Neutral Citation Number: [2022] EAT 167

Case No: EA-2019-000986-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 November 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE

- -

Between :

MS JENNIFER BENJAMIN
Appellant/Respondent to the Cross-Appeal

- v –

THE MARKFIELD PROJECT
Respondent/Cross-Appeal Appellant

- -
- -

Katy Sheridan (instructed through **Advocate)** for the **Appellant/Respondent**
Joanna Kerr (instructed directly by **The Markfield Project**) for the **Respondent/Appellant**

Hearing date: 3 November 2022

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 17 November 2022

SUMMARY

Practice and procedure – appeal and cross-appeal against reconsideration decision

Unfair dismissal – compensation – mitigation and re-training

In her application to the Employment Tribunal ("ET") to reconsider its decision on remedy, the claimant sought to rely on further documentation relating to mitigation and said that her evidence on injury to feelings had been adversely impacted by her disability. The ET rejected the application, holding that the further documentation merely confirmed its original decision; it did not address the points made regarding injury to feelings. The claimant appealed, complaining the ET had erred: (1) in its approach to mitigation, in particular in relation to her decision to embark upon a course of study; (2) in failing to address injury to feelings. The respondent cross-appealed, saying: (1) the ET had failed to address its objection that one of the new documents was inconsistent with the claimant's evidence at the liability stage; and (2) the award for injury to feelings was too high.

Held: allowing the appeal in part; dismissing the cross-appeal

The claimant's first ground of appeal was a challenge to the ET's original remedy decision and identified no error of law arising from the reconsideration judgment. Even if it had been a point that could be raised by way of application for reconsideration, the claimant had not asked that the ET reconsider its remedy decision because it had erred in its approach to the question of mitigation and re-training, and the ET had not erred in seeing this as akin to an application to rely on fresh evidence (on which its conclusion could not be challenged). The ET had, however, failed to address the claimant's reconsideration application in respect of the injury to feelings award. On this issue, the claimant had identified matters that were either relied on as fresh evidence (that is, as to the impact of the claimant's disability on her evidence on injury to feelings) or as going to the fairness of the hearing. It could not be said that these were not matters that might appropriately amount to grounds for reconsideration and the ET had erred in failing to address the application in this respect. Ground (1) of the appeal was dismissed; ground (2) allowed.

As for the cross-appeal, these were not matters that the respondent had sought to raise by way of application for reconsideration and did not properly arise from the judgment under appeal. In any event, there was no inconsistency in the evidence, as suggested by the first ground of cross-appeal. As for the second ground, this could only relate to the original remedy judgment (from which there was no appeal) but, in any case, did not meet the high threshold required for a perversity challenge.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. The appeal and cross-appeal in these proceedings raise questions as to the appropriate scope of an appeal against a reconsideration decision.

2. In giving this judgment I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against the reconsideration judgment of Employment Judge Bedeau, sitting at Watford on 14 August 2019, by which the claimant's application for reconsideration of the earlier remedy judgment of 8 March 2019 was refused. The claimant's appeal against the reconsideration judgment was permitted to proceed on amended grounds after a hearing under rule 3(10) **Employment Appeal Tribunal Rules 1993** (as amended) by His Honour Judge Auerbach, who also permitted the respondent to pursue a cross-appeal against that judgment. The claimant appeared in person before the Employment Tribunal ("ET") but, since the rule 3(10) hearing, has benefitted from *pro bono* representation by counsel in the appeal proceedings; Dr Kerr has represented the respondent's interests both before the ET and the EAT.

3. In addressing the appeal and cross-appeal, it has not proved possible to obtain a record of the ET's original liability judgment and it seems that no written reasons for that judgment were ever sought. The relevant background recounted in this judgment has, therefore, been taken from the parties' pleaded cases and from the ET's subsequent remedy and reconsideration judgments.

The Relevant Background and the ET's Findings

4. The respondent provides support services for people with learning disabilities; at the relevant time, it had around 36 employees. From September 2013 until 27 June 2016, the claimant was employed by the respondent as a part-time support worker, working 25 hours per week. As at the time of the termination of her employment with the respondent, the

claimant was 53; she had graduated in 2012 with a Bachelor of Arts degree in Special Needs.

5. The claimant resigned from her employment on 27 June 2016. She subsequently brought ET proceedings, claiming she had been constructively unfairly dismissed and had suffered race discrimination and disability discrimination by virtue of the respondent's failure to make reasonable adjustments (the claimant has dyslexia related learning difficulties and suffers difficulty processing information). Those claims were upheld by the ET following a full merits hearing from 15-17 October 2018, before EJ Bedeau and two lay members. A whistleblowing claim also pursued by the claimant was, however, dismissed.

6. The ET listed the case for a further hearing to determine remedy, making a number of case management orders for that hearing. Specifically, the claimant was ordered to serve:

> "… by 21 December 2018, documentary evidence of her search for employment from 28 June 2016 to 17 December 2018; a schedule of loss, by 17 December 2018; and a witness statement setting out details of her search for employment as well as any hurt and upset caused by the discriminatory treatment … by 21 December 2018."

7. The remedy hearing took place before the ET on 16 January 2019. The claimant gave evidence and the ET also heard from a witness for the respondent. In relation to her claim of lost earnings, the ET recorded the claimant's evidence as follows:

> "7. The claimant told us that she registered with her local job centre after leaving in June 2016. As she sustained an injury to her left wrist while at work when operating the door to a mini bus, she disclosed that fact to her local job centre and was advised to claim Employment and Support Allowance because of her injury. She had the benefit of the allowance from 27 June to 23 October 2016.
> 8. Either in late August or early September 2016, she decided to enrol on a Post-graduate Certificate in an *[sic]* Education course "PGCE". She tried to get in on the course at a local educational establishment but was unable to do so. In early September 2016, she enrolled on the course at Bedfordshire College for 2 years attending 1 day a week for 5 hours.
> 9. She told the Tribunal that whilst on the course she spent about 20 hours a week on her studies. She also sought for herself vocational assessment work at several educational establishments. The respondent, we find, do not have

> the necessary resources to provide work-based placements for those who are on the PGCE course.
> 10. She had registered with several recruitment agencies specialising in either education and/or training.
> 11. Contrary to what the tribunal ordered, there was no documentary evidence showing that she applied personally for employment positions similar to the one she occupied with the respondent or for any other employment posts. She told us that she was open to offers but that does not avoid the fact that there is the absence of documentary evidence apart from a list of recruitment agencies she provided for the purposes of the hearing. The absence of such documentary evidence in the Tribunal's view is critical to the claimant's claim for compensation.
> 12. The claimant made reference to a chronology covering events from 27 June 2016 to the 7 December 2018. From 2 February 2017 to 15 June 2017, she worked for Overland Day Care Nursery as an early years educator. It was full-time and she was paid. When that employment came to an end she applied for Job Seekers Allowance.
> 13. On 8 August 2017, she was offered an early years educator post at Mapledene Nursery working full-time from 5 September 2017. She told the Tribunal that it was renewed after 3 months but, unfortunately, on the 15 March 2018, it came to an end because she sustained an injury to her head. She told the Tribunal that her work at Mapledene was well regarded and she felt confident that her employment there would have continued but for her injury.
> 14. On the 16 March 2018, she applied for Employment and Support Allowance which came to an end on or around 12 June 2018. Thereafter she was in receipt of Job Seekers Allowance.
> 15. On 27 August 2018, she unsuccessfully applied for a special education needs lectureship post at Hackney College.
> 16. In October 2018, she sent her curriculum vitae for the post of English as a second language teacher on a voluntary basis and to Education Line Recruitment, a recruitment agency. On 19 November 2018, she registered with Veritas Employment Agency.
> 17. On 30 November, she applied for a role as a tutor in South-East London and for a post as a Special Education Needs tutor with Reeds Employment Agency."

8. In its judgment, sent to the parties on 8 March 2019, the ET addressed the question of compensation for pecuniary losses as follows:

> "43. In relation to the compensatory award, ordinarily, unfairly dismissed employees are entitled to be compensated for loss of salary from the date of dismissal to the date of the remedy hearing as well as future loss of income. However, in the claimant's case, by reason of the injury to her left wrist she was unable to work from 27 June 2016 to 23 October 2016. No evidence had been given in relation to whether the respondent operate [sic] a company sick pay scheme or contractual sick pay scheme. The claimant received during that period Employment and Support Allowance, therefore, for that period there was no loss of income.
> 44. What then was the position from 24 October 2016? The claimant had to

> demonstrate from documentary evidence, as she was required to do, that she was actively engaged in looking for work both personally and with the assistance of recruitment agencies, initially looking for work of the kind she was engaged in with the respondent or any other positions within her skills, experience and abilities. Had the claimant demonstrated she attempted to find employment and had been unsuccessful, the Tribunal would have taken that into account in assessing her financial loss.
> 45. In this case she decided in late August, early September 2016, to change her focus and to qualify as a teacher/lecturer by enrolling on to the PGCE course. In so doing, she spent 20 hours a week studying and the rest of her time looking for positions which allowed her to be assessed as part of the course in the hope that she would successfully complete it. That was her full-time focus. There was no evidence that she was actively engaged in looking for comparable positions like the one she had with the respondent or other roles from the 24 October 2016. As a result, she secured for herself 2 early years educator positions to assist her with her PGCE course which she eventually passed. There was no documentary evidence that she even applied for any part-time positions. We have come to the conclusion that there should be no financial loss from the 24 October 2016."

9. On the question of injury to feelings, the claimant's evidence (accepted by the ET) was that:

> "21. … as a consequence of her treatment [by the respondent], she began to question herself which affected her confidence. She felt disappointed and hurt because of the racially discriminatory way in which she had been treated. She said she had given her best to the company but was not respected. Having to resign had a financial impact upon her. She also suffered from sleepless nights worrying about her unfair treatment. Psychologically, in June, job satisfaction in her work had gone and she was no longer eager to go to work because she did not like being there and hated her job.
> 22. Being dyslexic she has to work harder than someone without her disability or without any disabilities.
> 23. In her schedule of loss, she stated that in addition to developing many sleepless nights and migraines there were incidents at work which were not part of her claims against the respondent. … She was asked what proportion of her sleepless nights and migraines were attributed to the other incidents. Initially she said 80% and then, after further questioning, said 50/50.
> 24. As regards her current feelings, she told the Tribunal that she feels disappointed at the way she had been treated by the Respondent."

10. The ET further recorded that, after the liability hearing, the respondent had apologised to the claimant for the way she had been treated, emphasising that this had not been intentional (the ET had found the treatment was unconscious race discrimination) and that changes had since been made.

11. The ET determined that the appropriate award for injury to feelings was £4,000 (plus interest), reasoning as follows:

> "50. As regards injury to feelings, we do take into account the answers given by the claimant in response to the statement in her schedule of loss that there were other incidents which caused her upset as well as sleepless nights and migraines. Initially she said 80% and thereafter 50/50. There was much more to her case. She had been the victim of racially discriminatory treatment and there was also the failure to make reasonable adjustments, in that she was not allowed adequate time to prepare for the internal disciplinary hearing. These impacted on her injured feelings.
> 51. Looking at matters globally, her hurt feelings were more acute and more intense shortly after her resignation and lessened once she secured for herself a place on the PGCE course and employment at the two nurseries. Her current state of mind is that she feels disappointed and that is over 2 years since her discriminatory treatment."

12. Following receipt of the ET's remedy judgment, on 22 March 2019, the claimant emailed the ET requesting a reconsideration of its decision as:

> "… the court was not able to gain access to the document evidence due the lack of acessing *[sic]* the internet. I called the court this morning and was advised that the bulk of the paper work will be to *[sic]* big to send by email I was advised to send the documential *[sic]* evidence by post. …."

13. The claimant also sent a six page document to the ET, further setting out the basis of her application, accompanied by documents that the ET described as:

> "… tending to show that she mitigated her losses by searching for employment." (ET reconsideration judgment, paragraph 1)

14. In the covering document, the claimant explained that she had had assistance (from her local Citizens Advice Bureau) in compiling her schedule of loss but had found that, together with the requirement to serve a witness statement, very demanding. Her disability had placed her at a disadvantage and she had little time to "*also send additional information regarding accessing documented evidence*". The claimant said that, on 16 January 2019, she had emailed to the ET and the respondent "*evidence of the jobs that I had applied for since 2016*" but the ET "*internet was down*" and the ET was "*unable to*

print of [sic] the evidence that I had submitted". At today's hearing, it has been explained to me that the claimant sent various emails through to the respondent on the day of the remedy hearing but those attending that hearing were not aware of the emails until after the hearing had taken place.

15. Returning to the reconsideration application, the claimant pointed out that she had told the ET that on 27 June 2016 (straight after she had resigned) she had claimed Employment Support Allowance ("ESA") and when this had ended on 23 October 2016 she had transferred to Job Seekers Allowance, which required that she was actively seeking work – something she considered the ET had failed to take into account. As for her decision to enrol on the PGCE course, the claimant pointed to the fact that she had been unable to work at the time, due to her hand injury, and was then aged 53 and had sought to widen her job prospects and her long-term financial independence.

16. The claimant also addressed the ET's injury to feelings award, asking that this be reconsidered, explaining that (as a result of her disability) she had not been "*sure what the question was*" and had found "*giving evidence perplexing and confusing*".

17. In considering the claimant's application on the papers, the ET recorded that the further material relied on by the claimant showed:

> "… that on 3 October 2016, she registered with Saddlers House recruitment agency; on 20 October she was in the process of registering with Sugarman Education; on 6 November 2016, she joined the Etech Supply Team which supplies teaching staff to schools; the next document in time, dated 27 June 2017, refers to her being shortlisted for the position of Under 3s Nursery Manager." (ET reconsideration judgment, paragraph 6)

18. The ET concluded that:

> "The documents lend support to the tribunal's findings and conclusion that the claimant's focus, in late October 2016, was on her PGCE course and on qualifying as a teacher." (ET reconsideration judgment, paragraph 7)

19. In the circumstances, the ET considered there was no reasonable prospect of its remedy judgment being varied or revoked and it refused the claimant's application for reconsideration.

The Grounds of Appeal and the Parties' Submissions

20. The claimant's appeal was permitted to proceed to a full hearing on the following grounds:

(1) The ET misdirected itself and/or misapplied the law on mitigation, in particular by:

(a) applying the wrong burden of proof, and the wrong test for its discharge; and/or

(b) finding that a decision to undertake further study (the PGCE) constituted failure of mitigation of itself.

(2) The ET failed to consider the claimant's reconsideration application in respect of the injury to feelings award.

21. In support of her appeal, the claimant submits: (i) in its remedy judgment, the ET had treated the claimant's decision to re-train as dispositive of the question whether she had acted reasonably; (ii) it further appeared that the ET had not been taken to the relevant legal principles on mitigation (and the burden of proof) and re-training; (iii) the application for reconsideration – drafted by a litigant in person with a learning difficulty – had sought to explain that the claimant had enrolled on the PGCE course in order to improve her career prospects and because she was at that time unable to work due to a hand injury, the claimant had not sought to challenge the finding that she had in fact enrolled on such a course but the ET had focussed on the question whether there was any reasonable prospect of this finding being varied, failing to consider the claimant's submission regarding the reasonableness of her enrolment on the course; (iv) the ET's remedy judgment further demonstrated that it had treated the claimant as bearing the burden of proof; (v) as for the reconsideration application relating to the injury to feelings award, this had either been ignored or the ET had failed to provide any reasons to explain why it had rejected this; in

either event, this was an error of law.

22. For its part, the respondent points out that the claimant's case at the remedy hearing had been put on the following basis:

> "The Claimant has been unable to secure any permanent employment since her dismissal despite her best efforts. She has sought to improve her skills in order to improve employment prospects by attending University and college"

The respondent had, however, produced a full response to the claimant's schedule of loss together with a witness statement and exhibits, which included evidence demonstrating that there were a significant number of vacancies in relevant roles for which the claimant could have applied. Under cross-examination, the claimant accepted she had not applied for any of the vacancies; when asked why she had not done so, the claimant's response had simply been that she was "*open to offers*".

23. As for the issues raised by the grounds of appeal, the respondent contends: (i) it was trite law that a claimant bears the burden of proving their losses and the respondent must prove any failure to mitigate, but in the present case, the claimant had made assertions which she could not substantiate about losses that she said flowed from the dismissal; (ii) although the ET did not refer to the principle that a respondent must prove a failure to mitigate, that was not necessarily fatal (see **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15) and in this case the respondent had adduced that evidence and the claimant had been unable to refute it - ultimately the question whether or not the claimant had mitigated her losses was dependent upon the facts of the case (see **Hibiscus Housing Association v McIntosh** UKEAT/0534/08); (iii) it had been the claimant's case that she had undertaken the PGCE as a step in mitigation taken as a result of a failure to find any other work but that had proved to be unsustainable under challenge and in the face of the respondent's evidence; (iv) as for the injury to feelings award, the claimant's schedule of loss had failed to specify any parameters in this regard but she had been given full opportunity to give evidence on

the point and the ET had encouraged her to expand upon that evidence in respect of the proportion of her stress and anxiety attributable to the matters determined in her favour at the liability stage.

The Cross-Appeal and the Parties' Submissions

24. The respondent was permitted to pursue a cross-appeal in respect of the ET's reconsideration judgment on two grounds, explained as follows:

    (1) The ET had ignored the respondent's submission in relation to the date of the claimant's application for ESA. In responding to the application for reconsideration, the respondent had referred to the letter confirming the start date of this allowance (27 June 2016), which was the same day the claimant had walked out of her employment. This cast doubt on the claimant's evidence at the liability hearing, to the effect that the conversation she had had at work at around 6:00pm on 27 June 2016 had been the "last straw" that had caused her to leave her employment; the new evidence appeared to show that the claimant had in fact already applied for ESA.

    (2) In any event, the ET's injury to feelings award was perverse. The claim related to a single event, involving unconscious discrimination and a failure to make reasonable adjustments, in respect of which the respondent had subsequently apologised. It was the respondent's submission that the ET must have elected to compensate the claimant for other, nebulous matters, which had not been the subject of her claim.

25. In fairness, I should record that Dr Kerr did not seek to pursue either ground of cross-appeal with any vigour at the hearing before me.

26. For the claimant it is said that the cross-appeal should be dismissed as a matter of principle: the respondent had not appealed against the remedy judgment nor had it made any application for reconsideration. In any event: (i) the ET had found as a fact that the claimant had the benefit of ESA from 27 June 2016 - if there was any point to be made

about that, it had been open to the respondent to do so at the remedy hearing; (ii) in any event, the letter in question did not show that the claimant made a claim prior to her (constructive) dismissal, merely that she was awarded the benefit from the day she left employment (claims could be backdated for up to three months; paragraph 1 of schedule 4 **Social Security (Claims and Payments) Regulations 1987/1968**); (iii) in relation to the injury to feelings award, this (a) could only go to the remedy judgment and did not arise out of the reconsideration judgment, and (b) failed to engage with the fact that the ET had reduced the award to take into account other matters impacting upon the claimant's feelings.

The Relevant Legal Principles

Reconsideration

27. The ET's power to reconsider its judgments is provided by rule 70 schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), which provides that the ET:

> "… may … reconsider any judgment where it is necessary in the interests of justice to do so…"

28. By rule 72(1), it is provided that an application for reconsideration shall be refused:

> "If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked …"

29. In interpreting or exercising its power of reconsideration, the ET will be bound to seek to give effect to the overriding objective, as provided at rule 2 **ET Rules**:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality

> and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense."

30. The purpose of reconsideration (then called a "review") was addressed by the EAT (Browne-Wilkinson J (as he then was) presiding) in **Trimble v Supertravel Ltd** [1982] ICR 440, as follows:

> "We do not think that it is appropriate for an [ET] to review their decision simply because it is said there was an error of law on its face. If the matter has been ventilated and properly argued, then errors 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 party 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 … . 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." (see p 442E-H)

31. A restrictive approach to the ET's power to reconsider (or review) its decisions had been taken in the earlier EAT ruling in **Flint v Eastern Electricity Board** [1975] ICR 395, and this was further affirmed by the decision in **Lindsay v Ironsides Ray & Vials** [1994] ICR 384, where the EAT considered that the power should be limited to cases involving:

> "… a 'procedural mishap' or 'procedural shortcoming,' or 'procedural occurrence' of a kind which constitutes a denial to a party of a fair and proper opportunity to present a case." (see page 394A)

32. Other divisions of the EAT considered, however, that the ET's power of reconsideration should not be so restricted. Thus in **M Shortfall t/a Auction Centres v Carey** UKEAT/351/93, the EAT dismissed a challenge to a review judgment (under what was then rule 10(e) of the relevant **ET Rules**), which had addressed a statutory provision that should – but was not – have been drawn to the attention of the ET at the earlier hearing; the EAT observing:

> "We have no difficulty in categorising that state of affairs of an [ET] dealing with an issue before it without any mention or consideration of the relevant statutory provision, partly due to Counsel inadvertently having failed to draw it to their attention on the one side, and partly due to a litigant in person having confused himself with a good deal of complex law and not drawing to their attention on the other side as falling within Rule 10(e)."

33. Similarly, in **Williams v Ferrosan Ltd** [2004] IRLR 608, the EAT held that where a mistake had been made by the ET due to oversight by both parties (in that case, whether the claimant would attract a tax liability on future earnings), it would be open to the ET (and, indeed, preferable) to correct its error by way of review. See also **Sodexho v Gibbons** [2005] ICR 1647 EAT.

34. The case-law in this regard was reviewed by the EAT in **Newcastle City Council v Marsden** [2010] ICR 743 EAT (Underhill P (as he then was) presiding). Recognising that the broad statutory discretion otherwise allowed should not become:

> "… so encrusted with case-law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires in the particular case." (see paragraph 16)

And acknowledging that the introduction of the overriding objective might be seen as:

> "a useful hook on which to hang an apparent departure from a long stream of previous authority." (paragraph 16)

The EAT also emphasised that the principles that underlay earlier case law remained valid:

> "… 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 the 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 in 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 … the view that it is unjust to give the losing party a second bite at the cherry – seems to me to be 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). …" (paragraph 17)

35. Where an application for reconsideration is made on the basis of evidence that was not adduced at the original hearing, the relevant test is that provided by the Court of Appeal in **Ladd v Marshall** [1954] EWCA Civ 1, namely that the evidence in question: (i) could not, with reasonable diligence, have been adduced before the original hearing; (ii) is such that it would probably have had an important influence on the result of the case; and (iii) is credible.

36. Where an ET entirely fails to deal with an issue clearly set out in the application for reconsideration, this can itself give rise to an error of law, see **Hossani v EDS Recruitment Ltd** [2020] ICR 491, EAT at paragraph 61. More generally, as a decision on a reconsideration application is a judgment, within the meaning of rule 1(3) **ET Rules**, the provisions of rule 62 apply such that there is a requirement that the ET shall give reasons for its decision on any disputed issue; as, however, the EAT (HHJ Auerbach presiding) explained in **Shaw v Intellectual Property Office** UKEAT/0186/20 and UKET/0187/20 at paragraph 64:

> "… the wording of rule 62(5) is not suitable to be applied … to decisions of that sort, as that wording is geared to decisions on issues arising in the substantive proceedings. The **Meek** principle [**Meek v City of Birmingham District Council** [1987] IRLR 250 CA] means that the essential requirement is that, for any given decision, reasons should be given which are sufficient to enable the reader to understand why that particular decision has been taken. Where a reconsideration application is refused on preliminary consideration, the reasons need to convey why the judge has formed the view that there is 'no reasonable prospect' of that application leading to the decision in question being changed. …"

37. As for the scope of an appeal against a reconsideration judgment, it is important that this

is distinguished from an appeal against the original judgment; as HHJ David Richardson observed in **AB v Home Office** UKEAT/0363/13:

> "An appeal against a refusal to review or reconsider a judgment is not to be equated with an appeal against the judgment itself." (see paragraph 55)

38. In some instances, however, the EAT has taken the view that the interests of justice might permit an appeal to be allowed against a decision on a reconsideration application notwithstanding the fact that the real complaint was against the original judgment; see, for example, the decision of HHJ Peter Clark in **Tamborrino v Kuypers** UKEAT/0483/05:

> "11 … I should have allowed an appeal against the Tribunal's original judgment, had that judgment been under appeal; but it is not. The present appeal is solely against the Chairman's review judgment. In that judgment the Chairman expressed the view that, having ruled on the withdrawal question in the first judgment, that ruling could only be challenged on appeal, not by way of review. It seems to me that that view is unduly restrictive, given the introduction of the overriding objective of the rules … to deal with cases justly.
> …
> 13. … It seems to me that the error in this case resulted from the Tribunal at the original hearing raising the spectre of Rule 25 [relating to with withdrawal and dismissal of a claim] and then overlooking a material part of its provisions applicable to the particular facts of this case. Whilst that was a matter which could properly form the basis for an appeal against the original judgment, I regard it as at least arguable, the test for the Chairman on the review application that the matter was capable of correction by way of review. Consequently, in my judgment, the Chairman was wrong to dismiss the review application …. I shall therefore set aside the review judgment and having done so, shall exercise my powers under Section 35(1) of the **Employment Tribunals Act 1996** and shall, myself, carry out the review, set aside the original judgment … and declare that the Claimant's claims … have not been withdrawn."

Compensation

39. In an unfair dismissal claim, section 123 **Employment Rights Act 1996** provides (so far as relevant for present purposes):

> "(1) Subject to the provisions of this section … the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

> …
> (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as to damages recoverable under the common law…"

40. In reviewing the case law relevant to the question of mitigation, the EAT in **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15 laid down the following guidance (see paragraph 16 of that judgment, summarised at paragraph 19 **Singh v Glass Express Midlands Ltd** UKEAT/0071/18):

> "(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove they have mitigated their loss.
> (2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.
> (3) What has to be proved is that the Claimant acted unreasonably; the Claimant does not have to show that what they did was reasonable.
> (4) There is a difference between acting reasonably and not acting unreasonably.
> (5) What is reasonable or unreasonable is a matter of fact.
> (6) That question is to be determined taking into account the views and wishes of the Claimant as one of the circumstances but it is the ET's assessment of reasonableness - and not the Claimant's - that counts.
> (7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.
> (8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
> (9) In cases in which it might be perfectly reasonable for a Claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient."

41. Considering the question of mitigation in circumstances where a claimant has decided to undertake a course of study, in **Hibiscus Housing Association Ltd v McIntosh** UKEAT/0534/08, the EAT emphasised the fact-sensitive nature of the ET's assessment:

> "As to whether the application to go on a university course was itself something which disqualified the Claimant from a compensatory award, this again was a question of fact for the Employment Tribunal. It is neither the law that, where an employee seeks higher or further education following a dismissal, this of itself constitutes a failure to mitigate, nor that such a course

> once applied for may necessarily be followed to a conclusion however many years distant at the employer's expense."

42. The ET's power to make an award to compensate a claimant for injury to feelings arising from unlawful discrimination is provided by section 124 **Equality Act 2010**. Whether the award in question relates to loss of earnings or to non-pecuniary losses, however, parliament has made clear that it is for an ET to determine questions of remedy; the ET will be best placed to make the requisite assessment and the EAT should be slow to interfere awards made by ET on remedy.

Discussion and Conclusions

The Appeal

43. In considering the claimant's application for reconsideration, the question for the ET was whether such reconsideration was necessary in the interests of justice. At the preliminary stage, under rule 72(1) **ET Rules**, the ET was bound to refuse the application if it took the view that there was no reasonable prospect of the original decision being varied or revoked. As for what might be necessary in the interests of justice, the ET was required to seek to deal with the case fairly and justly, in accordance with the overriding objective. It thus needed to have regard to the interests of both parties, and to what might legitimately be expected from the fair and just conduct of the litigation, which would include the principle that there should be finality in that litigation. The ET's decision represented the judicial determination of the legal dispute between the parties at that stage, it was not an invitation to engage in further dialogue regarding the conclusions it had reached. If the application for reconsideration thus amounted to an attempt to re-argue a point – to have a "second bite at the cherry" - there would be good reason for concluding that such reconsideration would not be in the interests of justice and that there was no reasonable prospect of the original decision being varied or revoked (see the discussion in **Newcastle**

City Council v Marsden [2010] ICR 743 EAT, *supra*).

44. In the present case, the application for reconsideration was put on two bases: (1) the claimant had been disadvantaged (at least in part, for reasons relating to her disability) in presenting the documentary evidence relevant to her attempts to mitigate her loss of earnings; (2) the claimant's disability had meant that she was unable to properly answer questions, and explain her case, relating to injury to feelings. In addressing the first part of the application, the ET effectively treated this as an application to rely on fresh evidence. Although it did not expressly refer to the test in **Ladd v Marshall** [1954] EWCA Civ 1, the ET can be seen to have assumed (in the claimant's favour) that the new documentation – on which the claimant sought to rely as demonstrating that she had not acted unreasonably in seeking to mitigate her loss – could not have been adduced at the original hearing and was credible. It is apparent, however, that it was satisfied that that new evidence would not have had an important influence on its decision; rather, the ET concluded that the documentation in question supported the finding it had already made. As for the second matter addressed by the application (the compensation awarded for injury to feelings), however, there is nothing to indicate that the ET engaged with the matters raised by the claimant in this respect.

45. The claimant's first ground of appeal addresses the first of the points raised by the reconsideration application: the ET's conclusion on remedy on the issue of mitigation. It is not suggested that the ET erred in the view it formed in relation to the new evidence relevant to mitigation; rather, it is contended that the ET repeated the mistake it had made in its remedy judgment, by effectively imposing a burden of proof on the claimant – requiring that she demonstrate that she had acted reasonably, when it was for the respondent to demonstrate that she had acted unreasonably – and by treating her decision to undertake her PGCE as dispositive of the issue of mitigation.

46. Even if I assume (in the claimant's favour) that the ET had erred in the approach it adopted to the question of mitigation in its original remedy judgment, two difficulties arise from the claimant's appeal in this respect. First, the objections thus identified relate to what are said to be errors in the original judgment; they do not arise from the reconsideration judgment under appeal. Secondly, these were not objections that the claimant had herself raised by way of her application for reconsideration but are points that were first taken at the rule 3(10) hearing, before the EAT.

47. For the claimant, it is said that the ET can be seen to have made the same error in its reconsideration decision – both in relation to the burden of proof and to the issue of re-training – as in its earlier remedy judgment. Although the claimant might not have expressly identified these points in her reconsideration application, she was a litigant in person, with a learning disability, and had done sufficient to raise these issues when she had explained why she had made the decision to undertake the PGCE course.

48. I note that the ET was plainly aware of the difficulties faced by the claimant as a litigant in person with a learning disability and it is apparent that reasonable adjustments had been put in place to assist her in the presentation of her case below. Even with that awareness, however, I cannot see that the ET could properly be criticised for failing to read the claimant's application for reconsideration as raising questions as to the burden of proof or the approach to be adopted when considering re-training as a form of mitigation. In oral argument, when asked to identify how these issues had been raised by the claimant's application, Ms Sheridan accepted that this presented some difficulty. This is a difficulty that arises from the fact that these were points only identified during the appeal process; they formed no part of the claimant's reconsideration application. Thus, even if it could be argued that it would have been in the interests of justice for the ET to have re-visited its approach to the burden of proof and to the issue of re-training at the reconsideration stage (although it might have been objected that these were matters more suited to the

appeal process), I cannot see that the ET erred in failing to undertake a task that had not been identified in the application it was seeking to address.

49. In my judgment, the first ground of appeal must therefore fail. This is not a case where the ET might be said to have taken an unduly restrictive approach to its power of reconsideration (the criticism made of the ET's decision in **Tamborrino v Kuypers** UKEAT/0483/05); the objection raised is one that was not identified in the application before the ET and there is no proper basis for concluding that it did anything other than reach a permissible decision on that application insofar as it addressed the issue of mitigation.

50. Before leaving the first ground of appeal, I should again make clear that I have considered this challenge on the assumption that the claimant is correct in her criticisms of the ET's approach to the question of mitigation in its original remedy judgment. Although not a matter that is strictly before me, for completeness, I should clarify that I am not persuaded that the ET did err in the ways the claimant suggests. Although the ET spoke of what the claimant "*had to demonstrate*" in terms of mitigation (see paragraph 44 of its remedy judgment, set out at paragraph 8 above), it was not in dispute that the respondent had adduced evidence of the availability of a number of apparently suitable vacancies for which the claimant had not applied. The real issue in this case was whether the respondent had thereby established that the claimant had acted unreasonably given that she had instead decided to try to improve her career prospects by undertaking a further course of study. That was a question of fact for the ET (see **Hibiscus Housing Association Ltd v McIntosh** UKEAT/0534/08), and I am not persuaded that any proper basis of challenge has been demonstrated such as to justify the EAT's interference with the ET's conclusion in this regard.

51. Turning then to the second ground of appeal, as the respondent observes, the appropriate

level of an award of compensation for injury to feelings was a matter that the ET was best placed to assess. The criticism made in this regard does not, however, relate to the ET's assessment of the claimant's injury to feelings at the remedy stage; rather, the claimant complains that the ET erred in its reconsideration judgment by failing to engage with this aspect of her application for reconsideration.

52. There is no dispute that the claimant's application had raised the issue of the injury to feelings award as a matter that the ET should reconsider; there is equally no dispute that the ET failed to address this in its reconsideration judgment. For the respondent it is said, however, that there was no reasonable basis on which the ET could have found that it was in the interests of justice to reconsider this aspect of its remedy judgment; the failure to expressly address the point should not be seen as fatal to the ET's decision to dismiss the reconsideration application.

53. On this point, however, the claimant's appeal is not focussed on the original remedy decision but on the ET's subsequent failure to address the matters she had raised in her application for reconsideration. Whether understood as an application to rely on fresh evidence (effectively the claimant's account of how her disability had adversely impacted her ability to give evidence of the hurt she had suffered) or as a complaint that she had (because of the effects of her disability – something that might not have been fully apparent to the ET at the time) not received a fair hearing, the claimant was not putting her case as a form of perversity challenge to the original award, but was saying that there were factors that meant she had not had a fair opportunity to present her evidence on this point. It might have been open to the ET to reject the claimant's objections in this regard but, on its face, the application raised questions that potentially fell within the scope of the ET's power of reconsideration (see **Trimble v Supertravel Ltd** [1982] ICR 440, *supra*). By failing to address this issue, the ET erred in law (**Hossani v EDS Recruitment Ltd** [2020] ICR 491).

54. The respondent contends that, in any event, it is apparent that this aspect of the application would fall to be dismissed on its merits: at the remedy hearing (as in the proceedings more generally), the ET had made reasonable adjustments so as to enable the claimant to present her best evidence. In particular, I am told that the ET assisted the claimant in clarifying that more of the injury to feelings that she had suffered was attributable to the matters for which the respondent had been held liable than might initially have seemed to be the case from her evidence. That may be correct, but I am not in a position to be able to assess whether the claimant's reconsideration application raised yet further matters that could be seen to have impacted upon the fairness of the remedy hearing. This was a matter that the ET needed to address but unfortunately overlooked. On this ground, I am therefore bound to allow the appeal and remit this aspect of the reconsideration application to now be considered by the ET.

The Cross-Appeal

55. I can take the points raised by the cross-appeal more shortly.

56. On the first point, although the respondent's response to the claimant's application for reconsideration raised a question as to whether the start date for her ESA benefit contradicted the claimant's evidence at the liability hearing, it had made no application itself in this regard; the ET cannot be said to have erred in failing to consider an application that had not been made. In any event, as Dr Kerr acknowledged in oral argument, there was a lack of substance to the point made by the respondent in this respect. The evidence referenced in its response to the reconsideration application was a letter that merely confirmed the period for which the claimant had been awarded ESA, going back to 27 June 2016 (the day she had left her employment). Given that there is no dispute that a claim for ESA could be backdated for up to three months, the letter in question does no more than confirm the claimant's evidence to the ET; there is no contradiction.

57. As for the second ground of cross-appeal, this is an attempt to challenge the ET's award

of compensation for injury to feelings on perversity grounds. This is misconceived for a number of reasons. First, the challenge does not arise from the reconsideration judgment that is the subject of these appeal proceedings: that judgment does not address the injury to feelings award at all. Second, it is a challenge that could only relate to the ET's original remedy judgment, but there is no appeal before me in that regard and the respondent did not seek to make any application for reconsideration in respect of that decision that might have made it a relevant issue in respect of the reconsideration judgment. Third, the objection raised does not begin to cross the high threshold set for a perversity challenge: the ET was plainly aware that this was a case of unconscious discrimination and a failure to make reasonable adjustments; it had taken into account the other matters that might also have impacted upon the claimant's feelings at this time and had carried out a careful and balanced assessment before arriving at the award made under this head. There is no proper basis for saying that the level of award was not one that was open to the ET on the material before it.

Disposal

58. For the reasons provided, I therefore dismiss the appeal on ground (1) but allow the appeal on ground (2) and, insofar as it relates to the question of injury to feelings, remit the claimant's application for reconsideration to the ET. The cross-appeal is dismissed in its entirety.