Neutral Citation Number: [2023] EWCA Civ 652

Case No: CA/2021/003092

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HON MR JUSTICE GRIFFITHS
EA-2021-000491-VP

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 June 2023

Before :

LORD JUSTICE BEAN
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE SIMLER

- -

Between :

MRS LYNN PHIPPS	**Claimant/ Appellant**
- and -	
PRIORY EDUCATION SERVICES LTD	**Defendant/ Respondent**

- -
- -

Rad Kohanzad and **Andrew Carter** (instructed by **Atkinson Rose LLP**) for the **Appellant**
Piers Martin (instructed by **Knights PLC**) for the **Respondent**

Hearing date: 10 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. This is an appeal from a decision of the Employment Appeal Tribunal (Griffiths J) affirming a decision of an employment tribunal (EJ Kelly) refusing an application to reconsider the striking out of the Appellant's claim. It requires us to consider the rule or principle that failings of a party's representative are not generally grounds for review.

History

2. In 2017 Mrs Phipps lodged a claim for unfair dismissal, age and disability discrimination, harassment, victimisation, "less favourable treatment", and "fundamental breach of contract". In her claim form ET1, she alleged that she was unfairly and in breach of contract dismissed by the Respondent Priory Education Services Ltd on 28 March 2017 with 10 weeks' notice pay, after concerns had been expressed about her failure to obtain a qualification which was mandatory if she was to continue her work with vulnerable children in a children's home.

3. The ET1 identified Mr Christopher Johnstone of One Assist Legal Services (OALS) as her representative. The standard form wording on the ET1 explained to the Claimant that, because she was providing the name and contact details of a representative, "we will in future only contact your representative and not you." By the time of the striking out of her claim, One Assist Legal Services was being described as One Assist Legal Services Ltd, a company of which Mr Johnstone was apparently a director. However, it was Mr Johnstone personally who was the named representative on the ET1, and no one else at OALS appears to have been involved at any time.

4. Priory's response form ET3 agreed that the Claimant's dates of employment were between 10 March 2006 and 28 March 2017 and that her job title was Night Waking Officer, but denied her claims of unfair dismissal and breaches of the Equality Act 2010. In its Grounds of Resistance, the Respondent contended that the Claimant had been enrolled for training in the required qualification on 25 March 2015, with a target completion date of 29 September 2016, but that she had completed only one assignment, which was not of a sufficient standard, and was then suspended and given a written warning following a disciplinary process. The ET3 further alleges that the Claimant's course tutor then expressed the view that the Claimant would probably never be able to complete the required qualification, and that a formal process followed in which her lack of progress in obtaining the qualification was explored with her. This process resulted, it is said in the ET3, in her dismissal with notice on 27 March 2017.

5. A preliminary hearing took place on 18 September 2017 which fixed agreed dates for a four day final hearing to begin on Monday, 12 March 2018. However, shortly before the first day of that hearing, the Claimant's representative applied for an adjournment on the grounds that he, Mr Johnstone, had suffered what he described as a "medical emergency". This was on Thursday, 8 March 2018, leaving just one clear working day before the start of the full hearing. He said that he had a brain infection and had been in hospital.

6. The application was granted and the four day slot for the full hearing was lost but Mr Johnstone was also ordered to provide medical evidence by 23 March 2018 (i) showing that he had been unfit to attend the hearing on 12 March; (ii) giving a diagnosis of his

condition; and (iii) stating for how long he would be unfit to attend any hearing. Mr Johnstone has never complied with this order. He did produce a medical letter on 9 March 2018, but it did not confirm that he had a brain infection, and it did not show that he was unfit to attend the full hearing. Mr Johnstone promised more information to follow but, in fact, no further information was ever provided.

7. The ET chased for the outstanding medical information on 9 April 2018. In the meantime, the ET relisted the full hearing for four days starting on 7 January 2019. The lack of evidence to support the adjournment which had already been granted, or to show whether the new listing was also at risk, was obviously a matter of concern. Consequently, the ET on 4 June 2018 issued a strike out warning, on the basis of failure to comply with its order for medical evidence dated 9 March 2018 and on the basis that the manner in which the proceedings were being conducted was unreasonable.

8. On 7 June 2018 Mr Johnstone alleged that the evidence had been sent to the wrong address; but this was not the case. In any event, the evidence he had in mind was the evidence originally supplied on 9 March 2018, which had already been examined and found not to be compliant with the order made.

9. On 11 October 2018, the ET directed Mr Johnstone to supply legible copies of illegible documents in relation to the claim that material had been sent to the wrong address. Mr Johnstone never complied with that order.

10. On 14 November 2018 the ET issued a second strike out warning on the basis that it did not appear that the claim was being actively pursued. It rescinded that warning on 24 November 2018 on the basis of a letter from Mr Johnstone dated 17 October 2018. The ET again ordered Mr Johnstone to provide the relevant medical evidence, setting a new deadline of 3 December 2018. That was already very close to the relisted full hearing set to begin on 7 January 2019.

11. Mr Johnstone did not respond. Consequently, the ET issued a further strike out warning on 17 December 2018. It was addressed to Mr Johnstone only and read:-

> "Dear Sir/Madam.
>
> STRIKE OUT WARNING
>
> Employment Tribunals Rules of Procedure 2013
>
> Rule 37
>
> On the application of the respondent, Employment Judge Dean is considering striking out the claim because
>
> - You have not complied with the Order of the Tribunal dated 18/09/17
>
> - It has not been actively pursued.
>
> If you wish to object to this proposal, you should give your reasons in writing or request a hearing at which can make them by 27/12/18."

12. On 4 January 2019 the ET issued a written decision striking out Mrs Phipps' claim. It gave brief reasons as follows:-

> "1. By a letter dated 17 December 2018 the Tribunal gave the claimant an opportunity to make representations or to request a hearing, as to why the claim should not be struck out because:
>
> • the claimant had not complied with the Order of the Tribunal dated 18 September 2017.
>
> • it has not been actively pursued.
>
> 2. The claimant has failed to make representations in writing, or has failed to make any sufficient representations, why this should not be done or to request a hearing. The claim is therefore struck out.
>
> 3. The hearing fixed for 07, 08, 09 and 10 January 2019 will not take place."

13. On 11 January 2019, the Respondent applied for costs against the Claimant personally (under Rule 76(1)(a) or 76(2) of the ET Rules) and for a wasted costs order against the Claimant's representative (under Rule 80(1) of the ET Rules).

14. On 14 January 2019 the Claimant applied for reconsideration of the decision of 4 January 2019 striking out her claim.

15. All these applications were heard on 3 July 2019. Both the Claimant and the Respondent were represented by counsel. Mr Johnstone and his company did not appear in answer to the wasted costs application and were not represented.

The ET decision of 3 July 2019

16. Apart from the correction of an error relating to a date the decision (made by Employment Judge Kelly, sitting alone) consisted of two elements. The first was that the Claimant's application for reconsideration of the judgment of 4 January 2019 was rejected and that decision was confirmed. The second was that One Assist Legal Services Ltd was ordered to pay the Respondent £11,906.17 by way of a wasted costs order. We were told that the latter order has never been enforced.

17. EJ Kelly was asked for written reasons. Her written reasons were signed on 5 March 2020, that is to say eight months after the hearing. They refer to the tribunal as "we", but the document gives her name only, and we assume that in accordance with the usual practice the hearing of 3 July 2019 had in fact been before the judge sitting alone. She held:

> "13. The claimant's evidence was that OASL did not take any steps to prepare for the hearing which was due to start on 12 Mar 2018, and that she did not know about this hearing. She said she did not know about the application to postpone the hearing of 12 Mar 2018. She said she was aware of the hearing listed in Jan 2019 but was not expecting to attend it. She said she was

> unaware of Tribunal's order of 9 Mar 2018, OASL's failure to comply with the tribunal's order and she was unaware of the strike out warnings and OASL's failure to respond to it. The first she was aware what was happening was when she received a judgment striking out her claim. She complained that OASL deceived her and constantly fed her lies and then made it impossible for her to speak to them. We accept all the claimant's evidence on this."
>
> 14. The respondent submitted that it could be inferred from this that OASL's real motivation for applying for a postponement of the March 2018 hearing was that it was not ready for trial and that the postponement application made was dishonest……
>
> 17. Under Rule 70 of the ET Rules, a judgment may be reconsidered where it is necessary on the interests of justice to do so. Judicial discretion as to reconsideration should be exercised having regard to the interests of both parties and the public interest in finality in litigation (*Outasight VB Ltd v Brown* 2015 ICR D11). Failings of a party's representative will not generally constitute grounds for review (*Lindsay v Ironsides Ray and Vials* 1994 ICR 381)……..
>
> ...
>
> 21. We do not consider it in the interests of justice to reconsider the Tribunal judgment of 4 Jan 2019 striking out her claim. The claimant did not comply with the Order of the Tribunal of 9 Mar 2018 and failed to respond to a strike out warning from the respondent. The claimant relied on the default of her representative, OASL. However, under the principles in *Lindsay,* failings of a party's representative will not generally constitute grounds for review."

18. On the issue of wasted costs the employment judge said:-

> "22. There was unreasonable conduct of the claimant or her representative under Rule 76(1)(a) of the Regulations in that the claimant or her representative failed to comply with an order of the Employment Tribunal of 9 March 2018, and a breach of the said order under Rule 76(2) of the Regulations.
>
> 23. We are not persuaded that the claimant is implicated in the unreasonable conduct and the breach of the order. It was her representative who failed to provide evidence of his inability to attend the hearing listed for 4 March 2018, not the claimant. We accept the claimant's evidence that her representative did not keep her informed on developments in her case and that she did not know of the Tribunal's order of 9 Mar 2018 or the strike out warning nor her representative's failure to respond to it. The fact she was told in or after April 2018 that there was a hearing listed

> for January 2019 does not mean that she was told of the requirement for her representative to provide medical evidence or of its failure to do so.
>
> 24. We find that the claimant's representative acted improperly, unreasonably and negligently. The only reasonable inference from its failure to provide the medical evidence ordered is that there was none and it had mislead the tribunal into postponing the hearing listed for with an untrue reason 12 March 2018. If in fact there was no deception and medical evidence was available, the failure of OASL to provide it was improper, unreasonable and negligent.
>
> 25. OASL's conduct caused the respondent to incur unnecessary costs because it had to defend a claim and prepare for its hearing listed on two different dates when, in fact, the hearing never went ahead.
>
> 26. Given the claimant's lack of culpability and her representative's entire culpability, it is just for the respondent's costs to be paid entirely by the claimant's representative, OASL……."

19. 11 days after EJ Kelly signed these Reasons, the first COVID lockdown began. This may explain, though it can hardly justify, the fact that it was not until March 2021 that the ET's reasons were sent to the parties – a total of 20 months since the hearing of 3 July 2019.

The appeal to the EAT

20. Mrs Phipps, with the assistance of her new solicitors, appealed to the EAT. The appeal was heard by Griffiths J on 6 October 2021. Mr Kohanzad and Mr Martin represented the Appellant and the Respondent respectively as they have before us. The published summary of Griffith J's decision was as follows:

> "The ET made no error of law when deciding on an application for reconsideration not to vary or revoke an earlier order striking out claims of unfair dismissal and age and disability discrimination on the grounds of non-compliance with existing orders and the claimant apparently not actively pursuing the claim.
>
> Although at a full hearing of the application for reconsideration new information was provided, indicating that the fault lay with the claimant's representative rather than herself, the ET was entitled to decide that the interests of justice and the broad discretion it had under Rule 70 made it appropriate for the claim to be struck out. The claimant had a remedy against her representative, and the findings of the ET made that remedy even more promising for her by accepting her evidence, examining the facts and the circumstances, and making strong findings

> against the representative, leading to a wasted costs order against it. The interests of justice included also the interests of the other party, who had prepared for two full hearings neither of which had been effective, and to the public interest in finality of litigation."

21. At paragraph 39 of the judgment Griffiths J said:-

> "The assessment of what is in the interests of justice is pre-eminently a first instance exercise and it is not to be done afresh by an appellate tribunal or court in the absence of an error of law, or an assessment which is extreme in its unreasonableness, or which fails to take into account or apply the relevant considerations, such that it constitutes an error of law. There would be no finality in litigation if the interests of justice test was one to be re-examined in the light of the appellate court's own opinion and assessment. The cases in this area all agree that finality is an important factor when considering the jurisdiction to reconsider a decision which has already been made under rule 70."

22. Griffiths J went on to reject a submission by Mr Kohanzad that the ET, in paragraph 12 of the reconsideration decision, notwithstanding its use of the word "generally", did not sufficiently recognise the breadth of the interests of justice to be considered, but applied an inflexible rule derived from its interpretation of *Lindsay v Ironsides Ray and Vials* [1994] ICR 381. Griffiths J said:-

> "42. I do not think that is a fair reading of the ET's decision. Paragraph 21 is preceded by a very detailed consideration of the relevant history, between paragraphs 1 to 16 of the Reasons. In the course of that review of the history, the tribunal made important findings of fact, notably at paragraph 13, which demonstrated that it was not inflexibly applying *Lindsay*. *Lindsay*, in the passage I have read, gave as a reason for not allowing failings of the party's representatives to constitute a ground for review, the risk of involving a tribunal in inappropriate investigations into the competence of the representative who was not present or represented at the review. However, in this case, the tribunal conducted just such an investigation and one understands why. It was not inappropriate in that case because the wasted costs order meant that the representative was in a sense a party to the hearing. He had been put on notice of the allegations of misconduct against him and he had been urged to attend and to put his side of the case before a decision was made. The fact that he did not attend does not mean that he was not in that sense a party to the decision."
>
> 43. The tribunal clearly had very much in mind those factors, having carefully not only rehearsed but established them. It then, at paragraph 17 of the decision, referred to the relevant law. In doing so, it did not limit itself to the case of *Lindsay*; it correctly

stated the full breadth of its power and its duty by saying, "a judgment may be reconsidered where it is necessary in the interests of justice to do so." It also referred to the need to have regard to the interests of both parties, and the public interest in finality of litigation. It seems to me wrong to say that paragraph 21, which follows subsequently, is to be read in isolation; it is all part of the whole.

44. Moreover, the tribunal, in giving its full written Reasons, some time after making its decision based on those Reasons following the hearing of 3 July 2019, no doubt had in mind that building upon its findings of fact about the outright misconduct of the representative, it had gone on to mitigate the effects of the refusal to reconsider, and therefore the shutting out of the claimant from further pursuing her claim, by ensuring, first of all, that the whole costs penalties of those proceedings fell on her representative and not on herself and, secondly, by very much improving the strength of her alternative remedy, in any proceedings she might choose to take against her representative, by making their findings of fact against him, which might be said, in the context in which they were made, to be binding on Mr Johnstone, who was party to the hearing, as the respondent to a wasted costs order, and who had been given a full opportunity to give evidence and make submissions, albeit that he did not avail himself of that opportunity.

45. It is therefore, in my judgment, incorrect to say that the tribunal was applying a blanket rule in its Second Decision or to read the decision not to revoke the Original Decision as being based entirely on the points made in the last two sentences of paragraph 21 of the Reasons.

46. It is said that the Reasons should have stated the potential exceptions to the general rule stated by *Lindsay*, and that the failure to do so demonstrates a lack of appreciation of the breadth of the discretion. It is said that the full Reasons should have explored the circumstances of the case. It is said that they should have discussed the interrelation between their findings of fact in paragraph 13 and their decision that it was not in the interests of justice to reconsider the Tribunal Judgment striking out the claim in paragraph 21.

47. All of this seems to me, however, to encourage precisely that formulaic recital of authorities decided on particular facts of particular cases, and to add encrustations into the interests of justice exercise in rule 70, which is discouraged in the judgment of Underhill J. Once one reads the decision as a whole, one sees that it was a flexible, conscientious and just decision, applying the correct principles of law, based on the facts of the case.

...

> 53. Rule 70 confers a broad discretion. I see no error of law in the ET's approach to this case. In the absence of an error of law there is no reason in this case to overturn the ET's decision that the interests of justice did not require it to revoke the Original Decision. The claimant had a remedy against her representative, and the findings of the ET made that remedy even more promising for her by accepting her evidence, examining the facts and the circumstances, and making strong findings against the representative leading to the wasted costs order. The respondent had prepared for two full hearings and, although it receive an order for costs, it could never recover the time lost in preparation, or the burden on witnesses who expected a hearing and then found it postponed, and then postponed again, before the case was struck out.
>
> 54. It was also the case that no steps at all had apparently been taken towards making the case ready on the claimant's side. The claimant was aware of the hearing fixed for January 2019 but was not intending or expecting to give evidence or to attend (Reasons paragraph 13). By the date of the hearing on 3 July 2019 which led to the Second Decision, the claimant's effective date of termination was already more than two years in the past. Given the claimant's remedy against her representative, the ET cannot be criticised for leaving the strike out in place in the Second Decision rather than saying that the case should be reinstated and restarted on a path to a third listing of the full hearing."

23. There was then yet another unfortunate delay: it appears that the judgment of Griffiths J was not transcribed and sent to the parties until a year after it had been delivered.

Grounds of appeal

24. The Appellant relies on the following grounds of appeal:

    i) The ET erred in treating *Lindsay v Ironsides Ray and Vials* [1994] ICR 381 as a rule of law giving a conclusive answer in every apparently similar case. The ET erred in failing to explore whether the facts found by it (at §13 ET Reasons) amounted to exceptional circumstances, taking the case outside of the general rule (that failings of a party's representative will not generally constitute grounds for review) or are not *Meek* compliant in that respect.

    ii) The ET erred in failing to apply the principles set out by Sedley LJ in *Bennett v London Borough of Southwark* [2002] IRLR 407. (In the light of the view I take of the first and third grounds it is unnecessary to consider ground 2.)

    iii) The ET's refusal to grant the Claimant's application for reconsideration was perverse.

Discussion

Three previous decisions of the EAT

25. There are three decisions of the EAT, each given by the President of the day, which are of particular significance for present purposes. The first is *Trimble v Supertravel Ltd* [1982] ICR 440. An industrial tribunal had refused to award the claimant compensation for her unfair dismissal on the ground that by not accepting a change in work she had failed to mitigate her loss. She had not been given an opportunity to deal with the issue. The tribunal refused a review. Browne-Wilkinson J said:-

> "As it seems to us the fundamental question is whether or not the industrial tribunal's decision that the employee had failed to mitigate her loss was reached after she had had a fair and proper opportunity to present her case on the point, being aware that it was a point which was in issue. We do not think that it is appropriate for an industrial tribunal to review their decision simply because it is said there was an error of law on its face. 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 under rule 10 of Schedule 1 to the Industrial Tribunals (Rules of Procedure) Regulations 1980, however important the point of law or fact may be. In essence, the review procedure enables errors occurring in the course of the proceedings to be corrected but would not normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in the light of all relevant argument."

26. In *Lindsay v Ironsides Ray & Vials* [1994] ICR 384 one of the issues before the industrial tribunal had been whether it was just and equitable to extend time for the presentation of a discrimination claim. The claimant's representative had failed to make submissions on this point at the hearing. Mummery J said:-

> "The Industrial Tribunal erred in law in holding that it had jurisdiction to grant a review of the earlier decision and to vary it. The power to grant a review on the grounds "that the interests of justice require such a review" is in very wide terms. It is, however, a power which should be cautiously exercised. As was observed by Phillips J. in Flint v. Eastern Electricity Board [1975] 10 ITR 152 at 160, the interests of justice include not only the interests of the person seeking a review, but also the interests of a person resisting a review on the grounds that "once a hearing which has been fairly conducted is complete, that should be the end of the matter". There are also the interests of the general public in finality of proceedings of this kind. Mr Justice Phillips

> said at p.161 that "It should only be in unusual cases that the appellant, the applicant before the Tribunal, is able to have a second bite at the cherry".

27. After citing the passage from *Trimble v Supertravel Ltd* which I have just quoted, Mummery J continued with the following much-cited paragraph:-

> "In our judgment, the Industrial Tribunal, in granting the review sought by Miss Lindsay, misapplied the provisions of Rule 10, as interpreted in the Trimble case. The facts in this case cannot be properly viewed as 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. The facts, as they appear to us, are that Miss Lindsay was represented at the first hearing by Mrs Grenham. The solicitor representing Ironsides Ray & Vials clearly raised before the Tribunal in his opening, as well as in his closing remarks, that there was an issue of extension of time under S.68(6). The Tribunal was aware of this and made a decision on the point. The failure of Mrs Grenham to make any submissions on the point and the failure of the Tribunal to identify to Mrs Grenham the way in which it was considering its exercise of discretion did not, in our view, amount to denial of a fair opportunity to present an argument on a point of substance. The fact that the Tribunal thought it necessary, in its review decision, to make criticisms of Mrs Grenham's ability indicated that the reason for granting a review was that, in the view of the Industrial Tribunal, Miss Lindsay's case was not properly argued as a result of Mrs Grenham's shortcomings. Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review. That is a dangerous path to follow. It involves the risk of encouraging a disappointed applicant to seek to re-argue his case by blaming his representative for the failure of his claim. That may involve the Tribunal in inappropriate investigations into the competence of the representative who is not present at or represented at the review. If there is a justified complaint against the representative, that may be the subject of other proceedings and procedure."

28. In *Newcastle-upon-Tyne City Council v Marsden* [2010] ICR 743 the claimant's counsel had made a misleading statement to the Tribunal which deprived his client of the opportunity of an adjournment. The misleading statement arose in these circumstances. A pre-hearing review was listed to determine the issue of whether the claimant was disabled for the purposes of the Disability Discrimination Act 1995. The claimant did not attend. Counsel told the tribunal that he was unable to say whether his client had been advised that he would be required to attend. EJ Hargrove felt obliged to dismiss the claim of disability discrimination. A few days later the claimant applied for a review of that decision in the interests of justice because the only reason that he had not attended the PHR was that counsel had advised him in conference that his

attendance was unnecessary. The employment judge granted the application for review, saying:-

> ".. the claimant specifically asked if he needed to attend the prehearing review and was told by counsel that he need not. Very regrettably Counsel failed to inform me of this fact at the pre-hearing review. I do not wish to be unnecessarily critical of Counsel but it is a cardinal principle of both sides of the legal profession that if a representative makes an error of this kind, in the interests of his client he should admit it at the earliest possible moment. He should have informed the Tribunal and made an application for a postponement on that ground. If he had done so, as I indicated in paragraph 3 of my reasons I would very probably have allowed it subject to an order for costs which should not in this event have been disputed and should not have been paid by the claimant."

29. The employment judge continued:-

> "(i) Having read the claimant's witness statements, one undated and another dated 29 April 2009 I think it is highly likely that had he been present at the pre-hearing review and given evidence, subject to it being believed, he would have succeeded on the long term effect principle which was the decisive factor upon which I was not satisfied at the pre-hearing review. The non-calling of the claimant was a fundamental reason for his failure.
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> (ii) No fault whatsoever can be attributed to the claimant personally in this respect.
>
> (iii) If the application for a review is refused the claimant's claim in its entirety (including the unfair dismissal claim) is likely to fail. I am far from satisfied that the claimant would be adequately compensated by his right to bring a claim against his former Counsel's insurers. There might for example be an argument that negligence actually during the course of a Hearing is not actionable. Certainly there would be considerable delay in dealing with the matter. That is a relevant factor which I am entitled to take into account. It is not one to be ignored as occurred in *Flint v Eastern Electricity Board* [1975] ICR page 395……..
>
> (iv) Any injustice to the respondent could be adequately cured by an appropriate order for costs. The costs of the hearing on 27 March have already been recovered by the respondent from Counsel's insurers. There is no injustice in refusing to allow the respondent to benefit from a fundamental error by the claimant's Counsel which led to the respondent succeeding in a submission on which it would, in my view, have probably failed if the error

had not occurred and the claimant had attended to give evidence. The benefit to the respondent was an unmerited windfall."

30. In the EAT Underhill J considered a number of previous authorities. At paragraphs 15-16 he said:-

> "15. ... There is in this field as in others a tendency – often denounced but seemingly ineradicable - for broad statutory discretions to become gradually 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. Thus a periodic scraping of the keel is desirable. (The exercise would indeed have been justifiable even apart from the introduction of the over-riding objective. It is not as if the principles of the over-riding objective were unknown prior to their explicit incorporation in the Rules in 2001: rule 34 (3) (e) itself is based squarely on the interests of justice. But I can see why its introduction has commended itself to judges of this Tribunal as a useful hook on which to hang an apparent departure from a long stream of previous authority.)
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> 16. But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in *Jurkowska v Hlmad Ltd*. [2008] ICR 841, at para. 19 of his judgment (p. 849), it is "basic"
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> > "… that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."
>
> 17. The principles that underlie such decisions as *Flint* and *Lindsay* remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation – or, as Phillips J put it in *Flint* ...at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry – seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal). Likewise, I respectfully endorse, for the reasons which he gives, the strong note of caution expressed by Mummery J in *Lindsay* about entertaining a review on the basis of alleged errors on the part of a representative……

18. To the extent, therefore, that the Judge felt free to ignore *Flint* and, in particular, *Lindsay* on the basis that the over-riding objective had made them irrelevant, I believe that he went too far. Other errors can also be detected in his detailed reasoning on the alternative remedy issue. In particular……the suggestion in the same sub-paragraph that the possibility of recovery against a third party was inherently of little or no weight seems to me to go further than the authorities would support.

19. But it does not follow that the Judge's decision, or his fundamental reasoning, were wrong. It is clear that he attached decisive weight to the (related) facts (a) that the Claimant's counsel misled the Tribunal and (b) that by doing so he deprived him of the opportunity of an adjournment which would otherwise have been granted: see para. 12 (2) above. Those are an exceptional circumstance. They take the case outside the straightforward "fresh evidence" category which, as Phillips J accepted in *Flint*, falls to be dealt with under head (d). They also take it outside the ordinary run of cases where a party suffers from the wrong, or indeed incompetent, advice of his representative. Whereas in a case of that kind the overall interests of justice, and in particular the weight to be attached to finality in litigation, may well require that a party bear (as between himself and the other party) the consequences of the errors of his own representative, the Judge was entitled to take a different view on the particular facts of the present case. It was peculiarly hard on the Claimant to have to bear the consequences of what the Judge found to be plain misconduct - at least where, as here, the Council suffered no prejudice beyond the fact that a case which they believed to be done with would have to be re-opened; and the importance of maintaining finality in litigation could reasonably be judged to be outweighed by the peculiar injustice to him. That does not necessarily dispose of the concern identified by Mummery J in *Lindsay* about the tribunal having to conduct an "inappropriate investigation" into counsel's advice; but in the present case the relevant investigation was confined to the narrow factual question of whether counsel had indeed advised the Claimant that he need not attend: once that were established, it was within the Judge's own knowledge that he had been misled.

20. As regards the errors in the Judge's reasoning on the alternative remedy point noted at para. 18 above, although the Judge may have gone too far in discounting this point altogether, the trend of the modern authorities in this and analogous situations is to emphasise the inherently less satisfactory nature of such a remedy. In this connection I should mention a contention by Mr Anderson to the effect that the Judge failed to address submissions made by him about the availability of a remedy through the Bar Standards Board. There is in fact

> considerable doubt whether any remedy available through the Board's procedures would be adequate; but in any event I am satisfied that the point was not of such substance that it required to be specifically addressed.
>
> 21. I would accordingly uphold the Judge's decision. Further, even if I took the view that the errors to which I have referred above were sufficient to vitiate the exercise of his discretion, the parties were agreed that I should in that case determine the issue myself, exercising my powers under s. 35 (1) of the Employment Tribunals Act 1996; and I would on balance reach the same decision as the Judge, for the reasons given in the previous two paragraphs."

31. I derive from these three judgments and the authorities cited in them, the following principles to be applied on applications for reconsideration in the interests of justice.

(1) The interests of justice test is broad-textured and should not be 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. The ET has a wide discretion in such cases. But dealing with cases justly requires that they be dealt with in accordance with recognised principles.

(2) Failings of a party's representative, professional or otherwise will not generally constitute a ground for review where the disappointed party has had an opportunity to argue the case and wishes to reargue it. This is because considerable weight must be given to the public interest in the finality of judicial decisions, both to protect the opposing party and to avoid over-burdening the employment tribunal system. A typical example of this is a case where a full hearing has been conducted but an argument was not put, or a witness was not called. In most such cases reconsideration will be refused on the grounds that the claimant has had a fair opportunity to put her case.

(3) However, the general rule that a party to tribunal proceedings cannot rely on the default of her representative as the basis for an application for reconsideration is not a blanket rule. In the exceptional circumstance where a party has not had a fair opportunity to present her case, that is a significant procedural shortcoming which may be appropriately dealt with by reconsideration.

32. *Marsden* is in many ways similar to the present case, although the representative's misconduct was less egregious and less prolonged than that of Mr Johnstone. Mr Marsden was deprived of a fair opportunity to present his case that he was disabled as a result of a misleading statement by his counsel. This, as Underhill J put it, was an exceptional circumstance, taking the case outside the usual run of those where a party suffers from the wrong or incompetent advice of a representative. Moreover, it was peculiarly hard on the claimant to have to bear the consequences of what the judge found to be plain misconduct, at least where the employers suffered no prejudice (beyond the fact that a case which they believed to be done with would have to be reopened), and the importance of maintaining finality in litigation would reasonably be judged to be outweighed by the peculiar injustice to him. It is significant that Underhill

J not only upheld the judge's decision to grant a review but said that he would on balance have reached the same decision himself.

The alternative remedy argument

33. There is one aspect of the judgment in *Lindsay,* referred to by Griffiths J in the EAT, which seems to me wholly unrealistic in a case like the present one: the argument that the Claimant can pursue an alternative remedy against her representative. Parliament has decided that a party in employment tribunal proceedings has the right to be represented by anyone. If the representative is a barrister, solicitor or chartered legal executive there are requirements for professional indemnity insurance and the representative is subject to professional regulation and discipline. If the representative is a trade union official or an employee of a litigation insurer there is not the same professional regulatory framework, but in practice a real remedy may exist. Although claims management companies acting for ET claimants on a commercial basis are now regulated by the Financial Conduct Authority, we have no knowledge of whether Mr Johnstone or his company were in fact regulated by anyone, nor whether they had any indemnity insurance.

34. Moreover, the days of legal aid for non-medical negligence claims have gone. Mrs Phipps would have to start by finding a lawyer who was willing to act on a conditional fee basis. Such a lawyer would have to calculate the value of the chance which has been lost by Mr Johnstone's misconduct. This would be difficult when witness statements have not been exchanged, disclosure has not been given, and there would be little if any way of reliably estimating either what prospects of success the ET claim had or the amount of compensation which Mrs Phipps would have been awarded in the event of liability being established. When one adds this to the improbability of OALS Ltd being good for the money - including not only compensation but potentially the enormous costs of a multi-day trial in the county court - the obvious conclusion is that the alternative remedy is a figment of the imagination.

35. This does not mean to say that in every ET case where the negligence or deliberate misconduct of an unregulated representative has led to the striking out of the client's case, that will be a reason to abandon the principles established in cases such as *Trimble, Lindsay* or *Marsden.* But it does suggest that where the availability of an alternative remedy of a claim for damages for professional negligence is put forward as a factor weighing against reconsideration in such a case, it should be treated with scepticism.

The Rule 70 decision in the present case

36. An application for reconsideration under Rule 70 must include a weighing of the injustice to the Applicant if reconsideration is refused against the injustice to the Respondent if it is granted, also giving weight to the public interest in the finality of litigation. The reasons of the ET mention this at paragraph 17, but at paragraph 21 give no explanation of why it was not in the interests of justice to reconsider the strike out beyond saying that under the principles in *Lindsay*, failings of a party's representative will not generally constitute grounds for review. The omission is particularly striking in view of the judge's finding at paragraph 13 that the first that the Claimant was aware was happening was when she received a judgment striking out her claim, and her further finding at paragraphs 23 and 24 that the Claimant was not implicated in the unreasonable and improper conduct of her representative.

37. This means that the reasons of the ET were, in my judgment not *Meek*-compliant. They may have been affected by the difficulty any judge has in giving reasons for a decision several months after the hearing. Although Griffiths J gave extensive reasons for upholding the decision, it remains the judgment of the ET which is primarily under review in this court.

38. We have to view the reconsideration decision as it was in 2019. The lamentable delays since that time, all of which appear to be attributable to the tribunal system rather than the fault of either party, should not be taken into account.

39. The case for reconsideration of the strike-out included the following points:

(1) The strike-out occurred entirely because of the improper conduct of the Claimant's representative.

(2) As the ET found, the Claimant was not implicated in this misconduct and had no knowledge of what was happening until she received the strike-out decision.

(3) The application for reconsideration was made within 10 days of the strike-out decision.

(4) The Claimant had not at any stage been given a fair opportunity to present her case.

(5) Any supposed alternative remedy was fanciful.

40. Against that must be weighed the public interest in finality of litigation; and also the injustice to the employers of having a case restored to life when they thought it had been struck out, and of having wasted a significant sum in costs which might prove (and has proved) to be irrecoverable. These points are not to be ignored but they are very substantially outweighed by the factors in the Claimant's favour.

41. On the facts as found by the ET at the hearing on 3 July 2019 there could in my judgment have been only one answer to the request for reconsideration. The application should have been granted on the grounds that it was necessary in the interests of justice. This is one of those rare cases where an appellant surmounts the high hurdle of showing legal perversity (a term which I regard as unnecessarily discourteous to a hard pressed EJ, but which is too entrenched in employment law to be replaced by a substitute). It would therefore be wrong to remit the case, either to EJ Kelly or to any other judge, for the decision to be taken again.

42. I would allow the appeal and revoke (a) the strike out order of 4 January 2019 (b) the decision of 3 July 2019 confirming the strike out order, and (c) the order of the EAT dismissing Mrs Phipps' appeal. If the parties cannot reach agreement, then, despite the highly regrettable delay, the case must return to the ET to proceed on the merits in the usual way.

Footnote

43. I would invite the President of Employment Tribunals for England and Wales to consider a modest change in practice (I do not think it requires a rule change) relating to strike-out applications. Rule 37(2) requires that a claim or response may not be struck out "unless the party in question has been given a reasonable opportunity to make

representations either in writing, or, if requested by the party, at a hearing". Where a party is represented, any warning letter under Rule 37(2) should surely be sent to the party personally, at whatever e-mail or postal address has been provided, as well as to the representative. Had that been done when any of the three warning letters were sent to Mr Johnstone but not to the Claimant in 2018, this case would almost certainly have taken a very different course.

Lady Justice Nicola Davies:

44. I agree.

Lady Justice Simler:

45. I also agree.