Appeal No.UKEAT/0297/18/BA
UKEAT/0013/19/BA

EMPLOYMENT APPEAL TRIBUNAL

7 ROLLS BUILDING. FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 16 May 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M ATEF HOSSAINI — APPELLANT

(1) EDS RECRUITMENT LTD (t/a J&C RECRUITMENT)
(2) TESAN DISTRIBUTION LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR LIAM VARNAN (of Counsel) Direct Public Access
For the First Respondent	MR DIARMUID BUNTING (of Counsel) Instructed by: DWF LLP 1 Scott Place 2 Hardman Street Manchester M3 3AA
For the Second Respondent	MR JONATHAN COLIN HEARD (of Counsel) Instructed by: Clarion Solicitors Elizabeth House 13-19 Queen Street Leeds West Yorkshire LS1 2TW

SUMMARY

PRACTICE AND PROCEDURE - New evidence on appeal

PRACTICE AND PROCEDURE - Costs

The claimant (who described himself as a Muslim of South Africa /Turkish/Iranian origin) was employed by the First Respondent as an agency worker and had been assigned to the Second Respondent as a driver. He pursued ET claims of race and religion/belief discrimination and harassment, relating to comments made by other workers, alleging they had called him "*babaji*", which he said was an inherently discriminatory term, and "*fucking Muslim*". He also made a claim of victimisation when his placement with the Second Respondent was terminated. It was admitted that the term "*babaji*" was used but the Respondents relied on a translation of that word, obtained by a manager of the First Respondent (Mrs Mears), which suggested it had no racial or religious connotation. Seeing that as the best direct evidence available, the ET rejected the Claimant's case that the use of this term amounted to racial or religious harassment. The ET also rejected the Claimant's evidence that the term "*fucking Muslim*" was used. As for the victimisation complaint, the ET found there had been diminution in the need for drivers and the termination of the Claimant's placement was unrelated to his complaints of harassment.

On the dismissal of the Claimant's claim, the Respondent applied for costs. The ET considered the without prejudice correspondence relating to settlement discussions between the parties and took the view that the Claimant had acted unreasonably in the negotiations, such that it was appropriate to make an award of costs of £10,000 for each the Respondents.

Subsequent to the ET hearing, the Claimant approached the translators used by Mrs Mears and was forwarded a copy of the translation provided to the First Respondent, which included a further possible translation of "*babaji*" stating it was an offensive term related to race /religion. This new evidence suggested the document relied on before the ET had been doctored to remove

this alternative translation. The Claimant applied to the ET for reconsideration of its decision, making a number of points but including clear reference to this new evidence. The ET, however, rejected the reconsideration application under 72(1) of the **ET Rules 2013.**

The Claimant appealed against (1) the ET's substantive decision on his claims and the award of costs; and (2) the refusal of his reconsideration application.

Held: *allowing the appeals*

The new evidence relied on by the Claimant met the tests laid down in **Ladd v Marshall** [1954] 1 WLR 1489: specifically, it was apparently credible, it was also relevant and would probably have had an important influence on the hearing – not only as to the possible meaning of "*babaji*" and the claim of harassment in that regard but also going to the issue of credibility more generally, and it could not have been obtained with reasonable diligence for use at the ET hearing. Although the translation of the term "*babaji*" had been in issue, the Claimant had no reason to doubt that the document produced by Mrs Mears was genuine, he had been entitled to expect that the Respondents would comply with their disclosure obligation and produce a complete and unaltered set of documents, and the requirement to exercise due diligence in the search for evidence could not extend to requiring a party to investigate the veracity and reliability of every document produced by opposing parties.

On the Claimant's application for reconsideration, the ET had demonstrated no engagement with the new evidence point and had failed to apply **Ladd v Marshall**. Had it done so, it would have been bound to find that the Claimant had met the three-stage test (see above).

The Claimant's appeals on the basis of this "*fresh evidence*" would thus be allowed. In the circumstances, the appropriate course was for the claims to be remitted to a differently constituted ET for re-hearing and it would be for that ET to reach a final determination on the credibility of the new evidence that the Claimant had adduced and to assess the relevance of that material in the underlying proceedings.

Given the potential importance of the new evidence to questions of credibility, it was hard to see how the ET's earlier costs decision could stand. In any event, the ET had erred in having regard to without prejudice correspondence that had not been "*without prejudice save as to costs*" (**Reed Executive plc v Reed Business Information Ltd** [2004] 1 WLR 3026 applied). Yet further, the ET'S reasoning did not demonstrate an exercise of discretion in determining whether it was appropriate to make an award of costs in this case, the ET having apparently considered this "*therefore*" followed from its decision that its costs jurisdiction was engaged (**Avoola v Christopher Fellowship** UKEAT/0508/13 applied). The appeal against the costs decision would also be allowed.

HER HONOUR JUDGE EADY QC

Introduction

1. These appeals raise an important issue as to the approach to new evidence in an appeal before the Employment Appeal Tribunal ("EAT"), where this suggests there was a procedural impropriety and unfairness in the underlying Employment Tribunal ("ET") proceedings. A further issue arises as to the reliance that may be placed on without prejudice material in making a costs award when the material in question was not "*without prejudice save as to costs*".

2. In giving this Judgment, I refer to the parties as the Claimant and the First and Second Respondents, as below.

3. By his first appeal, the Claimant challenges the Judgment of the ET sitting at Norwich (Employment Judge Postle, sitting with members, Mr Allan and Ms Kilner, from 16 to 19 July 2018), by which the Claimant's claims of race and religion and belief discrimination and harassment were dismissed and he was ordered to pay a contribution towards the Respondents' costs in the sum of £10,000 for each. By his second appeal, the Claimant challenges the ET's subsequent refusal of his application for reconsideration, a Judgment reached on the papers by Employment Judge Postle, sitting alone, and sent out on 23 November 2018.

4. At the Full Merits Hearing of his claim before the ET in July 2018, the Claimant appeared in person. The first and Second Respondents were represented by counsel, albeit Mr Bunting did not then appear for the First Respondent.

The Facts

5. The First Respondent operates a temporary employment agency. The Second Respondent operates warehouse and storage facilities.

6. The Claimant, who is a Muslim of South Asian/Turkish/Iranian origin, was engaged as an agency worker, under a contract for services with the First Respondent, in May 2016. As from 23 May 2016, he was assigned to the Second Respondent to provide services as a shunter driver.

7. On or about 14 September 2016 and on 15 October 2016, incidents occurred involving the Claimant and two other workers, a Mr Kunigilis (who was also employed by the First Respondent) and a Mr Seibutis (who was an employee of the Second Respondent). During the first incident, the other two workers called the Claimant a "*babaji*" and he retaliated by calling them "*pideras*". The office manager of the First Respondent, Mrs Mears, gave evidence to the ET that she later sought a translation of these terms, from a company called Global Translators UK, which suggested that the words could be translated as follows:

> **"One word is Russian and the other is Lithuanian — both words are offensive."**
>
> **"First translator: these words are quite offensive and as far as I know "babaji" means something like scarecrow and "pederasty" means homosexual."**
>
> **"Second translator: "babai" is different, something European people say when they are angry but it is nothing bad when you do not know it's said, particularly to an Indian or a Pakistani man it is easy to say babai. Pideras is Lithuanian and pederasty is Russian all mean like fucking gay."**

In fact, there is a typographical error in the ET's Judgment as, in the email of the translation adduced by Mrs Mears, the first translator had in fact used the word "*babaj*".

8. In any event, it seems that, on or about the same day as the word "*babaji*" was used, the Claimant made a complaint about this to the Second Respondents' supervisor, Mr Widger and an

informal meeting took place with the other workers, at which use of the words, "*babaji*" and "*pideras*", was admitted and all shook hands and apparently agreed to continue working together.

9. Later, on 5 October, however, the Claimant reported the incident to Mrs Mears, who advised him about the grievance procedure and the need to put his allegations into writing. As she did not know the meaning of the terms in issue, Mrs Mears told the ET that this was when she obtained the translations cited above.

10. On 6 October, Mrs Mears held a meeting with Mr Kunigilis, who admitted that he had called the Claimant a "*babaji*", which he accepted was offensive but said that he did not consider it had any racial or religious overtones. Mr Kunigilis appeared contrite and Mrs Mears then met with the Claimant to tell him of this response and he agreed that he would be happy to meet with Mr Kunigilis to see if the issue could be resolved. Mrs Mears facilitated this, with both men meeting in her presence, apologising to each other, shaking hands, and leaving the office together.

11. On the afternoon of 7 October, however, the Claimant again approached Mrs Mears, saying that he no longer accepted the' apology from Mr Kunigilis and he produced a letter in which he reported allegations of racism at work, in which, for the first time, he alleged that Mr Seibutis had called him a "*fucking Muslim*." It seems that this related to a second incident, on 5 October, at which, again, the term "*babaji*" had also been directed at the Claimant. Given the seriousness of the allegation the Claimant was making, Mrs Mears advised that a full investigation must now be carried out.

12. Subsequently, having carried out her investigation, Mrs Mears invited the Claimant to a meeting on 19 October, at which she asked him if he wanted to review the translation she had

obtained or the statements she had taken. The Claimant declined to do so. Mrs Mears advised that Messrs Kunigilis and Seibutus admitted using the term "*babaji*", but had never intended to offend the Claimant and had confirmed there were no religious or racial connotations in its use. They had, however, said that the term "*pideras*," used by the Claimant to them, was extremely offensive. Mrs Mears also advised that she had been able to find no evidence that the term "*fucking Muslim*" had been used. On that basis, Mrs Mears explained she would not be upholding the Claimant's grievance.

13. The Claimant asked for a further meeting with his Trade Union representative present and that was arranged for 3 November 2016. It is apparent that this meeting became heated and the Claimant complained that one of the managers present, a Mr Smith, had used the phrase "*fucking Muslim*," something the Respondents denied. In any event, the Claimant made clear he wanted a full apology for this term having been used and it was felt that the appropriate course was for an independent person to be called in to re-investigate his grievance.

14. Meanwhile (as the ET found), due to seasonal changes in the Second Respondent's workload, there was a diminishing requirement for it to engage shunter drivers. The First Respondent was duly informed of this position on 4 November 2016 and, as he was the only employee assigned to the Second Respondent for driving duties, the Claimant was told his services would be withdrawn, albeit his contract with the First Respondent would continue, pending a further placement being found. Having received this news on 5 November 2016, the Claimant submitted a second grievance to Mrs Mears, regarding the termination of his placement with the Second Respondent, which he considered to be an act of victimisation.

15. Returning to the outstanding first grievance investigation, this was carried out by a Mr Ransom, the Second Respondent's former Managing Director. On 30 November, the Claimant was told that this had been completed and he was invited to a further meeting, accompanied by his Trade Union representative the same day. As was subsequently confirmed by letter, the conclusion reached was that offensive and inappropriate language had been used on both sides but there was no evidence of religious or racial terminology.

16. After his assignment had been terminated on 5 November, the ET found that the Claimant was offered an alternative vacancy by the Second Respondent but he never confirmed whether he wanted to take this up. Further, on 11 January 2017, the First Respondent wrote to the Claimant offering him a position as a forklift truck driver, but received no response. It seems that, by this time, the Claimant may have obtained an alternative position elsewhere.

The ET's First Decision and Reasoning

17. In determining whether the Claimant had been subjected to harassment relating to race or religion, the ET considered the terms he alleged had been used by Messrs Kunigilis and Seibutis. It noted that, for some time, the Claimant had not alleged that anyone had used the phrase "*fucking Muslim*" and that, when he did make this allegation, it was initially said to be Mr Seibutis who had said this but later he had suggested it was also said by Mr Kunigilis. The ET did not find the Claimant's account credible in this respect and concluded this phrase had not been used. As for the term "*babaji*," this had been admitted but both Mr Kunigilis and Mr Seibutis had denied that it had religious or racial overtones. On the other hand, it was the Claimant's pleaded case that "*babaji*" was an inherently discriminatory word, which was a slur against Muslims. At paragraph 36 of its decision, the ET recorded that:

> **"The best direct evidence available before this Tribunal for the definition of either "Babaji" or "Babai", suggests it apparently has nothing to do with race or religion whatsoever. There was**

> **arranged, by Mrs Mears, a translation as she was unaware of what it meant as it seemed, at the relevant time, the Claimant did not understand what "Babaji" meant."**

18. The ET noted that the Claimant had relied on another translation, albeit the ET considered it was difficult to be sure of the source of the document he had adduced, which did not appear to be written by a translator.

19. At paragraph 40 of its decision, the ET further noted:

> **"Furthermore, if the Tribunal had any doubt it seems inconceivable that if on the one hand the Claimant alleges that "babaji" or "babai" was so inherently discriminatory when the Claimant was first spoken to by Mr Widger on 5 October when all parties admitted using offensive language the Claimant simply did not turn round and say words to the effect "hang on I'm being racially abused". It ended with the parties shaking hands on 5 October. If that was not enough, when the Claimant reported the matter to Mrs Mears of the First Respondent late on 5 October again he did not say to her that he was being racially abused merely that offensive language and abuse was being used. Again, on 6 October when there was a meeting of Mr Kunigilis, Mr Smith, Mrs Mears and the Claimant at which the parties apologised and shook hands there was no suggestion by the Claimant at this stage that he had been racially abused. To the Tribunal's mind the above was simply inconsistent with the Claimant's subsequent allegation he was being racially abused or on grounds of his religion."**

20. On that basis, the ET did not find that the allegations of harassment were made out.

21. The ET also rejected the Claimant's further complaint of harassment arising out of the grievance meeting on 3 November and his claims of victimisation relating to the withdrawal of his employment with the Second Respondent. It was satisfied that this had been for a genuine business/workload reason and was unrelated to the Claimant's allegations, not least as the relevant decision taker, Mr Welch (the Second Respondent's Operations Director) had no idea of the dispute between the Claimant and Messrs Kunigilis and Seibutis and the grievance process.

22. Having thus dismissed the Claimant's claims of harassment and victimisation, the ET went on to consider a claim for costs, made by both the First and Second Respondents. The ET recorded the Respondents' arguments in this respect as follows:

> **"57.1 On the first ground that the parties had entered into negotiations mid last year, around the 19 July 2017 at a time when the Claimant was represented by Thompson's Solicitors. There was an offer from the First and Second Respondents of £1,400 to settle the claims.**
>
> **…**
>
> **57.8 Counsel advanced for the second ground of their application that the claim had no reasonable prospects of success, given the findings of the Tribunal it had no prospect of succeeding."**

23. Having also heard from the Claimant, the ET reasoned, as follows:

> **"68. The Tribunal concluded that without the background negotiation history in September last year it might have been difficult to persuade a Tribunal that a costs order fell within the provisions.**
>
> **69. However, the Tribunal was surprised at the time when the Claimant was represented by the Trade Union's solicitors Thompson's there were clearly meaningful negotiations going on in July, August and early September which were moving towards a settlement, then quite out of the blue and the Tribunal suspects contrary to Thompson's advice the Claimant certainly upped the ante so to speak and demanded £42,000. That is not the way to negotiate a settlement, it is wholly unreasonable and furthermore it is an unreasonable manner in which to pursue proceedings and conduct sensible negotiations towards a settlement.**
>
> **70. The Tribunal also noted that even at this hearing the Claimant's schedule of loss is some £19,915.06.**
>
> **71. The Tribunal are unanimously in the view that the Claimant's conduct in upping the negotiation from £4,000 to £42,000 was wholly unreasonable. The Tribunal were also unanimous in their view this is a case where they should therefore exercise their discretion and make an award for costs."**

24. Taking account of the Respondents' explanation of the costs claimed, and having heard from the Claimant in terms of his means, the ET considered that two awards of £10,000 pounds, towards each of the Respondents' costs, was appropriate.

The Reconsideration Application

25. Subsequent to the Full Merits Hearing before the ET, it seems that the Claimant's wife contacted Global Translators UK, the translation company used by Mrs Mears, and obtained what is said to have been a copy of the email relied on by the Respondents. The explanation given by the Claimant, in this regard is set out in his application to adduce fresh evidence on appeal, which states as follows:

> **"3. The circumstances in which the Appellant came by this evidence is as follows:**

> **(1) At the time of the hearing before the employment tribunal, the Appellant had no reason to doubt the reliability of the unredacted document.**
>
> **(2) However, following the judgment, the Appellant was unhappy with the outcome, and in particular with the conclusion that the word "babaji" was not a racially-offensive term. On 28 August 2018 he and his wife, Sandra Walukiewicz, contacted the translation company, Global Translators UK Ltd, which had been used by the First Respondent to obtain translations of the word "babaji". They initially told Mr Sangha of Global Translators UK Ltd that they were employers, and that they had had a problem with one employee calling another "babaji", and wanted to know what it meant. Mr Sangha said that he had provided a translation of the same word to another company the previous year.**
>
> **(3). Mr Sangha subsequently forwarded to the Appellant's wife a copy of the email that he said he had provided to the other company. While he did not say that he had provided it to the First Respondent, it is plainly the same email that was disclosed by the First Respondent, but with the third translation included.**
>
> **(4). The e-mail exchange between the Appellant's wife and Mr Sangha, in which Mr Sangha confirms the racially-offensive nature of the word "babaji", and refers to having translated it for another company the previous year, is attached hereto."**

26. As the Claimant suggests, the copy of the email he now relies on contained not two but three translations of the term "babaji"; the additional, third, translation being as follows:

> **"Third translator: Babaj, ugly word for Muslim male, like I say - Hey Nigger - for black race man. Babaj, they say, thinking that he is Muslim like black ass Muslim."**

27. By an undated letter, apparently sent to the ET on 7 September 2018, the Claimant applied to the ET for a reconsideration of its Judgment. Various points were made in that application but, for present purposes, I need only refer to the following passage:

> **"… the Judge has given no reference to the translation provided by the Claimant (pages 179-183 of the bundle) that is a certified translation of an article comprehensively describing how the word Babaji he is used in a racist context was dark-skinned and people of Turkish origin. The same translation Pidaras also translates as "faggot" or "bugger".**
>
> **In addition to that, based on a newly obtained evidence from the translator employed by the Respondents, it is found that the Respondents have delivery [sic] removed the parts they did not like from the email to deceive the Tribunal. The Respondents' correspondence from Global Translators UK implies that there is a translation from the third translator that is completely removed by the Respondents upon submission to the Tribunal (The original correspondence between the Respondent and Global Translators UK can be provided if needed):**
>
> **"" 3rd translator: Babaj, ugly word for Muslim mate, like I say, Hey nigger - for black race man, Babaj, they say thinking he is Muslim . Like, Black ass Muslim"".**
>
> **Also, upon contacting Global Translators, they confirmed that they had been asked to translate these words and further explanation was provided in another email:**
>
> **""Babai in Lithuanian/Russian means black Muslim/Dark Skin-Man. It depends in which tone it is used. If Lithuanian/Russian people talk with each other they say BabaI to each other as a joke. It will be a Racial word if someone use it on purpose for someone. E.g. Niger is okay word if Nigerians talk with each other but it becomes racial word if any English Man or Indian says to them Nige! Many Tobacco/corner shops are also mentioned as BabaI shop."**

28. By its further Judgment, sent out to the parties on 23 November 2018, the ET refused the Claimant's reconsideration application, explaining (so far as is relevant), that:

> **"There was no reasonable prospect of the original decision being varied or revoked, to because**
>
> **1 The Claimant is attempting to relitigate facts and evidence found by the Tribunal at the hearing…"**

The Appeals

29. The Claimant's first appeal was lodged on 5 October 2018; it pre-dated the ET's Judgment on the re-consideration application, and contains 5 Grounds, as follows:

(1) The ET hearing was rendered unfair by the First Respondent's actions in disclosing and relying upon a redacted version of a key document.

(2) In making a costs order against the Claimant, the ET erred in concluding that his conduct had been unreasonable.

(3) Even if the ET had been entitled to conclude that the Claimant's conduct was unreasonable, it had failed to properly consider whether it should go on to exercise its discretion and make a costs order.

(4) Alternatively, the ET had failed to provide adequate reasons to explain the exercise of its discretion on costs.

(5) In any event, the ET erred in the exercise of its discretion, in failing to properly consider the nature, gravity and effect of the Claimant's allegedly unreasonable conduct.

30. By Order of 3 December 2018, Kerr J, allowed the Claimant's first appeal should proceed to a Full Hearing observing:

> **"The grounds of appeal are arguable. The meaning of "babaji" (as well as its spelling in languages using the Roman script) appears to vary considerably.**
>
> **There may be a legitimate Ladd v Marshall point and/or the fairness of the hearing may have been compromised if there was a wrongful redaction of the translation documents.**

> **In relation to costs, it is not clear whether any thought was given to the without prejudice rule nor whether the discretion in relation to costs is properly exercised."**

31. Having received the ET's reconsideration Judgment on 4 January 2019, the Claimant lodged a second appeal, pursued on the following four grounds:

(1) The ET had failed to give any or any sufficient regard to the fact that the Claimant was alleging that fresh evidence had become available which would, if admitted, have been likely to have had a significant effect upon the outcome of the case.

(2) Relatedly, the ET failed to apply the test in **Ladd v Marshall** [1954] 1WLR 489, to the question whether the fresh evidence should be admitted.

(3) The ET erred in concluding that it could properly determine that there was no reasonable prospect of the original decision being varied or revoked, without seeing the Respondents' response to the application and conducting a hearing.

(4) Alternatively, the ET failed to provide adequate reasons for its decision.

32. The second appeal was also permitted to proceed to a Full Hearing. Having considered the second Notice of Appeal on the papers, Laing J made the following observations:

> **"2. The ET gave no reasons for refusing the application other than there was no reasonable prospect that the original Decision would be varied or revoked because the Appellant was, "attempting to relitigate facts and evidence found by the Tribunal at the hearing", and he was unable to provide an address for the service of a witness summons.**
>
> **3. To be fair to the ET, the application for reconsideration, is seven pages long, and makes many detailed criticisms of the ET's Decision. Nevertheless, on the second and six pages, the Appellant claims that he has new evidence that the Respondent tampered with a translation of the word "Babaji" which he provided to the ET, by supressing a third meaning, which is racially offensive.**
>
> **4. If his evidence has been taken into account by the ET, it might have affected the ET's reasoning at paragraphs 35 to 39 and 43 of the Judgment."**

33. The Respondents resist the appeals.

34. As will be apparent from the Grounds of Appeal, which I have summarised above, the Claimant's points of challenge really fall under two headings: (1) fresh evidence; (2) costs. I have, therefore, divided the remainder of my Judgment accordingly.

Fresh Evidence – The Law

35. It is common ground that the test for determining whether fresh evidence is to be admitted is that laid down in **Ladd v Marshall** [1954] 1WLR 1489. Specifically, the party seeking to adduce the fresh evidence must show: (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. This test is incorporated into EAT's **Practice Direction** (see **EAT Practice Direction 2018**, paragraph 9.3), subject to the requirement that the EAT must have regard to the overriding objective.

36. As the EAT **Practice Direction** recognises, however, ordinarily the appropriate course would be to first apply to the ET - that is, the ET that presided over the hearing to which the evidence is said to be relevant - for a reconsideration of its Judgment (see **EAT Practice Direction 2018** at paragraph 9.1). That is appropriate because it is the ET that is the fact-finding body, which heard the relevant witnesses and is thus best faced to consider the fresh evidence in context and to assess, in particular, the extent to which, if at all, it would, or might, have made a difference to the ET's conclusions (and see the various observations to this effect made by different divisions of EAT, for example in **Adegbuji v Meteor Parking Ltd** UKEAT PA/1570/09, **Secretary of State for Health v Rance** [2007] IRLR 665 and **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, and by the Court of Appeal in **Malkan v West Midlands Regional Health Authority & Anor** [2002] EWCA Civ 1230).

37. That said, while acknowledging that this would ordinarily be the most appropriate course, in **Aslam v Barclays Capital Services Limited** [2011] UKEAT/40510, the EAT (HHJ David Richardson presiding) noted that in some cases the fresh evidence may raise a question as to the fairness of the hearing below, such as gives rise to a potential error of law for the EAT to determine. In **Aslam**, the new evidence took the form of an email that went to an issue before the ET but which had not been disclosed before the hearing. Recognising that it would normally be appropriate for this to be considered by the ET, HHJ Richardson made clear that might not always be the case:

> **"39. … the admission of further evidence may be relevant on appeal to a question of law. It may, for example, give rise to a question of the fairness of the hearing process at Tribunal level. It is part of the task of the Appeal Tribunal to ensure that a hearing at the Tribunal below was a fair hearing, meeting the requirements of the common law and of article 6 of the European Convention on Human Rights both of which guarantee a fair hearing.**
>
> **40. Generally speaking the mere fact that fresh evidence has come to light will not imperil the fairness of the proceedings. Employment Tribunal procedure, including the power to grant a review, will be able to encompass most circumstances in which fresh evidence has come to light and to deal with any fresh evidence in a way which is both fair and proportional. Occasionally, however, this will not be possible. Then the Appeal Tribunal must intervene.**
>
> **41. Mr Pievsky submitted that it was possible for the hearing process at Tribunal level to be fair in this case. He pointed out that on any view it was not the fault of the Tribunal that there was non-disclosure. He submitted that the Tribunal on a review would be able to listen to further evidence and make an assessment of the significance of the email which would be fair. The Claimant did not agree and sought a complete re-hearing.**
>
> **42. We have reached the conclusion that the non-disclosure of the email resulted in a hearing below which was unfair.**
>
> **43. For reasons we have explained, the email was potentially important material for the Tribunal to consider in a t least three ways: as to its primary findings of fact on one issue; as to the question whether there was unlawful discrimination on that issue; and as to the credibility of more than one witness. The Claimant was deprived of that material. His advocate was obliged to advance his case and cross examine without it.**
>
> **44. In many cases a Tribunal will be able to correct unfairness of this kind by ordering a review. In this case however we do not think that a review hearing will suffice to correct the unfairness. Such a hearing would generally have to be before the same Tribunal (rule 36(1) of the Employment[sic]). The Tribunal made adverse findings as to the credibility of the Claimant which it will be difficult for the Tribunal to revisit; and it will be difficult for the Claimant to have confidence in a process of this kind. The Tribunal made findings based upon the credibility of other witness which again it will be difficult to revisit. And this has arisen by reason of a significant breach of an order by the Respondent. We are certainly not saying that a review is inappropriate in every case where the Tribunal has made findings on credibility; but in a case of this kind, where for reasons given in Anya (see paragraphs 7-11 and 25) there should be anxious scrutiny of relevant contemporaneous documents before a Tribunal reaches conclusions on credibility, we think a review would be insufficient for justice to be done and seen to done."**

38. Although the jurisdiction of the EAT in hearing appeals from ET decisions is limited to questions of law (see Section 21(1) of the **Employment Tribunals Act 1996**), a question of law is not confined to any misconstruction or misapplication of the substantive law in the decision itself. It may also arise from a procedural error or irregularity in the conduct of the proceedings before the ET which, depending on the nature and gravity of the error or irregularity, may lead to a successful appeal (see per Mummery LJ at paragraph 6, **Connex South Eastern Ltd v Bangs** [2005] ICR 763 CA). Moreover, determining whether or not the earlier proceedings were fair is not simply a matter of reviewing an ET's exercise of its case management discretion (as to which, the potential for any challenge by way of appeal is limited); as Lord Reed observed in **R (on the application of Osborn) v Parole Board** [2014] AC 1115 SC:

> **"65. The first matter concerns the role of the court when considering whether a fair procedure was followed…its function is not merely to review the reasonableness of the decision-maker's judgement of what fairness required."**

39. In the present case, there is also a dispute between the parties as to whether the Claimant has provided sufficient explanation for the new evidence; specifically, as to whether he was required to lodge a witness statement, along with his application to adduce the new evidence. In this respect, there is a difference in wording between the EAT **Practice Direction 2013** (in force on 5 October 2018, when the Claimant lodged his application) and the **Practice Direction 2018**, which came into force on 19 December 2018. The former addresses the question of an application to admit fresh evidence, at paragraph 10.2, as follows:

> **"Subject to para. 10.1, where an application is made by a party to an appeal to put in, at the hearing of the appeal, any document which was not before the Employment Tribunal, and which has not been agreed in writing by the other parties, the application and a copy of the documents sought to be admitted should be presented to the EAT with the Notice of Appeal or the respondent's Answer, as appropriate. The application and copy should be served on the other parties. The same principle applies to any oral evidence not given at the Employment Tribunal which is sought to be adduced on the appeal. The nature and substance of such evidence together with the date when the party first became aware of its existence must be disclosed in a document, where appropriate a witness statement from the relevant witness with signed statement of truth, which must be similarly presented to the EAT and served."**

40. The **2018 Practice Direction** deals with this issue at paragraph 9.2, where it is stated:

> **"Subject to paragraph 9.1, where an application is made by a party to an appeal to put in, at the hearing of the appeal, any document which was not before the Employment Tribunal, and which has not been agreed in writing by the other parties, the application and a copy of the document(s) sought to be admitted should be presented to the EAT with the Notice of Appeal or the Respondent's Answer, as appropriate. The application and copy should be served on the other parties. The same principle applies to any oral evidence not given at the Employment Tribunal which is sought to be adduced on the appeal. The application to consider Fresh Evidence must explain what that evidence is, and how it came to light. Generally, a witness statement detailing this should be filed with the EAT and served on the other parties when the application is made."**

41. When considering an application for reconsideration, the ET's approach should be as laid down by Rule 72, Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") which (relevantly for present purposes) provides as follows:

> **"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, (including unless there are special reasons where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal…"**

Fresh Evidence - The Parties' Submissions

The Claimant's Case

42. The Claimant contends that the fresh evidence he seeks to admit clearly meets the **Ladd v Marshall** test. First, it could not have been obtained with reasonable diligence for use at the ET hearing: prior to the ET hearing, the Claimant had reasonably accepted the Respondents' translation as genuine - he did not agree its content, but had no reason to doubt it was genuine; he was entitled to expect that the Respondents would comply with their disclosure obligations and produce a complete and unaltered set of documents; the requirement to exercise due diligence in the search for evidence, could not extend to requiring a party to investigate the veracity and reliability of every document produced by opposing parties; although the Claimant knew the translation of "*babaji*" was in issue, the new evidence went beyond that - it was fresh evidence

as to what the First Respondent had done. Second, the fresh evidence was relevant and would have been likely to have had an important influence on the ET hearing: it would have had a direct impact on a factual matter in issue namely the meaning of the word "babaji" – on which, it tended to support the Claimant's case and undermine that of the Respondents and would suggest that the ET's conclusion (at paragraph 43: "*There is simply no credible evidence that the comments of "babaji" were made with racial or religious connotations*") was untenable; it would thus also be likely to have had an effect on the question whether the use of that term amounted to unlawful harassment; more than that, however, it would also impact on issues of credibility - it was Mrs Mears that had adduced the translation relied on by the Respondents so, if the fresh evidence was genuine, it would suggest that she had intentionally doctored a key document in order to mislead both the Claimant and the ET; beyond that the Claimant suggests this fresh evidence would provide a basis on which to challenge *all* the evidence from the First and Second Respondents. Third, the fresh evidence was apparently credible: it was noticeable that the translation produced by the Respondents had a gap after the second translation, which was consistent with something having been deleted; moreover, the suggestion in the third translation, that "*babaji*" had a racially or religiously offensive meaning was, to some extent, supported by the second translation found in both versions, referring to "*babaji*" being a term that it was easy for an angry European person to say to an Indian or Pakistani South Asian man; to the extent the Respondents disputed the genuineness of the fresh evidence it would have been open to them to contact Global Translators - the genuineness of the fresh evidence was thus easily verifiable by the Respondents.

43. On the first appeal, therefore, the Claimant contends the ET hearing was rendered unfair by the First Respondent's actions in disclosing and relying on a redacted version of a key document. It was no answer to suggest that the EAT had no jurisdiction to consider the fresh evidence: a question of law may arise from a procedural error or irregularity in the ET

proceedings (**Connex v Bangs** at paragraph 6). The hearing, in this case, was vitiated by unfairness in the withholding of relevant evidence and this would plainly have been material to the ET's assessment of credit (see **Aslam** and see the approach in **R (on the application of Osborn) v Parole Board**). As this was sufficiently serious to vitiate the fairness of the hearing below, it would in any event be necessary - if the EAT was to allow the first appeal - to send this matter to a differently constituted ET for a full re-hearing.

44. As for the second appeal, the ET had failed to engage with the fresh evidence point: this was not simply an attempt to re-litigate; the ET had failed to apply the test in **Ladd v Marshall** and it had erred in concluding that it could determine the application without seeking the Respondents' response and conducting a hearing. Alternatively, the ET had failed to give adequate reasons: although the reconsideration application had been lengthy, and had included a number of other points that the ET was entitled to reject, it had plainly included the fresh evidence issue and the ET had failed to demonstrate it had engaged with that at all, let alone that it had applied the test laid down in **Ladd v Marshall**.

The First Respondent's Case

45. For the First Respondent, it was emphasised that there was a fundamental need for finality in litigation. It would not generally be in the interests of justice for a party to get a second bite at the cherry, notwithstanding any oversight or strategic miscall at the original hearing. To the extent it was open to the EAT to receive fresh evidence, it could only do so when it was in the interests of justice, and that would, in almost all cases, mean that the requirements of the test in **Ladd v Marshall** must first be met. Initially, Mr Bunting suggested that even if the **Ladd v Marshall** tests were met, the interests of justice might still mean that the new evidence ought not

to be admitted, although he retreated from that position somewhat when exploring what that might mean in oral argument.

46. In any event, applying **Ladd v Marshall** to the present case, the First Respondent contended that the test was not met. First, the evidence on which the Claimant now sought to rely could have been obtained with reasonable diligence for use at the ET hearing: the Claimant had been offered sight of the translation as early as 19 October 2016, when it was offered to him at a meeting with Mrs Mears; given that the Claimant had taken issue with the First Respondent's credibility, it was incumbent upon him to take steps to check the veracity of the evidence adduced by the First Respondent from third parties but the Claimant did not seek to query that translation at any time following the 19 October meeting, or after receipt of the ET3, or following disclosure, or after the bundle was finalised, or after the exchange of witness statements; for the most part, the Claimant had been represented by competent solicitors in his pursuit of his claims; whether the point arises on a reconsideration or appeal, a party will not be allowed to adduce factual matters which it chose not to put before the ET at the first instance hearing (see **Bingham v Hoban Engineering Ltd** [1992] UKEAT/044/90, although accepting that case was not on all fours with the present). Second, as to whether the new material would probably have had an important influence on the ET's decision, the First Respondent accepted that the fresh evidence was, if genuine, relevant but did not accept that it would probably have had an important influence on the result of the case: this was merely an alleged email chain and, if presented at trial, the ET would first have to determine whether this or the Respondents' document was genuine; given the ET's view of the Claimant's credibility, it was most likely that it would have preferred the First Respondent's account of the translation, not least as it was inherently improbable that Mrs Mears would have tampered with the email from Global Translators, when she was simply carrying out the internal investigation (at a time when there was no suggestion that there would be any ET

proceedings); in any event, it was open to the ET to find that neither the Claimant nor his work colleagues understood "*babaji*" to have any racist or religious connotation, so it would not have amounted to harassment for the purposes of Section 26 **Equality Act 2010**, having not been said for the relevant purpose or heard with the relevant effect; even more obviously, the new evidence could have had no impact on the ET's findings in respect of victimisation, which were entirely unrelated to the issues raised by the harassment claims. Third, it could not be said that the fresh evidence was apparently credible: no email header was provided on the email initially produced by the Claimant and the chains that had then been produced could have been retrospectively manufactured; no evidence had been provided (for example, in the form of a witness statement from the alleged sender or recipient of the email) and although it was open to the EAT to take account of the fact that the First Respondent had not gone back to Global Translators to obtain evidence to counter what the Claimant was now seeking to suggest, it should not in fact draw any adverse inference from that (albeit Mr Bunting was unable to explain why his client had not attempted to rebut the new evidence relied on by the Claimant).

47. As for the second appeal, it could be taken that the ET's reconsideration Judgment dealt with the fresh evidence application in the round and had rightly determined that there was no reasonable prospect of the original decision being varied or revoked. In reaching that decision, it was implicit that the ET had applied the **Ladd v Marshall** test but found it was not satisfied. Additionally, the EAT could be satisfied that the ET had reached a permissible conclusion that would not be undermined for any failure to have regard to a relevant matter. The Claimant's application did not meet the requirements for the admissibility of fresh evidence. As for the reasons provided, these were adequate in the circumstances.

The Second Respondent's Case

48. For the Second Respondent, stress was placed on the limitation on EAT's jurisdiction to determine only questions of law. An ET did not err in law in circumstances where it came to a Judgment based on the evidence presented to it and an attempt to introduce fresh evidence after a Judgment has been given, does not render the original Judgment wrong in law. Where an Appellant sought to rely on fresh evidence, the appropriate course was for the evidence in question to be considered by the ET; the EAT was not itself hearing testimony from witnesses, albeit the Second Respondent allowed that was an option open to the EAT, and could not form a final view as to the credibility of the new evidence relied on by the Claimant, and so did not have jurisdiction to determine that issue. Accepting that the test **Ladd v Marshall** required only that the new evidence was apparently credible, finding that it was would not be sufficient for the EAT to then find that the hearing had been rendered unfair. Exploring that issue further, in oral argument, the Second Respondent contended that, even if the EAT found the test **Ladd v Marshall** had been met, it would not have jurisdiction to refer to the new evidence to reach any conclusions itself because it had not heard witness evidence on the point. Even if that was not correct, and to the extent the EAT had jurisdiction to consider the new evidence, the Claimant failed to comply with paragraph 9.2 of the **Practice Direction 2018** or paragraph 10.2 of the **Practice Direction 2013** - whichever applied, it could be seen that there was a requirement on the party seeking to adduce new evidence to serve a witness statement in support, something the Claimant, in his application to admit the new material, had suggested he was intending to do. More generally, it was not in accordance with the overriding objective for the appeal to be considered in view of that failure. In any event, the Claimant did not satisfy the legal threshold set out in **Ladd v Marshall**.

49. Adopting the submissions made by the First Respondent, the Second Respondent additionally contended: (1) from early on, 19 October 2016, the Claimant had known that Mrs Mears had obtained a translation of the term "*babaji*" that stated it had no racial or religious connotation and he could have sought to obtain evidence to counter the Respondents' case; certainly, there was nothing to prevent him contacting Global Translators before the hearing; (2) as to relevance, the translation was for the word "*babaj*", which was not the same as "*babaji*"; in any event, there are a large number of other matters as set out in ET's findings that were entirely unrelated to Mrs Mears and anything done in relation to the Global Translators' email, which demonstrated that it had formed an adverse view of the Claimant's credibility and/or had found that the evidence of the Respondents was to be preferred (for example, as to whether the term "*fucking Muslim*" had been used, and as to whether Mr Smith had used that term in his hearing with the Claimant, etc); moreover, on any case, the new material could not go to the victimisation claims; (3) the fresh evidence was not credible as there was a significant and concerning absence of supporting evidence (e.g. from the Claimant's wife and/or from Global Translators) or background detail to show that disputed translation was credible (it was noted that the Claimant and his wife had misrepresented their reasons for seeking the new translation and questions arose as to why a further translation had been provided by Global Translators that did not feature at all in the three translations that it was said had been offered to the First Respondent).

50. As for the reconsideration Judgment and the second appeal: the ET had adequate regard to this aspect of the application and reached a permissible view that the Claimant was seeking to re-litigate facts and evidence already determined; the Claimant had presented an incomplete and inconsistent material to support his application and it was permissible for the ET to reject it. More generally, just because the ET did not expressly refer to an authority, did not mean it had erred in law, it was implicit in the ET's reasons - in particular, its reference to the Claimant trying to

re-litigate matters - that it had had regard to the principles set out in **Ladd v Marshall** and had conducted a qualitative assessment of the information contained within and accompanying the application for reconsideration; the ET had reached a permissible view on the application, as presented, and had provided adequate reasons for that view.

Fresh Evidence - Discussion, and Conclusions

51. At the heart of the Claimant's complaint of unlawful harassment was his contention that the term "*babaji*" was inherently discriminatory and that it was a slur against Muslims, particularly Muslims from a particular part of the world. This was a term that, it was accepted, had been addressed to the Claimant by his work colleagues and the ET had understood that the Claimant was contending that it had racial or religious connotations. Before me, the First Respondent has suggested that, during his employment, the Claimant had not complained that this was the case (that is, that "*babaji*" had racial or religious connotations), and has argued that this could not, therefore, have had the requisite effect to meet the definition of harassment for the purposes of Section 26 of the **Equality Act 2010**. I am not, however, persuaded that was the First Respondent's understanding at the time the Claimant made his complaints: after all, why else would it have been relevant that Mr Kunigilis did not understand the word to have any racial or religious connotation (see, for example, the ET's finding at paragraph 15). The ET was, of course, entitled to record that the Claimant had not immediately made a complaint of racial abuse but it was certainly clear that this was his case before the ET and he had sought to rely on an extract from a publication, dealing with this phrase, to support what he was saying.

52. In rejecting the Claimant's case in this respect, the ET plainly placed considerable reliance on the translation obtained and adduced by Mrs Mears; which the ET described as, "*The best direct evidence*." In reaching that view, the ET did not consider that the translation was

undermined, in any way, by the fact that the translators had referred to the term, variously, as "*babaj*" and "*babai*", but that would be unsurprising, given that the translation was of a word that would not originally originally been written using the Roman alphabet. Similarly, however, that suggests that the ET would not have seen it fatal that the new evidence relied on by the Claimant also refers to "*babaj*" rather than "*babaji*".

53. As for the new evidence, I note that the Claimant's application to admit this material was not accompanied by a witness statement. That said, as the Claimant has observed in oral argument the EAT **Practice Direction (**whether of **2013** or **2018**) does not state that such evidence can only be admitted if accompanied by a statement in support. In the present case, the Claimant has explained how the email came to be forwarded to him from Global Translations - that much is set out in his application. It was, furthermore, open to either Respondent to seek to obtain evidence from Global Translations to rebut the Claimant's explanation; they have chosen not to do so. While I accept that it is for the Claimant to make good his case in this regard, I consider that the questions that I need to address are those laid down in **Ladd v Marshall**. Keeping in mind the overriding objective, I do not consider the Claimant's failure to attach a witness statement in support of his application to adduce new evidence is fatal to his appeal.

54. Turning then to the test laid down in **Ladd v Marshall**, it seems to me it is helpful to first consider the question whether the new evidence is apparently credible. Looking at the email chains that have been adduced (pages 111 to 106, and 93 to 94 of the bundle for this appeal hearing), I consider the test of apparent credibility is met. The emails are consistent with the explanation given by the Claimant in his application and there is nothing, on the face of the documentation, that would suggest that it has been tampered with. On the other hand, there is a gap in the email used by Mrs Mears before the ET that raises the question as to whether something

was deleted from that document before it was disclosed. I also accept that the third translation can be seen to have some consistency with the second; it would explain why it was a term that was used in anger. In making these observations, I allow that there is a question as to why Mrs Mears, or anyone else within the First Respondent, would have deleted part of the translation obtained from Global Translators at the stage of the internal investigation, but I am not required to determine credibility in absolute terms; it is sufficient that I consider that the evidence is apparently credible, and I do.

55. Secondly, I am also satisfied that the new evidence is potentially relevant and that it would probably have had an important influence on the ET's decision-making. That must certainly be the case in relation to the translation of the term "*babaji*", something that would be key to the ET's finding on the harassment claims. More than that, however, I am satisfied that it would probably have had an important influence on credibility in a more general sense. It is not just the fact that there is another translation - and one that supports the Claimant's case and undermines that of the Respondents - but the fact that it also suggests that someone has doctored the evidence, the suggestion being that this is likely to have been Mrs Mears or someone else within the First Respondent. That would seem to be a relevant consideration when assessing the credibility of the witnesses relied on by the Respondents. Moreover, this translation was a key part of the case below and, the fact that the ET rejected the Claimant's case as to what "*babaji*" meant, plainly influenced it in terms of the view it formed of his credibility more generally. More generally, as anyone who has been involved in litigation will know, a finding on credit on one issue very often infects the view formed on credibility on other issues. I therefore agree with the Claimant on this question: if the ET was misled by reliance being placed on a doctored form of this email, the fact that there had been evidence tampering would probably have had an important

influence on the ET's findings, going far beyond the straightforward issue of the translation of the term "*babaji*".

56. I turn then to the question whether the Claimant could, with reasonable diligence, have obtained this new evidence before the hearing. If the Claimant had been simply seeking to suggest that someone within Global Translators was prepared to provide a third translation then I can see that this was something that could have been obtained before the ET hearing: it was open to the Claimant to put in alternative translations of "*babaji*" and he could have approached Global Translators himself for this purpose. It is not in dispute that the Claimant did not seek to do that prior to the ET hearing but only subsequently thought he would try to get a translation from Global Translators, after he had received the ET's Judgment on his claims. Had that simply resulted in the third translation being provided by Global Translators, then it is hard to see how the Claimant would have met the first stage of **Ladd v Marshall** test. It is the fact that Global Translators then forwarded the email that, it says, was sent to the First Respondent, and the fact that this is different to the email produced for the ET proceedings, that changes the position. The Claimant had thus obtained something very different to what he might have initially envisaged: he had been provided with new evidence that suggested that the document put before the ET had been doctored. It may have been that had the Claimant approached Global Translators before the hearing, he would have obtained this evidence at that time but I do not accept that he could, or should, have been expected to go behind the First Respondent's disclosure.

57. It is said by the Respondents that reasonable diligence would have imposed such a requirement on the Claimant in this case: (1) because the translation was very much in issue before the ET, and (2) because the Claimant had doubted Mrs Mears' evidence in other respects and had thus put credibility in issue. I disagree. Where there is a dispute arising in respect of

evidence adduced from third parties, the normal course is that each party in the litigation will produce their own material; it is not customary that they should also seek to directly approach a third party instructed by an opponent, so as to question the *bona fides* of the material disclosed by that opponent. That is so, even if there is a dispute going to the credibility of the other party's own evidence. The Respondents are suggesting that the Claimant should have pursued a course that would have gone far beyond that which was reasonable; that is not the requirement laid down by the first stage of the **Ladd v Marshall** test.

58. Having thus considered the test laid down in **Ladd v Marshall**, I am satisfied that the new evidence can be adduced on this appeal and, should it be considered that there is any relevant difference in the application of the overriding objective to this test, I am equally satisfied that this means that it would be in the interests of justice for the Claimant to be permitted to rely on this material.

59. Having reached that view, I accept that, in the normal course, I might now wish to consider whether this was something that should be remitted to the ET for reconsideration. This is effectively the point being made by the Second Respondent as to the limited nature of the EAT's jurisdiction to determine the actual effect of the new evidence. That point can, however, only go so far. Whilst it is, as I have already indicated, generally more appropriate for the ET to undertake the required determination as the effect of the new evidence, given that the EAT has the power to step into the shoes of the ET for these purposes (see Section 35 **Employment**

Tribunals Act 1996), there can be no suggestion that I would not have jurisdiction to determine the point myself if required.

60. Certainly, there are two reasons for questioning whether a remission to the ET would be the appropriate course in the present case. First, because I am satisfied that the new evidence is plainly so significant in terms of the issues arising in this case – specifically, the harassment claims, but also more generally as to the credibility of the Claimant's case and that of the key witnesses – that I consider this is analogous to the position in **Aslam**: it raises issues of fundamental fairness, such as to suggest there should be a fresh hearing before a different ET. Second, because the ET in this case has already had the opportunity to consider this matter, on the Claimant's application for reconsideration.

61. That second question, then takes me to the ET's reconsideration Judgment and the second appeal. Allowing that the Claimant's application for reconsideration was lengthy, poorly drafted and raised a number of bad points, it is not suggested that the fresh evidence point was not made or was lost amongst the other points: it was there and it raised a serious issue. The ET did not, however, deal with this. Notwithstanding the valiant attempts made in Respondents' submissions to address this difficulty, there is simply no indication that the ET engaged with the new evidence point or that it applied the **Ladd v Marshall** test. The ET simply moved to dismissing the application, without seeking any response from the Respondents but, equally, without providing any reasoning adequate to deal with this point. Given the new evidence point and materials raised by the Claimant on his reconsideration application, I am satisfied that it was wrong for the ET to deal with this under Rule 72(1) of the **ET Rules**, without demonstrating

engagement with this part of the application and with the test in **Ladd v Marshall**. I am satisfied, therefore, that the second appeal should be allowed.

62. I therefore return to the question as to the appropriate course I should now adopt. For the reasons I have already explained, I have: (1) found that the ET fundamentally erred in its approach and decision on the Claimant's reconsideration application, (2) have myself concluded that the test in **Ladd v Marshall** is made out, such that the Claimant is entitled to rely on the new evidence in question, and (3) have held that the new evidence goes to the heart of the proceedings on the Claimant's claim. Having allowed the Claimant's appeals on these bases, I gave the parties the opportunity to address me further on the question of disposal. Having due regard to those submissions and to the guidance provided in **Sinclair Roche & Temperley v Heard and Fellows** [2004] IRLR 763 EAT, I am satisfied that the appropriate course in these circumstances is for this matter to be remitted to a differently constituted ET for re-hearing. It will be for the ET at that stage to form a final view as to the new evidence, both as to its credibility and as to its impact on the case as a whole.

Costs – The Law

63. The ET made a costs order on the basis that the Claimant had acted unreasonably in bringing or conducting the proceedings, (see Rule 76 **ET Rules**, which relevantly provides:

> **"76. When a costs order or a preparation time order may or shall be made**
>
> **(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
>
> **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success."**

64. It is common ground that there are three stages involved in the determination of a costs application: (1) the ET needs to determine whether or not its jurisdiction to make a costs award is engaged - here, whether in the circumstances provided by Rule 76**(**1) existed; if so, (2) it must consider the discretion afforded to it by the use of the word "*may*" at the start of that rule and determine whether or not it considers it appropriate to make an award of costs in that case; only then would it turn to question (3), that is to determine how much it should award. See **Abaya v Leeds Teaching Hospital NHS Trust** UKEAT/0258/16, paragraphs 14 to 18, **Haydar v Pennine Acute Hospitals NHS Trust** UKEAT/0023/18, paragraphs 25 and 37, and **Ayoola v St Christopher's Fellowship** UKEAT/0508/13 at paragraph 17.

65. Where correspondence is marked "*without prejudice save as to costs*" - sometimes referred to as a "***Calderbank** offer*" (see **Calderbank v Calderbank** [1975] AER 333 CA) - it is common ground that such documentation can be referred to on any application for costs (see **Kopel v Safeway Stores Plc** [2003] IRLR 753). That, however, it is not the case where the correspondence is marked is simply "*without Prejudice*", see **Reed Executive plc v Reed Business Information Ltd** [2004] 1WLR 3026, in which it was held that the Court has no jurisdiction to order disclosure of the without prejudice negotiations for the purpose of deciding the question of costs:

> **"20. Negotiations or offers which have taken place expressly on the "without prejudice save as to costs" basis are of course admissible on that question. So much was decided in the family law context in Calderbank v Calderbank [1976] Fam 93 and in the general civil litigation context by Cutts v Head [1984] Ch 290. Such offers go by the name "Calderbank offers."**
>
> **21. But generally, parties who have negotiated on a wholly "without prejudice" basis have always done so in the faith and expectation that what they say cannot be used against them even on the question of costs. As long ago as 1889 this Court held, in Walker v Wilsher (1889) 23 QBD 335 that, in the words of the headnote: "Letters or conversations written or declared to be "without prejudice" cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs." I shall call that the rule in Walker v Wilsher. Bowen LJ reasoned this way, at page 339:**
>
> > **"In my opinion it would be a bad thing and lead to serious consequences if the courts allowed the action of litigants, on letters written to them "without prejudice," to be given in evidence against them or to be used as material for depriving them of costs. It is most important that the door should not be shut against compromises, as would certainly be the**

> **case if letters written "without prejudice" and suggesting methods of compromise were liable to be read when a question of costs arose."**
>
> **22. There are exceptions to the general rule of non-admissibility of "without prejudice" negotiations. Robert Walker LJ conveniently listed the most important instances in Unilever v Procter & Gamble [2000] WLR 2436 at p. 2445. What is not included in that list is a general exception of non-admissibility when it comes to the question of costs. Indeed, it is implicit that he thought there was no such general exception, as appears from the passage, at p 2445 where he discusses Calderbank offers:**
>
> > **"(7). The exception (or apparent exception) for an offer expressly made "without prejudice except as to costs" was clearly recognised by this court in Cutts v Head, and by the House of Lords in Rush & Tompkins Ltd v Greater London Council [1989] AC 1280, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the importance which the new Civil Procedure Rules, Part 44.3(4), attach to the conduct of the parities in deciding the question of costs)."**

Costs - The Parties' Submissions

The Claimant's Case

66. For the Claimant it was noted that the only conduct that the ET found was unreasonable was the Claimant's counter offer (of £42,000). Indeed, at paragraph 68, it had recorded that, absent that aspect of the history, it would have been hard to persuade the ET that its costs jurisdiction was engaged. Failure to beat a settlement offer could be a relevant factor in assessing reasonable conduct (see **Raggett v John Lewis Plc** [2012] IRLR 906, paragraphs 41 to 46), but that would not have been open to the ET here, given: (1) the Claimant was entitled to seek a non-pecuniary remedy in the form of a declaration of discrimination; (2) the Claimant's schedule of loss was in the region of £20,000 and the offer made by the Respondent was considerably lower than that; and (3) the ET was having regard to without prejudice correspondence, when the £42,000 counter offer was not said to have been made "*without prejudice save as to costs*" (and thus that documentation was inadmissible even on the question of costs, see **Reed v Reed**).

67. The ET had moreover, failed to demonstrate that it had exercised its discretion. Although it had referred to the exercise of discretion at paragraph 71, the use of the word "*therefore*" suggested it saw the finding of unreasonableness as determinative of the exercise of

its jurisdiction which was wrong (see paragraph 17, **Ayoola)**. The ET had further failed to have regard to the fact that making a counter offer of £42,000 had not led to any increase in costs.

The Respondents' case

68. The First and Second Respondents arguments on the costs appeal overlapped sufficiently to mean their submissions can be taken together. They both take the view that it did not necessarily follow that, if the Claimant succeeded on his new evidence appeals, the costs decision must fall away. Otherwise, it was noted that the guidance in **Reed v Reed** was concerned with correspondence that went beyond the question of costs; in any event, although the email of 8 September 2017 was not expressly headed "*without prejudice save as to costs*" the content of the email had made it apparent that was the case and it had referred to the Claimant's counter offer of £42,000, so that was before the ET on the question of costs (although it was accepted that **Reed v Reed** must mean that the Claimant was entitled to rely upon his assertion of without prejudice privilege, which could not be simply rendered "*subject to costs*" by another party's reference to it, in a subsequent document headed in that way). More generally, the Respondents contended that the ET had plainly been entitled to take the view that the Claimant had acted unreasonably, a decision reached on wider grounds than simply his counter offer of £42,000.

69. As to the exercise of discretion, paragraph 71 made clear that the ET had considered whether it was appropriate to exercise its discretion to make a costs award, as did the fact that it then went on to consider the costs warning letter and the Claimant's means, all matters relevant to the exercise of its discretion. More generally, the decision in this regard was adequately explained.

Costs - Discussion and Conclusion

70. Given my view that the new evidence adduced by the Claimant would probably have an important influence on the ET's substantive decision, I find it difficult to see how the costs decision can stand: either the Respondents relied on evidence that had been doctored or the Claimant has adduced material that he has fraudulently created - in either event, I cannot see that this would not have an important influence on the question of costs.

71. Even if that was not correct, it is apparent that the ET had regard to without prejudice material that was not marked "*without prejudice save as to costs*" and did not, in the body of the document, suggest that was its purpose; that was wrong (see **Reed v Reed**). The Claimant was acting in person before the ET and it is not suggested that it was not open to him to take this point on appeal (a point that Kerr J expressly permitted to proceed to a Full Hearing and to which no objection has been taken). It is also apparent that the Claimant's privilege could not be, and was not, waived by any reference to his counter offer in the Respondents' correspondence. The ET's decision is thus vitiated by its reliance on material to which it should never have been referred.

72. In the yet further alternative, even if the ET had been entitled to refer to this material and it was entitled to see the Claimant's refusal of the Respondents' offer as unreasonable conduct such as to mean that its costs jurisdiction was engaged, I am not satisfied that the ET then demonstrated any recognition of the fact that it still had a discretion as to whether to make an award of costs. The use of the word "therefore" in paragraph 71, indeed suggests that it saw the making of the award as an inevitable consequence.

73. For all those reasons, I therefore also allow the appeal against costs.