EMPLOYMENT TRIBUNALS

Claimant: Ms C Langtry

Respondent: Thomas Roofing (NW) Ltd

Heard at: Liverpool

On: 22, 25, 26 and 27 July 2022

Before: Employment Judge Horne

Representatives
For the claimant: In person
For the respondent: Mrs J Ferrario, counsel

JUDGMENT ON RECONSIDERATION

1. The strike-out paragraph is revoked. This means that the claimant's claim can be pursued to a final hearing.

2. The tribunal did not determine:

    (a) Whether the evidence on the SD card was genuine or not;

    (b) Whether the claimant forged the Disputed Document or not; or

    (c) Any further issues relating to the claimant's employment status.

(The meaning of "the strike-out paragraph", "the SD card" and "the Disputed Document" is explained in the reasons for this judgment.)

REASONS

The original judgment

1. Reserved judgment ("the original judgment") was sent to the parties on 6 August 2020. By paragraph 2 of that judgment ("the strike-out paragraph") the claim was struck out. The reasons for the reserved judgment explained that the ground for striking out the claim was that the claimant had conducted the proceedings unreasonably by forging a document ("the Disputed Document") purporting to be a written contract of employment between the claimant and Mr Thomas.

2. It is the strike-out paragraph that is the subject of this reconsideration application.

3. Paragraph 3 of the original judgment ("the employment status paragraph") determined that the claimant was an employee from 26 September 2018 until 31 October 2018. Nobody is asking for the employment status paragraph to be reconsidered.

Relevant procedural history

4. The reasons for the original judgment relate the procedural history up to August 2020. It was unfortunately necessary for those reasons to explain the history in considerable detail.

5. Amongst other things, the procedural history showed:

   5.1. There were significant stages in the case (such as presentation of the claim form) when one might have expected the claimant to mention the existence of the Disputed Document.

   5.2. There was a video showing the Disputed Document. In the audio footage from the video, the claimant could be heard talking, followed by an indistinct voice, which the claimant said belonged to Mr Thomas. The claimant said that the video had been taken on 24 May 2018. She later produced a screenshot displaying creation properties for the video. It was common ground that, on 24 May 2018, the claimant and Mr Thomas had recently reconciled following a temporary breakdown in their relationship.

   5.3. The claimant and Levins solicitors (then acting for the respondent) had taken up highly polarised positions on the question of what had happened to the claimant's phone. Messages and other material on her phone appeared to show that Mr Thomas was threatening and harassing the claimant. In Family Court proceedings, Mr Thomas alleged that the evidence had been fabricated. Levins asked for the phone to be analysed by an expert. The claimant alleged that she had sent her phone to Levins by signed-for delivery. Levins admitted that they had signed for a package, but denied that the phone was inside. That denial was maintained in correspondence with the Solicitors Regulation Authority (SRA). Levins' position was that the claimant had pretended to send the phone.

   5.4. Soon after the claimant sent the Disputed Document to Levins, they asserted that the Disputed Document had been fabricated and asked that that document be examined by an expert. The claimant again sent an envelope to Levins for

which Levins signed to confirm receipt. I accepted the evidence of Mr Heath (solicitor and partner in Levins) that in fact there was nothing in the envelope apart from a few sheets of green paper.

5.5. Throughout the proceedings, both before and after the original judgment, the claimant has made numerous requests for disclosure of information on a USB drive which she claimed to have left on the desk in the respondent's home office. The claimant consistently argued that the USB drive contained business records and would be evidence of the work she had done for the respondent. She made strike-out applications based, in part, on the respondent's alleged failure to disclose the USB drive.

6. In the reasons, I explained why I had come to the conclusion that the Disputed Document was forged:

"

151.1 First, it is, in my view, inherently unlikely that Mr Thomas would have agreed to pay the claimant 50% of the profits of the business plus a weekly wage of £400.00. For tax reasons, his own salary was only the equivalent of £162.00 per week. The Disputed Document, if genuine, would have given the claimant a considerably better remuneration package than his own. He was the founder of the business and the respondent's director and sole shareholder. Even allowing for the possibility that Mr Thomas was pleading for the claimant to come back to him in May 2018, I do not think he would have agreed to the terms in the Disputed Document.

151.2 Second, if the Disputed Document were genuine, I would have expected the claimant to have mentioned it before August 2019. I remind myself that I must make allowances for the effect of her depression on her memory. Even so, if she had forgotten that the hard copy was in the boot of her car, she would, in my view, still have remembered: (a) that the document existed, and (b) that she had kept a copy of it somewhere. This was, on the claimant's version, the only signed document recording the claimant's entitlement to wages, and she had obtained it from Mr Thomas within days of telling him that all financial matters would be sorted out through solicitors. If she was telling the truth, she thought the Disputed Document was so important that she needed to take a photograph of it (which turned out to be a video) and a separate hard copy. She would not have forgotten that she had gone to such lengths to keep such an important document.

151.3 If, as would surely be the case, the claimant had remembered that the document existed, I would have expected her to mention in her claim form that Mr Thomas had agreed in writing that she was an employee. The claimant would, I think, have told me at the first preliminary hearing that her conclusive proof of the employment relationship was a signed agreement and not just an audio recording. I would also have expected her to ask for disclosure of the Disputed Document if she did not think that she had kept a copy.

151.4 If, as I also find would have happened, the claimant had remembered that she had taken a copy, it is highly likely that she would have thought of the Disputed Document as an important piece of evidence at the time she presented her claim. It would have been an obvious candidate for inclusion in the claimant's lists of evidence in her Grounds of Claim.

151.5 Third, the claimant's version of events is inconsistent with her own actions. If she is correct, she sent her best copy of the Disputed Document to the respondent's solicitors, knowing that that particular piece of paper would be needed for forensic testing, and that no other copy would do. In her written closing submissions, the claimant stated that she sent them her copy so that the "ink and print type be confirmed to [the respondent's] printer". Her evidence is that, knowing the importance of that piece of paper, she sent it directly to the respondent's solicitors, whom she already believed had falsely denied receiving another key piece of original evidence. Such was her distrust of the respondent as a reliable custodian of original evidence that she had complained about that precise issue to the SRA. I do not understand, why, if the claimant's version was accurate, she chose to send the Disputed Document directly to the respondent's solicitors. The obvious thing to do would have been to send it to the forensic analyst directly.

151.6 Fourth, the claimant has overstated a key piece of evidence supporting her case as to when the Disputed Document was created. That is the video *CL CT1.mp4.* The claimant's transcript sets out remarks allegedly made by Mr Thomas on the video. If Mr Thomas had been talking at the time she took the video, it would have been powerful evidence that the Disputed Document was in existence whilst the claimant and Mr Thomas were still in a relationship. But the video footage disclosed by the claimant does not include any of those remarks.

151.7 Fifth, I found Mr Heath's evidence to be reliable. He would have had just as much to lose by lying to the tribunal as the claimant had to lose by forging a document. But he would have had far less to gain. As soon as I accept that he was trying to be truthful, it follows, I think, that I must also accept that a member of his firm's administrative team brought him the green sheets of paper as soon as they were received by the firm, and that they were brought to him in the envelope that the claimant had posted. I think it very unlikely that an administrator would have planted the green sheets in that envelope. There is no evidence of any personal link between the firm's administrative staff and Mr Thomas or his family. Like Mr Heath, the staff would have had nothing to gain by their actions. Once it is established that the green paper, and nothing else, was in the envelope when it was delivered to the firm, it has to follow that the claimant, or somebody on her behalf, put the green paper in the envelope before posting it. That was a strange thing to do. The claimant

> had videoed herself putting the Disputed Document and other items into the envelope, then weighed the envelope and paid the postage. Before the envelope was posted, someone must have knowingly removed the contents and replaced them with the green paper. The only explanation I can think of is that the claimant sent the green paper deliberately to the respondent's solicitors, hoping that they would think of it as worthless and dispose of it. The respondent's solicitors would be driven to admit that they had received the envelope because they had signed for it. They would be blamed for losing its contents. The claimant would then rely on her video, and the weight of the package, to convince the tribunal that the envelope had contained the Disputed Document. It would appear to the tribunal, she hoped, that she had been willing to have the Disputed Document forensically analysed and had been deprived of that opportunity by the respondent's solicitors actions. I do not think that the claimant would have gone to such lengths if she believed that the Disputed Document was genuine.

7. Having concluded that the Disputed Document was forged, and having determined as many issues as I could based on the uncontroversial facts, I came to the conclusion that a fair hearing was not possible. The remaining factual disputes would need reliable evidence to resolve them. The reliability of the claimant's evidence was fatally undermined by her conduct in forging the Disputed Document. I therefore struck out the claim.

8. The respondent did not make any application for costs.

9. On 15 August 2020, the claimant applied for reconsideration of the original judgment. I will call this "the first reconsideration application". She also appealed to the Employment Appeal Tribunal on 15 September 2020. Her appeal has been stayed pending her reconsideration applications.

10. Part of the first reconsideration application was based on the video. Unfortunately, due to the tribunal's data security policies, the only way I could watch the video was to list the reconsideration application for a hearing where the claimant could play the video on her own equipment. That hearing took place on 23 March 2021. The respondent was informed of the date of the hearing, but also informed that there was no need for the respondent to attend.

11. I refused the first reconsideration application under rule 72(1) of the Employment Tribunal Rules of Procedure 2013. Based on the evidence and arguments put forward at that stage, my view was that there was no reasonable prospect of the strike-out paragraph being revoked. My judgment refusing the first reconsideration was sent to the parties on 11 May 2021.

12. The claimant then made her second reconsideration application. Among the grounds for reconsideration was that she had discovered an important new source of evidence. According to her application, the claimant discovered an SD card in her mailbox on 29 April 2021. The application was accompanied by a file of appendices. Each appendix was a set of images which the claimant said had been taken from the SD card. The claimant added arrows to some images and redacted others.

13. At Appendices 1 to 4 there are photographs of a mobile phone. Everyone agrees that this phone is the claimant's phone and that it is the same phone that is alleged by her to have been sent to Levins in July 2019. The photographs show images on that phone's screen. These include a still image from what looks to be the video CL CT1.mp4. As shown in Appendix 1, the phone is photographed against a sheet of paper on which someone has written an address. The claimant told me that she has traced this address and that it is linked to the respondent.

14. Appendix 18 is a photograph of a computer screen. Displayed on the screen are the contents of a folder within a USB drive (such as a memory stick). The folder is called "meetings and notes". One of the files shown in that folder is a word document with the filename, "Thomas Roofing Clare Langtry 24.05.2018". Another image in Appendix 18 shows file creation properties for that document. According to those properties, the document was created using Mr Thomas' Microsoft account, last modified at 23.35 on 24 May 2018, and last printed at 23.57 on 24 May 2018.

15. Some of the appendices are redacted images of photographs of the claimant. She says that these images are of a sexual nature and were taken without her consent. These images appeared on the SD card as screenshots from an unknown computer device. She redacted the images herself.

16. Other appendices showed further images of numerous files apparently also stored on a USB drive. These files appear to be purchase orders, invoices and credit notes for various customers of the respondent's business. Many of these documents bear reference numbers in their filenames.

17. A further set of images appended to the application are also said to have been taken from the SD card and show pages apparently torn out from a notebook. There are handwritten drawings on the pages. The claimant says that these drawings came from a pink notebook which was in the possession of Levins.

18. I caused the second reconsideration application to be listed for a hearing. The hearing took place on 13 September 2021. Unfortunately, the respondent did not attend. The claimant made a lengthy strike-out application based, in part, on the respondent's non-attendance and the explanations for their absence given by him and Levins. I refused to strike out the response and gave my reasons.

19. Eventually, the second reconsideration application was heard on 22 to 27 July 2022. The claimant represented herself, as she has done throughout these proceedings. The respondent was represented by Ms Ferrario of counsel. The claimant gave oral evidence and answered Ms Ferrario's questions. The respondent did not call any evidence. Once the evidence had concluded, the claimant prepared written closing submissions, which I read.

20. Under cross-examination, the claimant was asked why she had not preserved any fingerprints on the SD card, or handed it to the police. The claimant replied that she had received anonymous SD cards before, which had contained unwanted sexual images, and she was expecting this SD card to be more of the same. She said that she did not report the SD card to the police because, when she had reported previous SD cards, no action had been taken. She had received the previous SD cards at Christmas and New Year.

The claimant's arguments

21. The claimant argues that Appendix 18 shows the metadata for the Disputed Document, which means that it must have been created on 24 May 2018.

22. The claimant summarised the evidence on the SD card in this way:

> "All the information from the SD card must have been in the same place at the same time and taken by the same person, who had knowledge of the importance of those items and whom had access to those items."

23. According to the claimant's submissions, the only alternative to the SD card material being genuine is that she has fabricated it all, including the documents from the respondent's business. That, she says, is incomprehensible. Having once been incorrectly found to have forged a document, it is unthinkable that she would then expose herself to the risk of further findings of forgery by manufacturing further evidence.

24. The more likely explanation, says the claimant, is that Mr Thomas put the information on the SD card, or got someone else to do it for him. Her theory is that, since he has won the case, Mr Thomas has been taunting her with the evidence she could have used to secure a different outcome. This is a continuation of the abuse she says that Mr Thomas perpetrated towards her. Another possible explanation, advanced in the second reconsideration application itself, is that Mr Thomas' subsequent partner may have compiled the SD card at a time when she was publicly messaging that she was "single". At that time she might have had a motive to help the claimant.

The respondent's arguments

25. The respondent opposed the second reconsideration application. The arguments put forward by Ms Ferrario on the respondent's behalf can be summarised as follows:

25.1. It cannot be necessary in the interests of justice to reconsider the strike-out paragraph unless the claimant can overturn the finding that she forged the Disputed Document.

25.2. The claimant did not report the SD card to the police and contaminated it with her own fingerprints. When I asked Ms Ferrario what conclusions could be drawn from that conduct, her reply was that it was impossible to say who had created the SD card. The respondent does not put forward a positive case that the SD card was fabricated by the claimant.

25.3. The tribunal cannot accept the claimant's explanation of how she found the SD card. Her evidence has no credibility in the light of the findings made in the original judgment.

25.4. Even if Appendix 18 is genuine, it does not mean that the Disputed Document was genuine. The file, "Thomas Roofing Clare Langtry 24.05.18" could have been any letter written by Mr Thomas to the claimant.

25.5. With the exception of Appendix 18, none of the material on the SD card is relevant, because it does not address the forgery of the Disputed Document.

Relevant law

26. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so". On reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked, it may be taken again.

27. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

28. The old Employment Tribunal Rules of Procedure 2004 required that judgments could be "reviewed", but only on one of a prescribed list of grounds. One of those grounds was that "new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time." This proviso reflected the well-known principle applicable to civil appeals derived from *Ladd v. Marshall* [1954] 3 All ER 745, CA. The *Ladd v. Marshall* criteria, in relation to new evidence, are, first, that the evidence could not have been obtained with reasonable diligence for use at the original hearing, second, that it is relevant and probably would have had an important influence on the hearing, and, third, that it is apparently credible.

29. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. It is therefore theoretically open to a party to raise new evidence in support of a reconsideration even if the *Ladd v. Marshall* criteria are not strictly satisfied (see *Outasight VB Ltd v. Brown* UKEAT 0253/14).

30. The discretion to act in the interests of justice is not open-ended. There is a public interest in the finality of judgments. That public interest militates against the reconsideration discretion being exercised too readily: *Ministry of Justice v. Burton* [2016] EWCA Civ 714.

31. A tribunal may proactively control proceedings to ensure that they are conducted fairly and efficiently, but must not assist a party by making a case for it which that party has not advanced itself. In *Dundee City Council v. Malcolm* UKEATS 0019/15, Langstaff J said this:

> "[It] is not for a tribunal to make a case for a litigant. However much a tribunal feels that a litigant is not making the best case that litigant could, given the facts as they appear to the tribunal, it cannot step into the shoes of the litigant and make for itself any case which it appears could have been advanced successfully in the light of that material. To do so would be to enter the arena. It would be to abandon impartiality. It would run counter to the very essence of the accusatorial procedure. Although litigants who are not lawyers might not know what precise legal label might categorise their cases, they will know what it is that they are complaining about. The line between making a case which is not being advanced by a party, on the one hand, and helping that party to

> articulate clearly that which they are complaining about on the other may be fine, but it is critical. A tribunal's duty to be fair to both sides means it cannot enter the contest on behalf of either one. It must listen to the cases made for each, and must not substitute a case of its own."

32. Where a claimant is unrepresented, the tribunal must ensure that they adjudicate on the claim that is evidently raised in their claim form, and not to be distracted by any confusion that a litigant in person may have about the legal language that is used to describe the scenario: *Mervyn v. BW Controls Ltd* [2020] EWCA Civ 393.

33. I have cited *Malcolm* and *Mervyn* to illustrate the difficulty that a tribunal may get into if it either intervenes too proactively or (in the case of an unrepresented party) not proactively enough. Neither of these cases concerned reconsideration applications. In neither case was the tribunal having to consider for itself the public interest in finality of litigation. Nevertheless, the cases demonstrate the importance of the principle that a tribunal must not take sides.

34. In the context of reconsideration applications, my self-direction is this:

34.1. Where a party applies for reconsideration of a judgment, the tribunal may confirm the original decision based on arguments that were not advanced by the opposing party, provided that such arguments are appropriate and necessary to achieve the public interest in finality of litigation and also provided that they are compatible with the overriding objective of dealing with cases fairly.

34.2. The tribunal must not, however, go beyond those boundaries and make for itself a case for confirming the original judgment that is so different from that which was advanced by the opposing party, that to do so would give the appearance of taking sides.

34.3. Where one of the parties to a reconsideration application is unrepresented, and the tribunal assists the unrepresented party to articulate their arguments, there is less danger of the tribunal appearing to take sides, because the tribunal's intervention is justified by the requirement to place the parties on an equal footing (so far as is practicable). Where the positions of the two parties are reversed, that justification disappears. A tribunal may give the appearance of bias if it gives excessive assistance to a party represented by counsel to articulate their arguments against an unrepresented party.

Conclusions

<u>The finding under reconsideration</u>

35. I agree with Ms Ferrario that the focus must be on the original finding that the claimant had forged the Disputed Document. Whilst that finding stands, it would not be necessary in the interests of justice to reconsider the strike-out paragraph. Conversely, if the finding of forgery could not stand in the light of the new evidence, the strike-out paragraph would be unsustainable and it would be necessary in the interests of justice to revoke it.

<u>Admissibility of the SD card</u>

Apparent credibility

36. The appendices to the claimant's reconsideration application have the appearance of being credible. That is to say, there is nothing on the face of them that looks obviously false.

37. That is not quite enough for the claimant to be able to rely on the contents of the SD card. For the evidence to be apparently credible, the claimant needs to explain how the material could have come to be on the SD card. That explanation must be capable of belief. Whether or not the claimant has given a credible explanation appears to me to be inseparable from the question of whether the claimant could have relied on the contents of the SD card at the original hearing.

Relevance and influence

38. There is a dispute about the significance of Appendix 18 and the influence that it would have had on the original hearing. Contrary to the respondent's submissions, my view is that the metadata for the Word file "Thomas Roofing Clare Langtry 24.05.2018" are highly relevant. The file creation properties purport to show that a document, with a filename referring only to Mr Thomas and the claimant, was created and printed just before midnight on a day when – it is common ground – the claimant and Mr Thomas had just reconciled. Mr Thomas was not in the habit of typing letters generally. Still less was he in the habit of typing business letters to the claimant. Mr Thomas has never suggested that he did give any kind of letter to her at or around that time. There is no serious possibility of Thomas Roofing Clare Langtry 24.05.2018 being any genuine document other than the Disputed Document. If the metadata have not been falsified, the Disputed Document was created and printed on 24 May 2018. It still would not necessarily mean that Mr Thomas *signed* it. But what it would mean would be that a substantial ground for my finding of forgery would fall away. I attached significance to the fact that the claimant had not mentioned the existence of the Disputed Document until a late stage of the proceedings. It would not be possible to draw any inference of forgery from that failure if it could be established that the disputed document had been created and printed on 24 May 2018.

Could the claimant have relied on the SD card at the original hearing?

39. I now turn to the claimant's explanation for how she discovered the SD card. She stated in her second reconsideration application, and confirmed in her oral evidence to me, that she had discovered the SD card in her mailbox on 29 April 2021. I have to decide whether or not that explanation is credible.

40. I agree with the claimant that "all the information from the SD card must have been in the same place at the same time and taken by the same person, who had knowledge of the importance of those items and whom had access to those items". For convenience, I will refer to that person as "the SD card creator".

41. Of course, one possibility is that the SD card creator was the claimant herself. If this is what happened, it would plainly not be in the interests of justice to reconsider the original strike-out paragraph. The *Ladd v. Marshall* criteria would be the least of the claimant's worries. The claimant would be guilty of a serious attempt to deceive the tribunal. She would have had to have carefully curated a large selection of electronic documents (whether real or fabricated), saved them onto an SD card, and then told a deliberate lie about how she found it.

42. The only other possibility is that someone else saved the images onto the SD card and placed the SD card into the claimant's mailbox. That event must have

occurred sometime between 1 January 2021 (when the claimant discovered the New Year SD card) and 29 April 2021. Needless to say, the claimant could not have relied on the SD card at the original hearing if it had been placed into her mailbox during that period.

43. The critical question is, therefore, has the claimant told the truth about the discovery of the SD card? This is not easy question. The claimant's evidence about the discovery of the SD card was neither obviously true nor obviously false.

44. This is a convenient point to deal with two of the respondent's arguments.

44.1. The first is that I should determine the reconsideration application without trying to make a finding about who the SD card creator was. The uncertain identity of the SD card creator is, says Ms Ferrario, one of the factors making it unnecessary in the interests of justice to revoke the strike-out paragraph. I agree that it may not be necessary to identify precisely who was the SD card creator, provided that it was not the claimant herself. Where I disagree with the respondent is on their invitation to fudge the question of *whether the SD card creator was the claimant or not.* If the claimant was the SD card creator, she is guilty of a serious attempt to pervert the course of justice. If, on the other hand, the SD card creator was not the claimant, it is likely that the data on the SD card is genuine. I take this view because I cannot think of anyone else who would falsify it. Anyone falsifying the data would have had to know exactly what evidence to fabricate, understand its importance to the case, have the means to fabricate it and, crucially, have some reason to want to manufacture evidence in the claimant's favour. I cannot think of anyone who could want to do that apart from the claimant herself. I therefore need to try, if I can, to determine whether or not the claimant was the SD card creator.

44.2. The respondent seeks to challenge the credibility of the claimant's explanation of how she found the SD card, based on my original finding that the reliability of her evidence was fatally undermined. The difficulty with this argument is that it puts the cart before the horse. I found the claimant's evidence to be unreliable because of her forgery of the Disputed Document. If the SD card is genuine, the evidence on it undermines my finding that she forged the Disputed Document, and calls into question my reason for mistrusting her evidence in the first place.

45. To get to the truth of how the data came to be on the SD card, there needs to be a careful analysis of the data on the card and of the circumstances existing at the time.

46. The groundwork for such analysis includes the following:

46.1. It is highly likely that the SD card creator had copies of the PDF and Word document files containing the respondent's purchase orders, invoices and credit notes for the respondent's major clients. It is hard to imagine the SD card creator being able to make all that information up. It would be too great a risk. Dates, amounts and reference numbers could be easily checked with the supplier. It not realistic to think that the SD card creator had records other than the purchase orders and invoices.

46.2. The SD card creator also had access to numerous photographs of the screen of the claimant's original phone.

46.3. The SD card creator must have had in-depth knowledge of the issues in the case, the significance of the Disputed Document, and the importance of establishing the timing of its creation.

47. If the claimant was not the SD card creator, it would help her case to put forward a credible theory about who else the SD card creator could have been. Her suggestion that the SD card creator was Mr Thomas is unconvincing. I cannot see why he would have wanted to give the claimant all that information. I acknowledge that there are unresolved issues about alleged controlling conduct by Mr Thomas, which might be consistent with his wanting to taunt the claimant after he had won. But the claimant's theory does not fit with the procedural history of the case. The respondent, up to now, has not demonstrated any willingness to prolong the employment tribunal proceedings, for example, by applying for costs. For the whole of the time that the SD card could have been put in the mailbox (January to April 2021), there was a pending EAT appeal and a pending reconsideration application. The last thing that Mr Thomas is likely to have wanted to do would be to prolong the proceedings by giving the claimant further ammunition.

48. It is possible that Mr Thomas' subsequent partner might have wanted to help the claimant if she had separated from Mr Thomas. At first glance, that explanation seems plausible. It would still need to stand up to analysis, particularly against some of the images on the SD card. Why, for example, would Mr Thomas' partner have wanted to lay such a cryptic trail of information, such as the handwritten address at Appendix 1? Neither the claimant nor the respondent has made any submissions on that point, or any other points to do with Mr Thomas' partner.

49. If the SD card creator was someone other than the claimant, that person must have acquired the photographs of the claimant's mobile phone shown in Appendices 1 to 4. This means that the SD card creator either had the phone itself, or someone had provided the SD card creator with a selection of photographs. The claimant's evidence has always been that she sent her phone to Levins in July 2019. According to the claimant, the most likely explanation for the photographs reaching the SD card creator is that Levins gave the phone to Mr Thomas. It might be thought that the logical consequence of that submission is that Levins would have had to have lied to the tribunal and to the SRA when they said that they had not received the phone. Neither party addressed me on whether this was a logical consequence of the claimant's submission or not. Nor did they make submissions on whether Levins were likely or unlikely to have lied in that way. The respondent's express position is that the images of the phone are irrelevant to the reconsideration application.

50. I turn to the possibility of the SD card creator being the claimant herself. In my view, I cannot fairly make such a finding. Here are my reasons:

50.1. The respondent does not advance a positive case that the claimant was the SD card creator.

50.2. I cannot reach a finding that the claimant saved the data onto the SD card without at least some understanding of how the claimant could have acquired the data in the first place. Many of the images are from a USB drive, and appear to contain the kind of material that the claimant had consistently been asking to have disclosed to her. I have already discounted the notion that the SD card creator could have fabricated all the invoices, purchase orders

and credit notes from scratch. An alternative explanation is that the claimant had the USB drive all along. If that is correct, the claimant must have made a tactical choice to make dishonest strike-out applications based on a false accusation of alleged failure to disclose the USB drive to her. Such a tactic (if the claimant had employed it) would have been highly elaborate, highly risky and of dubious benefit when she could simply have relied on the USB material in the first place. More fundamentally in my view, the respondent has never suggested this as a possibility. In fact, the respondent has never engaged with any arguments about how the claimant could have acquired any of the data on the SD card.

50.3. Had the point been argued, I might have made a finding that the claimant was the SD card creator based on the images of her phone in Appendix 1-4, and the likelihood (or unlikelihood) of Levins having given the phone to Mr Thomas. But that point was not argued, and the evidence in support of it is stated by the respondent to be irrelevant.

50.4. In conclusion, I cannot find that the claimant was the SD card creator without constructing detailed arguments for myself, which go considerably beyond the respondent's case. That would, in my view, be going too far beyond the proper bounds of judicial intervention, even on a reconsideration application. It would be passing the limits of what is necessary to achieve the public interest in finality of litigation. A party represented by counsel can be expected not to need significant assistance in articulating its case. If I were to make a serious finding against the claimant that goes beyond the respondent's positive case, based on the arguments identified above – on which I heard no submissions – it would give every impression that I had taken the respondent's side.

51. Having declined to make a finding that the claimant was the SD card creator, I must proceed on the footing that Appendix 18 may well be genuine. The creation properties of the Word file, if genuine, would show that the Disputed Document was created and printed on 24 May 2018. That finding would undermine one of the key arguments in support of my finding that the claimant forged the Disputed Document. Since forgery of the Disputed Document was the basis on which I struck out the claim, the strike-out paragraph cannot stand.

Disposal

52. I therefore:

52.1. admit the SD card into evidence under the criteria in *Ladd v. Marshall*; and

52.2. revoke the strike-out paragraph in the interests of justice.

Matters for the final hearing

53. It is important to be clear about what this judgment means. I am not making a positive finding that the SD card is genuine. I am not making a finding that the Disputed Document is genuine. It will still be open to the tribunal to conclude that the claimant forged the Disputed Document, sought to cover up the forgery by sending green sheets of paper to Levins, and then doubled down by fabricating further evidence and lying to the tribunal in support of her second reconsideration application. My only conclusion is that there is sufficient possibility of the Disputed

Document being genuine that it is necessary in the interests of justice to revoke the strike-out paragraph.

54. It may well be necessary for a tribunal to decide whether or not the information on the SD card is genuine. If the tribunal considers it necessary, the matter will need to be determined by a full tribunal, having considered all the evidence, and with the benefit of detailed argument.

Employment Judge Horne
8 August 2022

SENT TO THE PARTIES ON
26 August 2022

FOR THE TRIBUNAL OFFICE