EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4106122/2015; 4100137/2016; 4105282/2016; and 4100153/2017

Hybrid Reconsideration Hearing held partly by CVP and partly in person at Glasgow on 14 December 2021 ; and Members' Meetings held remotely by Teams on 25 January 2022; and 29 April 2022

Employment Judge: Ian McPherson

Tribunal Members: Peter O'Hagan

Jim Burnett

Mr Brian F. Gourlay	**Claimant** **Represented by:** **Mr Simon John** **Barrister** **(instructed by** **McGrade & Co,** **Solicitors)**
West Dunbartonshire Council	**Respondents** **Represented by:** **Mr. Nigel Ettles** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved judgment of the Employment Tribunal is that: -

(1) Unanimously, the Tribunal finds that it has jurisdiction to consider the claimant's reconsideration application of 1 October 2021.

(2) Having heard both parties' representatives on the claimant's opposed application for reconsideration of the Tribunal's original liability Judgment dated 17 September 2021, and sent to parties on that same date, and in particular for variation of paragraphs (2) and (4) of that original Judgment, as sought by the claimant's counsel at this Reconsideration Hearing, the Tribunal, after private deliberation, at the Members' Meetings, decided it was in the interests of justice to grant the reconsideration sought, notwithstanding the respondents' objections.

(3) The Tribunal, on reconsideration, finds that the respondents did victimise the claimant, contrary to Section 27 of the Equality Act 2010, **by dismissing him on 24 September 2015; and rejection of his appeal against dismissal on 25 August 2016; and, having reconsidered the original Judgment, the Tribunal has varied paragraphs (2) and (4) of that Judgment by substituting the following new paragraphs, as follows:**

(2) Unanimously, the Tribunal finds that the respondents did not victimise the claimant, contrary to **Section 27 of the Equality Act 2010**, by (a) substantial redaction of his argument and documents for his stage 3 grievance (number 3) dated 25 July 2014; (b) the stopping of his grievance dated 28 February 2015 (number 5) by Stephen West on or about 12 March 2015; and (c) investigating him under the Code of Conduct from about 6 March 2015, and so dismisses those parts of his complaint to the Tribunal.

(4) By majority, Mr Burnett dissenting, the Tribunal finds that the respondents did victimise the claimant, contrary to **Section 27 of the Equality Act 2010**, by (a) suspending him on 17 June 2015 ; (b) dismissing him on 24 September 2015; and (c) rejection of his appeal against dismissal on 25 August 2016; and the Tribunal accordingly **orders** that a Remedy Hearing shall be fixed to

determine the amount of any compensation for injury to feelings to be paid by the respondents to the claimant for that victimisation.

(4) In consequence of those variations, the Tribunal substitutes the existing paragraphs 93 to 108 of the Reasons section of the original Judgment dated 17 September 2021, with new paragraphs 93 to 108, as set forth in the Appendix to the undernoted Reasons for this Reconsideration Judgment.

(5) Otherwise, the Tribunal confirms its original Judgment dated 17 September 2021.

(6) Case Management Orders for the fixing of the outstanding Remedy Hearing on all of the claimant's successful heads of complaint brought against the respondents, as upheld by the Tribunal, have been made, and they are issued under separate cover in a separate written Note and Orders by the Judge, issued to both parties' representatives, along with this our Reconsideration Judgment.

REASONS

Introduction

1. This case called before us again, as a full Tribunal, on Tuesday, 14 December 2021, for a one-day Reconsideration Hearing, on the claimant's application, following issue of our liability only Judgment dated 17 September 2021.

2. It was listed as a hybrid Hearing, as at that stage, it was envisaged, after correspondence between the Tribunal and both parties' representatives, that it would be held in person within the Glasgow Tribunal Centre, with the Judge and one member of the Tribunal, Mr Burnett (the other, Mr O'Hagan, to attend remotely by CVP, for shielding reasons), and the claimant and his counsel (but no instructing solicitor), and the solicitor for the respondents, all present in the public Tribunal hearing room.

3. In the event, that arrangement had to be altered at very short notice the afternoon before the start of the Reconsideration Hearing, when the Judge required to return home and isolate, for Covid related reasons, and both parties were advised by the Tribunal administration that the full Tribunal would now be attending remotely by CVP, and that parties could do so likewise, or attend the Tribunal in person, as originally envisaged.

4. The full Tribunal attended remotely, from their respective homes, as did the respondents' solicitor, Mr Nigel Ettles, while the claimant and his counsel, Mr Simon John, attended in person at the Tribunal, the arrangements having been altered while Mr John was mid-way between London and Glasgow on a flight up to Scotland.

5. He and Mr Gourlay attending in person allowed counsel to have the benefit of his client in attendance, for instructions, but socially distanced within the Tribunal hearing room. While scheduled to start at 10:00am, there were technical difficulties with Mr Ettles not being able to join the CVP, and the Tribunal clerk had to telephone, and assist him, before we started at around 10:50am, with all present, and the CVP working so that all present could be seen and heard by the others.

6. There was one exception to this, as for some reason, unexplained, Mr O'Hagan, one of the Tribunal members, could see and hear all others, but we could only see him, as although the CVP facility showed he was unmuted, nobody could hear him. An alternative communication channel was used for him to raise his hand, and by text / email to the Judge, he could raise any point, if and when required.

7. Other than a short disconnection of the Judge, at around 12:48, in error, when minimising his video screen, to look at a document on another screen, being referred to by Mr John in his oral submissions, when the Judge promptly reconnected, there were no other communication difficulties, and the full Tribunal and both parties were otherwise fully aware of what was going on, and being said, and overall we were satisfied that a fair hearing was provided to both parties, neither of whom raised any concerns.

Tribunal's Original Judgment

8. On 17 September 2021, the Tribunal issued its 199 page reserved liability Judgment and Reasons, following upon a Final Hearing, partly in person, and partly on CVP, lasting 21 days, and 2 Members' Meetings for private deliberation by the Tribunal only. This Reconsideration Judgment should be read alongside that original liability only Judgment, which is referred to for its full terms.

9. For present purposes, it will suffice to note here the specific terms of our liability only Judgment, as follows:

(1) ***Unanimously,*** *the Tribunal finds that the respondents failed to make reasonable adjustments for the claimant's MS disability, and so discriminated against him, on the grounds of his disability, contrary to* ***Sections 20 and 21 of the Equality Act 2010****, and the Tribunal accordingly* ***orders*** *that a Remedy Hearing shall be fixed to determine the amount of any compensation for injury to feelings to be paid by the respondents to the claimant for that unlawful disability discrimination.*

(2) ***Unanimously,*** *the Tribunal finds that the respondents did not victimise the claimant, contrary to* ***Section 27 of the Equality Act 2010****, by (a) substantial redaction of his argument and documents for his stage 3 grievance (number 3) dated 25 July 2014; (b) the stopping of his grievance dated 28 February 2015 (number 5) by Stephen West on or about 12 March 2015; (c) investigating him under the Code of Conduct from about 6 March 2015; (d) dismissing him on 24 September 2015; and (e) rejection of his appeal against dismissal on 25 August 2016; and so dismisses those parts of his complaint to the Tribunal.*

(3) ***By majority****, the Employment Judge dissenting, the Tribunal finds that the respondents did not discriminate against the claimant, on the grounds of his disability, contrary to* ***Section 15 of the Equality Act 2010****, by treating him unfavourably because of something arising in consequence of his MS disability, by issuing him with the informal*

Improvement Note dated 14 January 2015 under the respondents' Attendance Management Policy, and so dismisses that part of his complaint to the Tribunal.

(4) ***By majority,*** *Mr Burnett dissenting, the Tribunal finds that the respondents did victimise the claimant, contrary to* ***Section 27 of the Equality Act 2010****, by suspending him on 17 June 2015, and the Tribunal accordingly* ***orders*** *that a Remedy Hearing shall be fixed to determine the amount of any compensation for injury to feelings to be paid by the respondents to the claimant for that victimisation.*

(5) ***By majority****, Mr Burnett dissenting, the Tribunal finds that the claimant was unfairly dismissed by the respondents, contrary to* ***Section 98 of the Employment Rights Act 1996****, and the Tribunal accordingly* ***orders*** *that a Remedy Hearing shall be fixed to determine the amount of any compensation to be paid by the respondents to the claimant for that unfair dismissal.*

Claimant's Reconsideration Application

10. On 1 October 2021, the claimant's solicitor, Mr Giles Woolfson, of Mc Grade + Co, solicitors, Glasgow, applied to the Tribunal, further to **Rule 70 of the Employment Tribunal Rules of Procedure 2013**, for reconsideration of part of the Tribunal's Judgment issued on 17 September 2021. His application was copied to Mr Nigel Ettles, as solicitor for the respondents.

11. Mr Woolfson's application read as follows:

RECONSIDERATION APPLICATION

I represent the claimant in this matter, and I would be grateful if your records could be updated to reflect this.

The Judgment was issued to parties on 17 September 2021.

I am now applying, further to Rule 71 of the Employment Tribunal Rules of Procedure, for reconsideration of part of the Judgment.

Specifically, I invite the Tribunal to reconsider its decision at paragraph 100 of the Judgment, which currently finds that the dismissal of the claimant was not an act of victimisation. I invite the Tribunal to conclude that the dismissal was an act of victimisation and that the refusal to uphold the appeal was also an act of victimisation.

The reasons for making this application are as follows:

1. *One of the protected acts is identified at paragraph 87 of the Judgment, being the submission of an email to the Glasgow Employment Tribunal on 9 June 2015 disclosing the Twitter account of Ms Rogers. I will refer to this as the "relevant protected act".*

2. *The test for causation is identified at paragraph 93 of the Judgment.*

3. *I refer to paragraphs 174 and 175 of the closing submissions for the claimant: the protected act need not be the only reason for the detrimental treatment for victimisation to be established, and nor is it necessary for the protected act to be the primary cause of a detriment, or of great importance, so long as it is a significant or more than trivial influence.*

4. *The issue therefore is whether the relevant protected act formed a significant or more than trivial influence on the decision to dismiss.*

5. *The relevant protected act was one of the reasons for dismissal: factual findings at sub-paragraphs (207) and (225).*

6. *Counsel for the claimant has explained (with reference to his notes of evidence) that during cross-examination Stephen West confirmed that <u>all</u> of the allegations, including the allegation around submitting Twitter information*

to the Employment Tribunal (i.e. the relevant protected act), were necessary for him to reach the conclusion there had been gross misconduct, and that they were all a contributing factor.

7. *Counsel refers to the relevant evidence of Mr West at paragraphs 135 and 180 of his closing submissions, and has explained that Mr West accepted that the relevant protected act was material to the dismissal. The respondent, in its written reply, does not contest that Mr West confirmed that the relevant protected act was a contributory and aggravating factor in the dismissal.*

8. *Paragraph 98 of the Judgment finds that the relevant protected act was a substantial element in the decision to suspend the claimant, and that it was relevant the claimant had never been suspended previously despite his wide-ranging series of allegations and grievances. The suspension was found to be an act of victimisation.*

9. *Therefore, on the basis that:*

(a) the relevant protected act was considered to be significant enough for suspension, when the claimant had not been suspended despite the earlier allegations, and

(b) Mr West confirmed that <u>all</u> of the allegations (including the relevant protected act) were necessary for him to reach the conclusion there had been gross misconduct, and that the relevant protected act was an aggravating and contributory factor in the dismissal,

it should follow that the relevant protected act should be found to have had a more than trivial influence on the decision to dismiss.

10. *With regard to the appeal, paragraph 198 of the Judgment refers to the respondent's closing submission, which includes a statement that the appeals committee did not make any findings which were different from those*

of Stephen West. The Tribunal recognised variously in its Judgment, and particularly at paragraph 205, that the lack of a reasoned decision at appeal or the calling of an appeal decision maker to give evidence, rendered it impossible to form a view that any defects in the disciplinary stage were cured on appeal. At paragraph 180 of the claimant's closing submission, counsel submits that the relevant protected act was a continuing influence on suspension, dismissal and appeal.

11. *For the above reasons, I submit that causation between the relevant protected act and the dismissal and refusal to uphold the appeal has been made out.*

12. *However, paragraph 100 of the Judgment does not address the question of whether the protected act had a more than trivial influence on the decision to dismiss. There is no reference to the evidence of Stephen West in this regard or the associated findings at paragraph 98 of the Judgment, again bearing in mind a protected act need only, in part, influence a detriment in order to constitute victimisation.*

13. *I respectfully suggest this warrants reconsideration, and that this would be in the interests of justice given the potential significance of a finding that the dismissal of the claimant and the refusal to uphold his appeal were acts of victimisation.*

12. The claimant's application was referred to the Judge, who did not refuse it on initial consideration (under **Rule 72**), and by letter from the Tribunal, sent to both parties' representatives, on 8 October 2021, the respondents were invited to provide any response to the application by 18 October 2021, and, by that date, both parties were invited to express a view as to whether the reconsideration application could be determined without a Hearing.

13. By email to the Glasgow ET on 18 October 2021, Mr Woolfson, the claimant's solicitor, provided his response (with copy sent to Mr Ettles, as the respondents' solicitor), and, in particular, Mr Woolfson stated that, having

spoken with counsel, he proposed that a Hearing be set down in order for the reconsideration application to be determined.

14. Mr Woolfson anticipated that there was likely to be some discussion around the evidence, particularly that of Mr Stephen West, the respondent's dismissing officer, and that a Hearing might be a more efficient way to address any questions which the Tribunal might have in relation to the evidence, and for submissions to be presented including any counter-arguments.

15. Indeed, Mr Woolfson offered the observation that : "***A hearing should help to avoid what could potentially become a series of emails being exchanged",*** and he suggested that while a ½ day should be sufficient, the Tribunal might prefer to set aside a whole day just in case.

Respondents' Objections to Reconsideration

16. By email to the Glasgow ET on 18 October 2021, Mr Nigel Ettles, the respondents' solicitor, provided his response (with copy sent to Mr Woolfson, as the claimant's solicitor), and, in particular, Mr Ettles stated that he was of the view that the claimant's application for reconsideration could be determined without a Hearing.

17. Mr Ettles' response otherwise read as follows:

I refer to your letter of 8 October 2021 in which you invited a response to the Claimant's application for reconsideration of the judgment. On behalf of the Respondent, I provide the following response:-

1) *As stated in the Respondent's Reply to the Claimant's Closing Submissions, in his evidence to the Tribunal, Stephen West explained he took the view that the allegations against the Claimant cumulatively amounted to gross misconduct. When cross-examined he did not accept that if one allegation fell there could not be gross misconduct.*

2) *In his cross-examination of Mr West, Counsel for the Claimant asked whether Allegation 7 was a material or necessary part of the gross misconduct. Mr West replied that it was a contributory factor.*

3) *Allegation 7 was that "You trawled through the personal twitter account of Vicki Rogers and included two of her personal photographs in an Employment Tribunal submission alleging "cronyism". Such behaviour and comments can be viewed as a personal attack towards her."*

4) *It is clear from the letter of dismissal (page 655 of the documents) and from his evidence to the Tribunal that Mr West's concern about Allegation 7 was the claim of potential cronyism contained in the submission and not the fact that a submission had been made to the Employment Tribunal.*

5) *Towards the end of his cross-examination, Counsel for the Claimant put a more specific matter to Mr West. He put it to Mr West that the disciplinary process had been commenced wholly or in part because of Employment Tribunal proceedings. Mr West answered "No, that's not true at all."*

6) *In the circumstances, the Tribunal were right to find that the reason for the dismissal was not that the Claimant had done a protected act. The reason was the Claimant's conduct towards his fellow employees. There was therefore no victimisation in relation to the dismissal.*

7) *As stated in the Respondent's Closing Submissions, the Appeals Committee upheld the decision to dismiss on the basis of the same misconduct as that relied upon by Mr West. The Appeals Committee did not make any new or different findings. They simply upheld Mr West's decision. There is no evidence that the Appeals Committee reached their decision because of a protected act.*

8) *In the circumstances, the Tribunal were right to find that the Appeals Committee upheld the decision to dismiss not because of a protected act but because of the Claimant's conduct towards his fellow employees. There was therefore no victimisation in relation to the internal appeal.*

9) *There is no reason for the Employment Tribunal to reconsider their decisions in relation to the alleged acts of victimisation. It would not be in the interests of justice to reconsider the matter.*

Reconsideration Hearing ordered by the Tribunal

18. Following referral to the Judge, an email was sent to both parties' representatives, on 20 October 2021, acknowledging their correspondence dated 18 October 2021, and stating that the Judge agreed with the claimant's representative that the reconsideration required an oral Hearing, and that it was not appropriate to deal with it on the papers, as Mr Ettles for the respondents had suggested.

19. Further, the Judge considered a one-day allocation was appropriate, and that it should be held in person, rather than be conducted wholly remotely by CVP, although, on account of Mr O'Hagan, one of the Tribunal members, shielding, the Judge anticipated that he might seek to participate remotely, through CVP, and so the possibility of a hybrid Hearing might arise.

20. As there was a limit of 5 persons in the Hearing room, other than the panel, on account of social distancing measures, parties were asked to confirm who would be in attendance, or to observe by CVP.

21. By subsequent correspondence of 21 and 27 October 2021, both parties confirmed who would be in attendance at this Reconsideration Hearing, and they jointly requested that a Remedy Hearing should not take place meantime in respect of then successful heads of complaint as per the Tribunal's Judgment of 17 September 2021.

22. On 1 November 2021, the Tribunal gave notice to both parties that the claimant's opposed reconsideration application would be considered by the full Tribunal at a hybrid 1-day Reconsideration Hearing at the Glasgow Tribunal Centre on Tuesday, 14 December 2021, with all (except Mr O'Hagan attending by CVP) attending in person.

23. In advance of this Reconsideration Hearing, the Judge ordered both parties' representatives to liaise and co-operate in providing the Tribunal, by no later than 4.00pm on Monday, 6 December 2021, with a written skeleton argument, providing hyperlinked citation of any statutory provisions and / or case law authority to be relied upon by either party.

24. Further, pending the Tribunal's determination of the opposed reconsideration application, the Judge confirmed, via the Tribunal's email of 1 November 2021, that no steps would be taken meantime to relist the case for a Remedy Hearing, as per the original Judgment issued on 17 September 2021, but, at this Reconsideration Hearing, the Judge would wish both parties' representatives to be in a position to address the Tribunal on further procedure in advance of any Remedy Hearing.

Claimant's Appeal to the Employment Appeal Tribunal

25. On 29 October 2021, the EAT Edinburgh advised the Glasgow ET that they had received a Notice of Appeal from the claimant's solicitors, appealing against the Tribunal's Judgment of 17 September 2021, noting the reconsideration application to the ET made on the claimant's behalf, and advising that the appeal to the EAT was therefore sisted pending the outcome of this reconsideration.

26. The claimant's appeal to the EAT asked it to reverse the appealed aspects of the Tribunal's original Judgment (namely its finding that the claimant's dismissal and rejection of his appeal against dismissal did not amount to acts of victimisation), enter judgment for the claimant / appellant on those issues, and list the matter for a Remedy Hearing.

27. Specifically, the claimant's appeal was advanced on two grounds, namely:

Ground 1: "***The learned Tribunal failed to apply the correct legal test, alternatively misapplied the test when considering whether the detriments of dismissal and dismissal appeal rejection were "because of" the relevant protected act***".

Ground 2: "***In so rejecting the dismissal and the appeal refusal as acts amounting to victimisation, the learned Tribunal acted contrary to and / or failed to have any or any sufficient regard to the accepted relevant evidence before it, and to its own findings elsewhere in the judgment, which demonstrated that causation between protected act and the detriment/s was plainly made out.***"

Respondents' Skeleton Argument

28. By email to the Glasgow ET on 6 December 2021, sent at 15:50, the respondents' solicitor, Mr Ettles, attached his Skeleton Argument for the Respondent in response to the claimant's reconsideration application. It was copied to the claimant's solicitor, Mr Woolfson. Mr Ettles hyperlinked one authority on Bailii, **Ministry of Justice v Burton [2016] ICR 1128** (CA), and attached ICR reports for two other cases referred to in his Skeleton, but not available on Bailii, being **Trimble v Supertravel Ltd [1982] ICR 440** (EAT), and **Flint v Eastern Electricity Board [1975] ICR 395** (QBD).

29. Mr Ettles' Skeleton Argument was set out in two separate parts, (1) **Jurisdiction of Employment Tribunal** (paragraphs 1 to 6), and (2) **Response to Content of Application** (separate paragraphs 1 to 12). Rather than try and sub-edit his work, and provide our own executive summary, we consider it appropriate to note the full terms of his written submission, particularly as in his oral submissions to the Tribunal, Mr Ettles did so by reference to his written Skeleton.

30. For ease of reference, the full terms of the respondents' Skeleton Argument by Mr Ettles are reproduced here, as follows:

Jurisdiction of Employment Tribunal

1) The reconsideration application is unusual in that it does not involve, for instance, an obvious mistake, a defect in the procedure or new evidence that could not have been presented at the hearing.

2) The Claimant is effectively arguing that, although the Tribunal identified the correct legal test in relation to victimisation, it failed to apply that test. The Claimant is therefore contending that the Tribunal erred in law. The Claimant had the opportunity before the Tribunal to present arguments in relation to the allegation of victimisation and did in fact present such arguments.

3) The Claimant is asking the Tribunal to reconsider the evidence that is already before it and to apply the legal test that it has already applied but to come to a different conclusion.

*4) In **Trimble v Supertravel Ltd [1982] ICR 440**, it was held that if a matter has been ventilated and argued at a Tribunal hearing any error of law falls to be corrected on appeal and not by review.*

5) The Claimant has appealed to the Employment Appeal Tribunal as well as applying for reconsideration. The appeal is in relation to the matter which is the subject of the reconsideration application. It is therefore clear that the reconsideration application involves a point of law.

*6) Applying the principle in **Trimble**, the Tribunal does not have jurisdiction to hear the reconsideration application and the application should therefore be refused.*

Response to Content of Application

1) As stated in the Respondent's Reply to the Claimant's Closing Submissions, in his evidence to the Tribunal, Stephen West explained he took the view that the allegations against the Claimant cumulatively amounted to gross misconduct. When cross-examined he did not accept

that if one allegation fell there could not be gross misconduct. When pressed on the matter, he said that five or six of the allegations might be sufficient to establish gross misconduct.

2) *In his cross-examination of Mr West, Counsel for the Claimant asked whether Allegation 7 was a material or necessary part of the gross misconduct. Mr West replied that it was a contributory factor.*

3) *Allegation 7 was that "You trawled through the personal twitter account of Vicki Rogers and included two of her personal photographs in an Employment Tribunal submission alleging "cronyism". Such behaviour and comments can be viewed as a personal attack towards her."*

4) *It is clear from the letter of dismissal (page 655 of the documents) and from his evidence to the Tribunal that Mr West's concern about Allegation 7 was the claim of potential cronyism contained in the submission and not the fact that a submission had been made to the Employment Tribunal.*

5) *Towards the end of his cross-examination, Counsel for the Claimant put a more specific matter to Mr West. He put it to Mr West that the disciplinary process had been commenced wholly or in part because of Employment Tribunal proceedings. Mr West answered "No, that's not true at all."*

6) *In his reconsideration application the Claimant states that the relevant protected act was one of the reasons for dismissal and, apparently in support of that, refers to factual findings at sub-paragraphs (207) and (225). Those factual findings do not support the contention that the relevant protected act was one of the reasons for dismissal.*

7) *A finding that the protected act had a significant, or more than trivial, influence on the decision to suspend does not necessarily lead to a*

finding that it had such an influence on the decision to dismiss or the decision not to uphold the internal appeal. There were very significant developments between the suspension and the dismissal: in particular, the detailed investigation report was issued and there was a disciplinary hearing.

8) In the circumstances, the Tribunal was entitled to find that the reason for the dismissal was not that the Claimant had done a protected act and to find that the reason was the Claimant's conduct towards his fellow employees. The Tribunal was therefore entitled to find that there was no victimisation in relation to the dismissal.

9) As stated in the Respondent's Closing Submissions, the Appeals Committee upheld the decision to dismiss on the basis of the same misconduct as that relied upon by Mr West. The Appeals Committee did not make any new or different findings. They simply upheld Mr West's decision. There is no evidence that the Appeals Committee reached their decision because of a protected act.

10) In the circumstances, the Tribunal was entitled to find that the Appeals Committee upheld the decision to dismiss not because of a protected act but because of the Claimant's conduct towards his fellow employees. There was therefore no victimisation in relation to the internal appeal.

*11) The case of **Flint v Eastern Electricity Board [1975] ICR 395** emphasises the importance of the finality of litigation. The purpose of reconsideration should not be to have "a second bite at the cherry". This principle was endorsed in the more recent case of **Ministry of Justice v Burton [2016] ICR 1128** https://www.bailii.org/ew/cases/EWCA/Civ/2016/714.html.*

12) There is no reason for the Employment Tribunal to reconsider its decisions in relation to the alleged acts of victimisation. It would not be in the interests of justice to reconsider the matter. The Tribunal's original decision should be confirmed.

Claimant's Skeleton Argument

31. By email to the Glasgow ET on 6 December 2021, sent at 15:55, the claimant's solicitor, Mr Woolfson, attached the claimant's Skeleton Argument for the Reconsideration Hearing, prepared by the claimant's counsel, Mr Simon John. It was copied to the respondents' solicitor, Mr Ettles.

32. The claimant's Skeleton Argument cited 3 case law authorities, being:

- ***Igen Ltd and ors v Wong and other cases [2005] ICR 931; [2005] EWCA Civ. 142***
- ***Nagarajan v London Regional Transport [2000] 1 AC 501 (otherwise cited as Swiggs and Others v. Nagarajan [1999] UKHL 36; [1999] IRLR 572 ; [1999] ICR 877)***
- ***Pathan v South London Islamic Centre [2014] UKEAT 0312/13***

33. Mr John's Skeleton Argument, which is set out across 7 pages, and extending to 34 separate, consecutively numbered paragraphs, provided Background; The Causation Test; Respondent Concessions; Relevant Findings; Submissions; the Appeal ; and Summary. Again, rather than try and sub-edit his work, and provide our own executive summary, we consider it appropriate to note the full terms of his written submission, particularly as in his oral submissions to the Tribunal, Mr John did so by reference to his written Skeleton.

34. For ease of reference, the full terms of the claimant's Skeleton Argument by Mr John are reproduced here, as follows:

1. *The learned tribunal produced a detailed judgment covering multiple claims and significant factual issues. This reconsideration application only focuses on one aspect, namely the findings on victimisation discrimination in the dismissal (and the rejection of the appeal) which the Claimant respectfully submits could and should be rectified under a reconsideration.*

2. *Under **Rule 70**, judgments are reconsidered where it is in the interests of justice to do so, giving effect to the overriding objective to deal with cases fairly and justly. Namely avoiding unnecessary formality and seeking flexibility in the proceedings by correcting an apparent error by omission or inconsistency in the judgment and avoiding the delay and saving the expense of an appeal. As is consistent with the flexibility of the overriding objective, such reconsiderations should not be construed restrictively.*

Background

3. *The reconsideration application is in respect of a single protected act, namely: the submission by the Claimant to the Employment Tribunal on 9 June 2015 of a letter in which he raised issues as to lack of objectivity in the management of his concerns (see Judgment p.80 para (195-198)). Attached to that same letter was an extract from Manager Vick* (sic) *Rogers' public Twitter pages showing her and Manager Ms Angela Wilson seemingly as close friends. The Claimant was raising concerns where one of those was supposed to be investigating his concerns about the other and where Ms Wilson was seeking to investigate him. The Tribunal accepted that submission to the ET as a protected act. (The Claimant herein refers to that protected act as "the Twitter submission").*

4. *The Claimant alleged (amongst other things) that by reason of the Twitter Submission protected act he was: suspended, dismissed and his dismissal appeal was rejected (Judgment p.152).*

The causation test

5. *The Tribunal was addressed in closing submissions as to the applicable legal test for causation, ie. the "because of" question. A detriment is 'because of' a protected act if the protected act has had a 'significant influence' on the detrimental decision/action.*

6. *The Claimant submitted on this test in closing submissions (see claimant closing submissions para 174). The Court of Appeal have addressed this test in* ***Igen Ltd and ors v Wong and other cases 2005 ICR 931****, IGEN Ltd & Ors v Wong [2005] EWCA Civ 142 (18 February 2005) (bailii.org), in which Lord Justice Peter Gibson clarified[1] (with reference to Lord Nicholls' judgment in* ***Nagarajan v London Regional Transport [2000] 1 AC 501****) that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather 'an influence which is more than trivial'.*

7. *The Tribunal included this test in the Judgment (para 93).*

8. *The Claimant's closing submissions went on at paragraph 175 to explain how the protected act need not be the only reason for the detrimental treatment in order for victimisation to be established. Nor is it necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor.*

(See ***Pathan v South London Islamic Centre EAT 0312/13*** *http://www.bailii.org/uk/cases/UKEAT/2014/0312_13_1405.html.)*

These principles were not expressly acknowledged in the Judgment.

Respondent Concessions

E [1] See ***Igen*** para 37

9. Set against those issues and that legal test, dismissing officer Stephen West ("SW") was cross examined and made the following concessions:

a. In respect of the decision to suspend the Claimant SW accepted that the fact that the 9 June 2015 letter was submitted to the tribunal was "a particularly aggravating feature";

b. In respect of the dismissal, SW again accepted that the fact that the submission was made to the ET was "an aggravating aspect";

c. He accepted that the twitter submission (allegation number 7) "it was a contributing factor" (towards dismissal) and that it was "material" (towards dismissal);

10. Even the 24 September 2015 dismissal letter itself, referred to each of the allegations being "cumulatively they are demonstrative of gross misconduct …….this has resulted in an irretrievable breakdown of trust and confidence" (see Judgment p.89 para (225)).

11. The Claimant submitted on these concessions (see C closing paras 135 and 180).

12. However, they did not appear in the Judgment.

Relevant Findings

13. The Tribunal accepted that the said Twitter Submission amounted to a protected act (para 88) and that suspension, dismissal and appeal refusal were of course detriments (Para 85).

14. *The Tribunal found that the Twitter submission was "a substantial element in the respondents' decision to suspend the claimant" (para 98) and was a "substantial cause that led to the claimant's suspension" (para 99). The suspension was found to be an act of victimisation.*

15. *However, as for the 24 September 2015 dismissal, the Tribunal "was satisfied that this was because of the claimant's conduct in the workplace. It was not because he had done a protected act." (Judgment para 100).*

16. *The Tribunal made a similar finding in respect of the 25 August 2016 Appeal rejection (Judgment para 101).*

Submissions

17. *The test for victimisation causation is a relatively low threshold:- Was the protected act an influence in the detrimental decision, which is more than trivial?.*

18. *But the question is more nuanced than just that. The Tribunal must also bear in mind that:*

    a. *the protected act may be one of many reasons; and*
    b. *it need not be the primary reason for the detriment.*

    and the detriment is still to be considered 'because of' the protected act.

19. *To direct oneself only to the question: 'was the dismissal/appeal because of the protected act?' does not have regard to the more nuanced test and overestimates the significance which the protected act should play in the detrimental decision.*

20. *With the correct test in mind, the concessions of Mr West take on a central role.*

21. *Therefore, the Tribunal is respectfully requested to reconsider its decision as to the dismissal and appeal not being acts of victimisation. It is asked to consider the concessions made by Mr West, as submitted at the tribunal hearing, but which are absent from the Judgment. The tribunal is asked to consider that in light of Mr West's accepted concessions in evidence, that the relatively low threshold test for victimisation causation (an influence which is more than trivial, which can be one of many reasons, and which need not be the primary reason) realistically must be made out in this case.*

22. *Acceptance by Mr West that the fact of the Twitter Submission being made to the ET was an aggravating factor; and that it was a 'material' and 'contributing' factor to the dismissal; and which viewed 'cumulatively with the other allegations… contributed to dismissal' – it is respectfully submitted - must mean that the protected act Twitter submission had a more than trivial influence on dismissal. Realistically on that evidence, victimisation causation must be made out.*

23. *Further, the tribunal having found that the Twitter submission was a "substantial cause" in the decision to suspend, it is asked to reconsider, that it should logically follow that the dismissal was also a substantial (or more than trivial) cause in the dismissal. As submitted at final hearing (claimant's closing para 137) the Twitter submission evidently led to a hardening of attitudes towards the Claimant. The Claimant had not been suspended prior to June 2015, despite the wide range of allegations made against him. It was the Twitter Submission (the protected act) which resulted in suspension. There was nothing to suggest that the negative attitudes towards the Twitter submission had softened at the Respondent, between suspension and decision to dismiss. The form of allegation (no.7) remained the same at the point of suspension and at dismissal and included reference to the submission to the ET as part of that allegation.*

The Appeal

24. The same points in relation to the application of the correct test and the significance of Mr West's admission to the dismissal, apply to the next stage, the appeal.

25. If a dismissal is an act of victimisation, then it is questionable whether an appeal can cure that discrimination. But even if theoretically it can, that can surely only be the case if the Respondent has put evidence before the Tribunal (alternatively, if there is evidence before the tribunal) that the protected act played no material part in the appeal rejection. What a Respondent cannot do is produce no material evidence as to the reasoning of its appeal panel, and then try and submit into that evidential void, reasoning or findings to its benefit.

26. The Tribunal observed (para 199) that the Appeals Committee made no findings and it was that failure that made it impossible for the Tribunal to determine whether the unfairness in the dismissal was cured on appeal (para 205).

27. In the absence of express evidence to the contrary, the natural inference would be that the appeal committee has made the same dismissal decision for the same reasons as below. Otherwise, it would be in every Respondent's interest to provide no evidence as to its appeal decision and hide behind that absence.

28. Further, as presented by Mr Nettles (sic) *on behalf of the Respondent at the hearing and as repeated in his response to this reconsideration application in email dated 18th October 2021 (at para 7):*

"7) As stated in the Respondent's Closing Submissions, the Appeals Committee upheld the decision to dismiss on the basis of the same misconduct as that relied upon by Mr West. The Appeals Committee

did not make any new or different findings. They simply upheld Mr West's decision."

That is exactly the Claimant's point. The inference is that the Appeal Committee made the same decision for the same reasons. Or put another way, they simply endorsed the dismissal for the reasons given at dismissal. One of the reasons given in the dismissal letter was allegation 7. Allegation 7 relied upon the Twitter submission to the ET. Mr West admitted that that was an aggravating aspect of the misconduct, ie. the protected act aspect. So the inference must be that the influence of the protected act within allegation 7, carried through into the appeal refusal.

29. *If the Tribunal agree that the Twitter submission protected act formed a more than trivial influence in the dismissal, then in the absence of any reasoning from the Appeal Committee, it must realistically be considered an influential part in their rejection of the appeal. One fails to see how the Respondent can credibly contend otherwise.*

30. *If more was needed, it is evident from parts of the appeal transcript that the Appeal Committee had formed a dim view of the fact of the Twitter submission having been sent into the tribunal in June 2015 in any event. Councillor Rainey commented that the public nature of the Twitter Submission was outwith policy and against relationships with colleagues, and questioned the claimant on whether it was a breach of the Code of Conduct (see the minutes of the appeal hearing from 25 August 2016, page 8).*

Summary

31. *The Claimant respectfully requests the Tribunal to reconsider the dismissal and appeal victimisation findings in light of:*

    a. *The full legal causation test.*

b. The concessions by Mr West as to the causative significance of the Twitter Submission protected act.

And to consider that those concessions must and do meet that relatively low threshold causation test, such that dismissal was an act of victimisation.

32. Further / alternatively to reconsider that its findings as to the Twitter submission being a substantial cause in the suspension, logically translates into that submission also being a more than trivial influence in the dismissal.

33. To consider and infer (as indeed is the Respondent's case) that the appeal committee came to the same dismissal decision on the same basis as Mr West. Given that on his own admissions, Mr West's dismissal decision was more than trivially influenced by the Twitter submission to the ET, then in the absence of any evidence as to the reasoning of the Appeal Committee to the contrary, that appeal decision must also have been (or at the very least likely was) so influenced.

34. The Claimant respectfully invites those findings on reconsideration, plus consequential directions for a remedies hearing.

Issues for Determination by the Tribunal

35. The primary issue for determination by the Tribunal at this Reconsideration Hearing was the claimant's opposed application for reconsideration of part of our liability only Judgment dated 17 September 2021, as per Mr Woolfson's application of 1 October 2021, and Mr Ettles' objections of 18 October 2021, as each reproduced earlier in these Reasons.

36. A further, but ancillary matter, was to discuss with both parties' representatives further procedure in the case by way of fixing a Remedy Hearing. Both parties' representatives were alerted to this in the Tribunal's email of 1 November 2021.

37. In the event, arising from discussion with both parties' representatives on 14 December 2021, after the close of oral submissions on the opposed reconsideration application, the Judge made an interlocutory ruling, the terms of which were set forth the next day in a e-mailed communication from the Tribunal clerk. The claimant's instructing solicitor, Mr Woolfson, was given a period of 14 days to provide an update to the Tribunal, with a chronology and timeline for the claimant's various appeals to the Scottish Public Pensions Agency, the Pensions Ombudsman, and the Pensions Regulator, as Mr Ettles advised us that the respondents needed to see the outcome of the pensions challenges put in place by the claimant.

38. As such, further procedure about a Remedy Hearing was no longer for our determination as a full panel, but left to the Judge, in terms of general case management, after considering parties' correspondence to follow. In light of ongoing correspondence between the Tribunal and parties' representatives, and an ongoing delay in regard to the claimant's solicitor getting an update from the Pensions Ombudsman, the case has not yet been listed for any Remedy Hearing. As a full panel, we have given directions in the separate written Note & Orders by the Judge, issued alongside this our Reconsideration Judgment.

39. As neither party's written Skeleton Arguments addressed in their written submissions, in any detail, the relevant law on reconsideration, or the burden of proof, the Judge had issued instructions to both parties' representatives, on Friday, 10 December 2021, by email to them from the Tribunal clerk.

40. That email from the Tribunal advised them that, having noted the case law authorities listed by parties, the Judge wished parties' representatives to consider, and include in their oral submissions, any additional points either party wished to make, having regard to the authorities cited by the Judge, that neither party had cited, but which the Judge felt might be relevant to the claimant's opposed reconsideration application before the full Tribunal for determination.

41. Those additional case law authorities cited by the Judge (and provided with hyperlink to the Bailii website, for the assistance of parties' representatives) were as follows:

- ***Burden of Proof : Section 136, Equality Act 2010***

  Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913, [2018] ICR 748, [2018] IRLR 114

- ***Reconsideration of Judgments / Interests of Justice : ET Rules 2013***

  1) ***Council of The City of Newcastle Upon Tyne v. Marsden (Rev 1) [2010] UKEAT 0393_09_2301; [2010] ICR 743***

  2) ***Outasight VB Ltd v Brown [2014] UKEAT 0253_14_2111 ; [2015] ICR D11***

  3) ***Wolfe V North Middlesex University Hospital NHS Trust [2015] UKEAT 0065_14_0904 ; [2015] ICR 960***

  4) ***Serco Ltd v Wells [2016] UKEAT 0330_15_1301; [2016] ICR 768***

  5) ***Dundee City Council v Malcolm [2016] UKEAT 0021_15_0902***

  6) ***Liddington v. 2gether NHS Foundation Trust [2016] UKEAT 0002_16_2806***

7) Scranage v. Rochdale Metropolitan Borough Council [2018] UKEAT 0032_17_1902

42. In the Tribunal's email of 10 December 2021, parties' representatives were further advised that the Judge understood from the EAT Edinburgh that the claimant's appeal was sisted pending determination of this reconsideration application, and the Tribunal having seen the EAT Notice of Appeal submitted on 28 October 2021, parties were asked to confirm the position, at the start of the Reconsideration Hearing, that there had not been any respondents' reply, or any respondents' appeal or cross-appeal.

43. After that clarification, and any preliminary matters either party's representative may wish to raise, the Judge proposed, in terms of **Rule 45**, to hear from the claimant's counsel, Mr John, for a maximum of one hour, followed by Mr Ettles, solicitor for the respondents, again for a maximum of one hour. The Tribunal would then invite Mr John to reply, for up to 15 minutes, before then adjourning for private discussion, for up to 30 minutes, before returning, and asking either or both parties' representatives to clarify any matters arising,

44. Finally, and as previously advised, in the Tribunal's email of 1 November 2021, the Tribunal would thereafter wish to be addressed on further procedure, and listing for a Remedy Hearing. The Reconsideration Hearing was listed for a full day, and the Tribunal intended to reserve judgment, to be issued in writing, with reasons, at a later date, after a Members' Meeting for private deliberation by the Tribunal only in chambers, and likely held remotely by the full ET panel.

Reconsideration Hearing before the full Tribunal

45. At the start of the Reconsideration Hearing, on 14 December 2021, at 10:50am, both parties confirmed that they understood the procedure to be followed, and the Tribunal's timetabling for the Hearing, and Mr John, as counsel for the claimant, was invited first to address the Tribunal.

Submissions for the Claimant

46. Mr John opened his address to the Tribunal at 10:56 am by saying that his written skeleton argument was comprehensive, and it encapsulated his position. Under reference to paragraph 9 of his skeleton, he referred to the concessions made at the Final Hearing, under cross-examination, by the respondents' dismissing officer, Stephen West, and what he and Mr Ettles, the respondents' solicitor, had said in their respective written closing submissions to the Tribunal, at paragraphs 135 and 180, commenting that there were only "***semantic differences"*** between what they had each recorded, and these differences were, he submitted, ***"without significance***."

47. We pause, at this point, to reflect on exactly what was said to us at that earlier stage. Mr John, counsel for the claimant, had written: (allegation 7) 135. *"SW stated in XX that "**the fact it was to the ET was a particularly aggravating factor**." And that "**yes it was a contributory factor in the dismissal**"; and, at 180 : "SW accepted from direct questions that the 9 June 2015 submission to the ET was material to the suspension, and was an important contributing factor in the dismissal and **the fact it was to the ET was a significant and aggravating factor**. All of the ingredients of victimisation are made out. The appeal appear to have just accepted what went before. Hence it fed into their decision. The ET submission was a continuing influence on suspension, dismissal and appeal. As appeal was the final act, the claim is in time as a continuing act."*

48. In reply, Mr Ettles, solicitor for the respondents, had responded in his written reply to the claimant's closing submissions at the Final Hearing saying :

> *135. Once more, the Tribunal will have its own recollection and notes but, according to the Respondent's notes, Stephen West accepted that it was "**aggravating**" (not "a particularly aggravating factor") as the document was, in Counsel's words, "out there publicly". Mr West accepted that Allegation 7 was a contributory factor in the finding of gross misconduct.*

> *180. As stated at paragraph 135 above, Mr West agreed that it was a "**contributory factor**" (not "an important contributing factor"). Mr West accepted that it was an "**aggravating factor"** (not "a significant and aggravating factor").*

49. In writing up this our Reconsideration Judgment, we accept that, in his closing submissions after the Final Hearing, at paragraph 175, Mr John, counsel for the claimant, had referred to the relevant law, and in summarising his detailed written submissions in our original Judgment and Reasons, we did not, expressly, acknowledge the full applicable principles from his cited case of **Pathan v South London Islamic Centre EAT 0312/13**, viz: "*It follows that the protected act need not be the only reason for the detrimental treatment for victimisation to be established . Nor is it necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor.*"

50. At this Reconsideration Hearing, Mr John then considered whether this matter is apt for reconsideration. He referred us to the judgment of His Honour Judge Serota, at paragraph 75, of the EAT judgment in **Wolfe v North Middlesex University Hospital Trust [2015] UKEAT/0065/14**, and he explained that this EAT case is why the claimant chose to seek reconsideration by this Tribunal.

51. While Mr John noted that Mr Ettles, in his written submissions for the respondents, had referred to **Flint v Eastern Electricity Board [1975] ICR 395**, counsel for the claimant sounded some caution for us relying on that case, as while it emphasises the importance of the finality of judgment, it was a judgment given pre the Tribunal's overriding objective, and the current **Rule 70** refers to the "***interests of justice"*** as the test, and this application for reconsideration is not suggesting that there is any new evidence in the present case, and there has not been a failure to bring matters before the Tribunal.

52. Further, submitted Mr John, this is not a new evidence case, and so the EAT judgment in **Outasight VB Ltd v Brown [2015] ICR D11** is of no assistance, as the present case does not involve a **Ladd v Marshall** scenario of

attempting to lead new evidence, and the **Trimble v Supertravel Ltd [1982] ICR 440** judgment of the EAT, relied upon by Mr Ettles for the respondents, is not sufficiently similar to the present case.

53. Mr John stated that the **Serco Ltd v Wells [2016] ICR 768** judgment of the EAT, cited by the Judge for parties to consider, was of some assistance, where there was a material omission, but that EAT judgment applied to reconsideration of a case management order, rather than a Judgment, but it applies more broadly, and he prayed it in aid to deal with Mr Ettles' point that the reconsideration involves a point of law, and that is a matter for appeal to the EAT.

54. Further, Mr John stated that he acknowledged the importance of the finality of litigation, and not getting a "***second bite of the cherry***", but this reconsideration is not doing that, as he is just asking this Tribunal to factor in the issues already before it regarding victimisation, and weight that up in the interests of justice, and the Tribunal's overriding objective duty to deal with the case fairly and justly. He submitted that this Tribunal "***is not straight jacketed"*** in deciding how to do justice between the parties, and he stated that the claimant is ***"grateful for the detail and admirable scope of the Judgment"*** issued in the claimant's favour.

55. Mr John stated that the Judgment was not an account of every event, but the challenge here is not peripheral, but to do with the admissions made in evidence by the dismissing officer, Mr West, which, counsel submitted, showed that there was more than a trivial influence here between the "protected act" of the Twitter submission and the claimant's dismissal (and rejection of his appeal against dismissal). He stated that, at the Final Hearing, he had taken *verbatim* notes of the evidence given, and he had underscored, and highlighted, the evidence given by Mr West, and he was "***very confident***" that what he had written is the answers given by Mr West.

56. Further, submitted counsel for the claimant, the Tribunal should look at what he had written in paragraph 137 of his closing submissions to the Tribunal, which feeds into the question of materiality and causation. We pause here to

note and record what he said then (recalling that VR = Vicky Rogers, and AW = Angela Wilson):

> *137. VR was evidently a strong driving force behind the allegations and strength of feeling against the Claimant. Proper particulars of her allegations "onslaught of criticism", "ripple of concern" and "a number of challenges" should have been sought, and in the absence of which the relevant allegations withdrawn. C also in his submissions to the ET of 9 June 2015 [2-216] included that AW was not objectively managing his concerns, including re VR. As stated, VR also appears to have driven allegation 7 (the twitter photos) which allegation led to the suspension and appears to have been particularly influential in a hardening of VR/HR/R's position on C and therefore dismissal.*

57. Mr John further stated that in the respondents' consolidated ET3 response there had been a "***fairly rabid response***" to the Twitter allegations by the respondents' then solicitor, Gavin Walsh, and counsel submitted that it is very difficult to say causation is not there, if these things were factored in. As such, it cannot be trivial, conceptually, if it's contributing, significant, and material. Counsel added that it had been "***a Mammoth task for the Tribunal to deal with this case***", and the respondents had not really challenged the words used in his closing submissions at the Final Hearing, nor have the respondents in writing made a substantive challenge that Mr West's admissions are less than material, less than significant, and properly classed as trivial.

58. Instead, highlighted Mr John, Mr Ettles' submissions to this Reconsideration Hearing had sought to refer to other aspects of cross-examination, and he proceeded to draw our attention to what Mr Ettles has stated there in his written response to the content of the reconsideration application. He invited the Tribunal to look at its own notes of the evidence given at the Final Hearing, as he said his notes did not have the same points as Mr Ettles was referring to, and he further submitted, under reference to paragraphs 21 and 22 of his own skeleton submissions for the claimant, that the threshold test is low, namely more than trivial, the Twitter submission was a significant part in the claimant's

suspension, and that the actual evidence suggests it is far more than trivial but a substantial cause in the claimant's dismissal.

59. Further, Mr John described as not accurate, and potentially misleading, what Mr Ettles had stated at paragraph (4) of his written submissions about "***cronyism***", and he stated that paragraph (5), where Mr Ettles was highlighting part of Mr West's cross-examination by Mr John should be viewed in the context that Mr West was being asked about many points, where counsel stated that Mr West had fallen into a mindset of denying every point put to him.

60. Mr John also submitted that it was of significance that the Twitter submission to the ET featured in the letter of suspension, in the same wording as in the letter of invitation to the disciplinary hearing, and then in the dismissal letter itself, and further, under reference to paragraph (30) of the claimant's skeleton submissions, it was evident from parts of the appeal hearing transcript that the Appeal Committee formed a dim view of the fact of the Twitter submission having been sent to the Glasgow ET in June 2015.

61. Indeed, pointed out Mr John, councillor Rainey, chair of the Appeals Committee, had commented that the public nature of the Twitter submission was outwith Council policy and against relationships with colleagues, and he questioned the claimant (as per page 8 of the appeal hearing minutes of 25 August 206) on whether it was a breach of the Code of Conduct. Even if, which Mr John did not accept, other matters became more involved, he submitted that no other allegation became more significant than this one, and Mr West's evidence had clearly accepted that this was more than a trivial influence.

62. With reference to Mr Ettles' paragraph (8), where he had submitted that the Tribunal was entitled to find that there was no victimisation in relation to the dismissal, Mr John submitted that Mr Ettles had asked the wrong question, as it was not what was the reason for dismissal, but had the Twitter submission had a material influence on the decision to dismiss, and he submitted that it had.

63. While, at paragraphs (9) and (10), Mr Ettles had stated that there is no evidence that the Appeals Committee reached their decision because of the protected

act, and therefore there was no victimisation in relation to the internal appeal, Mr John commented that the Tribunal was ***"notably unimpressed***" in its Judgment that there were no findings by the Appeal Committee, and no basis for saying that the appeal had cured any defects in procedure.

64. He submitted that they must have upheld the dismissal as on the same basis as Mr West had decided to dismiss the claimant. Indeed, the respondents' closing submissions to the Tribunal stated that they upheld the decision to dismiss on the basis of the same misconduct as relied upon by Mr West.

65. Mr John then turned to address the burden of proof, under **Section 136 of the Equality Act 2010**, and the Court of Appeal's judgment in **Ayodele v Citylink & Another [2017] EWCA Civ. 1913**, and that the Tribunal should look at all the evidence, from the claimant and from the respondents. He submitted that this Tribunal has all of the respondents' documents, and Stephen West's admissions at the Final Hearing, and that they are all part of the facts of the case at stage 1, showing a strong *prima facie* case by the claimant, but at stage 2, there is no explanation from the respondents.

66. Counsel for the claimant invited the Tribunal to read, and re-read, his written submissions in this reconsideration application at paragraphs 24 to 30, and he submitted that as there was "***a void of explanation from the Appeals Committee***", it does not behove the respondents to invite the Tribunal to find that the protected act no longer had material influence on the decision to dismiss, and he submitted that the respondents cannot rely on their own evidential void.

67. In Mr John's submission, there was a *prima facie* case shown by the claimant, and the respondents' complete failure to call evidence from the Appeals Committee means that they fail at stage 2 to give a non-discriminatory explanation that establishes (per **Igen**, and **Madarassay**) that their decision is in no way influenced by discrimination, and the respondents have given no evidence ; in his submission, the respondents completely failed to explain their position.

68. Turning then to paragraphs (11) and (12) of Mr Ettles' submission, and his reference to the **Flint** judgment, Mr John stated that this application is ***"not a second bite of the cherry"***, as matters were led before the Tribunal at the Final Hearing, and he further submitted that it is "***absolutely in the interests of justice to reconsider"*** the liability Judgment, as there has been a material omission by the Tribunal, and, as per the **Wolfe** judgment, he is duty bound to ask for reconsideration here, in what he described as an "***otherwise admirable Judgment in all other respects.***"

69. In addressing Mr Ettles' submission that this matter is one for appeal, and not for reconsideration, Mr John, counsel for the claimant, submitted that he was not sure what Mr Ettles was really challenging here, and this is the way to deal with it here, at the ET, and not go off to the EAT, where if the appeal were upheld, then there would be a remit back to the ET. He submitted that the Tribunal should apply the correct legal test from **Igen**, and **Pathan**, to Mr West's admissions in evidence. Referring to the **Wolfe** judgment, he submitted that advocates should "***not leapfrog from the ET to the EAT."***

Submissions for the Respondents

70. When Mr John concluded his oral submissions for the claimant, at 11:40am, Mr Ettles, solicitor for the respondents, was invited to address the Tribunal. He commenced by addressing us on his 6 written paragraphs on the jurisdiction of the Employment Tribunal.

71. Looking at paragraph 93 of the Reasons for the original liability Judgment, he submitted that the claimant was saying that the Tribunal had identified the correct legal test for victimisation, but it had failed to apply that test, in circumstances where evidence had been led at the Final Hearing, there was no attempt to introduce new evidence, and the claimant was now asking the ET to come to a different conclusion on the evidence which it had already considered, and that any error of law falls to be corrected by appeal, and not by reconsideration.

72. Mr Ettles referred to His Honour Judge Serota's judgment in **Wolfe**, at paragraph 75, cited by Mr John, counsel for the claimant, and he focussed on its use of the words "***material omission***" : "***There is now a long line of authority to the effect that where a would be Appellant believes there has been a material omission on the part of an Employment Tribunal to deal with a significant issue or to give adequate reasons in respect of significant findings, the proper course is not to lodge a Notice of Appeal, but to go straight back to the Employment Tribunal and ask that the omission be repaired. If reasons are given orally, this should be done as soon as practicable on the completion of delivery of the judgment, and if Written Reasons are later handed down as soon as practicable after the Judgment is received. I would like to make clear that it is the duty of advocates to adopt this course in litigation in the Employment Tribunal."***

73. Continuing his submission, Mr Ettles stated that this Tribunal had given full reasons, and it was not possible for the claimant to argue otherwise, and there is no need for the matter to be reconsidered by the ET. Further, he added, paragraph 75 in **Wolfe** gives *carte blanche* for a claimant to go back to the ET for reconsideration, and he emphasised that what we had here was an "***alleged omission"***, against circumstances where this Tribunal had given detailed reasons in its Judgment, and that Mr John was just surmising that the Tribunal did not consider the evidence of Mr West.

74. Mr Ettles then submitted that **Trimble v Supertravel Ltd** is still good law, and , he drew our specific attention to that part of Mr Justice Browne-Wilkinson's judgment in **Trimble**, at page 442 of the ICR report, reading : "***We do not think that it is appropriate for an industrial tribunal to review their decision simply because it is said there was an error of law on its face. It the matter has been ventilated and properly argued, then error of law of that kind fall to be corrected by this appeal tribunal. If, on the other hand, due to an oversight or to some procedural occurrence one or other part can with substance say that he has not had a fair opportunity to present his argument on a point of substance, then that is a procedural shortcoming in the proceedings before the tribunal which, in our view, can be correctly***

dealt with by a review under rule 10 of schedule 1 to the Industrial Tribunals (Rules of Procedure) Regulations 1980 , however important the point of law or fact may be. In essence, the review procedure enables errors occurring in the course of the proceedings to be corrected but would not normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in the light of all relevant argument."

75. Under reference to paragraph 43d of His Honour Judge Hand's judgment in **Serco Ltd v Wells**, Mr Ettles then noted that, in the present case, there had been no material change in circumstances since the Tribunal's original Judgment was made.

76. In **Serco**, HHJ Hand had stated: ***"In my judgment the following emerges from the above consideration of the Rules and authorities relating to the CPR and the Employment Tribunal Rules:***

> ***a. the draftsmen of both sets of Rules must be taken to have drafted them with the same universal principle in mind, namely what I have described as finality and certainty of decision and orders and the integrity of judicial decisions and orders; this principle, as the authorities in both jurisdictions illustrate, usually directs any challenge to an order towards an appeal to a Tribunal of superior jurisdiction and discourages seeking the same Judge or another Judge of equivalent jurisdiction to look again at an order or decision, save in carefully defined circumstances;***
>
> ***b. although the only reference in either set of Rules to a "change in circumstances" is in a Practice Direction to the CPR and not in the CPR itself (and there is no explicit reference to a "material change in circumstances" in either) the principle, as it emerges from the authorities referred to above is that before a Judge can interfere with an earlier order made by a Judge of equivalent jurisdiction there must be either a material change of circumstances or a***

material omission or misstatement or some other substantial reason, which, taking account of the warning Rix LJ gives against attempting exhaustive definition, it is not possible to describe with greater precision;

c. when it comes to long standing procedural principles such as this, unless the rubric of the Rules clearly indicates the contrary, that principle should be taken to have been in the mind of the draftsmen when the Rules were drafted and the Rules must be interpreted so as to take account of such a principle;

d. the draftsmen of the current Employment Tribunal Rules have used the expression "necessary in the interests of justice"; in my judgment that should be interpreted through the prism of the principle I have just articulated; variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sound much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ put it these will be "rare … [and]... out of the ordinary".

77. Mr Ettles then referred us to the EAT Judgment by Mrs Justice Simler, in **Liddington**, at paragraphs 34 and 35, which we discuss more fully, later in these Reasons, under "***Relevant Law"***, and to the "***wide discretion***" comments relied upon by Mr John as counsel for the claimant. In further submission, Mr Ettles then stated that this reconsideration application is an attempt at re-litigation here, the claimant presenting the same arguments as previously, in the hope of a different result, and thus seeking "***a second bite of the cherry***", due to what he referred to as "***disappointment at the Judgment produced by the Tribunal***."

78. As the claimant has appealed to the EAT, Mr Ettles further submitted that this reconsideration application involves a point of law, and applying the **Trimble**

judgment, the ET does not have jurisdiction, and this application should be refused by the Tribunal.

79. It then being 11:58am, Mr Ettles advised that he was turning to look at his response to the contents of the claimant's reconsideration application, at his own paragraphs (1) to (12). He submitted that there is no reason for the Tribunal to reconsider its decisions in relation to the alleged acts of victimisation ; that it would not be in the interests of justice to do so; and that the original Judgment should be confirmed.

80. He invited the Tribunal to "***very carefully look at its own notes***" of the evidence given at the Final Hearing, and in relation to Mr John's reference to an "***evidential void***", Mr Ettles accepted that no witness had been led by the respondents from the Appeals Committee, but, in his submission, it was not necessary to lead such a witness, as a full note of the appeal hearing had been lodged, and it showed how the matter had been approached.

81. Further, Mr Ettles stated that "***the obvious inference"*** is that the Appeals Committee reached their decision on the same basis as Mr West had, and he accepted that while Mr West's dismissal letter to the claimant was long and detailed, the Appeal Committee's decision letter was brief, but in compliance with the respondents' own procedures.

82. On the burden of proof, and the **Ayodele** judgment, by Lord Justice Singh, at paragraphs 92 and 93, Mr Ettles stated that the claimant had been unable to prove a *prima facie* case of victimisation, and the Tribunal had not erred in how it had dealt with that matter in the original Judgment. He submitted that the claimant had inferred things but, in his submission, there was no evidence to shift the burden from the claimant to the respondents. He commented that the claimant infers that the protected act must have factored in the same way in the dismissal, and refusal to uphold the internal appeal, as it had in the claimant's suspension, but the claimant had no real evidence to point to in that regard.

83. Referring to the **Flint v Eastern Electricity Board** judgment, by Mr Justice Phillips, in the Queen's Bench Division, Mr Ettles drew our attention to that part

of the EAT judgment, at page 404 of the ICR report, reading as follows: ***"But over and above all that, the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry. It certainly seems to me, hard though it may seem in the instant case, that it would not be right that he should be allowed to have a second bite at the cherry in cases which are perfectly simple, perfectly straightforward, where the issues are perfectly clear and where the information that he now seeks leave at a further hearing to put before the tribunal has been in his possession and in his mind the whole time. It really seems to me to be a classic case where it is undesirable that there should be a review."***

84. Mr Ettles also referred us to paragraph 21 of the Court of Appeal's judgment in **Ministry of Justice v Burton [2016] EWCA Civ 1128**, where Lord Justice Elias stated that : "***An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743, para. 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Iron sides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review. In my judgment, these principles are particularly relevant here."***

85. In Mr Ettles' submission, the judgment in **Wolfe** can be distinguished from the present case, as he submitted that there had been no material omission by this Tribunal to deal with a significant issue. He submitted that the Tribunal in the

present case gave a reserved Judgment, even if it did not refer to all the evidence led, and he further submitted that adequate reasons were given by this Tribunal in its original Judgment.

86. Next, Mr Ettles referred us to the judgment of Mr Justice Underhill, then President of the EAT, in **Marsden**, at paragraph 17, that justice requires an equal regard to the interests and legitimate expectations of both parties: ***"The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation – or, as Phillips J put it in Flint ...at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry – seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal)."***

87. Further, Mr Ettles referred us to the EAT judgment in **Outasight**, at paragraph 33, that discretion in a reconsideration application should be exercised judicially ; and to HHJ Eady QC's judgment, in **Scranage**, at paragraph 22, about the applicable test for reconsideration, and the importance of the finality of litigation. He submitted that there was no reason for this Tribunal to reconsider its decision about the alleged acts of victimisation, and that it is not in the interests of justice, and contrary to finality of litigation, to reconsider the original Judgment.

88. Mr Ettles then added that it is not in the interests of justice to agree to the claimant having a second bite of the cherry, and he further submitted that the Tribunal needs to look very closely at the evidence led at the Final Hearing, and the admissions by Mr West, as referred to by Mr John, counsel for the claimant, may not be exactly what they seem. He submitted, in particular, that there was no admission by Mr West that the protected act formed part of the reason to

dismiss, and he closed his oral submissions by inviting the Tribunal to confirm its previous decision.

Reply for the Claimant

89. It then being 12:31, the Judge offered Mr John an adjournment to consult with the claimant, before giving his reply to Mr Ettles' oral submissions to the Tribunal. Mr John indicated that he was content to proceed, without any adjournment, and so he proceeded forthwith to deliver his further oral submissions to us.

90. On the jurisdictional point, counsel for the claimant submitted that "***Mr Ettles misses the point.***" Mr John stated that the Tribunal was being asked to consider the evidence led at the Final Hearing, and come to a conclusion, as Mr West's admissions were so important, and required setting out by the Tribunal, and that Mr Ettles' submission was unrealistic. The claimant was not asking for a different decision, he was only asking for the evidence led to be considered, and a decision reached on that evidence.

91. Further, submitted Mr John, he was surprised to see that Mr Ettles was relying upon the **Trimble** judgement from 1982, given the **Wolfe** judgment 33 years later in 2015, and he referred us to that part of Mr Justice Brown-Wilkinson's judgment in **Trimble**, reading : "***If, on the other hand, due to an oversight or to some procedural occurrence one or other part can with substance say that he has not had a fair opportunity to present his argument on a point of substance, then that is a procedural shortcoming in the proceedings before the tribunal which, in our view, can be correctly dealt with by a review…"***

92. Counsel for the claimant stated that we should look at the real qualification in that part of the **Trimble** judgment, and not the first part relied upon by Mr Ettles, namely : "***We do not think that it is appropriate for an industrial tribunal to review their decision simply because it is said there was an error of law on its face. It the matter has been ventilated and properly argued, then error of law of that kind fall to be corrected by this appeal tribunal."***

93. As regards Mr Ettles' reference to paragraph 43d in the **Serco** judgment, Mr John stated that he was "***non-plussed***", and commented that the sections of that judgment read out by Mr Ettles were in fact saying the opposite of what Mr Ettles was suggesting. He submitted that "***an omission to state a relevant fact***" is exactly what we have here, and so it is suitable for reconsideration.

94. Next, Mr John referred to paragraphs 34 and 35 of the EAT judgment in **Liddington**, and the applicable tests for a reconsideration application, and he submitted that there is a different context to the present case, where the claimant here is not seeking a second bite of the cherry, and so different on the facts from the **Liddington** case, where the claimant failed to raise a point first time round.

95. Looking then at Mr Ettles' written reply to the content of the claimant's reconsideration application, Mr John submitted that the Tribunal should look at the respondent's written closing submissions reply in the main proceedings, and Mr Ettles' reply to his skeleton argument then, at paragraphs 135 and 180.

96. Mr John further stated that it was key for the Tribunal to look at its own notes of the evidence led at the Final Hearing, as the evidence was "***out there publicly***", the Final Hearing having been a public Hearing.

97. He added that it seemed to him that Mr Ettles was now making submissions "***flying in the face"*** of what he understood was accepted by him at the time of the Final Hearing.

98. Further, Mr John submitted that there was no new evidence in the present case, and so this was not like **Ladd v Marshall**, and he invited this Tribunal to make transparent what it made of the evidence led at the Final Hearing. He reiterated that the claimant was not seeking a second bite of the cherry, but it was in the interests of justice to reconsider the original Judgment, and it was, he added, a highly relevant admission by Mr West that needed to be factored into the case, and that must outweigh finality of litigation.

99. Mr John further stated that the **Marsden** judgment pre-dated **Wolfe** by some 5 years, and that **Outasight** involved fresh evidence, as did **Scranage**. Mr John

also stated that he was "***troubled"*** by Mr Ettles' submission that Mr West's admission "***might not be what it seems***." He then submitted that, if Mr West's answers were, as he had recorded them, or if something less in the ET's notes, then he was "***troubled***" that Mr Ettles had not come forward with his own notes, taken at the time of the Final Hearing, when his reply at paragraphs 135 and 180 accepted "***contributory"*** and "***aggravating"*** factors, and there was no issue taken then that those words did not relate to the protected act. He further submitted that that was a ***prima facie*** case shown by the claimant, unless the respondents could show a non-discriminatory explanation.

100. At this point in the Hearing, just after the Judge had disconnected in error, and re-connected, after minimising his screen, and in the lead up to the lunch-time adjournment, the Judge invited Mr Ettles to look at the respondents' reconsideration skeleton, at paragraph 9, and his reply to the closing submissions at paragraphs 135 and 180, and address the Tribunal, after the lunch-break, and address the Tribunal more fully on the points being made now by counsel for the claimant.

Response by the Respondents' Solicitor

101. The Hearing adjourned for lunch at 12:59, and resumed at 13:58, when the Judge invited Mr Ettles to respond . In doing so, Mr Ettles stated that he had looked at Mr John's paragraphs 9 (a), (b) and (c), which, for ease of reference, we reproduce here again:

> ***9. Set against those issues and that legal test, dismissing officer Stephen West ("SW") was cross examined and made the following concessions:***
>
> ***a. In respect of the decision to suspend the Claimant SW accepted that the fact that the 9 June 2015 letter was submitted to the tribunal was "a particularly aggravating feature";***

b. In respect of the dismissal, SW again accepted that the fact that the submission was made to the ET was "an aggravating aspect";

c. He accepted that the twitter submission (allegation number 7) "it was a contributing factor" (towards dismissal) and that it was "material" (towards dismissal);

102. In response, Mr Ettles stated that:

Paragraph 9(a) : Mr Ettles stated that Mr West accepted that the letter to the ET was an aggravating factor.

Paragraph 9 (b) : Mr Ettles stated that he did not have a record of Mr West saying that.

Paragraph 9 (c) : Mr Ettles stated that he had no record of Mr West saying that, and it was not clear whether Mr John's question to Mr West was referring to allegation 7, or the protected act.

Reply by the Claimant's Counsel

103. It then being 2:05pm, Mr John replied, saying that he asked Mr West whether the Twitter submission to the ET was part of the reason for the claimant's misconduct, and he agreed it was, and that it was an aggravating aspect, and when he asked Mr West why the dismissal letter says all the allegations are cumulative, and necessary for gross misconduct, Mr West said the Twitter submission was a contributory factor. Asked if it was integral to the claimant being dismissed, Mr West said it was, and when Mr John specifically asked Mr West about the submission being to the ET, he stated that cronyism was linked to allegation 7, as also the fact it was sent to the ET.

104. Thereafter, Mr John referred to the judgment in **Ministry of Justice v Burton**, at paragraph 25, saying that that case was a new evidence case, and it was very much a fact sensitive decision, and not setting any policy precedent and the importance of the finality of litigation is correct and a lot of cases say

that, but there is still a wide discretion, not open-ended, but shutting out a second bite of the cherry.

105. Mr John then stated that the present case is not such a case, and that dealing with all relevant matters is central to the interests of justice, and overshadows any concept of finality, and this Tribunal should deal with it as per the strong *dicta* in **Wolfe**.

106. Submissions then concluded, and there were no questions of clarification from either lay member of the Tribunal for either party's legal representative. Matters then turned to discussions about a Remedy Hearing, after a short adjournment allowed at 2:17pm for Mr John to contact his instructing solicitor, Mr Woolfson, but it is not necessary to record those discussions, after 2:24pm, as they have been superceded by the passage of time, and our separate Case Management Orders as detailed in the separate written Note & Orders issued alongside this Judgment.

107. Mr Ettles confirmed, in closing, that he sought to have the Tribunal confirm its original Judgment, while Mr John stated that he sought to have the Tribunal vary its original Judgment, and he clarified that he was not seeking its revocation, or confirmation. He was content with what was there, which should be confirmed, but otherwise varied to make a finding that there had been further acts of victimisation established by the claimant.

108. When the Judge referred to Mr Wolfson's reconsideration application of 1 October 2021, and its reference to paragraph 100 of the Judgment, which Mr John agreed should be a reference to paragraph 100 of the Reasons for the original Judgment, where, as reproduced earlier in these Reasons, at paragraph 11 above, Mr Woolfson had stated : "***I invite the Tribunal to reconsider its decision at paragraph 100 of the Judgment, which currently finds that the dismissal of the claimant was not an act of victimisation. I invite the Tribunal to conclude that the dismissal was an act of victimisation and that the refusal to uphold the appeal was also an act of victimisation."***

109. The Judge then asked Mr John to clarify what does the claimant suggest, if a reconsideration were to be granted, the Tribunal might do to vary its original Judgment, at pages 2 and 3 of that Judgment, where its decision was set out across five separate parts. In response, Mr John submitted that he was seeking variation to parts (2) and (4) of that original Judgment, to delete 2(d) and (e), and add them in, in positive terms, to part (4), thus finding each of suspension, dismissal, and refusal of appeal, were all acts of victimisation by the respondents against the claimant. He added that it would then be for the Tribunal to consider inserting appropriate findings in the Reasons part of the Judgment to reflect any variations made.

Reserved Judgment

110. The Judge closed the Reconsideration Hearing at 2:45pm, thanking those in attendance for their contribution, and he stated that Judgment was reserved, and it would be issued in writing, with Reasons, in due course, after private deliberation by the Tribunal, and parties would be updated when a Members' Meeting was arranged for private deliberation by the full ET panel.

111. With no opportunity that afternoon, initial private deliberation was held when the Tribunal met remotely, on Teams, for private deliberations on Tuesday, 25 January 2022. A draft Judgment was then progressed by the Judge, with a view to a further Members' Meeting with Members after 8 March 2022, as one of the lay members of the Tribunal went aboard for an extended holiday.

112. While it was hoped, thereafter, to arrange that Members' Meeting as soon as possible to finalise the Reconsideration Judgment, that did not happen, for a variety of reasons, including other judicial business for the Judge, annual leave for the Judge, and the Tribunal awaiting an update from The Pensions Ombudsman, as regards certain pension matters relating to the claimant's request for a Remedy Hearing.

113. It was only recently that the full Tribunal has had the opportunity to discuss and finalise its decision. The Judge apologises to parties and their representatives for the delay in progressing this matter to this stage.

114. This Judgment represents the final product from our further private deliberations, and reflects our views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

115. The majority view of the Judge, and Mr O'Hagan, allows the reconsideration application and varies our original Judgment accordingly. Mr Burnett, the other member of the Tribunal, is in the minority, and adheres to the views he expressed in our original Judgment.

Relevant Law

116. **The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** set out the Rules of Procedure in Schedule 1, and those in relation to the reconsideration of judgments are at **Rules 70 – 73**. The provisions we consider relevant for the present application are as follows:

> ***"70 Principles***
>
> *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again.*
>
> ***71 Application***
>
> *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record,*

or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72 Process

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (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. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

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

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal,

shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

117. When considering such an issue regard must also be had to the Tribunal's overriding objective in **Rule 2.** In **Serco Ltd v Wells [2016] ICR 768**, the EAT observed that the Rules of Procedure must be taken to have been drafted in accordance with the principles of finality, certainty and the integrity of judicial orders and decisions, which usually means that a challenge to an order should take the form of an appeal to a higher tribunal rather than being reconsidered by another Employment Judge "*save in carefully defined circumstances".*

118. Under the heading of "***The fundamental principle***" the following was stated:

"24….. I need to recognise that the topics of certainty and finality in litigation and of the integrity of judicial orders and decisions are both antique and far reaching. Even in the relatively narrow statutory jurisdiction of the employment tribunal the topic covers all kinds of orders and directions; examples are to be found in the context of strike out, reconsideration (formerly review) and what is nowadays called 'relief from sanction' all of which might involve variation of previous directions and orders, as well as in cases, like the present, which might be described as 'set-aside cases', where the only issue is variation of a previous direction and order."

119. The issue of reconsideration was therefore specifically in contemplation. The EAT held that a Tribunal should interpret the words '*necessary in the interests of justice'* in what is now **Rule 70** as limiting reconsideration to where: (a) there has been a material change of circumstances since the order was made; (b) the order was based on a misstatement or omission; or (c) there is some other 'rare' and 'out of the ordinary' circumstance.

120. The EAT also held that the issue of whether or not an order should be varied or set aside was a matter of jurisdiction and not an exercise of discretion by the Tribunal. The question of whether there has been a material change of

circumstances was to be decided "*from an objective standpoint … not from the point of view of a band of reasonableness but from the point of view that either the factual matrix can support that view or it cannot"*.

121. The previous statutory formulation of the terms of **Rule 70** was based on the test laid down in **Ladd v Marshall [1954] 3 All ER 745**, for determining the admissibility of fresh evidence in the Court of Appeal (therefore a matter of English law and practice), and the substance of the **Ladd v Marshall** test has been held to be applicable to what had been a review procedure in employment tribunals in **Wileman v Minilec Engineering Ltd [1988] IRLR 144**.

122. Following the implementation of the 2013 Rules, the EAT held that the **Ladd v Marshall** test (in conjunction with the overriding objective) continues to apply where it is sought to persuade a tribunal, in the interests of justice, to reconsider its judgment on the basis of new evidence (**Outasight VB Ltd v Brown UKEAT/0253/14**).

123. The **Ladd v Marshall** test has three parts. It must be shown: (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing; (b) that it is relevant and would probably have had an important influence on the hearing; and (c) that it is apparently credible.

124. There is one authority on the former provisions as to review being in **Stevenson v Golden Wonder Ltd [1977] IRLR 474** in which the EAT stated that those provisions were not intended to provide parties with the opportunity for "*further evidence [to be] adduced which was available before"*.

125. The EAT in **Outasight** acknowledged that there might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles were not strictly met. What is not permitted under the 2013 Rules, the EAT held, is the adoption of an altogether broader approach whereby fresh evidence may be admitted regardless of the constraints to be found in the established test.

126. The reconsideration application requires to be dealt with as per **Rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013**. We have set out its full terms above for ease of reference. As this was an application for reconsideration by the claimant, **Rule 73**, relating to reconsiderations by the Tribunal on its own initiative, does not fall to be considered further. Further, as always, there is the Tribunal's overriding objective, under **Rule 2,** to deal with the case fairly and justly.

127. The previous Employment Tribunal Rules 2004 provided a number of grounds on which a judgment could be reviewed (now called a reconsideration). The only ground in the current 2013 Rules is that the judgment can be reconsidered where it is necessary "***in the interests of justice***" to do so. That means justice to both sides.

128. However, it was confirmed by Her Honour Judge Eady QC (as she then was, now Mrs Justice Eady, the current EAT President) in **Outasight VB Limited v Brown [2014] UKEAT/0253/14/LA,** now reported at **[2015] ICR D11,** that the guidance given by the Employment Appeal Tribunal in respect the previous Rules is still relevant guidance in respect of the 2013 Rules and, therefore, we have considered the case law arising out of the 2004 Rules.

129. The approach to be taken to applications for reconsideration was also set out more recently in the case of **Liddington v 2Gether NHS Foundation Trust [2016] UKEAT/0002/16/DA** in the judgment of Mrs Justice Simler, then President of the EAT. The Employment Tribunal is required to:

> "1***. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;***

2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and

3. give reasons for concluding that there is nothing in the grounds advanced by the (applicant) that could lead him to vary or revoke his decision."

130. In paragraph 34 and 35 of the Judgment, the learned EAT President, Mrs Justice Simler, stated as follows:

34. In his Reconsideration Judgment the Judge identified the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage. In this case, the Judge addressed each ground in turn. He considered whether was anything in each of the particular grounds relied on that might lead him to vary or revoke his decision. For the reasons he gave, he concluded that there was nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision, and accordingly he refused the application at the preliminary stage. As he made clear, a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or

additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

35. Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing reconsideration accordingly.

131. There is a public policy principle that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principle. In the case of **Stephenson v Golden Wonder Limited [1977] IRLR 474** it was made clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "***second bite of the cherry***". Lord Macdonald, the Scottish EAT Judge, said that the review provisions were "***not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence produced which was available before".***

132. The Employment Appeal Tribunal went on to say in the case of **Fforde v Black EAT68/80** that this ground does not mean "***that in every case where a litigant is unsuccessful is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone radically wrong with the***

procedure involving the denial of natural justice or something of that order."

133. "***In the interests of justice***" means the interests of justice to both sides. The Employment Appeal Tribunal provided further guidance in **Reading v EMI Leisure Limited EAT262/81** where it was stated "***when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation."***

134. The 2013 Rules came into force on 29 July 2013 and introduced the new concept of reconsideration of judgments rather than a review of judgments as it was entitled under the previous 2004 Rules of Procedure. In the 2004 Rules there were five grounds on which a review could be sought and the last of the five was the single ground that now exists for a reconsideration under the 2013 Rules namely that the interest of justice render it necessary to reconsider.

135. We consider that any guidance on the meaning of "***the interests of justice***" issued under the 2004 Rules (and the earlier Rules) is still relevant to reconsiderations under the 2013 Rules. We also remind ourselves that the phrase "***in the interests of justice***" means the interests of justice to both sides.

136. Further, we have also reminded ourselves of the guidance to Tribunals in **Newcastle upon Tyne City Council – v- Marsden [2010] ICR 743** and in particular the words of Mr Justice Underhill when commenting on the introduction of the overriding objective (now found in **Rule 2** of the 2013 Rules) and the necessity to review previous decisions and on the subject of a review:

> "***But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in Jurkowska v Hlmad Ltd. [2008] ICR 841, at para. 19 of his judgment (p. 849), it is "basic" "… that dealing***

with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."

The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation – or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry – seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal").

137. Further, we have considered the further guidance on the 2013 Rules from Her Honour Judge Eady QC (as she then was, now Mrs Justice Eady, EAT President) in her judgment in **Outasight VB Limited –v- Brown [2014] UKEAT/0253/14**. We have considered that guidance and in particular have noted what is said about the grounds for a reconsideration under the 2013 Rules:

"In my judgment, the 2013 Rules removed the unnecessary (arguably redundant) specific grounds that had been expressly listed in the earlier Rules. Any consideration of an application under one of the specified grounds would have taken the interests of justice into account. The specified grounds can be seen as having provided examples of circumstances in which the

> ***interests of justice might allow a review. The previous listing of such examples in the old Rules - and their absence from new - does not provide any reason for treating the application in this case differently simply because it fell to be considered under the "interests of justice" provision of the 2013 Rules. Even if it did not meet the requirements laid down in Rule 34(3)(d) of the 2004 Rules, the ET could have considered whether it should be allowed as in the interests of justice under Rule 34(3)(e). There is no reason why it should then have adopted a more restrictive approach than it was bound to apply under the 2013 Rules".***

138. In considering this reconsideration application, we have taken into account the helpful judicial guidance provided by Her Honour Judge Eady QC, then EAT Judge, in her judgment delivered on 19 February 2018, in **Scranage v Rochdale Metropolitan Borough Council [2018] UKEAT/0032/17**, at paragraph 22, when considering the relevant legal principles, where she stated as follows (underlining is our emphasis): -

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

139. **Outasight VB Ltd v Brown** is, of course, an earlier EAT authority **[2014] UKEAT/0253/14**, now reported at **[2015] ICR D11**, also by Her Honour Judge Eady QC, where at paragraphs 27 to 38, the learned EAT Judge (now Mrs Justice Eady, EAT President) reviewed the legal principles. The EAT President, then Mr Justice Langstaff, in **Dundee City Council v Malcolm [2016] UKEATS/0019-21/15**, at paragraph 20, states that the current Rules effected

no change of substance to the previous Rules, and that they do not permit a claimant to have a second bite of the cherry, and the broader interests of justice, in particular an interest in the finality of litigation, remained just as important after the change as it had been before.

140. Further, we have also taken into account the Court of Appeal's judgment, in **Ministry of Justice v Burton & Another [2016] EWCA Civ.714**, also reported **at [2016] ICR 1128**, where Lord Justice Elias, at paragraph 25, refers, without demur, to the principles "***recently affirmed by HH Judge Eady in the EAT in Outasight VB Ltd v Brown UKEAT/0253/14."***

141. Further, at paragraph 21 in **Burton**, Lord Justice Elias had stated that:

> ***"An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743, para. 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily…"***

Discussion and Deliberation

142. We have now carefully considered both parties' written submissions, our own notes of the evidence led at the Final Hearing, and also our own obligations under **Rule 2 of the Employment Tribunal Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly.

143. We consider that both parties have been given a reasonable opportunity, in advance of and at this Reconsideration Hearing, to make their own written and oral representations pursuing, and opposing, as the case may be, the claimant's application for reconsideration of our original liability Judgment dated 17 September 2021.

144. There is no dispute that that original Judgment is a Judgment as defined in **Rule 1(3)(b) of the Employment Tribunals Rules of Procedure 2013**. It finally disposed of the claimant's claim against the respondents, upholding some, but not all parts, and it is therefore a Judgment open to reconsideration on the application of either party. Only the claimant has sought a reconsideration, and only the claimant has appealed it to the Employment Appeal Tribunal, as is his right.

145. On the test of ***"in the interests of justice",*** under **Rule 70**, which is what gives this Tribunal jurisdiction in this matter, there is now only one ground for "***reconsideration***", being that reconsideration "***is necessary in the interests of justice***." That phrase is not defined in the **Employment Tribunals Rules of Procedure 2013,** but it is generally accepted that it encompasses the five separate grounds upon which a Tribunal could "***review"*** a Judgment under the former **2004 Rules**.

146. While there are many similarities between the former and current Rules, there are some differences between the current **Rules 70 to 73** and the former **Rules 33 to 36**. Reconsideration of a Judgment is one of the two possible ways that a party can challenge an Employment Tribunal's Judgment. The other way, of course, is by appeal to the Employment Appeal Tribunal.

147. **Rule 70** confers a general power on the Employment Tribunal, and it stands in contrast to the appellate jurisdiction of the Employment Appeal Tribunal ("***EAT***"). In most cases, a reconsideration will deal with matters more quickly and at less expense than an appeal to the EAT.

Reconsideration within the Tribunal's Jurisdiction, and original Judgment varied in the interests of justice

148. After most careful consideration of the competing arguments, taking into account the relevant law, as ascertained in the legal authorities referred to above, in our self-direction, we are satisfied that this is one of those cases where, on reconsideration, it is appropriate, in the interests of justice, to vary parts of our original Judgment.

149. We explain our reasoning, as follows:

150. Unanimously, we find that this Tribunal has jurisdiction to consider the claimant's reconsideration application of 1 October 2021. We reject, as not well-founded, Mr Ettles' arguments in his Skeleton Argument about Jurisdiction of the Tribunal.

151. The EAT judgment in **Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960 ; [2015] UKEAT/0065/14**, refers, and we found upon that judgment, at paragraph 75, to which Mr John, the claimant's counsel, drew our specific attention, where the EAT judge, His Honour Judge Serota QC, stated : "***There is now a long line of authority to the effect that where a would be Appellant believes there has been a material omission on the part of an Employment Tribunal to deal with a significant issue or to give adequate reasons in respect of significant findings, the proper course is not to lodge a Notice of Appeal, but to go straight back to the Employment Tribunal and ask that the omission be repaired. If reasons are given orally, this should be done as soon as practicable on the completion of delivery of the judgment, and if Written Reasons are later handed down as soon as practicable after the Judgment is received. I would like to make clear that it is the duty of advocates to adopt this course in litigation in the Employment Tribunal."***

152. We identified the test of causation at paragraph 93 of our original Judgment. In our factual findings, at sub-paragraphs (207) and (225) we found that the relevant "protected act", being the submission of an email to the Glasgow ET on 9 June 2015, disclosing the Twitter account of Ms Rogers, as per our then paragraph 87, was one of the reasons for the claimant's dismissal.

153. As per paragraph (3) of this our Reconsideration Judgment, the Tribunal has, on reconsideration, and by majority (Mr Burnett dissenting) found that the respondents did victimise the claimant, contrary to **Section 27 of the Equality Act 2010**, by dismissing him on 24 September 2015, and rejection of his appeal against dismissal on 25 August 2016, as well as by suspending him on 17 June 2015, as we found (by the same majority of the Employment Judge and Mr O'Hagan) in the Tribunal's original Judgment of 17 September 2021.

154. After careful consideration, the majority of this Tribunal are persuaded that the arguments, written and oral, advanced by Mr John, counsel for the claimant, are well-founded, and that reconsideration is in the interests of justice. On reconsideration, we find, by majority, that causation between the "protected act" and the detriments of dismissal, and also refusal of appeal, are made out.

155. In deciding otherwise, in the Tribunal's original Judgment, we recognise now that the Tribunal, while directing itself to the correct legal test, unfortunately misapplied it to the evidence before us at the Final Hearing, when dealing with a myriad of factual and legal issues in a complex case.

156. We are clear that the claimant presented his evidence at the Final Hearing, and his points were properly put by his counsel to the respondents' witnesses, in particular Mr West, in cross-examination, and this reconsideration application is not, as Mr Ettles repeatedly sought to convince us, a "second bite of the cherry."

157. While we recognise the importance of the finality of litigation, so too do we recognise the interests of justice, and that those interests include not just the interests of both parties, but also the wider public interest in the proper administration of justice, and public confidence in the Employment Tribunal.

158. Equally, we are clear that Mr John, as counsel for the claimant, presented his closing submissions at the Final Hearing, written and oral, in relation to each of the allegations of victimisation, and the Tribunal regrettably, but perhaps understandably given the size of the case before them, described by Mr John

at this Reconsideration Hearing as "***Mammoth***", failed to give proper and due regard to the whole evidence and closing submissions made by both parties at the Final Hearing on this aspect of the case relating to victimisation. It was an inadvertent oversight on our part, which it is in the interests of justice, we now rectify.

159. Having reconsidered our original Judgment, the Tribunal has varied paragraphs (2) and (4) of that original Judgment by substituting the new paragraphs (2) and (4), as shown above, at paragraph (3) of the judgment part of this Reconsideration Judgment.

160. In consequence of those variations to our original Judgment, the Tribunal has also had cause to substitute the text of paragraphs 93 to 108 of the Reasons section of the original Judgment dated 17 September 2021, with new paragraphs 93 to 108, as set forth in the Appendix to these the Reasons for this our Reconsideration Judgment.

161. We refer to pages 65 to 69 below for the revised text of those paragraphs 93 to 108, which now supercede and replace the original text, in consequence of the variations to our original Judgment. **In doing so, we note and record that it is only at paragraphs 100, 101, 102, 104 and 108, that we have revised the original text, to take account of our Reconsideration Judgment**. Otherwise, the Tribunal confirms its original Judgment dated 17 September 2021.

Further Procedure : Remedy Hearing

162. Case Management Orders for the fixing of the outstanding Remedy Hearing have been made, and they are issued under separate cover in a separate written Note and Orders by the Judge, sent to both parties' representatives, along with this our Reconsideration Judgment.

Intimation to EAT and ACAS

163. In issuing this Judgment and Reasons, we have instructed the clerk to the Tribunal to send a copy to ACAS, and to the EAT Registrar, for their respective information.

Employment Judge: **Ian McPherson**

Date of Judgment: **9 May 2022**

Entered in register and copied to parties: **10 May 2022**

This is the Appendix referred to at paragraph 160 in the foregoing Reasons for our Reconsideration Judgment.

In consequence of our variations to paragraphs (2) and (4) to our original Judgment dated 17 September 2021, the Tribunal substitutes the existing paragraphs 93 to 108 of the Reasons section of the original Judgment dated 17 September 2021, with new paragraphs 93 to 108, as set forth below, with the revised text in light of our reconsideration of the original Judgment, shown at paragraphs 100, 101, 102, 104 and 108 :-

Causation

93. The next question for the Tribunal therefore is whether respondents subjected the claimant to the aforesaid detriments, wholly, or in part, because the claimant had done the protected acts. The test is whether the protected acts form a 'significant, or more than trivial influence' on the respondents' decision making? We deal with each in turn.

(a) Substantial redaction of his argument and documents for his stage 3 Grievance (number 3) - dated 25 July 2014;

94. The Tribunal accepts the respondents' position which was that the reason for the redaction was that the claimant was attempting to introduce new matters which had not been considered earlier. It was not because of a protected act. It was not an act of victimisation.

(b) The stopping of his Grievance dated 28 February 2015 (number 5) by Stephen West on or about 12 March 2015;

95. The Tribunal accepts that the grievance was suspended to allow the disciplinary process and investigation into the claimant's alleged conduct in

the workplace to progress. It was not because the claimant had done a protected act. It was not an act of victimisation.

(c) Investigating him under the Code of Conduct from about 6 March 2015;

96. The Tribunal was satisfied that the reason for this investigation was because of the claimant's alleged conduct in the workplace. It was not because he had done a protected act. It was not an act of victimisation.

(d) Suspending him on 17 June 2015;

97. The Employment Judge and Mr O'Hagan, in the majority, accepted that there had been a complaint by Mr McGowan about the claimant and that was part of the reason why the claimant was suspended. This is expressly stated in the suspension letter.

98. However, they considered that the sending of the email by the claimant to the Tribunal about the Twitter account was part of reason for the decision to suspend, and a substantial element in the respondents' decision to suspend the claimant. The majority considered it relevant that the claimant had never been suspended previously despite his wide-ranging series of allegations, and grievances, over a period of time.

99. The other Tribunal member, Mr Burnett in the minority, considered that this suspension was because Mr McGowan, HR Manager, had made a complaint against the claimant. This was seen as something further to be investigated. He considered it was not because the claimant had done a protected act and it was therefore not an act of victimisation. Accordingly, the majority decision of the Tribunal is that this was an act of victimisation, as it was the sending of the Twitter email that was the substantial cause that led to the claimant's suspension.

(e) Dismissing him on 24 September 2015;

100. The Employment Judge and Mr O'Hagan, in the majority, accepted that the respondents had subjected the claimant to this detriment because he had done the protected acts, and the protected acts formed a significant, or more than trivial influence, on the respondents' decision making by Mr West to dismiss the claimant. The other Tribunal member, Mr Burnett in the minority, was satisfied that the claimant's dismissal was because of the claimant's conduct in the workplace. It was not because he had done a protected act, and it was not an act of victimisation. Accordingly, the majority decision of the Tribunal is that the claimant's dismissal was an act of victimisation by the respondents against the claimant.

(f) Rejection of his Appeal on 25 August 2016;

101. The Employment Judge and Mr O'Hagan, in the majority, accepted that the respondents had subjected the claimant to this detriment because he had done the protected acts, and the protected acts formed a significant, or more than trivial influence, on the respondents' decision making by the Appeal Committee to reject the claimant's appeal against dismissal. The other Tribunal member, Mr Burnett in the minority, was satisfied that rejection of the claimant's appeal was because of the claimant's conduct in the workplace, and the Appeal Committee's upholding of Mr West's decision to summarily dismiss the claimant. It was not because he had done a protected act, and it was not an act of victimisation. Accordingly, the majority decision of the Tribunal is that the respondents' rejection of the claimant's appeal against dismissal was an act of victimisation by the respondents against the claimant.

102. In summary, therefore, the Tribunal dismisses items (a), (b) and (c) in the list of detriments, but upholds items (d) relating to suspending the claimant on 17 June 2015, (e) dismissing him on 24 September 2015, and (f) rejection of his appeal on 25 August 2016, which are all upheld by the majority of the

Tribunal, as being established acts of victimisation by the respondents against the claimant.

103. **Section 136 of the Equality Act 2010** deals with the burden of proof. Further, the **EHRC Code of Practice on Employment (2011)** states, at paragraph 15.33, that: "***An Employment Tribunal will hear all of the evidence from the claimant and the respondent before deciding whether the burden of proof has shifted to the respondent."***

104. As the Tribunal felt able to make a positive assessment that the reason for the detriments (a), (b) and (c) was not because the claimant had done a protected act, there is no need to consider the shifting burden of proof. As regards detriments (d), (e) and (f), which the majority of the Tribunal have upheld, the Tribunal finds that the burden of proof shifted to the respondents, but the respondents did not establish, to the satisfaction of the majority of the Tribunal, that their reason for dismissing the claimant, and rejecting his appeal against dismissal, was not influenced by the fact that the claimant had done the protected acts.

105. The respondents argued, in their grounds of resistance to the combined claims, that the claimant's victimisation complaint was time-barred, although this matter was not flagged up by parties' representatives in this List of Issues as a preliminary matter, in terms of **Section 123 of the Equality Act 2010.** At paragraph 3.6 of his written closing submissions for the respondents, Mr Ettles stated: "***The detriments of suspension, dismissal and rejection of the Claimant's Appeal do not constitute a course of conduct for the purposes of Section 118(6) of the Equality Act 2010."***

106. **Section 118** is part of chapter 2 of Part 9 of the legislation relating to enforcement of the Act in the civil courts, and it has no application to the Employment Tribunal. Chapter 3 refers to the Tribunal, and **Section 123(6)** refers – which, as it happens, is in the same terms as **Section 118(6)**

107. Mr Ettles' closing submissions did not invite us to find that the victimisation head of complaint is time-barred. We note that while time bar is a

jurisdictional issue, which neither we nor the parties can waive, even if the victimisation complaint is time-barred, it is just and equitable to allow it to proceed, when we have heard evidence on it, and neither party has suggested that they have been unfairly prejudiced by us doing so, when they have both led evidence before us on this aspect of the case.

108. Further, in our original Judgment, it was not necessary for us to go on and determine whether the detriments amounted to a course of conduct, as with the exception of the claimant's suspension, we then found, by majority, that none of the other detriments amounted to an act of victimisation. In this our Reconsideration Judgment, that view has changed. 2 further detriments have been upheld by the majority of the Tribunal. The respondents' Appeals Committee, in any event, were a separate decision-making body, distinct from Mr West, as the original dismissing manager. However, Mr West was the management representative at the Appeals Committee, he presented the management case, and he resisted the claimant's appeal against dismissal, and he was very much a key figure and influencer on the elected councillors forming the Appeals Committee. As Mr West was responsible for detriments (d) and (e), we find that to be a course of conduct. However, while he was not the final decision maker on the claimant's appeal, the Appeals Committee upheld his decision to dismiss the claimant, and they did not provide any reasoned decision for that decision, and Mr Ettles was insistent upon advising us that the Appeal Committee did so for the same reasons as Mr West. On that basis, the majority of the Tribunal finds that there was a continuing course of conduct, as both Mr West (the designated dismissing officer) and the Appeals Committee (the delegated elected member / councillor body with decision making power for the Council) upheld the claimant's summary dismissal from the respondents, and both Mr West and the Appeals Committee were acting on behalf of the respondents.