‘Wasn’t me’ – How a rep’s error can be relied upon in getting Judgment reconsidered

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Phipps v Priory Education Services Ltd [2023] EWCA Civ 652

1. On an application for reconsideration under Rule 70, the ‘interests of justice’ test requires balancing the justice to *both* parties as well as having regard to the fact that there is a public interest in the finality of litigation.

2. The principle that the failings of one’s own representative will not generally constitute grounds for reconsideration was notably stated by Mummery J in **Lindsay v Ironsides Ray and Vials [1994] ICR 381** as follows:

> *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.*

3. However, the Court of Appeal has now provided further guidance in **Phipps** as to the principles an ET should apply in approaching an application for reconsideration where the fault lies squarely at the door of a representative as opposed to that of their client.

Facts / ET Decision

4. Mrs Phipps lodged a claim for unfair dismissal and various heads of discrimination in 2017. Within her ET1 Mr Johnstone of OALS was identified as her representative. A 4-day final hearing was listed in March 2018. Mr Johnstone, immediately prior to that hearing, sought an

adjournment on the grounds he personally had suffered 'a medical emergency' and thus would be unable to attend / represent Mrs Phipps. That hearing was accordingly postponed and Mr Johnstone was ordered to provide medical evidence showing he had been unfit to attend the hearing. In short Mr Johnstone never complied with that order.

5. Further orders chasing this information were made by the ET culminating in several strike out warnings in light of continued non-compliance. Ultimately the latter of which clearly set a date for any objection to the proposed strike out to be received by. With no response on behalf of Mrs Phipps, her entire claim was struck out.

6. On 14th January 2019 Mrs Phipps applied for reconsideration of the decision to strike out her claim. At a hearing on 3rd July 2019 Mrs Phipps's application for reconsideration was rejected and a wasted costs order was made against Mr Johnstone. Neither Mr Johnstone nor OALS attended that hearing despite having been notified of the application for wasted costs. The ET, having heard evidence from Mrs Phipps made a number of findings which I briefly summarise as follows:

    - The claimant did not know about the initial hearing that was listed in March 2018, nor did she know about the application to postpone that hearing;
    - The claimant was unaware of the ET's order, OALS's failure to comply with that order or the strike out warnings that were issued and OALS's failure to respond;
    - The first the claimant was aware of what was happening was when she received judgment striking out her claim;
    - OALS deceived her and constantly fed her lies and then made it impossible for her to speak to them;
    - The claimant's representative acted improperly, unreasonably and negligently. 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 OALS.

7. Pertinently at Paragraph 21 of the ET's Judgment the tribunal held as follows:

    > *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(sic). However, under the principles in Lindsay, failings of a party's representative will not generally constitute grounds for review.****"* (highlighting of last two sentences added).

EAT Decision

8. Mrs Phipps appealed the decision rejecting her application for reconsideration, in particular asserting that the ET had applied an inflexible rule derived from its interpretation of **Lindsay**.

9. Griffiths J in October 2021 held that the ET had not erred in rejecting the application for reconsideration and dismissed Mrs Phipps appeal. Notable remarks of Griffiths J include the following:

> *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.*
>
> *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.*
>
> *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.*

Court of Appeal (CoA)

10. Mrs Phipps appealed to the CoA on 3 grounds, of which only 2 were ultimately pertinent and which were as follows:

- 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 … 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.
- The ET's refusal to grant the Claimant's application for reconsideration was perverse.

11. The CoA held that on the facts found by the ET at the hearing on 3rd July 2019, there could have been only one answer to the request for reconsideration, namely that the application for reconsideration should have been granted as reconsideration was necessary in the interests of justice.

12. The CoA held that 'legal perversity' had been established and therefore revoked the previous decisions of the ET and EAT on the striking out of Mrs Phipps claim so that it could proceed before the ET to be determined on its merits.

Rationale of Court of Appeal

13. In essence the CoA restated the core balancing exercise required by r.70 ET Rules (as set out above in introduction section) and remarked on the fact that the ET had not given any explanation of why it was not in the interests of justice to reconsider the strike out beyond stating the principle espoused in Lindsay (i.e. that failings of a party's representative will not generally constitute grounds for review). That omission, the CoA found, was striking given the ET's own factual findings and ultimately the reasons of the ET were not Meek compliant.

14. The CoA balanced the competing factors for and against reconsideration of the strike out decision that were before the ET and ultimately concluded that the factors against reconsideration were very substantially outweighed by factors in the Claimant's favour.

15. In favour of reconsideration the CoA identified 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.

16. Conversely against reconsideration the CoA took account of the following:

(1) the public interest in finality of litigation;
(2) the injustice to the employers of having a case restored to life when they thought it had been struck out;
(3) the Respondent having wasted a significant sum in costs which might prove (and has proved) to be irrecoverable.

Court of Appeal Guidance

17. Perhaps most importantly and of particular note, the CoA reviewed 3 key EAT decisions in this area, namely Trimble v Supertravel Ltd [1982] ICR 440, Newcastle-upon-Tyne City Council v Marsden [2010] ICR 743 and Lindsay and from those derived and set out the principles to be applied on applications for reconsideration in the interests of justice at Paragraph 31 of the CoA Judgment. I have set this out in full as follows:

(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.

Arguments of Alternative Remedy

18. A further notable observation of the CoA, was in respect of 'the alternative remedy argument' and this is where the CoA clearly stated its disagreement with the EAT Judgment in Lindsay, stating:

> *'the argument that the Claimant can pursue an alternative remedy against her representative [seems to me wholly unrealistic in a case like the present one]. Parliament has decided that a party in employment tribunal proceedings has the right to be represented by anyone … 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.'*

19. The CoA went on to reflect on the reality of the situation faced by Mrs Phipps were she to pursue a civil claim for negligence against OALS. The CoA noted that there was no legal aid for such a claim and so she would have to find a lawyer willing to act on a conditional fee basis who would have no way of reliably estimating either the prospects of success her ET claim had or the amount of compensation she would have been awarded if her claim was successful. Taking further account of the improbability of OALS being 'good for the money' and the potentially enormous costs of a multi-day trial in the county court, the CoA concluded that the supposed 'alternative remedy' was in fact a *'figment of the imagination'*

20. Whilst the CoA did make clear that this did not mean that where the negligence or deliberate misconduct of an unregulated representative has led to strike out that will be a reason to abandon the established principles set out above, in such cases where the 'alternative remedy' is advanced as a factor weighing against reconsideration, it should *'be treated with scepticism'*

Final Commentary / Observations

21. My overarching thoughts and final observations in respect of this decision are in bullet point form as follows:

    1. This decision does not overturn the Lindsay principle that *Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review*. However, the CoA has in my view, softened the edges of that 'general' rule by making clear that:

- This **is NOT a blanket rule** – exceptional circumstances will exist in certain cases and in each case the ET needs to be cautious to properly weigh and balance the factors for and against reconsideration;
- A key factor to consider is whether the party applying for reconsideration **has had a fair opportunity to present their case**. If not, this is likely to amount to an exceptional circumstance and may well warrant reconsideration.
- Arguments of 'alternative remedy against one's own representative' are not to be simply accepted but rather scrutinised. If that representative is unregulated for example, such suggestions are likely to be a figment of the imagination and should be left out of account.

2. The CoA usefully summarises and sets out the core principles on an application for reconsideration and, for the time being at least, Phipps is likely to prove to be the go-to authority when such applications are heard.

3. It will be interesting to see whether the President of the Employment Tribunals for England and Wales takes up the 'invitation' of the CoA that *'where a party is represented, any warning letter under Rule 37(2) should be sent to the party personally, at whatever email or postal address has been provided, as well as to their representative'*

22. For my part this footnote suggestion of the CoA seems eminently pragmatic and sensible. Even if the President does not take up this suggestion I will likely be advising my clients when applying for a strike out warning to reference Phipps and invite the ET to accordingly ensure that such a warning is sent to **both** the claimant and their representative. No Respondent is likely to want to find themselves in the position such as in this claim - where inexcusable conduct of the Claimant's representative has caused significant and irrecoverable costs to be incurred and 6 years down the line they are effectively required to start from scratch in defending the claim.

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