti**), that possibility does not arise on the ET's findings of fact in the present proceedings. Here, even if Mr Glover were to be attributed with the dishonest intent that the Claimant contends he possessed (and, again, assuming that to have received some support in the new material provided by the Crown Court's Judgment), he was not making the relevant findings of fact or assessment of those findings - those matters were, and remained, the responsibility of Mr Zuntz. Moreover, the matters relied on by Mr Zuntz for his decision were not really in dispute: there had been a complaint by Aria concerning the Claimant's conduct and Mr Zuntz was entitled to find that this had brought the Respondent into disrepute; the Claimant had sent 286 emails of a personal nature between 2 January and 18 March 2009 (not the emails considered by Ms Monk) and during that period he had sent 38 emails that Mr Zuntz considered were of an inappropriate nature. Whether or not it was appropriate to find that these constituted acts of gross misconduct and to decide that the Claimant should be dismissed for these matters, the ET's earlier Judgment in these respects was not put into question by the new material.

55. Having thus tried to test how the new material, taken at its highest, might impact upon the ET's substantive Judgment, I am unable to see it can be said that Employment Judge Sherratt erred in concluding that the matters raised could not impact upon the ET's findings. That is not to say that I do not see the significance of the points made in the Crown Court's Judgment: if there was a deliberate attempt to mislead the ET on the Claimant's discovery

A applications that was a serious matter and it is understandable why the Crown Court considered this meant that the Claimant's earlier conviction should be overturned. Ultimately, however, whatever the real reason for the reference to an apparently fictitious 90-day email deletion policy, those points could not have an important influence on the ET's Judgment and Employment Judge Sherratt - who was obviously best placed to make this assessment - did not err in so concluding.

B

C

56. For all those reasons, I am bound to dismiss this appeal.

D

E

F

G

H