Appeal No. UKEAT/0189/19/JOJ (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 27 May & 16 June 2020
Judgment Handed down on 30 October 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MR J BANERJEE — APPELLANT

ROYAL BANK OF CANADA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CAROLYN D'SOUZA (of Counsel) and MR ANDREW WATSON (of Counsel) Instructed by: Setfords Solicitors 46 Chancery Lane London WC2A 1JE
For the Respondent	MR DAVID CRAIG (One of Her Majesty's Counsel) Instructed by: Freshfields Bruckhaus Deringer LLP 65 Fleet Street London EC4Y 1HS

SUMMARY

PRACTICE AND PROCEDURE

In this case the Employment Appeal Tribunal (E.A.T) was asked whether a party was entitled to ask the Tribunal to reconsider on "its own initiative" **(Rules 70 and 73 of the Employment Tribunals Rules of Procedure 2013)** when it had failed to apply for reconsideration and where any application, if made, would be substantially out of time. Held that the Respondent was entitled to submit that a Tribunal should reconsider "on its own initiative" and that in doing so the Respondent ought not to be regarded as having made an application for reconsideration; Held further that the Tribunal had acted on its own initiative so as to vary an order it had pronounced as a result of a misunderstanding on its part of the law and which if uncorrected had the potential to cause injustice and that in so doing the Tribunal had not erred by failing to give effect to the principle of finality.

THE HONOURABLE LORD SUMMERS

Facts and Circumstances

1 The Claimant in this case presented a claim for unfair dismissal. I shall refer to him as "the Claimant". I shall refer to his former employers as "the Respondent". The Employment Tribunal will be referred to as "the Tribunal".

2 The Tribunal decided to separate issues relevant to lability from those relevant to quantum. In co-operation with the parties a liability hearing (hereafter "the Liability Hearing") was fixed and a List of Issues agreed. One of the issues allocated to the Liability Hearing was whether an ACAS uplift was appropriate and if so, what percentage should be applied. The issue (hereafter "the Issue") ran as follows –

> **"If the Tribunal finds that the Respondent unfairly dismissed the Claimant, did the Respondent unreasonably fail to comply with the ACAS Code on Disciplinary Procedures such that an uplift in compensation is appropriate, and if so, what percentage?"**

3 The **Trade Union and Labour Relations (Consolidation) Act 1992** section 207A (2) gives tribunals the power to uplift awards for breaches of the ACAS Code of Practice relative to dispute resolution. The Tribunal may exercise this power if it considers it just and equitable to do so. The uplift may be up to 25%.

4 In **Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290 Elias, LJ considered s. 207A. He directed Tribunals to approach the calculation of the uplift in two stages (p.1302 B-C) -

> **"Once the tribunal has fixed on the appropriate uplift by focussing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms… this must not be disproportionate, but there is no simple formula for determining when the amount should be so characterised…."**

5 He goes on in his judgement to explain why an uplift calculated only under reference to the "nature and gravity of the breach" can yield disproportionately high uplifts. The practical effect of his decision is that Tribunals should determine the multiplicand before selecting the multiplier. A Tribunal should therefore refrain from fixing a percentage under section 207A

A until it can be sure it produces a sum that is proportionate to the gravity of the breach of the ACAS Code (see also **Abbey National Plc v Chagger** [2010] ICR 397 per Elias LJ at paragraph102).

B 6 It will be evident from the foregoing that in fixing the ACAS uplift the Tribunal should, at least in cases where the risk I have adverted to can be foreseen, hear evidence about quantum before fixing the appropriate percentage. No doubt in some cases it is not necessary to hear evidence on quantum. If the sums involved are modest the Tribunal may not consider that it is necessary to establish the multiplicand since it can foresee that the final figure will be within an C acceptable range. But in some cases, detailed evidence of quantum will be critical.

7 The Respondent referred to **Wardle** in its written submissions to the Tribunal at the Lability Hearing (Core Bundle pp. 118-120 paragraphs 158-159). The written submissions refer to the two-stage test and acknowledge the necessity of establishing what an uplift means D in money terms before fixing the ACAS uplift. The Respondents did not make any oral submission that the Issue should be deferred. Nor for that matter did the Claimant. The Tribunal then wrote its judgement.

E 8 It is not clear to me whether the Tribunal omitted to read the Respondent's written submissions about **Wardle** or having read them did not appreciate their implications. The Tribunal proceeded to fix the ACAS uplift without reference to the monetary consequences of the uplift. The order (hereafter "the Order") ran as follows –

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> **"The award of compensation is to be subject to an uplift of 25% because of the Respondent's failure to comply with the ACAS Code of Practice."**

9 At the time of his dismissal the Claimant was employed as a trader in the City and was G earning significant sums of money. The Respondent calculate that applying an uplift of 25% will yield an uplift of about £261,000. The Respondent submitted that this figure was manifestly excessive. The Claimant submitted that it was not. He referred to the fact that the Respondent had been censured for the way in which it had conducted a dismissal in a previous H case (**King v Royal Bank of Canada** [2012] IRLR 280).

10 No reconsideration was sought within the 14 days prescribed by the Rule 71 of the **Employment Tribunals Rules of Procedure 2013** (hereafter "the Rules").

11 The Respondent supplied me with a number of explanations for this failure. It said that until the parties received the Remedies Judgement on 1 February 2019 it was not clear that the Tribunal had determined the ACAS uplift at the Liability Judgement. The Respondent sought to support its understanding by reference to the Tribunal's finding that the parties (p. 17, paragraph. 97 of Liability Judgement) "considered that it would be an effective use of tribunal time to determine the level of the ACAS uplift at the same time as liability as it turns on the extent of the Respondent's default in failing to apply a proper disciplinary procedure". These observations do not support such an understanding. The Tribunal's observations rather tend to suggest that the Tribunal had an erroneous understanding of what it could decide at the Liability Hearing. The Respondent sought to say that it did not seek reconsideration because it did not appreciate that a large award was likely. In the circumstances this seems unlikely. I do not consider that an explanation has been tendered that satisfactorily explains why the Respondent did not apply for reconsideration. It is not for me to speculate why there was a failure to reconsider. All that I can say is that the explanations offered do not appear to me to be good reasons.

12 The failure of the Respondents to apply for reconsideration is a key feature of this case. As will become evident a party who could have reconsidered and fails to reconsider may be in an uncomfortable position if it later wishes to raise with the Tribunal the possibility of the Tribunal reconsidering "on its own initiative".

13 The Respondent did however mark an appeal. It did so within the relevant time limits. One of the Grounds of Appeal was that the Tribunal had erred in fixing the ACAS uplift at 25% (Core Bundle 124-126). The appeal passed the sift. While the appeal was in dependency before the E.A.T the Remedies Hearing took place. In the events that happened the Tribunal issued its Remedies Judgement shortly before the appeal was due to be heard. It decided that it should reconsider the 25% uplift "on its own initiative" (Rules 70 and 73 of the Rules). The Respondent then dropped its appeal on the ACAS uplift. On the eve of the appeal the Respondent abandoned the appeal in its entirety.

14 The purpose of an appeal to the E.A.T is to deal with issues of law or cases where the factual findings may be said to be perverse. In this case the Respondent would have required to satisfy the E.A.T that the Tribunal had made an error of law. That may not have been straightforward. As will become obvious in the paragraphs that follow if there was an error of law in this case, it had arisen in unusual circumstances. The error was one that both the Respondent and the Claimant had a hand in creating. The Issue they asked the Tribunal to resolve was tainted with their own error. In addition, the Respondent had provided written submissions that accurately stated the law. The Tribunal no doubt beguiled by the terms of the Issue and the absence of any oral submission explaining that the Issue could not be resolved without further evidence determined the ACAS uplift. I was referred to **Secretary of State for Health v Rance** [2007] IRLR 665 at p. 673 where the E.A.T helpfully summarises circumstances in which it can be said an error of law may or may not be said to exist. It is not obvious that the E.A.T would have regarded the Order as marked by error of law.

The Remedies Hearing

15 The case progressed on to a further hearing on remedies. I was advised that the Claimant submitted to the Tribunal before the Remedy Hearing that the ACAS uplift was res judicata. The parties sought to agree issues. They agreed the following issue (hereafter "Issue 2") -

> **"Would it be just and equitable to award the Claimant a 25% uplift on the sum awarded to him?"**

16 The agreement containing Issue 2 is set out in the Core Bundle (pp. 127-134; 139 issue 17).

17 The Remedies Hearing then took place over four days. Towards the end of the fourth day the parties addressed the ACAS uplift. The Claimant lodged a transcript of the submissions made by the parties. Mr Craig QC for the Respondent observed that the Tribunal had power to reconsider the ACAS uplift on its own motion (Core Bundle p. 163). Senior Counsel for the Claimant Mr Nicholls QC described this suggestion as "extraordinary" (Core Bundle p 164). He advised the Employment Judge that he had not anticipated this submission and had not come prepared to address it (although I see that Mr Craig QC had trailed the suggestion in his written closing submission (Core Bundle p. 158)). Notwithstanding, Mr Nicholls QC provided

the Tribunal with a precis of the case law and observed that the power is rarely and sparingly used. He was extremely brief. No cases were cited.

18 The suggestion evidently found favour with the Employment Judge. He issued his Remedies Judgement and ordered a reconsideration on his own initiative under Rule 73. The order of 1 February 2019 ran as follows –

> **"There shall be a reconsideration of the ACAS uplift. Once the parties have calculated the sums to which the Claimant is entitled, the parties will have an opportunity to put forward any further submissions on the question of whether the percentage uplift should be reduced, and if so to what extent, having regard to the total compensation to be paid to the Claimant."**

19 This led to a change in the Respondent's position. One week after the Tribunal issued its Remedy Judgement and five days before the Liability Appeal was due to be heard the Respondent withdrew the Ground of Appeal that dealt with the ACAS uplift. The day before the Liability Appeal the Respondent withdrew the remainder of their appeal.

The Rules on Reconsideration

20 The rules dealing with reconsideration are found in the **Employment Tribunals Rules of Procedure 2013**, Schedule 1, Rules 70-73. Rule 70 provides –

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

21 Rule 71 is not relevant for present purposes. Rule 72(2) is relevant to the present case in as much as it is referred to in Rule 73. Rule 72(2) provides –

> **"……the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations."**

22 Rule 73 provides –

> **"Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72 (2) (as if an application had been made and not refused)."**

23 I have little doubt that Rule 73's primary purpose is to enable Tribunals to act on their own initiative without the involvement of parties. The phrase "on its own initiative" is no doubt intended to stand in contrast with cases where a party acts on its own initiative and makes an application under Rules 70-72. This case raises the question of what should happen when one of the parties asks the Tribunal to act "on its own initiative".

The Grounds of Appeal

24 Only one Ground passed the sift. I have broken it down into three segments.

Did the Respondent Apply for Reconsideration?

25 The Claimants submitted that in substance the Respondent's submission to the Tribunal in connection with the ACAS uplift was an application for reconsideration and should be subject to the rules on reconsideration. If it was truly an application for reconsideration by the Respondent, then it was not open to the Tribunal to apply Rule 73. The Claimant provided me with a transcript of the hearing. The relevant part of the transcript is in the Core Bundle (p. 163; transcript page 26 lines 2-17). It records Mr Craig QC's submission as follows –

> **"...the tribunal…. has rules that allow it to reconsider a judgment. Obviously this would be out of time, but you can do that of your own motion, and, indeed, you can extend the time for doing it, and in our submission, if you take the view that a 25 per cent uplift to an award would be disproportionate… then that's what you should do, and it would be, in our submission, deeply unattractive for the tribunal to do that , and would be forced to make an award for an ACAS uplift that was out of all proportion to the wrong, or the harm, that it caused."**

26 Having considered this submission carefully I am of the opinion that it supports the following propositions. Mr Craig QC on behalf of the Respondent submitted that the Tribunal was entitled to reconsider the Order. If the Respondent applied to do so Mr Craig QC accepted "…this would be out of time". Mr Craig QC referred to the alternative means of reconsideration. He submitted "…you can do it of your own motion". This is a reference to the Tribunal's separate power under Rules 70 and 73 which is unconstrained by time limits. The words "you can do it of your own motion" are at variance with the wording of the **2013 Rules**. The words he used are drawn from the **Employment Tribunals Rules of Procedure 2001**. The **2013 Rules** have superseded the **2001 Rules.** Rule 13(1) of the **2001 Rules** provides –

> **"Subject to the provisions of this rule, a tribunal shall have power, on the application of a party, or of its own motion, to review any decision on the grounds that:**

(a) the decision was wrongly made as a result of an error on the part of the tribunal staff;

(b) a party did not receive notice of the proceedings leading to the decision;

(c) the decision was made in the absence of a party;

(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known or foreseen at the time of the hearing; or

(e) the interests of justice require such a review".

27 After referring to the power of the Tribunal to reconsider "of its own motion", Mr Craig QC returned to the possibility of an application by the Respondent and reminded the Tribunal that if an application was made "…you can extend the time for doing it". Mr Craig QC thus submitted that both methods of reconsideration were available although in the case of an application under Rules 70-72 the Respondent would have to seek leave to be heard out of time. Mr Craig QC went on to say, "that's what you should do". Since an application under Rules 70-72 was beyond the 14 day time limit prescribed in Rule 71 an application would have had to be supported by an application under Rule 5 of the **2013 Regulations**. The Respondent had not sought an extension of time. In that circumstance the words "that's what you should do" can only refer to the Tribunal reconsidering "on its own initiative" under Rule 73. Mr Craig QC's submission was in effect that the Tribunal should use its own powers under Rules 70 and 73. While he referred to the possibility of an application for reconsideration he did not apply for a reconsideration. Thus, in my opinion it is clear that Mr Craig QC submitted to the Tribunal that it should reconsider "on its own initiative". This understanding is consistent with the Speaking Note for the Respondent (Core Bundle p. 158 paragraph 124). In my opinion therefore the Respondent was not making an application for reconsideration.

Is a party entitled to invoke a Tribunal's power to reconsider?

28 The Claimant further submitted that even if it could not be said that the Respondent had applied for a reconsideration, it had nevertheless requested the Tribunal to reconsider and in that situation, it could not be said that the Tribunal had acted "on its own initiative".

29 In this connection the Claimants referred me to **TCO In-Well Technologies UK Ltd v Stuart** [2017] ICR 1175. In that case the claimant sought reconsideration pursuant to Rules 70 and 71 on the ground that the compensatory element of his award should have been grossed up

A to take account of his tax liability. The respondent objected that the application came after the 14 day time limit prescribed by Rule 71. Without making any decision on the claimant's application the tribunal reconsidered the award "on its own initiative" under Rule 73 and decided the calculation was wrong and that the interests of justice required the compensatory element to be grossed up. The employer appealed. In the E.A.T the principal issue for Lady Wise was whether the tribunal was entitled to utilise its Rule 73 powers if the claimant had already sought a reconsideration under rules 70-72? Lady Wise looked at the wording of the Rules and came to the conclusion that they were separate processes and that an application precluded the tribunal from acting "on its own initiative". I entirely agree with Lady Wise.

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30 The Claimant argued that the following passage supported the Claimant's case (p. 1184D-E).

> **"The inclusion in rule 70 including within the term "on its own initiative" action taken following a request from the appeal tribunal is a necessary clarification, as otherwise it could easily be argued that reconsideration following such a request could never fall within the usual meaning of reconsidering on one's own initiative. Far from supporting the construction put on it by the claimant, I consider that the inclusion of this particular route to reconsideration on the tribunal's own initiative tends to support a conclusion that a request from any other party, especially one that takes the form of a formal application for reconsideration, excludes the route of reconsideration at the tribunal's own initiative."**

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31 The Claimant relied in particular on the following, "a request from any other party, especially one that takes the form of a formal application for reconsideration, excludes the route of reconsideration at the tribunal's own initiative". The Claimant pointed out that the Respondent had made a request saying, "that's what you should do". Ms D'Souza submitted that if such a request was made then the Tribunal could no longer reconsider "on its own initiative".

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32 In my opinion however the quotation relied on by the Claimant has been taken out of context. **TCO** does not involve a party asking a tribunal to act "on its own initiative" under Rule 73. **TCO** involved an application to reconsider under Rules 70-72. Lady Wise examined the wording of Rule 70 as follows -

> **"A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so……."**

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33 Lady Wise noted that the Rule treated reconsideration on its own initiative as an alternative to reconsideration on the application of a party. She concluded therefore that they could not be used in combination. She noted that the Rule allowed the E.A.T to request reconsideration. She asked herself whether that undermined her hypothesis and concluded the purpose of the words "(which may reflect a request from the Employment Appeal Tribunal)" was to bring inside the E.A.T request within the scope of a reconsideration on the Tribunal's "own initiative". Thus, she reasoned, the exception proved the rule. The specific provision made for a request from the E.A.T showed that a request or application from outside the tribunal should be treated as excluding a tribunal reconsidering "on its own initiative". I entirely agree with her reasoning and with her interpretation of the Rule.

34 The words "a request from any other party, especially one that takes the form of a formal application for reconsideration, excludes the route of reconsideration at the tribunal's own initiative" refer to an application that does not invoke a tribunal's power to "act on its own initiative". **TCO** has no relevance to this case.

35 That leaves the question of principle open for my consideration. Is a tribunal unable to act autonomously "on its own initiative" because submissions are made to it about its power in Rules 70 and 73?

36 I am unable to accept that the Tribunal's ability to act on its own initiative was removed by the first of Mr Craig QC's submissions. An advocate is entitled to remind a tribunal of its powers. Of greater delicacy is whether the submission "that's what you should do" impinged upon its power to act "on its own initiative". I acknowledge that the distinction between an application for reconsideration and a reconsideration on the Tribunal's "own initiative" might become blurred if a party was entitled to persuade a tribunal to act under Rules 70 and 73. But these considerations do not arise here. Mr Craig QC's submission was brief (very brief). It contains no argument or reasoning. The circumstances that might be thought eloquent of the desirability of reconsideration were already known to the Employment Judge. It is clear from the Remedies Judgement that the Employment Judge did act on "its own initiative". It is evident that he considered he should intervene. It is evident that he informed himself of the relevant rules and case law without the benefit of any submissions.

37 I am not persuaded that the short statement "that's what you should do" could be said to impinge on the "initiative" of the Tribunal. I consider that the discomfort that a judge might feel if he or she thought that the Respondent was simply getting the Tribunal to do what it had culpably failed to do does not arise on the facts of this case. I consider Mr Craig QC's advocacy remained within the Rules. I do not consider that his submission led the Tribunal into an error of law.

38 The Claimant argued that the route chosen by the Tribunal put the Respondent in a more advantageous position than they would have been if it had applied for a reconsideration under Rules 70-72. It was relieved of the need to argue that the Tribunal erred in law in the appeal to the E.A.T and it was relieved of the need to apply for reconsideration and by virtue of its own fault, to apply for reconsideration out of time. In my opinion these points would have more force if they had been raised in connection with the Tribunal's decision to exercise its power under Rules 70 and 73. But there is no reference in the Notice of Appeal to the proposition that the Tribunal had erred in law by failing to attach weight to the failure of the Respondent to seek reconsideration. Nor is there a ground of appeal submitting that the Tribunal erred in law by concentrating on the question of "common mistake". I do not consider that I can entertain this argument.

39 The Respondent referred me to **Southwark LBC v Bartholomew** [2004] ICR 358. In that case a local authority applied to a tribunal asking it to review an order it had made "on its own motion" in the "interests of justice". It is an old rules case. The relevant provision was rule 13(1)(e) of the old **Employment Tribunals Rules of Procedure 2001**. Although the case differs in a number of respects from the present case and although the point was not argued, the Respondent asked me to notice that although ostensibly acting "on its own motion" the Tribunal was addressed by the local authority and asked to review "on its own motion". Although it was interesting to read **Southwark** the case does not discuss the points submitted to me and is therefore of limited use.

Was the Tribunal's decision on the ACAS Uplift Final?

40 The remaining ground of appeal runs as follows –

> **"Further, even if the Tribunal was properly entitled to reconsider its judgment of its own motion, the Tribunal erred in failing to give effect to principles concerning the importance of finality and/or the significance of a party's representative failing to rely on a particular argument."**

41 Ms D'Souza drew attention to the definition of the word "judgement" in paragraph 1(3) of schedule 1 of the 2013 Regulations. A "judgement" there is defined as

> "…..
>
> **(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—**
>
> > **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or**
> >
> > **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue).**

42 In this part of the ground of appeal the Claimant submitted that the principle of finality ought to have dissuaded the Tribunal from reconsidering the Order. The Claimant submitted that reconsideration came about because a "particular argument" that had not been ventilated at the Liability Hearing was entertained at reconsideration. She submitted that the Order was a judgement which finally determined the issue of the ACAS uplift. She noted that although the Claimant had from time to time described the Order as "res judicata" it would be more accurate to say that the Order finally determined the issue of the ACAS uplift.

I accept that the principle of finality is an important principle. It is not however an absolute principle and is subject to many qualifications. The Tribunal decision was not final to the extent that it was subject to both reconsideration and appeal. For as long as reconsideration or appeal remained competent, I do not consider that paragraph 1(3) of schedule 1 of the 2013 Regulations is in point. As regards the "particular argument" I was referred to **Flint v Eastern Electricity Board** [1975] ICR 395 which makes it clear that a tribunal is not obliged to allow new points to be argued on reconsideration simply because they have been omitted and seem relevant to the disposal of the claim. Philips, J set his face against what he described as "second bites at the cherry" (p. 404). But no new arguments were placed before the Tribunal at the Remedies Hearing. The Respondent had stated the law accurately in its written submission at the Liability Hearing. There was no "second bite at the cherry". The problem in this case was that the parties did not appreciate that the law articulated in **Wardle** undermined the Issue they had agreed. The question of a new legal argument does not arise, and the principle of finality is not in play. The Tribunal was entirely justified in seeking to sort out the problem that had arisen.

43 In my opinion this case resembles **Williams v Ferrosan Ltd** [2004] IRLR 607. In that case the E.A.T approved the use of the power to review (or, as it is now called, "to reconsider") where the parties and the tribunal had collectively misunderstood the law and had failed to appreciate that an award should be grossed up so as to take account of the tax liability on the payment. This is the source of the Tribunal's description of the ACAS uplift as a "common mistake" (p. 610; paragraph 17). I think the Tribunal was right to see the analogy with **Williams** and take the same approach. It may be said that the facts of this case call for reconsideration more strongly in that the Respondent had correctly identified the law but failed to realise that if it did not seek to amend the Issue or alert the Tribunal to the conflict between his written submission and the Issue, the Tribunal might fall into error. Justice would be affronted if matters were left untouched. I accept that it could not be said in this case that "this error would have been corrected by the E.A.T" (p. 610, paragraph 17). The Respondent's failure to seek reconsideration was a factor that may have troubled the E.A.T on appeal from the Liability Hearing. But that detail apart **Williams** supports the Tribunal's approach.

44 Under reference to this aspect of the Ground of Appeal Ms D'Souza advanced a series of arguments that were not prefigured in the Ground of Appeal. In light of the view that I have taken it is not necessary for me to set them out at length. They are to be found in the Claimant's Skeleton Argument under "Issue 3". She argued *inter alia* that the Tribunal had failed to follow the procedures set out in Rules 70-73. As a result, the Claimants had not had an opportunity to be heard on the question of whether it was "necessary in the interests of justice". She took me through the case law that governs the exercise of the discretion and pointed out that the Tribunal had failed to give the Claimant an opportunity to be heard on how these cases should be interpreted. She pointed out that the Tribunal had examined the cases for itself and had, she argued, come up with an erroneous conclusion. In the Skeleton argument at paragraph 62 et seq. arguments based on procedural unfairness and natural justice are set out. Ms D'Souza took me to paragraph 97 of the Remedy Judgement and argued that the Tribunal had misstated the parties' position in connection with the ACAS uplift and the rule in **Wardle**. It was evident she submitted that there was not a "common mistake" (**Williams v Ferrosan Ltd,** see above). Ms D'Souza also argued that the Tribunal's course of action had meant that the Claimant had no opportunity to address it on the significance of the failure to apply for reconsideration and the fact that the Respondent had been represented throughout by skilled layers and counsel (**Lindsay v Ironsides Ray & Vials** [1994] ICR 384). The Claimant argued that he should have been given an opportunity to address the Tribunal on the cases cited by the

Tribunal at paragraph 26 of the Judgement. She pointed out that the Claimant had not been heard on the cases referred to by the Tribunal - **Ministry of Justice v Burton &Anor** [2016] ICR 1128, **Newcastle upon Tyne City Council v Marsden** [2010] ICR 743**, Flint v Eastern Electricity Board** (above), **Lindsay v Ironsides Ray & Vials** (above).

45 I do not consider that the Ground of Appeal raises these points. I do not have any locus to determine them. I make the following brief observations in deference to Ms D'Souza's detailed and careful submissions.

46 Where a matter is to be determined that affects the interests of a party to a litigation it would ordinarily be thought consistent with the precepts of natural justice that the party so affected should be given an opportunity to be heard. It should be remembered however that Rule 73 places the authority to decide whether there should be a reconsideration in the hands of the tribunal. I am not perturbed by the absence of detailed submissions in this connection at the Remedies Hearing. I do not accept Mr Craig QC's submission that the Claimant had an opportunity to set out the arguments referred to above at the Remedies Hearing. It was not appropriate to make such submissions at that stage. Rule 73 leaves the question of whether to propose reconsideration in the hands of the Tribunal. The Tribunal evidently apprised itself of the law after the Remedies Hearing as I would expect it to do and issued its judgement appointing a hearing under Rule 73. The Remedies Judgement sets out its assessment of the cases the Tribunal considered to be relevant to the issue of reconsideration. In light of its conclusion, the Tribunal made the following order.

> **"There shall be a reconsideration of the ACAS uplift. Once the parties have calculated the sums to which the Claimant is entitled, the parties will have an opportunity to put forward any further submissions on the question of whether the percentage uplift should be reduced, and if so to what extent, having regard to the total compensation to be paid to the Claimant."**

47 The Tribunal knew that the Claimant's position was that the Order was res judicata. The Tribunal's view was that because it was a "genuine, common mistake" the Order could be reconsidered "on its own initiative". I acknowledge that this conclusion was reached without the Claimant having an opportunity to be heard on why it could not be called a "common mistake" and why other factors e.g. the failure to apply for reconsideration, militated against the Tribunal hearing the matter on "its own initiative". The Tribunal should perhaps have invited submissions on these issues. That approach would appear to me to be in closer harmony with

the terms of Rule 73. Although this form of reconsideration is both initiated and resolved by the Tribunal there will be cases where the interests of justice make it desirable to give the parties an opportunity to make submissions before pronouncing the order. I accept that paragraphs 26 and 27 of the Remedies Judgement indicate that **Ministry of Justice v Burton** and **Newcastle upon Tyne City Council v Marsden** were central to the Tribunal's reasoning and I accept that the citation of other authorities would have been helpful but I am not satisfied that giving the Claimant an opportunity to be heard on these issues would have made any difference to the outcome (see **Stanley Cole (Wainfleet) Ltd v Sheridan** [2003] IRLR 885). The overshadowing consideration in the mind of the Tribunal was that the Order had been pronounced as a result of a combination of errors by both parties and the Tribunal. Although the Tribunal does not express any view on the size of the award for the ACAS uplift, I think it is legitimate to infer that it was concerned that the Order might lead to an excess of compensation. I do not consider that the arguments laid before me by Ms D'Souza would have made any difference to the outcome. Since however the Claimant did not raise these issues in his Grounds of Appeal these arguments are academic.

48 The Respondent submitted that the Claimant was not entitled to argue the Grounds of Appeal because he had agreed to Issue 2, set out at paragraph 17 above. It proceeded on the basis that the size of the ACAS uplift was a matter which should be addressed at the Remedies hearing. It was not clear to me whether this submission was based on principles of estoppel/personal bar or contractual agreement. Whichever basis is advanced, it is unsound. The submissions supplied to the Tribunal made it clear that the Claimant submitted that the Order was final. In this circumstance it is not possible to read the Issue as amounting to an acceptance that the Tribunal was entitled to vary the Order if it was just and equitable to do so. In any event I am sceptical of the proposition that contractual analysis or the doctrines of estoppel/personal bar may be applied to court documents designed for the limited purpose of identifying the issues in dispute between the parties. Parties may agree that an issue is in dispute before a Court without any implication that they concede the legal or factual predicates on which they proceed.

Although it forms no part of the reasons I have given for the disposal of the appeal. I should observe that I consider the Claimant must take a share of blame for the difficulty that has arisen. I acknowledge that the Tribunal should have considered the written submission from the Respondent that set out the law and should have seen that it would not be possible to resolve the

Issue in the absence of evidence of quantum. But in fairness to the Tribunal both parties had agreed the Issue. Neither party warned the Tribunal that it could not resolve the Issue consistently with **Wardle** without evidence of quantum. I acknowledge that the Respondent could have tried to put the error right. This sort of failure is tailor made for reconsideration procedure and that it would have been open to the Respondent to seek reconsideration. I have explained earlier in the Judgement why I consider the explanations they have offered for their failure to do so are hard to understand. Whatever the position I consider that the Tribunal was entitled to exercise its own initiative and seek to reconsider the size of the ACAS uplift.

49 I therefore refuse the appeal and remit the claim back to the Tribunal to proceed as accords.