Appeal No. UKEAT/0253/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 November 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

OUTASIGHT VB LIMITED — APPELLANT

MR L BROWN — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR PAUL WILSON (of Counsel) Instructed by: Jones & Co Solicitors Mayville Sherwood Drive New Ollerton Newark Nottinghamshire NG22 9PP
For the Respondent	Written submissions

SUMMARY

PRACTICE AND PROCEDURE - Review

Reconsideration - Rule 70 Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** - fresh evidence - interests of justice

Having lost his claim for wrongful dismissal/breach of contract before the Employment Tribunal, the Claimant applied for a reconsideration of that Judgment on the basis that he wished to adduce fresh evidence. The evidence in question related to the earlier criminal conviction (for offences of dishonesty) of the Respondent's sole witness and director (Mr Whittaker). The Employment Tribunal considered the change in the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (Rule 70-73 Schedule 1) - which departed from the specified categories provided by Rule 34(3) of the **Employment Tribunal Rules 2004** - meant it had a broader discretion and could admit fresh evidence even if not meeting the tests laid down in **Ladd v Marshall** [1954] 3 All ER 745, CA. Although there was no evidence as to why the information could not have been obtained prior to the Liability Hearing, the Employment Tribunal took the view this was something it could consider and, doing so, concluded it should revoke its original Judgment.

In reaching that view, the Employment Tribunal took account of the overriding objective and wider interests of justice but felt its original Judgment had been finely balanced and the credibility of Mr Whittaker had been a central feature in its decision making; had it been aware of his past conviction for offences of dishonesty that would have been likely to have had an important influence on the result of the case (albeit it could not say that it would necessarily have changed the result). With some hesitation, the proper course was to revoke the earlier Judgment.

On the Respondent's appeal, allowing that appeal and revoking the Reconsideration Judgment and reinstating the Liability Judgment.

The Employment Tribunal had erred in taking the view that the position had changed under the **2013 Rules**. The approach laid down in **Ladd v Marshall** would in most cases encapsulate what is meant by "the interests of justice". It provided a consistent approach across the civil courts and laid down the test applied in the Employment Appeal Tribunal. Simply because those principles are no longer expressly set out within the **Employment Tribunal Rules** did not mean that they no longer had relevance when determining "the interests of justice".

There might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles laid down in **Ladd v Marshall** were not strictly met. Employment Tribunals had, however, always had the ability to review Judgments where it was in the interests of justice to do so (see Rule 34(3)(e) **ET Rules 2004**). That power was recognised as allowing for a residual category of case, see **Flint v Eastern Electricity Board** [1975] ICR 395, and could permit fresh evidence to be adduced in circumstances where the requirements of paragraph (d) were not strictly met (**Flint**; **General Council of British Shipping v Deria** [1985] ICR 198, EAT). Such cases might include those where there was some additional factor or mitigating circumstances which meant that the evidence in question could not be obtained with reasonable diligence at an earlier stage (**Deria**). That might arise where there were issues as to fair hearing: where a party was genuinely ambushed by what had taken place or - as in **Newcastle City Council v Marsden** [2010] ICR 743, EAT - where circumstances meant that an adjournment was not allowed to a party when otherwise it might have been (there apparently because of error on the part of Counsel). That, however, was not this case. The Claimant had known sufficient of Mr Whittaker's past to say - in written submissions at the Liability Hearing - that he had previously been in prison for fraud. If the Claimant's case was that this was relevant to Mr Whittaker's credibility, he could have put that or sought an adjournment (a possibility the Employment Judge had raised) in order to properly prepare to put that case. Even if he was taken by surprise by Mr Whittaker being called as the Respondent's witness, he was given the opportunity to seek an adjournment and also had time to reflect further on the point when the case went part-heard. Although the Claimant said there were difficulties in researching Mr Whittaker's past because he used his middle name, the Claimant had himself disclosed documents in the Liability Hearing that gave Mr Whittaker's full name, which was also apparent from exhibits to his (Mr Whittaker's) witness statement. There was no evidence that the Claimant could not have put the point and/or obtained the necessary further proof of conviction before Judgment was given on liability.

Applying the interests of justice test, there was no reason why the principles laid down in **Ladd v Marshall** should not apply to this case. The Employment Tribunal's conclusion was vitiated by its erroneous approach; alternatively, was perverse.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent as they were below. The appeal is that of the Respondent against a Judgment of the Sheffield Employment Tribunal (Employment Judge Rostant, sitting with members on 20 March 2014) - "the ET" - sent to the parties on 15 April 2014. In that Judgment the ET allowed the Claimant's application for a reconsideration of its earlier Liability Judgment (sent to the parties on 22 June 2012).

2. The Liability Judgment had dismissed the Claimant's claim of breach of contract and wrongful dismissal. By its Reconsideration Judgment the ET revoked its earlier Decision and directed that the Claimant's claims be re-heard by a fresh ET.

3. The Claimant had appealed against the earlier Liability Judgment, but that appeal was stayed pending the ET's determination of his reconsideration application. The Respondent now appealed the Reconsideration Judgment.

4. On considering the appeal on the papers, Langstaff P took the view that it raised a potential issue of law relating to the effect, if any, of the change in the **ET Rules** in respect of the introduction of fresh evidence. He also considered it possibly arguable that the ET wrongly exercised its discretion in this case.

5. The Claimant had represented himself at the Liability Hearing before the ET. That had taken place over two days, 26 April 2012 and 9 May 2012. He was then represented by his wife at the Reconsideration Hearing. He has sent his apologies as he was unable to attend this

appeal hearing due to work commitments. That is unfortunate as I had some questions about what had taken place below. I was, however, assisted by Mr Wilson, Counsel for the Respondent, who has sought to help me on a neutral basis, consistent with his duty to the court. In any event, the Claimant lodged written submissions for this hearing, and I have spent some time reading those and have duly taken them into account. For completeness I note that the Respondent was represented at the Liability Hearing by its solicitor, Mr Bevan. At the Reconsideration Hearing, and before me, it has been represented by Mr Wilson of Counsel.

The Background Facts

6. The Respondent manufactures of a type of shower unit, originally invented by the Claimant. Before the ET, there was a dispute as to the precise nature of the contractual relationship. The Claimant argued he had entered into an agreement under which he became a 49% shareholder. He had originally gone into business with Ms Caroline Olsen; she had then brought in her father, Mr Whittaker, and he became a director. The Claimant said the share agreement was relevant because it explained why Mr Whittaker and his daughter wanted him removed in such a way as to take away his rights. Although the ET did not consider this matter essential for its determination of the case, it allowed it was relevant in terms of overall credibility. It did not accept the Claimant's evidence, finding his account implausible. It did accept the account given by Mr Whittaker, the Respondent's only witness before the ET.

7. In any event, the Claimant became an employee of the Respondent. Primarily it was his role to manufacture the shower units. His contract of employment was for a two-year fixed term, commencing 9 November 2010.

8. According to Mr Whittaker, on 23 May 2011 he was telephoned by Ms Olsen, who said she had seen the Claimant and his son drive a company van into the warehouse and load it with materials. When she approached they had closed the van doors quickly, which made her suspicious. Having reported the matter to Mr Whittaker, she returned to the warehouse and asked the Claimant to open the van, but he drove off. The Claimant denied that account: he had only loaded materials into the van on 23 May 2011 as part of his normal duties; Ms Olsen was present, but she had not challenged him in any way.

9. The ET accepted Mr Whittaker's hearsay account as to what Ms Olsen had said. It considered that account corroborated by the fact that Mr Whittaker had suspended the Claimant the following day and had carried out a stock check. Those actions, the ET found, were more consistent with Mr Whittaker's account rather than part of some more elaborate plot. Overall, it was not prepared to find that Mr Whittaker had not been telling the truth.

10. Having carried out a stock check, Mr Whittaker stated he had found a significant shortage of particular items. He thought the missing items might be used by the Claimant to refurbish shower units that he legitimately had at his own home. The Claimant disputed whether there had been any stock check but, even if there had been, doubted whether it could be accurate given that the stock control systems lacked robustness. Matters were put to the Claimant at a meeting. He denied theft, but was dismissed.

11. The ET found the Respondent had discharged the burden upon it of showing that the Claimant was guilty of theft from his employer. That amounted to a repudiatory breach of contract such as to deprive the Claimant of any right he might otherwise have to sue for compensation for the remainder of his contract.

The ET Proceedings and Reasoning

12. The Claimant's claim was of wrongful dismissal and damages for breach of contract under the **Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994**. He was seeking damages for the remainder of his two-year fixed term. He had considered the case would largely centre around the evidence of Ms Olsen: it was her account of events on 23 May 2011 that he understood to be in issue. Mr Wilson makes the point that, as Mr Whittaker had dismissed the Claimant, it must always have seemed likely he would be called to give evidence. From a lawyer's perspective, that might be so, but I have to take into account that the Claimant was acting in person with no experience of litigation, and, in any event, this was a breach of contract claim on which the ET would have to make findings as to what had actually taken place, not simply test the Respondent's decision.

13. Witness statements were meant to be exchanged in advance of the hearing. The parties had apparently agreed that this would only happen at 4pm the evening before. That was ill-advised. At 4.01 pm, the Claimant received (by e-mail) Mr Whittaker's 42-page witness statement, attaching certain documents as exhibits. The Claimant is dyslexic and seeks assistance from his wife when dealing with this kind of paperwork. About half an hour later, they contacted the Respondent's Solicitors to ask that Ms Olsen and two members of staff be available at the ET for the Claimant to question. The response was that the Respondent would not be calling Ms Olsen or the other employees; the Claimant would need to raise the matter with the ET. The Claimant says that he was taken by surprise by the fact that Mr Whittaker was going to be called at all, let alone as the only witness for the Respondent. His e-mail exchange with the Respondent's solicitors does not reveal surprise that Mr Whittaker would be attending as a witness, although it certainly suggests he was expecting others to be called.

14. At the outset of the hearing, the Claimant raised this issue with the ET. The Employment Judge observed that evidence from persons who were not at the ET would be given less weight. That said, the Claimant was given the opportunity to state whether he wished to proceed that day or adjourn. He opted to proceed; the hearing duly went ahead. It lasted two days rather than the one listed. I am told (Mr Wilson having taken instructions on the point) that the evidence was not completed within the day, so the case went part-heard, resuming about a fortnight later. As the findings of fact make clear, the ET accepted Mr Whittaker's evidence in preference to that of the Claimant, accepting his account of what he said he had been told by Ms Olsen.

15. It is the Claimant's case, in responding to this appeal, that he was not prepared to cross-examine Mr Whittaker and had not researched matters relating to his evidence and credibility. He says he was only able to do so after the Liability Hearing. Moreover he says that when he did so, it was not entirely easy as Mr Whittaker uses his middle name, Geoffrey, rather than his first name, Charles. That is relevant because the Claimant ultimately found out that, on 11 September 1994 at Leeds Crown Court, Mr Charles Geoffrey Whittaker had been convicted on 15 counts of obtaining property by deception, and was sentenced to five years' imprisonment. The Claimant says he had not previously known for sure of Mr Whittaker's conviction. Whereas his wife, who had lived locally (the Claimant had grown up in London) had heard some rumours about Mr Whittaker's past, she did not know the detail.

16. The Respondent says that is not an entirely accurate picture. First, the Claimant knew, or could reasonably have been expected to know, Mr Whittaker's full name. It was on the letter of 17 February 2011, appointing Mr Whittaker director of the Respondent, which the Claimant

himself had disclosed in the ET proceedings. Further, there were two documents exhibited to Mr Whittaker's witness statement, which had cover sheets, which state:

> **"THIS IS THE EXHIBIT MARKED 'GW2' referred to in the Witness Statement of Charles Geoffrey Whittaker"**

Although those were only sent to the Claimant the evening before the hearing started, he certainly had them before the case went part-heard. In the addition, the ET3 referred to "Mr C G Whittaker".

17. Second, in a document apparently used by the Claimant as a synopsis of his case before the ET at the Liability Hearing, he had stated:

> **"Within a few weeks of signing the new contract, it became obvious that Caroline had a drink problem. She would arrive at work drunk, if she came into work at all.**
>
> **Caroline lied to clients, suppliers and staff. I tried to speak to her about the problems, but without success.**
>
> **In December, she came to me and asked if she could bring in her father in to assist with the work load, until such time as the business was running smoothly again.**
>
> **I did not feel comfortable about this since I had, by now, found out that Geoffrey Whittaker, her father, had been in prison for fraud in the 80's, and was 'abit [sic] of a gangster'!"**

18. The Respondent thus observes that the Claimant knew sufficient either to put his case properly (if he really believed that this - the previous conviction for dishonesty - was relevant to how Mr Whittaker's evidence should be seen), or, at least, to raise with the ET the need for time to obtain proof of what he had understood in this regard, if not to actually obtain that proof before the resumed hearing in May.

19. In fact, after receiving the ET's Judgment, and before raising any issue as to Mr Whittaker's earlier criminal conviction, the Claimant had focussed on a different matter relating to the stock check Mr Whittaker had said was undertaken after the events of 23 May 2011. He sought to raise the issue of that new evidence in an appeal to the EAT. That appeal was (and

remains) stayed, on the direction of HHJ McMullen QC, pending the Claimant using the ET review procedure. The Claimant duly did that by letter received at the ET on 14 May 2013.

20. Given the procedural history, the ET allowed the application for a review out of time and set the matter down for a reconsideration hearing. By the time that took place the **2013 ET Rules** were in force. By then, the Claimant had also obtained a certificate of conviction in respect of Mr Whittaker, which is dated 10 September 2013. It appears that issue was only raised by the Claimant at the hearing itself, although the Respondent had an inkling that it might be when it saw that the Claimant had put the certificate of conviction into the bundle for the hearing. In any event, it took no objection to how the matter was raised.

21. I am told that most of the evidence and submissions at the reconsideration hearing addressed the stock check documentation point. Mrs Brown, the Claimant's wife, and Mr Whittaker gave evidence on this issue. The ET did not accept that the Claimant had been ambushed by the evidence at the original Liability Hearing such that he had been unable to proceed. He had been given the opportunity to seek a postponement but had chosen to go ahead. Further, the evidence he wanted to rely on regarding the stock check was material that could have been obtained in time for that Liability Hearing had the Claimant realised the significance of seeking to rebut the Respondent's position on that issue. In any event the new evidence in question would not in fact have materially influenced the ET to a different view from that which it had taken. It rejected the application for reconsideration on that basis.

22. The ET then turned to the question of Mr Whittaker's previous conviction. It took the view that the **2013 Rules** allowed it to exercise a broader discretion than the old Rules had; a viewpoint at that stage shared by Mr Wilson for the Respondent, who allowed that there might

be circumstances in which an application would have failed under the old Rules but could nevertheless be granted under the new Rules. The ET found the Claimant had some inkling of Mr Whittaker's past conviction but did not have proof positive until he and his wife had carried out an internet search and obtained the certificate of conviction from Leeds Crown Court. It considered that, had the Claimant wished to make Mr Whittaker's conviction an issue at the Liability Hearing, he probably could have carried out the same search before the hearing, since he had, at least, heard rumours of Mr Whittaker's past and could have acted on those rumours in exactly the way he and his wife did after the Liability Judgment; that is to say, by conducting the same research. Whatever the difficulties in tracking down proof of Mr Whittaker's conviction, there was no evidence before the ET that there was any reason why that information could only have been obtained after rather than prior to the Liability Judgment.

23. That being so, the ET took the view that, applying what it called the strict Rule 34(4) test under the **2004 Rules** (it was actually there referring to Rule 34(3)), this would not constitute fresh evidence in the traditional sense. Allowing that it had a wider discretion under the **2013 Rules**, however, it considered this was something it could take into account and, doing so, concluded it should revoke its original Judgment.

24. In reaching that view the ET took account of the overriding objective and the risk to that of having the matter returned for a new hearing by a fresh Tribunal in terms of the further expense and delay for the parties, the fact that proceedings would be prolonged, and it would not serve the interests of finality in litigation. On the other hand, and outweighing all those considerations, the ET observed that the original Judgment had been finely balanced. The burden of proof had rested on the Respondent and the principal witness of fact, Ms Olsen, was not present. The credibility of Mr Whittaker was a central feature in the original decision. Had

the ET been aware of his past conviction for offences of dishonesty, that would have been likely to have had an important influence on the result of the case, albeit the ET could not say it would necessarily have changed the result. It further took account of the unusual nature of the proceedings; it had been determining a breach of contract claim not an unfair dismissal claim, so it had to make a finding as to whether or not the Claimant was guilty of theft. That outcome was all the more important for the Claimant given the reputational risk of a finding of dishonesty and that also tipped the balance in his favour on the application. Finally, the Claimant had been representing himself and had been out of his depth at the Liability Hearing.

25. Weighing all those factors in mind, not without some hesitation, the ET concluded the proper course was to revoke its earlier Judgment.

The Appeal

26. The Grounds of Appeal are threefold. First, the ET failed to follow the test in **Wileman v Minilec Engineering Ltd** [1988] IRLR EAT and **Ladd v Marshall** [1954] 1 WLR 1489 CA and thereby wrongly revoked the original Judgment, despite finding that the Claimant could, with reasonable diligence, have obtained proof of the conviction before the ET Liability hearing. Second, the ET erred in holding that it had a broader discretion under the **2013 Rules** as compared to the **2004 Rules**. Third, it reached a perverse conclusion.

The Legal Principles

27. The starting point are the provisions concerning the reconsideration of an Employment Tribunal Judgment as laid down by Rules 70 to 73 of Schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, which provide under the heading "Reconsideration of Judgments":

"70. Principles

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."

28. The test for reconsideration under the **2013 Rules** is thus straightforwardly whether such reconsideration is in the interests of justice. This can be contrasted with the rather more complex system laid down by the provisions of Rules 34 to 36 of the **2004 ET Rules**, which governed the review of Judgments and other decisions; in particular, Rule 34(3):

"Subject to paragraph (4), decisions may be reviewed on the following grounds only—

(a) the decision was wrongly made as a result of an administrative error;

(b) a party did not receive notice of the proceedings leading to the decision;

(c) the decision was made in the absence of a party;

(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or

(e) the interests of justice require such a review."

29. I note in passing that the ET refers to this provision as Rule 34(4). That seems to be a simple error of transcription and I cannot see that anything turns on that mistake.

30. Rule 34(3)(d) of the **2004 Rules**, "New evidence", reflected the well-known principles for the admission of new evidence on appeal in civil litigation set down by the Court of Appeal in **<u>Ladd v Marshall</u>**. Under the **2013 Rules**, instead of the five possible grounds for holding a review, there is only one ground on which a Judgment can be reconsidered: the interests of justice. That said, as can be observed, Rule 34(3)(e) also allowed for the interests of justice to stand as a ground for a review. There would not seem to be any immediately obvious reason why cases decided on that basis - the interests of justice - under the old Rules would not still be relevant to cases under the new. Moreover, although there were formally specific grounds in

the previous roles as well as the more general interests of justice ground, I cannot see why one of the former, specifically identified grounds, should not form the basis of an application for a reconsideration of a Judgment in the interests of justice. That is indeed what happened in respect of some of the new evidence cases under Rule 34(3)(d) (or its predecessors) to which I have been referred in argument; see, for example, **Flint v Eastern Electricity Board** [1975] ICR 395 QBD and **General Council of British Shipping v Deria** [1985] ICR 198 EAT.

31. Under the previous Rules, the "interests of justice" ground was described as "a residual category of case designed to confer a wide discretion on [Employment] Tribunals", **Flint** per Phillips J at page 401. It was seen as possibly allowing evidence to be adduced in circumstances where the requirements of paragraph (d) of Rule 34(3) were not strictly met, where there might be some special additional circumstance or mitigating factor.

32. As for what the interests of justice might be, in **Flint** Phillips J stated as follows:

> **"… First of all, they are the interests of the employee. Plainly from his point of view it is highly desirable that the evidence should be given, because it follows, from what I have already said, that there is at least some, perhaps good, chance that if it is given his case will succeed. One also has to consider the interests of the employers, because it is in their interests that once a hearing which has been fairly conducted is complete, that should be the end of the matter. Although this is a case where one's sympathy is with the employee, because it is his claim for a redundancy payment and the employers have more money than he has, it has to be remembered that the same principles have to be applied either way because one day a case may arise the other way round. So, plainly, their interests have to be considered.**
>
> **But over and above all that, the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry. It certainly seems to me, hard though it may seem in the instant case, that it would not be right that he should be allowed to have a second bite at the cherry in cases which are perfectly simple, perfectly straightforward, where the issues are perfectly clear and where the information that he now seeks leave at a further hearing to put before the tribunal has been in his possession and in his mind the whole time. It really seems to me to be a classic case where it is undesirable that there should be a review." (page 404E - 405A)**

33. The interests of justice have thus long allowed for a broad discretion, albeit one that must be exercised judicially, which 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.

34. As for what might be an additional circumstance or mitigating factor, allowing evidence to be adduced albeit that the strict requirements of **Ladd v Marshall** might not be met, that was a question explored by the EAT in **General Council of British Shipping v Deria**. In that case, it was argued that this should include an admission of race discrimination which raised an issue of widespread public importance. The EAT disagreed, holding that it would not construe so widely the possible residual category envisaged in **Flint**; the other circumstances or mitigating factors had to be related to the failure to bring the matter within paragraph (d) of the Rule.

35. In **Newcastle City Council v Marsden** [2010] ICR 743 the EAT (per Underhill P, as he then was) was concerned with how the **2004 Rules** should be read in the light of the overriding objective. That is now set out at Rule 2, Schedule 1 of the **2013 Rules**, as follows:

> **"2. Overriding objective**
>
> **The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—**
>
> > **(a) ensuring that the parties are on an equal footing;**
> >
> > **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
> >
> > **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
> >
> > **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
> >
> > **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."**

36. In **Marsden** the EAT observed that having regard to the overriding objective did not mean disregarding all the principles that had been laid down in earlier cases such as **Flint**. As Underhill P noted, see page 753 at paragraph 17:

> **"… 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 …**
>
> > **"that dealing with cases justly requires that they be dealt with in accordance with recognised principles. …" "**

37. The EAT held that the principles underlying cases as **Flint** remained valid, in particular the weight that had been attached (in **Flint** and other cases) to the need for finality in litigation.

38. A further consideration that might be applicable to an exercise of discretion in the interests of justice could arise from the right to a fair hearing laid down by Article 6(1) of the **European Convention of Human Rights**, as incorporated into UK law by the **Human Rights Act 1998**. There may be circumstances - perhaps where a party has been ambushed at the hearing of their case, or where an issue has arisen over disclosure of documents - where that might amount to an additional circumstance such as to mean that the interests of justice would require new evidence to be adduced in circumstances that might not otherwise strictly meet the requirements of **Ladd v Marshall**. I return to this point below, as it seems to be a matter implicitly raised by the Claimant's submissions before me.

Submissions

The Respondent's Case

39. On behalf of the Respondent, Mr Wilson had originally said that he would accept that - in theory - the new Rule might give ETs a wider discretion than the old. He was conscious that he had made that concession before the ET and initially did not seek to resile from it. During oral submissions and on further reflection, however, he felt that his concession had been

wrongly made; in truth, the position had not changed. He observed that under the old Rules paragraphs (a) - (d) set out well-travelled examples; the interests of justice might allow a wider view than those specific cases. That, however, was also permissible under the old Rule.

40. If ETs were not to follow the **Ladd v Marshall** test when considering applications to adduce fresh evidence, they would be under a different regime to that followed in all other civil courts and the EAT. The same principles should still apply. As laid down in **Flint**, under the old Rules the ET had to consider, first, the criteria under (d), only going on to consider the interests of justice in more general terms (under (e)) if some other mitigating factor so required, see **Flint** page 404H. That other mitigating factor would have to be related to the failure to bring the matter within (d), **General Council of British Shipping v Deria**. The reality was that this was a case like that of **Redding v EMI Leisure Ltd** EAT/262/81, where the Claimant had appealed against the rejection of her application for a review on the basis that she had not understood the case against her below and had failed to do herself justice when presenting her claim. The EAT had there observed:

> **"… When you boil down what is said on [the Claimant's] behalf, it really comes to this: that she did not do herself justice at the hearing, so justice requires that there should be a second hearing so that she may. Now, "justice" means justice to both parties. It is not said and, as we see, cannot be said that any conduct of the case by the employers here caused [the Claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation …"**

41. Here the Claimant had the ability to put the point he wished to make before the ET in terms, as was apparent from his synopsis document where he had expressly referred to what he understood about Mr Whittaker at the time. What more did he then need? For whatever reason he had not sort to emphasise that point at the original hearing, but he had had the ability to do so. If the case was put badly, he may not have done himself justice but that was not the only consideration. Justice had to be done to both parties, and there were broader policy considerations including the need for finality in litigation.

42. The ET had found that this case did not meet the test laid down in **Ladd v Marshall**. There were no other circumstances or mitigating factors which would engage the interests of justice on the basis of **Deria**. The ET had considered that it was possible that more general interests of justice permitted broader factors to be taken into account but it was still required to have regard to the same principles. "Interests of justice" continued to mean the same thing. That was also what was meant by the application of the overriding objective.

43. In any event, the conclusion was perverse. This was really an attempt at getting a second bite of the cherry. The Claimant knew the basic facts. There was no evidence before the ET as to why he had been able to obtain the proof later, but not before the Liability Judgment. He had an opportunity to seek an adjournment but chose to proceed. Anyway, the ET had really decided the issues of credit on other corroborative material. Even at the reconsideration hearing it had accepted Mr Whittaker's evidence. It was simply perverse to see this particular new evidence, the proof of conviction, as so material to permit its introduction at such a late stage.

The Claimant's Case

44. I have set out the Claimant's position above, when summarising what took place in the ET proceedings. He makes the point that he is dyslexic, and as the ET observed, out of his depth at the ET hearing. With the late exchange of witness statements, he had been surprised by Mr Whittaker being called as the Respondent's witness. He did not have proof of Mr Whittaker's conviction and there were difficulties in finding about this and obtaining that proof because Mr Whittaker now uses his middle name. The true position was that Mr Whittaker obtained the Claimant's property - the intellectual property rights - by deception. That is the way Mr Whittaker operates, as evidenced by the previous conviction by the Crown Court. (I

make clear I do not know the detail of the basis of Mr Whittaker's past conviction and as to how similar those details might be to what the Claimant alleges happens in this case.)

45. From the Claimant's perspective, to allow Mr Whittaker to get away with this would be to allow the perpetration of a fraud. The court should have regard to the difficulties he faced. Moreover all this came down to credit, and the ET did not have a full picture as to Mr Whittaker. Having that full picture would have presented a very different case.

Discussion and Conclusions

46. I start with the question of the ET's approach; whether the different structure of the **2013 Rules** meant that it was entitled to depart from the approach laid down under the **2004 Rules** (and previously). It is right that the Rules are now differently structured. In particular, the specified grounds for review, previously listed, have been replaced by the simple provision that a reconsideration might take place in the interests of justice. I do not, however, see that as a significant departure. The same basic principles will apply. The specified categories under Rule 34(3) of the **2004 Rules** could be seen as particular instances when the interests of justice would generally have required a review. If a party is not heard because the Notice of Hearing was not received, it is easy to see why it would be in the interests of justice to review the ET's decision. That said, the specified ground would not give an automatic right. If the Notice of Hearing was not received because of some culpable default by the party concerned, it might well not provide a sound basis for a review; it would not be in the interests of justice to allow a case to be reopened on that basis.

47. In any event, the former Rule expressly allowed for review where the interests of justice required. I do not see why using that same expression under the **2013 Rules**, albeit without the earlier specified grounds, would change the approach to be adopted.

48. In my judgment, the **2013 Rules** removed the unnecessary (arguably redundant) specific grounds that had been expressly listed in the earlier Rules. Any consideration of an application under one of the specified grounds would have taken the interests of justice into account. The specified grounds can be seen as having provided examples of circumstances in which the interests of justice might allow a review. The previous listing of such examples in the old Rules - and their absence from new - does not provide any reason for treating the application in this case differently simply because it fell to be considered under the "interests of justice" provision of the **2013 Rules**. Even if it did not meet the requirements laid down in Rule 34(3)(d) of the **2004 Rules**, the ET could have considered whether it should be allowed as in the interests of justice under Rule 34(3)(e). There is no reason why it should then have adopted a more restrictive approach than it was bound to apply under the **2013 Rules**.

49. More specifically, as to an application to introduce fresh evidence after the determination of a case, the approach laid down in **Ladd v Marshall** will, in most cases, encapsulate that which is meant by the "interests of justice". It provides a consistent approach across the civil courts and the EAT. Should a different approach be adopted in the ET because the principles of **Ladd v Marshall** are no longer expressly set out in the Rules? I do not think so. Those principles set down the relevant questions in most cases where judicial discretion has to be exercised upon an application to admit fresh evidence in the interests of justice.

50. In saying that, I allow that the interests of justice might on occasion permit evidence to be adduced where the requirements of **Ladd v Marshall** are not strictly met, but it was ever thus. Hence, the residual category allowed by Rule 34(3)(e) **2004 Rules** and the recognition of how this might then be used in cases such as **Flint** and **Deria**. As to what circumstances might lead an ET to allow an application to admit fresh evidence, that will inevitably be case-specific. It is, of course, always dangerous to try to lay down any general principles when dealing with specific facts, particularly where - as here - one party is not represented and where the point was not fully argued below. That said, it might be in the interests of justice to allow fresh evidence to be adduced where there is some additional factor or mitigating circumstance which meant that the evidence in question could not be obtained with reasonable diligence at an earlier stage (**Deria**). This might arise where there are issues as to whether there was a fair hearing below; perhaps where a party was genuinely ambushed by what took place or, as in **Marsden**, where circumstances meant that an adjournment was not allowed to a party when otherwise it would have been (there apparently because of an error on the part of that party's Counsel).

51. For the reasons I have given, I consider that the ET in this case was wrong to think that the **2013 Rules** had changed the position. That, however, is not the end of the matter and I have spent some time reflecting on whether it might, in any event, have been right in its exercise of discretion in this instance. In particular - given the way the Claimant has put his case on this appeal - I have considered whether there were broader issues of fair hearing (which can be seen as part of the requirement under the overriding objective, that ETs deal with cases fairly and justly). I am not sure that the ET in fact approached the case in this way; its focus seems rather to have been on the possible relevance of the material given the issues it had to determine. That might be characterised as looking at the interests of justice from the perspective of the Claimant. The reasoning does not detail the ET's findings as to how the Claimant obtained the

new evidence in issue and, particularly, why he could not have done so before. The ET's conclusion was, however, that the Claimant had not demonstrated that he could not, with reasonable diligence, have obtained that information before.

52. The Claimant's submissions take issue with that conclusion but fail to engage with a number of points adverse to his case in this regard. Thus, if it was the Claimant's case that he had effectively been duped by Mr Whittaker, someone who engaged in fraud to obtain that which he wanted, as was evidenced by his conviction, why could that case not have been put? The Claimant certainly knew sufficient to refer to Mr Whittaker's past in his synopsis for the ET (he apparently knew that Mr Whittaker had been in prison for fraud) and did not seem to feel he had to hold back in the criticisms he made of Mr Whittaker and his daughter. He might have placed the conviction in the wrong decade, but I cannot see that would have made much difference. If he felt ambushed or put off his stride in presenting his case because he was surprised that Mr Whittaker was going to be the Respondent's witness, the Claimant could have taken the opportunity to ask for an adjournment (as he was invited to do, by the Employment Judge). He could simply have asked the Employment Judge how best he could approach this point, given that he did not have proof positive of the conviction. Even if he felt unable to do that or was at a disadvantage by having been taken by surprise on the first day, that does not explain why he did not raise the point when the case went part-heard.

53. On that last point, there is no explanation as to why the new evidence was not obtained during the break between the two hearing days. There is no evidence as to how precisely the Claimant obtained details of Mr Whittaker's conviction. Although the Claimant has said there was some difficulty in this, given that Mr Whittaker uses his middle rather than his full name, it cannot be that he did not know Mr Whittaker's full name until after the Liability Hearing: it

was apparent from the documentation that the Claimant himself disclosed and also from the documentation attached to Mr Whittaker's witness statement.

54. Appreciating the difficulties for litigants in person engaged in ET proceedings for the first time, the material before me suggests that the Claimant only undertook research into Mr Whittaker's past some time after he had received the ET's Judgment dismissing his case. It may be that - like Ms Redding (**Redding v EMI Leisure Ltd**) - the Claimant feels that he failed to do himself justice in the presentation of his case at the Liability Hearing. Given the facts of this case, however I do not accept that he was denied a fair hearing or that circumstances arose such that it could properly be said that it was in the interests of justice to permit him to adduce fresh evidence after the determination of his claim. I think that the ET in this case allowed itself to be misled by the way in which it viewed the **2013 Rules**. It thereby permitted the Claimant to have a second bite at the cherry and failed to take into account the broader interests of justice, in particular the interest in finality of litigation. That was an error of law. It led the ET to reach a conclusion that was perverse given the facts of this case.

55. In those circumstances, the appropriate course for me must be to allow the appeal, to overturn the Reconsideration Judgment and to reinstate the Liability Judgment. I duly do so.