EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/114070/2007

Heard in Glasgow on 7 March 2018

Employment Judge: Lucy Wiseman
Members: Peter Denheen
Vernon Alexander

Ms Fiona McBride — **Claimant**
Represented by:
Mr C MacNeill
Queens Counsel

Scottish Police Authority — **Respondent**
Represented by:
Mr A Delaney
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal having reconsidered the Judgment dated 22 December 2017 in respect of the sum of compensation awarded to the claimant, decided to confirm the Judgment

REASONS

1. The Tribunal, by Judgment dated 22 December 2017, decided the respondent had not shown it was not practicable, in terms of Section 117(4)(a) Employment Rights Act, to reinstate the claimant on the 27 February 2017. The Tribunal ordered the respondent to pay to the claimant compensation in the sum of £415,227.

2. The respondent, by letter of 5 January 2018, applied for a reconsideration of the Judgment, in respect of the sum of compensation awarded to the claimant, which, it was said, had been calculated on the basis of figures which were not accurate in respect of loss of earnings and pension loss.

3. The Hearing today was to consider and determine the respondent's application for reconsideration.

4. We heard submissions from both representatives. We were also provided with an Affidavit prepared by Ms Amy McDonald, the respondent's 2026 Forensics Modernisation Programme Manager who, at the time of these proceedings, was the Director of Financial Accountability. The claimant's representative agreed the Affidavit as being Ms McDonald's evidence in chief, and confirmed they had no cross examination.

Background

5. The Tribunal considered it helpful to set out the background and context of the application for reconsideration because this case has a very lengthy history. The original Hearing to determine the claim of unfair dismissal took place in September/October 2008, with the Judgment being issued to parties on the 26 January 2009. The Tribunal ordered reinstatement of the claimant. The respondent successfully appealed the decision to reinstate to the Employment Appeal Tribunal. The claimant thereafter appealed to the Inner House of the Court of Session and the Supreme Court. The Supreme Court upheld the decision of the Employment Tribunal to reinstate the claimant and remitted the case to the Employment Tribunal.

6. The Employment Tribunal decided, by Judgment dated 24 January 2017, to vary the date of the order for reinstatement from the 27 February 2009 to the 27 February 2017.

7. The respondent did not reinstate the claimant and a Hearing to determine the practicability of the respondent complying with the order for reinstatement took place in August/September 2017.

8. The representatives undertook extensive work prior to the Hearing regarding practicability, in respect of the preparation of figures to be used regarding the calculation of the amount in terms of Section 114(2)(a) Employment Rights Act, the additional award and compensation. The representatives confirmed, during submissions, that the principles to be applied regarding the calculation of compensation had been agreed, although not all of the figures had been agreed. Mr MacNeill noted in his submission which figures had been agreed and stated (paragraph 150 of the Judgment) *"the representatives had broadly agreed the figures subject to three areas of dispute"* which related to whether the figures should be gross or net and whether Jobseekers Allowance should be deducted. Mr Napier did not dispute this and confirmed the respondent would finalise their figures after the submissions. There was no indication, at this time, that anything other than an arithmetical calculation was being done with a view to agreeing figures. There was no suggestion that significantly lower figures may be produced by the respondent.

9. The respondent's representative emailed the claimant's representative on 5 September (the day after the Hearing had concluded) setting out their version of the figures and asserting an error had been made because an "*incorrect salary scale had been used*". The respondent provided revised figures for Section 114(2)(a) and pension contributions. The respondent's representative invited the claimant's representative to agree the figures. The email was copied to the Tribunal for information.

10. The claimant's representative responded the following day (copied to the Tribunal) in terms that the respondent was now trying to raise matters beyond the scope of what was agreed and were trying to rewrite their own figures. The claimant's representative noted the respondent had provided salary figures to them over a year ago and had asked the claimant to agree them, and she had. The claimant's representative confirmed both parties had

proceeded on the basis of the figures produced by the respondent and agreed by them. It was said that attempting now, after the close of the Hearing, to revise the salary figures was simply too late.

11. The respondent's representative emailed the Tribunal on 6 September apologising for the *"error"* coming to light at this late stage and inviting the Tribunal to accept the figures now provided.

12. The correspondence was acknowledged.

13. The Tribunal subsequently issued its Judgment and used the figures provided by the claimant's representative.

Findings of fact

14. The respondent did not dispute the evidence of Ms McDonald as set out in the Affidavit produced for the Tribunal. We made the following material findings of fact based on the Affidavit.

15. Ms McDonald, was, at the time of these events, employed by the respondent as Director of Financial Accountability. The task of producing the salary information relevant to the period 2008 – 2017 was delegated to Ms McDonald's team.

16. The initial information was produced in 2016, but from July 2017 onwards a great deal of focus went in to producing and updating the loss of earnings and pension spreadsheets. Emails were exchanged regarding the calculations, tax and an actuarial pension calculation produced by the claimant. There was a great deal of scrutiny in relation to the calculations, but no-one in the respondent's organisation thought to check the original figures upon which the calculations were based.

17. The claimant's solicitor raised a query with the respondent's solicitor late on 3 September, regarding the claimant's salary figure for 2007. The

respondent's solicitor forwarded the email to Ms McDonald on the morning of 4 September.

18. Ms McDonald was unable to reconcile the salary figures given on the original calculations within the spreadsheet and concluded the previously given salary and pension calculations being used by the representatives were wrong.

19. Ms McDonald undertook an immediate recalculation based on spinal column point 32. Ms McDonald provided updated recalculations by lunchtime on 4 September, with a final spreadsheet being provided at 16.08 on 5 September.

20. Ms McDonald was unable to say why the original figures provided were wrong. She could "*only guess*" how the mistake might have been made, and surmised that "*possibly"* a team member, rather than looking at the actual spinal column point for each year, looked at an equivalent comparator and *"perhaps"* used figures for someone who worked overtime, and inadvertently included overtime in the original calculation.

Respondent's submission

21. Mr Delaney commenced his submission by outlining the legal test to be applied to applications for reconsideration. He referred to rules 70 – 73 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) and to the sole ground of reconsideration being "*where it is in the interests of justice to do so".* Mr Delaney referred to the previous Rules and the additional grounds for review which had included where new evidence had become available since the conclusion of the hearing, provided that its existence could not have been reasonably known or foreseen at that time. Mr Delaney noted that whilst the four grounds had been superseded by the "*interests of justice*" test, it was accepted and understood their circumstances would now fall within that ground.

22. Mr Delaney confirmed the respondent's application for reconsideration was based on there being fresh evidence, and that it would be in the interests of justice to allow the application for reconsideration because the wrong figures had been used to calculate compensation and the claimant should not benefit from this.

23. Mr Delaney referred to the case of ***Outasight VB Ltd v Brown UKEATS/02531/14*** where the EAT held an Employment Tribunal had wrongly considered that it now had a wider discretion under the 2013 Rules than it had before, in relation to new evidence. The EAT said the same basic principles would apply. In relation to new evidence it was stated:

> *" .. as to an application for fresh evidence after the determination of a case, the approach laid down by* ***Ladd v Marshall*** *will, in most cases, encapsulate that which is meant by "the interests of justice". It provides a consistent approach across the civil courts and the EAT. Should a different approach be adopted because the principles of Ladd v Marshall are no longer set out expressly in the Rules? I do not think so. Those principles set down the relevant questions in most cases where judicial discretion has to be exercised upon an application to admit fresh evidence in the interests of justice."*

24. Mr Delaney invited the Tribunal to note the EAT went on to state, at paragraph 50, that the interests of justice might on occasion permit new evidence to be adduced where the requirements of *Ladd v Marshall* are not strictly met, but this did not represent a change to the position under the previous rules. The EAT referred to this as a residual category which had been recognised in cases such as **Flint v Eastern Electricity Board [1975] ICR 395** and **General Council of British Shipping v Deria [1985] ICR 198*.***

25. Mr Delaney referred the Tribunal to the thee conditions set out by Denning LJ in ***Ladd v Marshall*** in relation to the use of fresh evidence:-

> *" .. to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at that trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumed to be believed, or in other words, it must be apparently credible though it need not be incontrovertible."*

26. Mr Delaney referred to the ***Flint*** case where it was said (in relation to what circumstances might fall outside the previous version of the rules, but be required in the interests of justice) that there would have to be "*some other circumstances, some mitigating factor, to make it that the interests of justice require such a review".* Mr Delaney noted there was reference to the interests of the employee and the employer being relevant, and to the fact proceedings should be as final as possible and it should only be in unusual cases that a party was able to have a second bite of the cherry. Further, in the ***Deria*** case where it was said that a review should only be granted where there was some circumstance or mitigating factor which related to the failure to present evidence.

27. Mr Delaney submitted the EAT in ***Outasight*** pulled the three stands set out above together and the position was either that the principles of ***Ladd v Marshall*** were satisfied, or the circumstances must fall into the residual category recognised by ***Flint*** where the interests of justice otherwise require a review.

28. Mr Delaney submitted the principles of ***Ladd v Marshall*** were satisfied in this case, albeit he recognised a potential difficulty for the respondent related to the issue of whether the evidence could not have been obtained using reasonable diligence. He referred to the affidavit of Ms McDonald and

submitted a reasonable explanation had been provided why the new evidence had not been placed before the Employment Tribunal before the end of the Hearing. He referred to the explanation that the schedule of loss previously put forward by the respondent contained a factual error specifically in relation to the claimant's salary figures given for the years 2007 – 2016 being incorrect and not placing the claimant at the correct spinal column point (32) for the role of Reporting Officer within Fingerprints. This was a mistake based on human error when entering salary information into an Excel spreadsheet.

29. The respondent acknowledged and accepted the error could have been noticed at an earlier stage, and Ms McDonald felt she ought to have picked it up earlier. However, reasonable diligence was being taken by the respondent and indeed a great deal of focus and attention was placed on certain aspects of the schedule of loss including the gross and net pay calculations, tax treatment and pension aspects. The schedule of loss had been very complicated in nature and contained a significant amount of information. The underlying problem was that the input data for salary figures were not double checked by the respondent against the correct spinal column point for the claimant's basic salary for the relevant years. Further, the error was not such that any reasonable person would have spotted it.

30. Mr Delany submitted the concept of reasonable diligence allowed for an honest mistake and the correction of incorrect and inaccurate figures. This error went unnoticed by both parties and their representatives until an email from the claimant's solicitor on the Sunday evening before the final day of the Hearing led the respondent to manually check the figures. It was submitted that the concept of reasonable diligence should not be stretched to allow no scope for errors to be made.

31. This was not, it was suggested, a situation where the respondent was seeking to have a second bite at the cherry.

32. Mr Delaney submitted that had a factual error been known and accepted by the Employment Tribunal, it would have used the revised figures in this case, and this would have had an important effect on the case because compensation would have been awarded on the basis of the factually correct figures. He invited the Tribunal to accept Ms McDonald's evidence as credible.

33. Ms McDonald believed the original figures had been provided in error, and that the most likely explanation was the person delegated with the task of providing the information had looked at an equivalent officer in the role and had perhaps used figures for someone who worked a lot of overtime. Overtime is not contractual and not pensionable. So even if the claimant had worked the same level of overtime, the pension loss sum would still have to be adjusted.

34. Mr Delaney submitted that should the Tribunal not accept that the ***Ladd v Marshall*** test had been satisfied, there were other circumstances and/or mitigating factors justifying the reconsideration application. The error was picked up on the last day of the Hearing, and Ms McDonald gave priority to recalculating the salary loss and pension loss. She provided a final spreadsheet on 5 September and it was thereafter promptly provided to the claimant and the Tribunal. She could not reasonably have done more to rectify the matter once it was noticed. It was submitted that, taking into account the position of the parties, the interests of justice required reconsideration. The respondent is a public authority with a statutory duty to secure best value in its use of public funds. Further, the claimant would benefit from a windfall if there was no reconsideration.

35. Mr Delaney referred to the correspondence from the respondent's representative to the Tribunal on 6 September, and noted there had been no reference to this in the Tribunal's judgment. He invited the Tribunal to allow the application for reconsideration and to reduce the sum in respect of Section 114(2)(a) by £47,519 in respect of salary loss and £8,398 in respect of pension loss. This would be a total reduction of £55,817 to the Section

114(2)(a) which would result in the compensation payable being a sum of £359,410 rather than £415,227.

Claimant's submissions

36. Mr MacNeill invited the Tribunal to refuse the application for reconsideration because (i) the test regarding fresh evidence had not been met; (ii) in light of the fact the figures had been largely agreed, it was too late to make changes and (iii) if the Tribunal accepted Ms McDonald's evidence, there was nothing to say the new figures were any more correct than the old ones.

37. Mr MacNeill, before dealing with these three points, invited the Tribunal to have regard to the background to this matter. He noted figures had first been produced for the Preliminary Hearing on 22 September 2016, when the respondent sought to argue the date of reinstatement should not be varied. The date of reinstatement was varied, and preparations began for the full hearing regarding practicability.

38. Mr MacNeill referred to the extensive email correspondence between the claimant and respondent's representative regarding the information required to make calculations. On page 21 of the productions for this Hearing, the claimant's representative made clear that he required a schedule setting out every benefit the claimant would have received (including arrears of pay) for the period 1 May 2007 until 27 February 2017. He also made clear that in order to make sense of the tables the respondent had produced, he would require an explanation of the figures. The respondent had, in response (page 29) sent a mass of figures with no explanation how these related to the figures on previous pages.

39. Mr MacNeill expressly invited the Tribunal to have regard to the fact that no-where in the submissions today, or in the affidavit of Ms McDonald, was there an explanation why the error had not been picked up when the figures had been produced for September 2017 and updated for the Hearing.

40. The Tribunal was also invited to have regard to further emails from the claimant's representative (page 31/32) seeking clarification regarding how the figures produced by the respondent had been arrived at, and the attitude of the respondent that having produced the figures, it was for the claimant to do the calculation. The respondent pressed the claimant to agree the figures (page 41), and ultimately she did so. On page 39 the claimant's representative informed the Tribunal that:-

> *"The respondents provided the claimant with income figures for the position of reporting fingerprint officer. We attach the figures. The claimant's position is that the reporting fingerprint officer rates of pay and benefits reflect the rates of pay and benefits which she would have received were it not for the unfair dismissal. Please note that the figures in the attached are as provided to us by the respondent. We are not in a position to be able to check that the underlying figures are correct and have to simply take the figures as they are."*

41. Mr MacNeill submitted that, in effect, there was an agreement that these were the correct figures. He referred to the respondent's email dated 8 August 2017 (page 43) where the respondent's representative stated:-

> *"You will appreciate that we are not able to accept that your client would have continued as a RFE after reorganisation, but I don't think there is any dispute that, on a hypothetical basis, these are the figures which would be relevant, should the Tribunal make a finding to this effect."*

42. The figures were included in the joint bundle for the Hearing. There were ongoing discussions, not in relation to the figures themselves, but to agree how the figures should be treated (for example, gross or net).

43. The claimant's representative noted, on the Sunday prior to submissions on the Monday, that her salary figure for 2007/08 was lower than her salary noted for 2007. He emailed the respondent's representative to query this

(page 48). Mr MacNeill had noted the respondent's representative, in submissions, referred to an arithmetic calculation being underway; that any figure had to be agreed by the CEO and there was a move towards agreement. On the following day (5 September) new figures were produced for the first time, and no opportunity had been given for the claimant to seek clarification or explanation for the figures. Mr MacNeill invited the Tribunal to look at the respondent's email of the 5 September (page 4) where it was stated that *"I am advised that due to human error the original amounts were calculated incorrectly as an incorrect salary scale was used."* The affidavit produced today by the respondent does not say this; nor does the letter dated 5th January making the application for reconsideration and neither did the respondent's submissions today. If the affidavit is to be believed, the error related to including overtime in basic pay, whereas the application and the respondent's submission today relate to the wrong spinal column point. Mr MacNeill submitted the respondent had given a very muddled explanation.

44. The application for reconsideration proceeded on the basis there is fresh evidence for the Tribunal to consider. Mr MacNeill took no issue with the law as referred to by Mr Delaney. The EAT in ***Outasight*** had endorsed ***Ladd v Marshall***. Mr MacNeill submitted there was no question in this case that all the data the respondent required was in their possession. This is not a case where the respondent could not have known of the information: they had all of the wages information and details. In ***Flint*** the respondent had possession of the evidence and this was fatal to the application. In ***Deria*** it was held there must be something specific why the evidence was not presented. Mr MacNeill noted the respondent's position regarding public funds, but submitted this plea was hollow because, apart from the calamitous decision to appeal the order for reinstatement rather than face the consequences, Mr Nelson had told the Tribunal that money was no object in preventing the claimant from returning to work.

45. The position was this: the respondent had all of the information, they presented it and the claimant accepted it.

46. The affidavit of Ms McDonald, at paragraphs 22 – 25 referred to there being a great deal of scrutiny of the figures over a period of time. Ms McDonald delegated the function of collecting the information and assumed the person had got it right. There was no checking of the figures before they were produced for the claimant and the Tribunal, and the claimant was pressured into accepting and agreeing the figures were accurate.

47. Mr MacNeill noted this was not an application by the respondent to open up the Hearing to allow for evidence to be led and challenged. This was a bold application to have the Tribunal accept evidence as fact, when it had not been tested, in place of evidence which had been discussed and agreed by the parties. Mr MacNeill invited the parties not to entertain such an application.

48. Mr MacNeill, in relation to the second ground (above) noted figures had been produced by the respondent and discussions had proceeded on that basis. The pension contributions had been agreed, and the basic award and the compensatory award if the cap applied was agreed as being 52 weeks times a weeks' pay. The claimant's actuarial report had been prepared on the basis of the figures provided by the respondent. It was only after the conclusion of the Hearing that lower figures had been produced. It was submitted that it could not be said to be in the interests of justice to require a revisiting of the award.

49. Finally, Mr MacNeill disputed the description of the old figures as "*wrong"* and the new figures as "*correct*". Ms McDonald, in paragraph 27 of the Affidavit, could "*only guess*" at how the error occurred and explained what "*possibly*" may have happened. Further, and crucially, at paragraph 30 Ms McDonald referred to calculations for loss of earnings. However, it was not the compensatory award which was being reviewed. The figure used in Section 114(2)(a) includes any benefit which the complainant might reasonably have expected to have had but for the dismissal (including arrears of pay). It was submitted the term "*any benefit*" was not restricted to arrears of pay, but could include overtime. Accordingly, if as Ms McDonald suggested, the figures were produced by comparison, there was no reason to say they were incorrect

because overtime could reasonably have been included in calculating Section 114(2)(a).

50. Mr MacNeill invited the Tribunal to refuse the application for reconsideration.

Discussion and Decision

51. We had regard to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) and to rules 70 – 72 which set out the rules governing reconsideration of judgments. The rules provide as follows:

> *"70 Principles*
>
> *A Tribunal may, either on its own initiative .. 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.*
>
> *71 Application*
>
> *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties, or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*
>
> *72 Process*
>
> *(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable*

prospect of the original decision being varied or revoked .. the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other party and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing ….."

52. We also had regard to the case authorities to which we were referred. We noted there was no dispute between the representatives regarding the position that it was generally accepted that the "*interests of justice*" was broad enough to embrace the grounds for review set out in the previous 2004 Rules and which included that new evidence had become available. There was also no dispute regarding the public policy principle that there should be finality in litigation and that the "*interests of justice*" have to be seen from both sides.

53. The 2004 Rules (rule 43(3)(d)) provided a ground for review if "*new evidence had become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time."* This provision reflected the principles for admission of new evidence on appeal set down by the Court of Appeal in ***Ladd v Marshall [1954] All ER 745*** where it was held that leave to produce new evidence will only be granted (i) if it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (ii) if the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive and (iii) if the evidence is such as is presumably to be believed.

54. In ***Flint v Eastern Electricity Board [1975] ICR 395*** it was held that the application to review must fail because the evidence sought to be produced

had been within the knowledge of the employee at the time of the original hearing and was not introduced at that stage.

55. In ***General Council of British Shipping v Deria [1985] ICR 198*** the EAT held a review based on there being new evidence should only be granted where there was some mitigating factor relating to the failure to produce evidence in the first place.

56. In ***Outasight VB Ltd v Brown*** (above) the employee lost his claim for wrongful dismissal/breach of contract, and applied for a reconsideration of the Judgment on the basis he wished to produce fresh evidence. The evidence related to the earlier criminal conviction (for offences of dishonesty) of the respondent's sole witness and director. The EAT held the Employment Tribunal had erred in taking the position that the 2013 Rules gave a broader discretion to admit new evidence. It was stated that:-

> *"The approach laid down in **Ladd v Marshall** would in most cases encapsulate what is meant by "the interests of justice". It provided a consistent approach across the civil courts and laid down the test applied in the Employment Appeal Tribunal. Simply because those principles are no longer expressly set out within the Employment Tribunal Rules did not mean that they no longer had any relevance when determining the interests of justice.*
>
> *There might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles laid down in **Ladd v Marshall** were not strictly met. Employment Tribunals had, however, always had the ability to review Judgments where it was in the interests of justice to do so. That power was recognised as allowing for a residual category of case (see **Flint v Eastern Electricity Board**) and could permit fresh evidence to be adduced in circumstances where the requirements of paragraph (d) were not strictly met (**Flint; General Council of British Shipping v Deria**). Such cases might include those where there was some additional factor or mitigating*

*circumstances which meant that the evidence in question could not be obtained with reasonable diligence at an earlier stage (**Deria**). ….*

*Applying the interests of justice test, there was no reason why the principles laid down in **Ladd v Marshall** should not apply to this case."*

57. The respondent sought reconsideration of the Judgment dated 22 December 2017, in respect of the sum of compensation awarded to the claimant, which – they submitted – had been calculated based on figures which were not accurate in respect of loss of earnings and pension loss. The basis of the application for reconsideration was (a) new evidence had become available and/or (b) there were mitigating circumstances relating to the failure to present evidence which rendered it in the interests of justice to reconsider the Judgment.

58. We firstly considered the respondent's submission that new evidence had become available. The three conditions which must be fulfilled to justify the reception of fresh evidence are as set out in ***Ladd v Marshall*** above. The first condition is that it must be shown the evidence could not have been obtained with reasonable diligence for use at the hearing. Mr Delaney recognised this presented a potential difficulty for the respondent in circumstances where they, and only they, held all of the relevant information required in respect of earnings and pension. Mr Delaney sought to resolve that difficulty by focusing on "*reasonable diligence*".

59. We considered the first material fact (which was not in dispute) to be that it was the respondent in this case who held all of the information regarding earnings, pay and benefits. The information the respondent now seeks to introduce as "*fresh*" evidence, was in their possession and within their knowledge at all times.

60. The claimant could not, without information being provided by the respondent, have calculated the amount to be specified in terms of Section 114(2)(a) Employment Rights Act, pension loss or compensation. The parties'

representatives were encouraged by the Tribunal to try to agree the figures for the final hearing. The emails to which this Tribunal was referred today indicate figures were provided by the respondent's representative to the claimant's representative prior to the hearing in September 2016. The email from the claimant's representative dated 27 June 2017 (page 21) not only requested an up-to-date schedule setting out every benefit the claimant would have received (including arrears of pay) for the period 1 May 2007 to 27 February 2017, but also an explanation of the figures provided by the respondent.

61. We do not know whether the explanation requested by the claimant's solicitor was provided by the respondent, but a perusal of the emails produced for this hearing suggested it had not been provided. We referred for example, to the email of 27 July 2017 (page 39) from the claimant's representative to the Employment Tribunal where it was noted the respondent had provided the claimant with income figures, but confirmed "*We are not in a position to be able to check that the underlying figures are correct and have to simply take the figures as they are."* We accepted Mr MacNeill's submission that the approach of the respondent appeared to have been to provide a "*data dump*" of information and leave the claimant's representative to do the calculations. We considered that if the respondent had provided the explanation sought by the claimant's representative and/or provided information to allow the claimant's representative to check the underlying figures, it would have allowed such issues as there might have been regarding accuracy to come to light.

62. We considered the second material fact to be that the respondent had ample opportunity to revise, scrutinise and/or revisit the figures in the period September 2016 to September 2017. There were, throughout this period, not only exchanges of information, but discussions between representatives and senior Counsel. We noted that no-where in the affidavit of Ms McDonald or in the submissions of Mr Delaney, was there an explanation why the "*error*" was not picked up during this scrutiny.

63. Mr Delaney invited the Tribunal to accept the respondent had exercised reasonable diligence, but that the "*error*" was simply not noticed. Mr Delaney, in his submission, told the Tribunal a factual error had occurred regarding the claimant's salary figure for the years 2007 – 2017 and not placing the claimant on the correct spinal column point. Ms McDonald, in her affidavit witness evidence, confirmed that *"when we were asked to produce calculations I delegated this within the team. I had no reason to expect the figures then produced would have been inaccurate."* The language used by Ms McDonald suggested no checking was carried out to ensure the accuracy of the figures provided, notwithstanding the fact there was potentially liability for an exceptionally large award of money. Further, Ms McDonald, in preparing her affidavit, appeared to have made no investigations to try to learn/understand how an error had been made.

64. The respondent's position was simply that an error was made at an early stage; the error could not have been noticed earlier but that did not mean reasonable diligence was not being exercised. We could not accept Mr Delaney's submission because it was evident any error could, with reasonable diligence, have been noticed at any point when the calculations were being done or scrutinised. The pay scales (spinal column points) were in the possession of the respondent and the respondent's representative and were available to review at any time.

65. We decided, having had regard to the above points, that the information the respondent wished to introduce as fresh evidence, was not fresh evidence. It was evidence within the respondent's possession and knowledge at all times and it was information which could have been produced with reasonable diligence. The respondent had ample time and opportunity to review, revise and scrutinise the information. The respondent also could have complied with the requests from the claimant's representative for an explanation of their figures, or to provide information to allow him to check the underlying figures, but they chose not to do so.

66. The second and third conditions set out in ***Ladd v Marshall*** are considered below.

67. We next turned to consider whether it would be in the interests of justice to allow the respondent's application for reconsideration and whether there were any mitigating or additional factors which meant the evidence in question could not be obtained with reasonable diligence at an earlier stage.

68. Mr Delaney suggested the mistake was one of human error when entering salary loss information into an Excel spreadsheet. He suggested reasonable diligence had been exercised by the respondent but the erroneous figures were not such that any reasonable person looking at them would have spotted the error. The issue, essentially, was that notwithstanding the level of scrutiny regarding the figures and calculations, no-one from the respondent organisation double checked the basic information. We did not consider this was a mitigating or additional factor which meant the evidence could not have been obtained with reasonable diligence. This was a case where the respondent held all of the information: the onus was on them to provide the information to allow the calculations to be made and we considered it not unreasonable to expect the respondent to check the accuracy of the information being provided, particularly in circumstances where it was being provided for the purposes of lengthy and contentious litigation. The respondent could, at any time, have revisited the accuracy of the information they had provided. Indeed, Ms McDonald stated (paragraph 22 of her affidavit) that she "*couldn't help feeling it should have been picked up at an earlier stage"*.

69. We concluded the respondent did not exercise reasonable diligence when providing the information to the respondent's representative. The figures could have been checked at that stage and/or subsequently for accuracy. The respondent failed to do so.

70. We next considered the respondent's explanation for the error. Mr Delaney, in the application for reconsideration (page 1) referred to inaccurate figures

within the Schedule of Loss produced by the respondent and stated, *"we understand this arose from the claimant having been placed at the wrong spinal column point."* Mr Delaney's submission also referred (three times) to the claimant not having been placed on the correct spinal column point. However, Ms McDonald, in her affidavit, stated:-

> *"I am unable to explain why the original incorrect figures were higher than they should have been as I didn't compile them. .. I can only guess as to how the mistake might have been made. Possibly what happened was the team member rather than looking at the actual spinal column points for each year instead looked at an equivalent officer in the role and using figures perhaps for someone who worked a lot of overtime, and inadvertently included that overtime mistakenly within the original calculations. It is the only logical explanation I can think of."*

71. Mr Delaney's submission explained the respondent's position was that the error had occurred because the respondent had placed the claimant on the wrong spinal column point. However, that submission was not supported by the evidence of Ms McDonald. Ms McDonald's position was (i) she did not know why the original figures were higher than they should have been; (ii) she could only guess at an explanation and (iii) it was possibly explained by someone using a comparative approach rather than using the spinal column points. The respondent's explanation was muddled and confused and left the Tribunal in the position of not knowing or understanding why an error may have occurred.

72. We accepted Mr MacNeill's submission that Ms McDonald's affidavit evidence focussed on the calculation of loss of earnings (paragraph 30) and her position that it would not have been appropriate to include overtime within the calculation of loss of earnings. The terms of Section 114(2)(a) Employment Rights Act refer to *"any amount payable by the employer in respect of any benefit which the complainant might reasonably have been expected to have had but for dismissal (including arrears of pay) for the period*

between the date of termination and the date of reinstatement". We accepted the terms of Section 114(2)(a) are not limited to the loss of basic pay and can include overtime. Accordingly, if the figures produced by the respondent were, as suggested by Ms McDonald, produced by comparison, there was no reason to say this was wrong because the claimant often worked overtime and this could reasonably have been included in Section 114(2)(a).

73. We next had regard to the fact certain financial aspects were agreed between the parties. The email from the claimant's representative to the Employment Tribunal on 27 July 2017 (page 39) noted the parties had been asked by the Tribunal, at a preliminary hearing on 28 June 2017, to calculate the amount payable in terms of Section 114(2)(a) Employment Rights Act. The claimant's representative confirmed the respondent had provided the claimant with income figures for the position of Reporting Fingerprint Officer. He confirmed that the claimant's position was that the Reporting Fingerprint Officer rates of pay and benefits reflect the rates of pay and benefits which she would have received were it not for the unfair dismissal. We accepted the submission of Mr MacNeill that there was, in effect, agreement that the figures provided were the correct figures.

74. We further noted the respondent's pension contributions, the basic award and the compensatory award (if the cap applied) were agreed. In addition to this the actuarial report obtained by the claimant had been prepared on the basis of the figures provided by the respondent.

75. We referred above (in the section entitled Background) to the fact that on the day of submissions the respondent's representative confirmed the respondent would finalise their figures after submissions and provide them to the Tribunal the following day. There was no indication at this stage that the respondent's figures would be significantly different/lower than the figures which had been provided by the claimant's representative (based on the information provided by the respondent).

76. There was no application to delay submissions until the respondent's figures had been provided, and no application for evidence to be heard to explain the respondent's position/figures. The respondent's revised figures were provided to the claimant's representative, and the Tribunal, the day after the hearing concluded. There was no opportunity for the claimant (or indeed this Tribunal) to seek clarification or explanation regarding the figures and no opportunity to challenge the respondent's position.

77. The respondent, in making their application for reconsideration, did not invite the Tribunal to revoke its decision and allow evidence to be led to explain what had happened and the basis for their revised calculation. The respondent invited the Tribunal to simply accept evidence as fact when it had not been tested and to substitute that in place of evidence which had been discussed, scrutinised and essentially agreed by the parties.

78. The claimant has had no opportunity to test the figures now provided by the respondent. Furthermore, we noted an email dated 5 September 2017 from the respondent's representative to the claimant's representative, and copied to the Tribunal, was produced at page 4, with an excel spreadsheet with pay scales for Civilians and Officers (pages 5 – 6) and an excel spreadsheet with updated Schedule of Loss (pages 7 – 12) with a revised summary, original pension loss, revised pension loss, original loss of earnings, revised loss of earnings and salary and allowances. Ms McDonald's affidavit evidence did not include an explanation of the figures and neither did Mr Delaney's submission. It was not possible for this Tribunal, in the absence of any explanation, to understand the respondent's figures or calculations. Indeed, it was not possible for the Tribunal to form any view regarding the accuracy of the figures now presented by the respondent.

79. The respondent argued the claimant would benefit from a windfall if compensation was based on inaccurate figures in respect of loss of earnings and pension loss. That argument is, however, premised on the figures used in the Judgment being "*wrong*" and the figures now produced by the respondent being "*correct*". The respondent has been unable to clearly

explain the figures and calculations now produced, or why an error (allegedly) occurred and so we were not persuaded the previous figures were wrong: further, even if there was an error, we were not persuaded the figures now produced by the respondent were correct.

80. The second condition set out in ***Ladd v Marshall*** was that if the further evidence is such that, if given, it would probably have an important influence on the result of the case. We could not accept the further evidence would probably have an important influence on the result of the case because (as set out above) it is not possible for this Tribunal to understand how the error occurred and whether the revised figures are accurate.

81. The third condition is that if the evidence is such as is presumably to be believed. We again, for the reasons set out above, could not accept the evidence was presumably to be believed. We say that because the respondent's explanation how the error occurred is muddled and confused; the figures and calculations have not been tested and it is not possible for this Tribunal to know whether the figures are accurate.

82. We, in conclusion, decided there were no mitigating or additional factors to explain why the evidence could not be obtained with reasonable diligence at an earlier stage. We further concluded (a) the respondent's explanation for the error was muddled and confused; (b) if the respondent carried out a comparative exercise and included overtime, this is not necessarily an error when calculating the Section 114(2)(a); (iii) the figures provided by the respondent to the claimant in preparation for the practicability hearing had, in effect, been agreed; (iv) we could not ascertain with any certainty whether the figures now produced by the respondent were correct and (v) the respondent was inviting the Tribunal to simply accept as fact, figures which had not been tested (or indeed spoken to) in place of figures which had been reviewed, scrutinised and agreed.

83. We lastly had regard to Mr Delaney`s submission regarding the respondent being a public authority with a statutory duty to secure best value in terms of its use of public funds. We balanced what was said by Mr Delaney with (a) the fact ***Deria*** stated it does not matter whether there is a point of general public importance that would be addressed by the additional evidence and (b) the fact Mr Nelson, the respondent`s Director of Forensic Services told the Tribunal (at the last Hearing) that money was no object when it came to preventing the claimant from returning to work. We considered, given Mr Nelson`s admission, that no weight should be attached to Mr Delaney`s submission .

84. We asked ourselves whether it would be in the interests of justice to allow a reconsideration of the Judgment dated 22 December 2017, in respect of the sum of compensation awarded to the claimant. We decided, having heard from both parties and reconsidered the Judgement, to confirm the Judgment dated 22 December 2017. We reached that decision because:-

- the information now provided by the respondent is not fresh evidence;
- the information could have been obtained earlier with reasonable diligence;
- the respondent cannot explain the basis of the error;
- the Tribunal has no way of understanding or testing whether the information now provided by the respondent is accurate;
- the figures originally provided by the respondent and accepted by the claimant were, broadly, agreed;
- the respondent could have addressed this matter on the last day of the Hearing, or given some indication the arithmetic calculation could have a significant impact on the calculation of compensation. They did not do so and accordingly the Tribunal proceeded on the basis of the figures which had been largely agreed; and

- it would not be in the interests of justice for this Tribunal to accept the respondent`s untested evidence in fact, in place of evidence which was discussed and broadly agreed by the parties (particularly in light of the points made above).

Employment Judge: Lucy Wiseman
Date of Judgment: 29 March 2018
Entered in register: 04 April 2018
and copied to parties