Neutral Citation Number: [2025] EAT 160

Case No: EA-2022-001334-RS and EA-2023-001175-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04 November 2025

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

Mr J Mayanja

Appellant

- and -

City of Bradford Metropolitan District Council

Respondent

- -
- -

Mr J Mayanja the Appellant in person
Ms R Mellor (instructed by Ward Hadaway LLP) for the **Respondent**

Hearing date: 23 October 2025

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JUDGMENT

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SUMMARY

Practice and Procedure, Race Discrimination

The Employment Tribunal found that the claimant was not a credible witness, primarily because it rejected his evidence that a job offer was made to him, and then preferred the evidence of the respondent's manager to that of the claimant where there was any conflict. In a separate judgment the Employment Tribunal awarded costs against the claimant. After the hearing the claimant discovered the email in which the job offer was apparently made. The Employment Tribunal erred in failing to reconsider the liability judgment. If necessary, in circumstances where the claimant had applied for reconsideration but the Employment Tribunal did not reconsider the liability judgment, I would have permitted the new evidence to be introduced for the purposes of the appeal against the liability judgment. The liability and costs judgments are set aside and the claim is remitted to a differently constituted Employment Tribunal.

HIS HONOUR JUDGE JAMES TAYLER:

1. These appeals raise issues about the circumstances in which new evidence can be introduced after a hearing.

2. The appeals are against judgments of Employment Judge O'Neill sitting with members. The first is a liability judgment sent to the parties on 15 November 2022 after a hearing on 17, 18 and 19 October 2022. The second is a reconsideration judgment sent to the parties on 17 August 2023, after a hearing on 11 August 2023.

3. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal.

4. The claimant describes himself as being of black African ethnicity. The claimant asserted that he had been offered and accepted a job as Refugee and New Communities Integration Officer with the respondent Council in October 2021. The respondent asserted that no offer was made but the claimant was merely informed that he was the preferred candidate in an ongoing selection process. He was asked to provide references. During that process the respondent asserts the material he provided demonstrated that the claimant had made misleading statements in his job application, as a result of which his candidacy was not taken forward. That decision was taken by Ms Clipsom, Outreach and Private Rented Options Service Manager. The Employment Tribunal referred to the manager as both Mrs and Ms Clipsom, for consistency I shall use Ms Clipsom.

5. The claimant brought complaints of breach of contract, direct race discrimination, indirect race discrimination and victimisation in respect of the decision not to progress with his candidacy and of race harassment in respect of a comment allegedly made during that process by Ms Clipsom.

6. All of the complaints failed. On a fair reading of the judgment as a whole it is clear that the adverse view that the Employment Tribunal formed as to the claimant's credibility was fundamental to the rejection of all of the complaints. A key reason for that determination was the rejection of the claimant's evidence that Ms Clipsom had offered him the job.

7. The Employment Tribunal held that:

17. On the 20th of October 2021 Mrs Clipsom informed the claimant that he was the '*preferred candidate*' and confirmed same by e-mail that day which also set out the requirement for a medical and two satisfactory references ''.

18. **In the pleadings, in the discussion at the outset of the hearing and during his own evidence and cross examination it was the claimant's position that he had received a voice message on the 18th of October 2021 informing him** *in order to progress your application* **of the respondent's offer of employment which he accepted by e-mail on the 19th of October 2021 and there had been no conditions attached to the original offer**.

19. The bundle of documents contains the e-mail from Mrs Clipsom of the 20th of October 2021 but not any e-mail from the claimant accepting an offer on the 19th of October 2021. During the cross examination, in answer to questions from me the claimant admitted that he had sent no e-mail on the 19th of October 2021 or at all, accepting the respondents offer. The claimant had maintained in his statement dated the 30th of September 2021 which was adopted without amendment at the beginning of his evidence that such an e-mail had been sent which was patently untrue.

20. The claimant also maintained in that statement that Mrs Clipsom had left an unconditional offer on the claimant's answering service and that he had evidence of those messages. In cross examination the claimant conceded that he had no evidence of such calls, he claims the messages were erased, he had no transcripts of them. He failed to explain when he intended to disclose such messages. He then agreed that the length of the incoming calls from Mrs Clipsom were too short to encompass a formal offer.

21. **Mrs. Clipsom is an experienced manager who has undergone training in the council's recruitment and HR policies and practices and demonstrated in her evidence a thorough knowledge of them. She denies having made any offer to the claimant on the 18th or 19th of October 2021. The council's guidance to managers instructs them not to make offers at this stage of the process and the tribunal accepts her evidence that she did not do so. We prefer her evidence to that of the Claimant.** In any event during his submissions the claimant said that he no longer relied on a contract having been made on the 18th of October 2021.

22. **The tribunal also find that the inconsistent statements made by the claimant in respect of the alleged messages and emails on the 18th and 19th of October casts doubt on his credibility as a reliable witness.**

23.On the 20th of October 2021 Mrs Clipsom sent an e-mail to the claimant in the following terms '*further to your interview for the above post I am pleased to inform you that you are the preferred candidate… in order to progress your application further we need to receive medical clearance ….to received two satisfactory references*'. The claimant agrees that this was the first time anything was put in writing.

24.In the emails which followed the 20th of October 2021 the claimant expresses no surprise that these things have been requested and raises no protests about it. We accept Mrs Clipsom's evidence that no offer was made and that the email of 20 October 2021 had been merely a step in the process towards an offer. [emphasis added]

8. At the end of its findings of fact the Employment Tribunal stated:

> Credibility
>
> 57. **The tribunal find Mrs Clipsom to be a reliable witness and where there is a conflict we prefer her evidence**. She answered questions in cross examination in a clear and straight forward manner and was at pains to check her understanding of the questions put in order to address them fully. **She was an experienced manager who was knowledgeable and reliable in respect of the respondents procedure and the steps of the recruitment exercise.**
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> 58. In contrast the claimant was a more difficult witness who on a number of occasions did not give a straight answer to the questions put and was evasive . In respect of a number of key issues he changed core evidence at a very late stage and in some aspects was inconsistent in the evidence given. In respect of the harassment claim the tribunal has concluded that the allegation was fabricated. [emphasis added]

9. In rejecting the breach of contract complaint the Employment Tribunal noted that the claimant conceded that there was no email acceptance of any offer on 19 October 2021, but went on to state:

> For avoidance of doubt had these concessions not been made **the tribunal preferred the evidence of the respondent and find no offer was made.** …
>
> **The tribunal prefers the evidence of Mrs Clipsom to the effect that no offer was made in the e-mail of the 20th of October 2021 or at all.** [emphasis added]

10. The Employment Tribunal rejected the harassment complaint. The key reasoning was set out in the findings of fact:

> 28. In the ET1 the claimant says he was harassed by Mrs Clipsom in a telephone call of the 6th of November 2020. In the ET1 he alleges she said '*this is not Africa, the procedure in this country you provide all former employee details*'. Such a remark is denied by Mrs Clipsom. The claimant then changed his mind and contended that this conversation took place on 5 November 2021.The telephone records, which we accept as a complete record, show no conversation at all on the 5th of November 2021 or the 6th of November 2021.
>
> In his witness statement the claimant deals with this conversation at paragraph 36 and 37. Nowhere in his witness statement does he mention the reference to Africa and he gives an account which is materially different from that set out in the ET1. In his witness statement he only says '*she kept ranting about the procedure in this country is you provide a proper functional e-mail*'. The claimant gives the date of this alleged conversation as the 5th of November 2021 (a different date from that in the ET1) and he makes no mention of any offending reference to Africa.
>
> 29. Mrs Clipsom denies those remarks and says there were no telephone conversations on either the 5th or the 6th of November 2021, although there was an e-mail exchange in which she asked again about correct e-mail addresses and the claimant notified her of his COVID. The telephone records support her evidence that there were no such calls on the 5th or 6th of November 2021.
>
> 30. **The tribunal find the claimant be unreliable in his evidence relating to this conversation which is at the heart of his harassment claim. Given that this allegation**

> **is the core of the harassment claim the tribunal finds it incredible that the witness statement contains no reference to the Africa remark and there is an inconsistency between the dates and in the conversation as described in the witness statement and the ET1**.
>
> 31.Under cross examination the claimant was unable to give an account of what had been said by Mrs Clipsom and was unable to recall the words used or provide a consistent date. In his cross examination of Mrs Clipsom and his own cross examination and evidence in chief he refers only to 5 or 6 November, but in his submissions the claimant sought to rely on another date for the alleged conversation namely the 3rd of November 2021, this date was never put to the respondent witness.
>
> 32.**The tribunal prefers the evidence of Mrs Clipsom and find that this conversation did not take place at all. The tribunal has reached the conclusion that the claimant has invented this telephone conversation and his harassment allegation is fabricated**.

11. The core reasoning was that the claimant had been inconsistent in his account of when the conversation occurred and precisely what had been said. However, the backdrop to this analysis was the overall assessment of the claimant's credibility that was fundamentally undermined by the conclusion that he had falsely asserted that an offer of employment had been made by Ms Clipsom.

12. The victimisation complaint arose out of information that the claimant had provided to the respondent about previous litigation with Stockport MBC. Once again the Employment Tribunal preferred the evidence of Ms Clipsom, holding in its findings of fact that:

> 33. Mrs Clipsom says that the first she knew of the Stockport litigation was on the 9th of November when she received the references from Stockport. At an early stage in the recruitment proceedings the claimant had made a request to change his interview date on the basis that it clashed with an employment tribunal listing. His request was granted and Mrs Clipsom assumed without making any further inquiry that this referred to a case in which he was representing in a professional capacity at Kirklees CAB. The tribunal accept that this was her view and that she thought no more about the matter until she received the Stockport reference on the 9th of November 2021.
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> 34.The tribunal also accepts her evidence that she first became aware of the Stockport case on the 9th of November 2021. **The claimant says that he made Mrs Clipsom aware of the Stockport case at an earlier stage when they were discussing the problems with the Stockport reference. <u>We generally prefer Mrs Clipsom as a more reliable witness</u>.** [emphasis added]

13. In its conclusions the Employment Tribunal held:

> 67. It is not disputed that the claimant has done a protected act in that he has brought a relevant employment tribunal claim again[st] Stockport MBC. The claimant can establish detriment in that a decision was made to remove him from the recruitment process. The tribunal can detect no behaviour from Mrs Clipsom after (9November 2021) the date she acquired the knowledge of the Stockport case to suggest she weighed that matter in the

> balance or that influenced her in making the decision at all. In the circumstances we find that the claimant has failed to show a prima facia case ie facts from which could find discrimination but for an explanation.
>
> 68. **In any event we are satisfied with the explanations given by Mrs Clipsom for her decision which the tribunal accepts as truthful and well founded** and not related to any extent to the knowledge of an employment tribunal claim against Stockport. [emphasis added]

14. In dismissing the indirect discrimination complaint the Employment Tribunal held that the relevant PCPs had not been applied. The first related to salary in previous employment. The Employment Tribunal held:

> 74. **We accept Mrs Clipsom's evidence that the claimant's competence was measured by the interview tests and questions and confirmation by Kirklees of like experience of sufficient length. It would have made no difference to her had the claimant put down the correct salary of £19,723** and neither he nor anyone else would have gained an advantage from putting down £23,000 on the application form. The claimant had not been employed in the twilight economy and his salary records were readily available. In the circumstances the claimant was not disadvantaged at all by the requirement … to provide accurate salary details.
>
> 75. **The claimant can establish detriment in that a decision was made to remove him from the recruitment process. The decision was not made in any part because of his level of salary, it was made because the claimant has given a false figure for his salary together with other factors as set out in the letter of 4 January 2022.**
>
> 76. **We are satisfied with the explanations given by Mrs Clipsom for her decision which the tribunal accepts as truthful and well founded and not related to race or ethnicity**. [emphasis added]

15. The second PCP related to employment history. The Employment Tribunal held:

> 78. We do not accept the [claimant's] submission that the required full employment history was applied by the respondent in order to test suitability or competence. **We accept the evidence of Mrs Clipsom that his competence was not in doubt and his employment history with Kirklees alone was sufficient to meet any criterion as to competence or suitability.** Mrs Clipsom accepts that many people may have a history in which they have done jobs below the level of their speciality. [emphasis added]

16. The Employment Tribunal rejected the direct race discrimination complaint:

> 81. The claimant is a black African. He has established that he has suffered a detriment in that having been the best candidate at interview and having been judged as competent and designated the preferred candidate, Mrs Clipsom decided not to continue with the recruitment process and not to offer him the post. This calls for an explanation.
>
> 82. **We accept the explanations given by Mrs Clipsom for her decision** set out in her letter of the 4th of January 2022 and the underlying matter of the claimants integrity. As set out above we find that Mrs Clipsom's conclusions were well founded and reasonable.

The team in which the job falls is diverse and the previous postholder had a BME background and when the position came to be re advertised a black African was appointed.

83. The claimant submits that Mrs Clipsom had acted in bad faith and went beyond her powers under the respondent's written procedures by undertaking additional investigations following the receipt of the references. He argues by reference to the Council's guidance documents that Mrs Clipsom was only entitled to consider the pre employment checks, the interview and associated tests, the medical information and the two references as they were submitted and she was not permitted to go beyond that. In going beyond and making further inquiries the claimant argues that she was on a frolic of her own and must have been driven by conscious or unconscious racial bias. The claimant says he should have been offered the post once competence had been established and the references returned.

84. Mrs Clipsom's position is that the additional inquiries she made after receipt of the references was a normal part of her duties wherever a query over the references was found and it would have been remiss of her not to follow up any discrepancies.

85. The tribunal does not accept the claimants proposition that Mrs Clipsom was in some way constrained by the respondent's guidance to managers and that she had thus exceeded her authority. This tribunal agrees with Mrs Clipsom that it would be remiss of a recruiting officer not to investigate such discrepancies.

86. Having investigated the discrepancies and sought clarification from the claimant and the referees Mrs Clipsom remained dissatisfied and the investigation had cast serious doubt on the Claimant's integrity, the tribunal find her dissatisfaction to be reasonable in the circumstances.

87. The Tribunal have considered whether her degree of dissatisfaction was sufficient to warrant the removal of the claimant from the process or whether she seized on the discrepancies as a reason to be rid of the claimant, consciously or unconsciously because of his race and whether she would have reacted in the same way had the candidate not been black African.

Mrs Clipsom appeared before us and impressed us as an experienced professional manager working in an area with a significant number of BME staff appointed by her. She has undergone training in recruitment and equalities. She was happy to afford the claimant preferred candidate status and continues to accept him as a competent candidate who would have been appointed had the references been satisfactory. As a witness we found her straight forward and reliable.

The claimant did not press Mrs Clipsom in cross examination on this question and we have heard nothing to suggest that she would have treated a person without the claimant's characteristics differently.

88. In the circumstances we are satisfied by the explanation given by the respondent as to the reasons for removing the claimant from the recruitment process and that Mrs Clipsom would have treated any candidate in the same way if she had such doubts over that person's integrity and the claimant's colour or ethnicity had no bearing on her decision, consciously or unconsciously.

> 89. The claim of direct discrimination fails. [emphasis added]

17. After receiving the liability judgment the respondent applied for costs. By a judgment sent to the parties on 12 April 2023 the Employment Tribunal awarded cost of £2,000 to the respondent.

18. The claimant made an application for reconsideration on 25 April 2023. In the covering email the claimant stated:

> I'm the claimant in this matter, I hereby wish to file my application for reconsideration of the ET cost decision dated 05/04/2023 served on me on the 12th April 2023.
>
> Attached below are two documents, 6 pages of grounds of challenge and associated new evidence relied upon that was fraudulently excluded from the initial bundle. I will now look forward to hearing from you soon.

19. The email suggested that the reconsideration application was made only in respect of the costs judgment. However, in the application attached to the email the claimant stated:

> Supported with new evidence fraudulently excluded from initial trial bundle, as well as ET's glaring error in handling of claimant's application for postponement of the costs hearing means both full hearing and costs assessment were arguably corrupted in way or another.
>
> **Claimant therefore seeks a reconsideration of both decisions under the provisions of Rule 71 on the following errors**. [emphasis added]

20. The claimant attached an email that he had discovered on a search of his computer:

> Tried ringing but I think your phone may be switched off.
>
> **I'm pleased to say we'd like to offer you the job.**
>
> Can I give you a ring in the morning to confirm that you want to take it, and discuss start date etc. [emphasis added]

21. The Employment Tribunal treated the reconsideration application as limited to the costs judgment.

22. The Employment Tribunal stated that the email could have been disclosed by the claimant by exercise of reasonable diligence:

> 28. It is submitted by the Respondent that the email could have been obtained by the Claimant and presented to the Tribunal with very little effort both before the substantive hearing of the matter and certainly before the decision on costs was made. There is no reason given by the Claimant as to why he could not produce the email with reasonable diligence before now. The Tribunal accepts that this was an oversight on his part and he had no intention nor any reason to conceal it. However the duty to produce this document

did not lie with the respondents alone and the claimant had equal responsibility to ensure that all relevant documents are before the Tribunal.

29. The Tribunal finds that the claimant could have produced this email before the substantive hearing had he conducted a diligent search.

23. However, the Employment Tribunal admitted the new evidence when it reached its conclusion:

44. **New evidence – the email of 18 October 2021. This is accepted as credible by the respondent. Both the claimant and the respondent had an equal duty to produce the documents for the Bundle and that had either of them searched diligently for it the email would have been in the Bundle. However, having regard to the likely impact on our conclusions as to costs had the email been before us at the costs hearing, then we consider it would be unjust not to take that likely impact into account.**

45. In the Costs Judgment we concluded that '*the claims in contract and harassment had no reasonable prospect of success and that the Claimant acted unreasonably in that he*

a. fabricated the harassment claim

b. constructed the contract claim on a basis which he knew to be untrue ie the telephone offer on 18 October 2021 and the email of acceptance on 19 October 2021

c. pretended to the respondent in the preparation stages to have evidence which did not exist ie transcripts and recordings of key telephone conversations and copy email of 18 and 19 October 2021.'

46. **The email of 18 October 2021 has had no impact on our finding that the harassment claim was fabricated which remains our view. That conclusion was based principally on the claimant's own evidence. Nothing in the evidence today had led us to doubt the overall honesty and credibility of Ms Clipsom.**

47. **The email of 18 October 2021 does impact on our finding that the claimant constructed his contract claim on a basis which he knew to be untrue. That conclusion cannot stand now and the claimant cannot be said to have constructed his contract claim based on an unconditional offer knowing it to be untrue when the email of 18 October 2021 has the appearance of an unconditional offer.**

48. **The third ground at 45c is so inextricably bound up with the alleged unconditional offer that we would not have awarded costs on those grounds alone knowing the contents of the email of 18 October 2021**, even though it remains the case that the claimant pretended to the respondent in the preparation stages to have evidence which did not exist ie transcripts and recordings of key telephone conversations and copy email of 19 October 2021.

49. In the circumstances we vary our order and reduce the sum to be paid to £200.

24. The Employment Tribunal concluded that there had been no deliberate concealment of the

email of 18 October 2021:

> 30. The respondent failed to produce this document for inclusion in the Bundle. The respondent and their witness Mrs Clipsom now accept that the email of 18 October 2021 now produced is a genuine copy and that Mrs Clipsom sent an email in these terms on 18 October 2021. At the original hearing she had no recollection of such an email and had been unable to locate it when the Bundle was prepared or at the time of the Substantive hearing.
>
> 31.Now, having had sight of it and checked her email system, she has identified the email as having been sent by her on 18 October 2021 at 17.19. The credibility of the new evidence is accepted.
>
> 32. Ms Clipsom told us that at the time the Bundle was prepared the Council archived its documents differently from today when the archives are held on 'the Cloud'. At the time the Bundle was prepared she was using an old computer and that the 'Outlook Search' function had been turned off. Documents more than 6 weeks old were held in a separate archiving system which was stored elsewhere and had to be searched through a different search function than she had.She says that she conducted a search in July 2022 and this produced the documents in the Bundle. However it did not produce the email of 18 October 2021. She tells us that there were a lot of complaints about the old archiving system.
>
> 33. She told us that when the claimant produced the copy of the email she initially suspected that it was a false document as she had no memory whatsoever of having sent it and was convinced that she had not done so. However she conducted a new search using the new search system and found the document and accepts that she was mistaken and it had been sent by her.
>
> 34. It was put to her that emails before 5pm on 18 October 2021 had been produced and emails sent on 20 October 2021 had been found but the particular email sent at about 5.20pm and which appeared to make the claimant an unconditional offer of a job had not been produced. Further that was the only email to have gone missing which the claimant suggested was highly suspicious and indicated that Ms Clipsom had been dishonest and had tried to conceal the document.
>
> 35. **The Tribunal weighed this up with great care but having heard Ms Clipsom give evidence and observed her under cross examination accept her evidence that this was an oversight on her part brought about by the new computer system and that she had no intention of concealing the document**.
>
> 36. Having no memory of the email, Ms Clipsom had nothing to put her on notice that such an email existed and had been omitted from the Bundle. The claimant had failed to refer to it at any stage as set out above at paragraph 26.
>
> We note that it would have been impossible for Ms Clipsom to conceal the email from the claimant as he had a copy of it. It had been sent to him.
>
> She accepts that so confident was she in her mistaken belief that she would not have sent and did not send such an email that she may not have searched as diligently as she should have done when faced with the obstacles of the old system.

> 37. **We do not find that this was a dishonest act on the part of Mrs Clipsom such as to undermine her overall credibility**. [emphasis added]

25. The claimant appealed against the liability and reconsideration judgments. HHJ Beard was of the opinion that there were no arguable grounds of appeal as set out in a letter dated 9 June 2023. The claimant challenged that opinion pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993 (as amended)**. The claimant obtained assistance through the ELAAS scheme from Karon Monaghan KC who drafted separate substituted grounds of appeal for both appeals. Those grounds alone were permitted to proceed by Sarah Crowther KC Deputy Judge of the High Court who recorded in her reasons:

> 7. Finally, Mr Mayanja confirmed to me that the grounds of appeal provided by Ms Monaghan KC replaced his earlier grounds in their entirety. I dismissed the appeal on the earlier grounds.

26. In the appeal against the liability judgment there are 4 grounds challenging the dismissal of the indirect discrimination complaint and a fifth ground that relies on the new evidence:

> GROUND 5: There is fresh evidence on a central issue namely credibility which is such as to undermine the Employment Tribunal's findings.

27. The first two grounds of appeal against the reconsideration judgment challenge the failure to reconsider the liability judgment:

> Ground 1: The ET erred in failing to reconsider the Substantive Judgment.
>
> Ground 2: The ET erred in concluding that there was no application before it to reconsider the Substantive Judgment. Such a conclusion was perverse and/or the ET gave inadequate reasons for so concluding.

28. The third ground contends that the costs judgment should have been entirely revoked.

29. For many years the EAT has been prepared in very limited circumstances to consider the admission of new evidence that was not before the Employment Tribunal if the conditions referred to by Lord Justice Denning in **Ladd v Marshall** [1954] 1 WLR 1489 are met:

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

30. In **Adegbuji v Meteor Parking Ltd.** UKEATPA/1570/09/LA, Underhill (P), while stressing that he was not determining the appeal on this basis, questioned the rationale for applying the **Ladd v Marshall** principles in the EAT and stressed the expectation that where there is new evidence generally an application for reconsideration should be made to the Employment Tribunal:

> 7. I should start by making this observation, though it will not be the basis on which I decide the case. In my judgment the right course for a party who seeks to have a decision of an employment tribunal overturned on the basis of fresh evidence will almost always be to apply to the original Tribunal for a review under rules 34 to 36 of the Employment Tribunal Rules of Procedure, relying on rule 34(3)(d). This Tribunal only has jurisdiction to correct errors of law on the part of an employment tribunal: see section 21(1) of the Employment Tribunals Act 1996. As at present advised, I find it hard to see how an employment tribunal which decides a case properly on the evidence before it can be said to have made an error of law simply because evidence is subsequently produced which suggests that its decision was wrong. (Any analogy with fresh evidence appeals in the Court of Appeal on appeals from the High Court seems to me flawed, because the Court of Appeal has in principle jurisdiction to entertain an appeal on an issue of fact: also, there is no review procedure available in the High Court.) This appears however to be a novel point, and I have not however heard argument on it. I am accordingly prepared to assume for present purposes that this Tribunal has jurisdiction to entertain fresh evidence appeals, while flagging it up as a point which may need to be decided on a future occasion. (In some circumstances, where a new evidence point is only part of an appeal also proceeding on other grounds, section 35 of the 1996 Act may give this Tribunal the relevant jurisdiction.) However, even on that basis, the review procedure of the employment tribunal will normally be much more appropriate for deciding a fresh evidence issue. The employment tribunal will normally be better placed to decide at least the second and third questions arising under *Ladd v Marshall* [1954] 1 WLR 1489 - that is, whether the evidence in question would probably have had an important influence on the outcome of the case and whether it is apparently credible. Time limits in the employment tribunal are rather tighter for an application for a review than they are for an appeal to this Tribunal, but there is power to extend time in both cases and in truth, in a genuine fresh evidence case, the tribunal will generally be disposed to grant an extension because if the evidence could genuinely not have been obtained earlier it would not normally be just to refuse it.
>
> 8. For those reasons, it is already very common for fresh evidence appeals to be stayed pending a review application made, or to be made, in the employment tribunal. That course, however, was not taken in this case, and it does not appear to be the universal practice. I hope that henceforth it will become general practice, at least in cases where the fresh evidence issue stands alone or is easily separable from any other issues that may be raised.
>
> 9. Having said all that by way of preface, the fact is that the matter is now before me, and I think that in the circumstances I ought to consider whether the Appellant has made a case for the admission of fresh evidence. The governing principles are conventionally taken to be as stated in *Ladd v Marshall*, to which I have referred above and to which express reference is made in the Employment Appeal Tribunal Practice Direction. Although there has recently been some wobble in the Court of Appeal authorities about the weight to be given to *Ladd v Marshall*, the current position is that, while not

> constituting a straitjacket, it does provide firm guidance on the approach which [it will] normally be appropriate to take in such a case.

31. The **Employment Appeal Tribunal Practice Direction 2024** provides:

> 8.12.1. The EAT generally will not consider evidence that was not before the Employment Tribunal.
>
> 8.12.2. Where you seek to rely on evidence that was not before the Employment Tribunal, usually you should apply to the Employment Tribunal for reconsideration of a judgment, or for an order, direction or other decision to be altered because of a material change in circumstances, relying on the new material, before applying to introduce it in the EAT.
>
> 8.12.3. Where such an application for reconsideration of a judgment, or for an order, direction or other decision to be altered because of a material change in circumstances, has been or should be made to the Employment Tribunal the appeal may be stayed (or sisted, in Scotland) until the application has been determined. The Employment Tribunal as the fact-finding body, which has heard any witnesses, is the appropriate body to consider "fresh evidence" and in particular the extent to which (if at all) the new evidence would or might have made a difference to its conclusions. It is also generally best placed to determine whether an earlier case management order, direction or decision should be altered because of a change in circumstances. …
>
> 8.12.6. In considering an application to admit evidence in the EAT that was not before an Employment Tribunal the EAT will apply the overriding objective and consider relevant factors including whether the evidence:
>
> > a. could have been obtained with reasonable diligence for use in the Employment Tribunal
> >
> > b. is relevant and would probably have had an important influence on the decision of the Employment Tribunal
> >
> > c is apparently credible

32. The claimant explained that he was sure that an offer of employment had been made but he was not sure precisely how it was made or accepted whether by telephone, text or email. The Order in respect of documentation made was somewhat unusual:

> 3. For the purposes of the main hearing the following directions then apply.
>
> The Discovery Process
>
> 3.1. By Friday 15 July 2022 the Respondent will send the Claimant its proposed draft trial bundle index, it will be double spaced.
>
> 3.2 The Claimant having received the same will consider whether there are any additional documents that he requires to be in the trial bundle as being relevant and necessary to determining of the issues. If he considers that such documents are needed, then he will

> make an entry at the appropriate space in the trial index by way of brief description of said document and having completed the said draft trial bundle index he will return it to the Respondents by Friday 5 August 2022. With it he will send a copy of any such additional document for inclusion in the trial bundle if he has the same. If he does not have the document but believes it to be in the Respondents custody or control, he will make that plain and that it requires to be in the trial bundle.

33. Strictly speaking, there was no order for disclosure. The Order was made on the basis that the respondent would have primary responsibility for the preparation of the bundle. The claimant was entitled to expect that the respondent would disclose relevant documentary evidence. I accept that the claimant assumed that there was no email offering the job because if there was such an email it would have been disclosed by the respondent. It was not until the respondent applied for costs that the claimant gave further thought as to how the offer he felt sure had been made was communicated. He said that he thought this was just before the cost judgment was sent to him.

34. I have concluded that it is beneficial to consider the appeals and grounds out of order.

35. I consider that, despite the misleading covering email, the reconsideration application made it clear that the claimant was seeking reconsideration of the liability judgment in addition to the costs judgment (ground 1 reconsideration appeal). The Employment Tribunal should at the very least have considered whether to reconsider the liability judgment.

36. Despite stating that the claimant could with reasonable diligence have disclosed the 18 October 2021 email, the Employment Tribunal did permit him to rely upon that new evidence in setting aside part of the costs judgment. The respondent has not challenged the decision of the Employment Tribunal to permit the claimant to rely on the new evidence when dealing with reconsideration. Having permitted the claimant to rely on the new evidence it was incumbent on the Employment Tribunal to consider the claimant's application to rely on the new evidence to reconsider the liability judgment. The Employment Tribunal accepted that the new evidence demonstrated that the claimant had not made up the suggestion that an offer of employment had been made so that the costs awarded in respect of that complaint should be revoked. The Employment Tribunal also concluded that Ms Clipsom had not deliberately concealed the email, but did not go on to consider the general assessment that it made of the credibility of the claimant as opposed to Ms Clipsom that

was fundamental to the liability decisions dismissing all of his complaints.

37. The claimant sought reconsideration as required by the **EAT Practice Direction**. The Employment Tribunal accepted that the new material could be relied upon by the claimant, notwithstanding the suggestion that he could have disclosed it himself with reasonable diligence. If the Employment Tribunal had not accepted that the new evidence could be relied upon, in the unusual circumstances of this case I would have permitted the admission of the new evidence in the appeal. Contrary to the view expressed by the Employment Tribunal I accept that the claimant could not have been expected to disclose the new evidence exercising reasonable diligence. The Employment Tribunal considered that there was an equal obligation on the claimant and the respondent to disclose the email of 18 October 2021, however it is clear that the Employment Tribunal when making the orders to prepare for the liability placed the primary obligation on the respondent to provide the relevant documents. In the particular circumstances of this case I consider it was reasonable of the claimant to rely on the respondent exercising proper care when doing so.

38. When the liability judgment is read as a whole it is clear that the fundamental reason for the decision of the Employment Tribunal that the claimant was lacking in credibility was that there was no evidence of the job offer that the claimant relied upon. This case demonstrates the risk of making an overarching assessment of credibility that then is relied on in all further assessments. The Employment Tribunal held that Ms Clipsom was a reliable witness and that "where there is a conflict we prefer her evidence". The foundation upon which that assessment was made was the conclusion that she had not offered the job to the claimant. Not only did she not mention the email of 18 October 2021 she was adamant that she would not have made such an offer because it was against the respondent's policies. The Employment Tribunal held: "Mrs. Clipsom is an experienced manager who has undergone training in the council's recruitment and HR policies and practices and demonstrated in her evidence a thorough knowledge of them. She denies having made any offer to the claimant on the 18th or 19th of October 2021. The council's guidance to managers instructs them not to make offers at this stage of the process and the tribunal accepts her evidence that she did not

do so. We prefer her evidence to that of the Claimant."

39. This led the Employment Tribunal to immediately conclude that "the inconsistent statements made by the claimant in respect of the alleged messages and emails on the 18th and 19th of October casts doubt on his credibility as a reliable witness." The respondent correctly points out that the Employment Tribunal rejected the claimant's evidence in other respects, including his assertion that the offer was accepted by telephone on 19 October 2021, the fact that the claimant initially suggested he sent an email on 19 October 2021 which he later accepted had not been sent, the rejection of the harassment complaint and the claimant's exaggeration of his salary in one of his earlier jobs. However, that has to be set against the centrality of the rejection of the claimant's contention that he received a job offer and the adamant evidence of Ms Clipsom that she had not, and would not, offer a job other than conditional on the receipt of references. The decision of the Employment Tribunal was built on foundations of sand because the Employment Tribunal adopted the approach of preferring the evidence of Ms Clipsom to that of the claimant where there was any conflict. If that generalised determination on credibility had not been made, it is unclear whether the decisions would have gone against the claimant in all the other respects. Accordingly Ground 5 of the liability judgment succeeds. The decision of the Employment Tribunal is fundamentally unsafe and is set aside in respect of all complaints because they all failed because the Employment Tribunal preferred the evidence of Ms Clipsom in all respects. That also has the consequence that the remaining costs judgment must also be set aside.

40. The matter will be remitted to a differently constituted Employment Tribunal to determine all of the claimant's complaints afresh. I consider that it is necessary to remit the matter to a different Employment Tribunal so that the claimant will be confident that the matter will be determined afresh and that there will be no preconceptions about the claimant's credibility.