Neutral Citation Number: [2022] EAT 129

Case No: EA-2021-000491-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 October 2021

Before :

THE HONOURABLE MR JUSTICE GRIFFITHS

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Between :

MRS LYNN PHIPPS **Appellant**

- and -

PRIORY EDUCATION SERVICES LTD **Respondent**

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- -

Rad Kohanzad (instructed by Atkinson Rose LLP) for the **Appellant**
Piers Martin for the **Respondent**

Hearing date: 6 October 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, JURISDICTIONAL/ TIME POINTS

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.

Outasight VB Ltd v Brown [2015] ICR D11 applied. **Lindsay v Ironsides Ray and Vials** [1994] ICR 381, **Ministry of Justice v Burton** [2016] ICR 1128, **Newcastle upon Tyne City Council v Marsden** [2010] ICR 743 and **Bennett v London Borough of Southwark** [2002] IRLR 407 considered.

THE HONOURABLE MR JUSTICE GRIFFITHS:

Introduction

1. This is an appeal by the claimant against judgment and reasons of an employment judge following a hearing at the Midlands West Employment Tribunal on 3 July 2019. At that hearing submissions were made by counsel for both parties and evidence was given by the claimant. The decision appealed against ("the Second Decision") was to vary an earlier decision of a different employment judge dated 4 January 2019 ("the Original Decision") to correct a misstated date, but otherwise to confirm the substance of the Original Decision, which was to strike out the claim, on the basis that the claimant had not complied with tribunal orders and had not actively pursued the claim, and had not made representations, although invited, to request a hearing, or to show any reason why the claim should not be struck out. The Second Decision also made an order that the respondent's costs should be paid by the claimant's legal representative personally, against which there is no appeal. The Second Decision also decided that no order for costs should be made against the claimant herself, although that had been applied for, and there is no appeal against that either.

2. The sole ground of appeal is that the employment judge is said to have erred, quoting from paragraph 1 of the Grounds of Appeal, "*in considering that any failing of a party's representatives, professional or otherwise, will not generally constitute a ground for reconsideration*". It is said, quoting paragraph 4 of the Grounds of Appeal, that, "*Insofar as **Lindsay v Ironsides Ray and Vials** [1994] ICR 381 is authority for that proposition, it is…wrong in law*."

3. That ground of appeal and that and other authorities have been skilfully and attractively developed before me by Mr Rad Kohanzad, who appears for the appellant on this full appeal.

Procedural history

4. It is necessary briefly to outline the procedural history which gave rise to the challenged decisions.

5. The claimant lodged a claim for unfair dismissal and age and disability discrimination against

the respondent (box 8.1 of the ET1), although the accompanying details of the claim conclude by stating her claims more broadly, including unfair dismissal, direct discrimination based on her age (which was 64 years), harassment, victimisation, “less favourable treatment”, and “fundamental breach of contract”. In her ET1, she stated that she was unfairly and in breach of contract dismissed by the respondent 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. Her Details of Claim show that her case is that she was making what should have been regarded as satisfactory progress towards obtaining the qualification, although she had completed only one or two of the eight or so assignments required, and that her dismissal and the end of her career has left her devastated.

6. The claimant's ET1 identified Mr Christopher Johnstone of One Assist Legal Services 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 Second Decision, One Assist Legal Services was being described as One Assist Legal Services Ltd, a company of which Mr Johnstone appears to be a director. However, it was Mr Johnstone personally who was the named representative on the ET1 and no one else at One Assist Legal Services appears to have been involved at any time, so far as I can see from the papers, and so far as counsel before me understands the matter.

7. The respondent's ET3 in response to the claim 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 based upon his interaction with her, 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.

8. 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 this hearing, the claimant's representative (Mr Johnstone) 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.

9. The application was granted and the full hearing was lost but Mr Johnstone was also ordered to provide medical evidence by 23 March 2018 showing: (i) that he was unfit to attend the hearing; (ii) a diagnosis of his condition; and (iii) how long he would be unfit to attend the 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.

10. The ET chased for the outstanding medical information on 9 April 2018. The order of 8 March 2018 had required it by 23 March 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.

11. 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

on 8 March 2018.

12. 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.

13. On 14 November 2018 the ET issued a strike out warning on the basis that it appeared that the claim did not appear to be actively pursued. It rescinded the warning on 24 November 2018 on the basis of a letter from Mr Johnstone dated 17 October 2018, which was better than silence, albeit that the letter in question had not been copied to the respondent's representatives, had named the parties incorrectly, and had given the wrong case number, which is why it had not reached the file. 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.

14. Mr Johnstone did not respond. Consequently, the ET issued a further strike out warning on 17 December 2018 based on non-compliance with the existing orders and the claimant apparently not actively pursuing the claim. The claimant was directed to respond by 27 December 2018. There was, again, no response at all. The ET's letter of 17 December 2018 gave the claimant an opportunity to make representations or request a hearing as to why her claim should not be struck out. There was no response to that opportunity either.

15. On 4 January 2019 the Original Decision was made. This was on the last working day (Friday) before the adjourned full hearing was due to begin (on Monday, 7 January 2019). The Original Decision struck out the claim and vacated the full hearing. It referred to the failure to comply with tribunal orders, and the claim not being actively pursued. It also referred to the lack of written or other representations as to why the claim should not be struck out, notwithstanding the warnings in previous correspondence. It also noted that a hearing had not been requested before a decision was made.

The Second Decision

16. 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).

17. On 14 January 2019 the claimant applied for reconsideration of the Original Decision striking out her claim.

18. All these applications were heard on 3 July 2019, and both the claimant and the respondent were represented by counsel.

19. The claimant had obtained new representation, having instructed solicitors, as I am told, in February 2019, therefore promptly after learning of the striking out of her claim by the Original Decision in January. The claimant also gave evidence, which the ET accepted. Her evidence was that the fault was wholly with her representative and that she did not know what was being done and not done. Not only did she not know that an adjournment of the original full hearing listed in March 2018 was sought at the last minute, she did not know that such a hearing was due to take place on the original dates in March 2018. She did not know about the ET order for medical evidence and she did not know that her representative was failing to comply with orders. She did not know that the ET had warned that the claim would be struck out. She was aware of the hearing listed in January 2019, which was to be the adjourned full hearing, but *"was not expecting to attend it*." (Second Decision Reasons at paragraph 13). The ET accepted her evidence that One Assist Legal Services "*deceived her and constantly fed her lies and then made it impossible for her to speak to them*." (Reasons para 13). It noted that One Assist Legal Services had been put on notice of the hearing of 3 July 2019 and of the applications being made, including the wasted costs application against them, but had not attended the hearing or submitted any evidence or submissions.

20. The Second Decision was made as a result of that hearing. It varied the Original Decision only to the extent of relying on the non-compliance with the original order of 9 March 2018 as the basis for striking out (in place of the date 18 September 2017 which was in the Original Decision). It rejected the application for costs against the claimant personally, as I have said. It granted an order for wasted costs against One Assist Legal Services Ltd, her former representative.

21. The Original Decision is now supported by five pages of full written reasons for which a request was made by the claimant. As well as setting out the procedural history and making the findings in the claimant's favour on the evidence to which I have already referred, the Reasons show that the ET found that the claimant was not implicated in her representative's unreasonable conduct (paragraph 23) and that the whole fault lay on the representative (paragraph 26). The claimant's representative acted "*improperly, unreasonably and negligently*." The "*only reasonable inference*" from the evidence was that there was in fact no medical evidence supporting the original application for adjournment and, "*it had misled the tribunal into postponing the hearing listed with an untrue reason*", i.e. the hearing listed on 12 to 15 March 2018 (paragraph 24 of the Reasons). The respondent "*had to defend a claim and prepare for its hearing listed on two different dates when, in fact, the hearing never went ahead*." (Reasons, paragraph 25).

The appeal

22. The single Ground of Appeal is that the ET, "*erred in considering that any failing of a party's representatives, professional or otherwise, will not generally constitute a ground for reconsideration.*" The essence of the appeal is that her application for reconsideration was refused. However, the original decision was, it seems to me, reconsidered. Evidence was heard and findings were made which established a completely different context for the failures, both to comply with orders and to progress the case, with which the Original Decision was concerned. The real complaint is that the ET did not reverse the strike out. It is recognised that the ET had a discretion, but it is argued that it made an error of law by considering itself bound by a rigid rule that the fault of the legal representative cannot excuse a party from non-compliance with rules or orders.

23. I am not convinced that the ET reasoning is correctly characterised in this way.

24. The ET summarised the relevant law as follows (paragraph 17 of the Reasons):

> **"Under Rule 70 of the ET Rules, a judgment maybe 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)."**

25. This seems to me a correct although brief statement of the law. In applying the law the ET said, quoting from paragraph 21 of the Reasons:

> **"We do not consider it in the interests of justice to reconsider the Tribunal judgment of 4 January 2019 striking out her claim. The claimant did not comply with the Order of the Tribunal of 9 March 2018 and failed to respond to a strike out warning from the respondent. The claimant relied on the default of her representative, OASDL. However, under the principles in *Lindsay,* failings of a party's representative will not generally constitute grounds for review."**

26. This considered the correct test, which was "*the interests of justice*". It did not suggest that **Lindsay** was a rigid principle but noted, correctly, that failings of a party's representative will not "*generally"* constitute grounds for review.

27. I have been referred to a number of cases, starting with **Lindsay** and the judgment of Mummery J in that case. It was a case in which a representative had not misconducted themselves in the extreme way found on the facts of this case by the ET but had behaved, it seems, incompetently, or allegedly so, in failing to refer to relevant law. In the judgment of Mummery J the following passage appears, which was before the ET, since it was set out also in written submissions for the respondent, albeit that only part of it was again repeated in the Reasons themselves:

> **"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.**
>
> **It is thus our view that the Industrial Tribunal erred in law in granting a review under Rule 10.1(e)"**

28. It will be noted that the tribunal's brief summary of the law, which I have already cited from paragraph 17, was correct in noting that the guidance of Mummery J was that failings of a party's representative will not "generally" constitute grounds for review.

29. I was also referred to the case of **Ministry of Justice v Burton** [2016] ICR 1128, a decision of a Court of Appeal consisting of Elias LJ, Kitchen LJ and King LJ. In that case, in the judgment of Elias LJ at paragraph 21, it is said as follows:

> **"(…) as Underhill J pointed out in *Newcastle Upon Tyne City Council v Marsden* [2010] ICR 743, para 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board* [1975] ICR 395) which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray & Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."**

30. In paragraph 24 Elias LJ went onto say:

> **"Quite apart from these considerations, in my view it is highly material, as Employment Judge Macmillan thought, that this argument was not addressed before the judge. Nobody suggested that there should be tapering or a cap. If the point was an obvious one for the judge to consider, it must have been obvious for counsel to raise it at the material time. Given the observations of Mummery J in the *Lindsay v Ironsides Ray & Vials* [1994] ICR 384, the refusal of the judge to reconsider the point in these circumstances was wholly apt. The principle that it will not in general be in the interests of justice to reopen a case on the basis that counsel had not raised a certain point should not be circumvented by suggesting that the point should have been taken by the judge of his or her own motion."**

31. In argument Mr Kohanzad submits that these dicta should be given a narrow construction and be applied only to cases such as those expressly referred to, as was apt on the facts before the judges in those cases, where the default of the legal representative is in failing to make a legal submission or draw attention to a legal point which might or perhaps should have been made. It is submitted to me that those cases have no application or little application to a case such as the present where the default of the legal representative is outright misconduct, in this case apparently approaching dishonesty.

32. In that context, reliance before me was placed on the case of **Newcastle upon Tyne City Council v Marsden** [2010] ICR 743 and the judgment of the President of the Employment Appeals Tribunal, Underhill J in that case. At paragraph 16, Underhill J said:

> **"*Williams v Ferrosan Ltd* and *Sodexho Ltd v Gibbons* clearly show that the extensive case law in relation to rule 34(3)(e) and its predecessors should not be regarded as requiring tribunals when considering applications under that head to apply particular, and restrictive, formulae - such as the "exceptionality" and "procedural mishap" tests which were understood to** be **prescribed by *DG Moncreiff (Farmers) Ltd* and *Trimble*. I would not in any way question that approach or the general message of both decisions. 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. (…)"**

33. In paragraph 17:

> **"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 it is "basic"**

> **'that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case-by-case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made.'**
>
> **The principles that underlie such decisions as *Flint* and *Lindsay* remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation - or as Phillips J put it in *Flint* (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry - seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject of course, to appeal). 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. *Lindsay* was referred to in both *Williams v Ferrosan Ltd* and *Sodexho Ltd v Gibbons*, but Mummery J's observations on this aspect were not disapproved: at para 17 of his judgment in *Williams (…*) Hooper J said only that the dangers to which Mummery J referred were of less concern on the facts of that particular case."**

34. Underhill J did find errors in the reasoning of the employment judge from whom he was hearing the appeal but he went onto say this at paragraph 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 the 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 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 could reasonably be judged to be outweighed by the particular 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."**

35. It is urged before me that this case drew a bright line distinction between cases of what might be called incompetence or oversight by counsel and cases of positive misconduct by counsel and that the case before me, and before the tribunal deciding the Second Decision, being a case of misconduct, the same result ought to have followed upon the reconsideration, as followed in the

case of **Newcastle upon Tyne v Marsden**.

36. I am not persuaded by this submission. What the EAT did in the case of **Newcastle upon Tyne v Marsden** was to uphold the exercise of discretion by the employment judge and to reject criticisms that the Judge's decision was one that was wrong in law or which he was not entitled to reach. It did so, although it accepted that there were some flaws in the reasoning of the employment judge: see paragraph 18 of the EAT Judgment.

37. The passages I have read demonstrate that Underhill J was strongly deprecating and discouraging the encrustation of the keel of the statutory test (which is to do what is necessary in the interests of justice) with barnacles of formulae from decided cases. The vindication of the decision that was actually made falls far short of saying that in a similar case no other decision would be reasonable or legally correct. The phrase in paragraph 19 of the judgment which I have cited, that the judge was entitled to take a different view on the particular facts of that case, and other phrases, such as what the weight to be attached to finalising litigation "*may well require*", show that Underhill J was not laying down an inflexible rule or an inevitable conclusion on particular facts, but was respecting the decision which he was himself considering as falling within an ambit of what it was lawful, permissible and reasonable for the employment judge to determine when deciding what was necessary in the interests of justice.

38. Indeed the warning in paragraph 17 of the judgment of Underhill J that the, "*cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case (...)*" highlights the weakness of a submission based on a contrast between the facts and decision in one case with the similar facts and different outcome in the case under appeal.

39. 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.

40. I was also referred to the case of **Bennett v London Borough of Southwark** [2002] IRLR 407 and to *obiter dicta* of Sedley LJ in a divided Court of Appeal giving judgment in that case. However, that is a case about the striking out of a claim and not a case in which a decision was being reconsidered under rule 70 or its predecessors. I do not think that it usefully adds to the more recent and more directly applicable jurisprudence to which I have already referred.

41. Based on these authorities, it is submitted by Mr Kohanzad that the ET in the Second Decision, notwithstanding its use of the word "*generally*," did not sufficiently recognize the breadth of the interests of justice to be considered and, in paragraph 21 of its decision, rested its conclusions solely on the failings of the claimant's representative not generally constituting grounds for review.

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.

48. The test for whether reconsideration may take place is quite strict, which is appropriate given the usual expectation of finality in litigation. It is that reconsideration should be "necessary" in the interests of justice. The interests of justice are not limited to the point of view of the person claiming reconsideration. The interests of the other party or parties must also be taken into account, as must the interests of the tribunal system, which has limited resources to be shared appropriately between all those who need them.

49. Although the claimant was not personally at fault, a lot of tribunal time and resource have been wasted and the Second Decision found in terms, as I have said, that the ET had been "misled" into postponing the original full hearing at the last minute, which is a very serious matter indeed. The respondent had no responsibility for this at all and yet the respondent too had suffered the loss of two full hearings, at the last minute in both cases. The only person who was able to supervise and exercise discipline over the claimant's representative was the claimant herself. There had been no engagement with the respondent and no substantive response to tribunal orders and correspondence by the representative.

50. The ET finding that the claimant had been "*(…) deceived and constantly fed lies (…)*" and that OASL "*(…) then made it impossible for her to speak to them. (…)*" (paragraph 13 of the Reasons), is very much in her favour but if she was dissatisfied, as she clearly was, she was the only person who could take action; for example, by dismissing them and finding new advisors, as she subsequently did in February 2019 This is not in any sense a criticism of her, it is simply an indication of where the interests of justice might lie in terms of which party, if any, was to bear the consequences of the misconduct, breaches of orders, failure to prosecute the claim and

unreasonable behaviour, which had taken place.

51. The claimant was aware of the hearing fixed for January 2019, although she was not expecting to attend it. Although she was not in any sense to blame, which is clear from the Second Decision, it does not follow from this that she could not expect to suffer any consequences as a result of the way in which her claim had been conducted on her behalf. There had to be an assessment of the interests of justice and that was the assessment which the tribunal in this case carried out, after correctly directing itself on the law and carefully examining the relevant facts.

52. As HHJ Eady QC noted in paragraph 33 of **Outasight VB Ltd v Brown**, the interests of justice means:

> **"(…) having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."**

This was expressly referred to in paragraph 17 of the reasons explaining the Second Decision and it was a relevant factor to which the ET was entitled to give weight, as plainly it did.

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 on 28 March 2017 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.

55. I am not persuaded that the Reasons contain any error of law, or that the Second Decision was wrong on legal or any other grounds.

56. Consequently, the appeal is dismissed.