BEFORE : LORD JUSTICES WARD; BUXTON ; and MANCE : CA. : 25th July 2003

JUDGMENT : LORD JUSTICE WARD.

The Issue.

1. This appeal raises the short but interesting point identified by Mr Recorder Langstaff Q.C., the Chairman of the Employment Appeal Tribunal, when giving permission to appeal:- *"The Court of Appeal may wish to consider the scope of the test to be applied to determine whether failure by a court or tribunal to alert advocates to a material, significant and relevant authority is such that an appeal on that ground should succeed."*

The background.

2. Mrs Sheridan, the respondent to this appeal, was employed by the appellant, Stanley Cole (Wainfleet) Ltd., a manufacturing company, from 14th August 1995 until she resigned, that resignation being treated as taking effect on 28th July 2000. She made a complaint to the Employment Tribunal in Nottingham alleging that she had been unfairly constructively dismissed.

3. The tribunal found that on Friday, 14th April 2000, she was one of four working in the Customer Services Department. She was approached by Mr Holyer, a recently promoted quality manager, about an order for one of her usual customers. There was a heated discussion. Mr Holyer raised his voice but was not abusive. Nonetheless Mrs Sheridan felt threatened, and felt so physically ill that she left the office. After an absence of about an hour and a half, part of which spread over her lunch break, she returned and spoke to her superior, a Mr Leigh. She was upset, in tears and emotional and Mr Leigh advised her to go home. She saw her doctor during the weekend and was certified unfit to work for two weeks due to stress. She remained away from work providing medical certificates to similar effect for the remainder of her employment.

4. On 27th April she was seen at home by the personnel manager and gave her account of the events of the 14th. On 17th May Mr Leigh conducted a disciplinary inquiry and found that she had unreasonably left work without permission "thereby committing an act of gross misconduct which could result in summary dismissal". She was given a final written warning for misconduct.

5. She appealed to the managing director, Mr Cole, and attended a meeting before him on 16th June. He wrote to Mrs Sheridan on 21st June upholding the final warning. She resigned a month later on 21st July stating in her letter dated that day:

   "Thank you for your letter of 21st June 2000 following our meeting on 16th June 2000.

   You will appreciate that I am profoundly disappointed and upset at the decision you reached.

   I cannot believe that after five years of loyal and devoted hard work to the firm you were prepared to back up the decision made on the 17th May to give me a final warning for a single incident which was in any case not my fault.

   I cannot understand how a single occasion on which I was away from the office "without permission" can be construed as Gross Misconduct …

   As a result of all the stress and worry I have as you will know been unable to work. My doctor describes my condition as stress, anxiety and depression of which I am still being treated.

   I had hoped to return to work with the stain on my record removed. Since you are not prepared to do so I am sorry to say that I consider myself to have been constructively dismissed.

   I shall be taking advice as to any action that I may take for this constructive unfair dismissal."

   The company treated the letter as giving one week's notice of termination and so her employment ended on 28th July 2000. She duly lodged her complaint with the Employment Tribunal.

The Employment Tribunal hearing.

6. The hearing took place over two days. In its written decision promulgated on 15th June 2001 the Employment Tribunal directed itself on the law as follows:- *"In order to establish constructive dismissal an employee must firstly show that she terminated the contract, that is common ground, see the letter of resignation 21 July … Secondly, it was in response to the employer's breach of contract, thirdly that the breach of contract constituted a significant breach going to the root of the contract and fourthly* ***that the employee acted promptly in terminating the contract.****"* (Emphasis added by me).

7. It is not necessary for the purposes of this appeal to decide on the correctness of that direction, especially on the need for or perhaps relevance of acting promptly, or perhaps, more accurately, failing to act promptly.

8. On the facts, the tribunal concluded that the incident with Mr Holyer was relatively minor. They held:- *"In our view it falls clearly outside the band of reasonable responses having regard also to Mrs Sheridan's record and length of service. The imposition of such a disproportionate penalty is in our view a breach either of an implied term of trust and confidence or an implied term that the disciplinary procedure will be used fairly and without oppression. It is also in our view a significant breach going to the root of the contract therefore entitling Mrs Sheridan to resign."*

9. The tribunal did however add:- *"We have been somewhat more exercised by the delay between the notification of the confirmation of the final written warning and the letter of resignation. Such a delay would normally not be acceptable but in this case we find that by reason of Mrs Sheridan's illness which is supported by medical certificates and her evidence that she took time to take* advice in those particular circumstances we find that her resignation was carried out in time."

10. The tribunal was satisfied that she was justified in treating her employment at an end by reason of the employer's breach and that the dismissal in all the circumstances was unfair. Having found in her favour a remedy hearing was fixed for 13th July. Simply for the sake of revealing the outcome of this case, I note that the Employment Tribunal eventually awarded her £3,500 and that comparatively modest sum is the amount at stake in this appeal.

The review.

11. Mrs Sheridan, with the help of the Citizens Advice Bureau, prepared a schedule of loss for the remedy hearing. This disclosed that she had commenced employment with Butlins and worked for them for fourteen weeks from 2nd August to 7th November 2000. This information set the appellant on a train of enquiry. On looking through the eighty-page bundle of documents which had been before the Employment Tribunal, Dr Cohen, a director of the company, paid closer attention to document 70 and 71. The first was a letter from Butlins dated 24th July, a date after Mrs Sheridan's letter of resignation. Butlins wrote:-

"*The above named person [Mrs Sheridan] has applied for employment with our company. The engagement is subject to receipt of satisfactory references and we would, therefore, ask you to complete the attached form and return it to us …"*

That form (as completed by the company) was document 71, and gave a favourable reference. It recorded that Mrs Sheridan had been employed from 14th September 1995 to "28.7.00." In answer to the question how her employment ended the company stated through "resignation".

12. In response to further enquiries from the company Butlins supplied the following information:-
"Mrs Sheridan submitted her application (for employment) with a covering letter on 25th June 2000.

We do not have a record of the date she attended an interview, although there are notes on her file to suggest that the interview was held on 16th July 2000.

The offer of employment was dated 19th July 2000.

Mrs Sheridan was employed from 2nd August to 7th November 2000."

13. That led to the company applying on 25th June 2001 for a review of its decision on grounds falling within Rule 13 of the Employment Tribunal's Rules of Procedure as set out in schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2001 which provide as follows:-

"13(1) … a tribunal shall have power … to review any decision on the grounds that …

(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 the time of the hearing; or

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

14. The new evidence which the company sought to introduce was the fact of Mrs Sheridan's employment with Butlins and the information contained in Butlins' letter of 4th July. The company submitted in its written application:-

"This evidence is relevant to two central issues in this case as well as raising an important question as to the applicant's credibility. The two central issues are as follows:-

a) whether the applicant's delay in resigning her employment with the respondent constituted a waiver of any repudiatory breach of contract.

b) what was the real reason for the applicant's resignation?"

15. The company submitted:-

"6. The respondent is not legally represented in these proceedings. The Employment Tribunal are meant to provide a relatively informal forum in which employment disputes can be resolved and where legal representation is not necessary. There were a large number of documents in this case. Pages 70-71 of the bundle did not seem to the respondent to be very important and we never focussed on the date on p.70. Had we noticed this date, then we would have followed through as we subsequently did.

7. It is not reasonable to expect a non-legally represented litigant to act as a forensic expert. The reality is that the evidence was not available at the close of the hearing and the respondent did exercise reasonable diligence in preparing its case. In these circumstances the criteria [are] satisfied.

The Interests of Justice.

8. The rules allow the tribunal a broad discretion to allow a review in circumstances where the interests of justice would be served by doing so. The respondent submits that this is such a case. Even if the tribunal decides to adopt a restrictive approach to the issues of new evidence, it would not be in the interests of justice to deprive the respondent of the opportunity to argue the merits of the review.

9. The review involves reasonably narrow issues. …"

16. In its decision dated 1st November 2001 the tribunal held as follows:-

"3. The first issue we have to determine is whether that evidence is new. In our view it is not. Although both documents to which we have referred postdate the hearing dates of March and May 2001 the evidence i.e. the fact that Mrs Sheridan was seeking work was available at the date of the hearing. We say that because it is common ground that documents 70 and 71 in the original bundle were available at the hearing though never referred to. Document 70 is a request by Butlins for a reference and document 71 is a standard form of reply by Stanley Cole duly signed by Mr Leigh in response to that request.

4. Even if we are wrong on that point, in our view the evidence itself was clearly foreseeable given the existence of documents 70 and 71 of the original bundle in that it is clear that Mrs Sheridan was seeking employment at some point around the date the receipt of document 70 which was 28 July 2000. Therefore, in our view, the evidence should have been known of and was reasonably foreseeable at the date of our hearing. We, therefore, conclude that the application based on ground (d) must fail."

17. Dealing with the interests of justice, the tribunal held:-

"5. … Dr Cohen's application is based on the same facts namely that Mrs Sheridan was seeking employment.

Neither party has, in fact, referred us to authority in this context. We feel that we must be guided by the case of ***General Council of British Shipping v Deria & Others*** *[1985] 1 ICR 198. I will quote the headnote: "Held, allowing the appeal, that where a review of an Industrial Tribunal decision was precluded under Rule [13(1)(d)] on the ground that the new evidence had been available, a review based on the new evidence should only be granted under Rule [13(1)(e)] where there was some circumstance or mitigating factor which related to the failure to bring the matter within Rule [13(1)(d)], and not to the nature of the dispute at large, making it such that the interests of justice required a review. …"*

6. What then is the circumstance or mitigating factor which would require us to grant a review under paragraph (e)? We turn to Dr Cohen's submissions and, in fact, to paragraphs 6 and 7 of those submissions. I hope that in paraphrasing them I have done them justice but it seems to us that Dr Cohen is saying that because he is not legally qualified the tribunal should not expect a non-legally represented litigant to act as a forensic expert. However, again unfortunately for Dr Cohen, there is again authority on the point in question and we

*refer to the case of **Lindsay v Ironsides Ray & Vials** [1994] IRLR 318. In that case the EAT held that an Industrial Tribunal had erred in law in holding that it had jurisdiction to grant a review of its decision because the employee's case had not been properly argued at the preliminary hearing as a result of her representative's shortcomings. The EAT went on to conclude that it would not be in the interests of justice for there to be a review on such grounds. They held that even though the interests of justice ground of review is in very wide terms it is a power which must be cautiously exercised. Further they hold that failings of a representative will not generally constitute a ground for review because that would risk encouraging a disappointed applicant to seek to re-argue his case by blaming his representative for the failure of his claim. Again we feel that we are bound by the guidance of the EAT in that case. It must, therefore, follow in our view that since as Dr Cohen has conceded it was his own shortcoming that led to the existence of Mrs Sheridan's application for employment not being pursued we have no alternative but to refuse the application for review on this ground."*

18. The company is aggrieved at the way in which that review hearing was conducted. Dr Cohen, who appeared before the tribunal on the company's behalf as he appears before us, set out in an affidavit what happened as follows:-

"3. The hearing on 26th October commenced at Boston at approximately 10.50 a.m. I represented the appellant and Mrs Victoria Miller of the Citizens Advice Bureau represented the respondent.

4. The tribunal decided that it would first hear submissions from the parties as to whether or not they should allow the review to be considered on its merits. All of the witnesses were present. Witness statements had been exchanged that morning and both parties were ready to proceed to a hearing on the merits of the review.

5. The submissions of the parties were brief and did not involve references to case law. The tribunal did not raise any issues or cases with us and never invited any comments or submissions on any case law. The tribunal retired to consider its decision at around 11.15 a.m.

6. The tribunal returned at around 11.45 a.m. and the chairman dictated the decision and extended reasons into a tape recorder in the presence of the parties. He had photocopies of two cases with him, certain passages were highlighted and he read extracts of these during the course of his decision. Although I cannot be absolutely certain, I believe that the chairman had both of these photocopies in front of him from the beginning of the hearing. These cases were Central Council of British Shipping v Deria & Others [1985] ICR 198 and Lindsay v Ironsides Ray & Vials [1984] IRLR 318.

7. I was extremely surprised when the chairman referred to these cases. He had given us no intimation that he was intending to rely on them and gave me no opportunity to comment or make any submissions on them. In any event, I had never seen or heard of these cases and it was only after the hearing that I obtained copies and could form an opinion.

8. If I had been given an opportunity to comment, I would have sought to persuade the tribunal that the facts of this case were substantially different from those in Lindsay v Ironsides Ray & Vials and that the guidance given by the EAT in that case did not compel the tribunal to refuse the review on ground 13(1)(e) as particularised in the ground of appeal.

9. I therefore believe that the appellant was seriously and unfairly prejudiced by the failure of the tribunal to afford me an opportunity to comment on the cases referred to in the tribunal's decision."

19. The tribunal has accepted that paragraphs 1-6 inclusive of that affidavit are accurate but the chairman has written:- *"Mr Cohen omits to mention that the tribunal did outline the tasks of the tribunal as to both grounds of the review, and as to the application under rule 13(1)(e), said that such an application would not normally succeed if based on the same facts as the application under rule 13(1)(d)."*

20. Dr Cohen does not recollect that and, I hope without doing injustice to the tribunal, I approach this matter accepting for this purpose that no help was given to Dr Cohen as to the way in which tribunals have applied rule 13(1)(e).

The appeals to the Employment Appeal Tribunal.

21. The company appealed both the decision promulgated on 15th June 2001 and the decision of 1st November 2001. The first appeal, described as the merits appeal, raised issues as to the correct

approach to determining a claim of constructive dismissal and as to whether the imposition of a final written warning may be capable of amounting to repudiatory conduct on the part of the employer. The second appeal raised issues of the correct approach by an Employment Tribunal to authorities and the test which it is appropriate to apply to an authority which the tribunal wishes to rely on in reaching its decision but which it has not invited the parties to address. There was, however, no appeal against the adverse findings made against the company on the rule 13(1)(d) ground.

22. In a decision promulgated on 25th October 2002 the Employment Appeal Tribunal, presided over by Mr Recorder Langstaff Q.C., dismissed the merits appeal and there is rightly no further appeal to us.

23. The second appeal, the "review appeal", was also dismissed. The tribunal concluded:- *"… as a matter of legal principle, we should not accede to an appeal simply upon the basis that an authority, however material, significant and relevant, has not been drawn to the attention of the parties as undoubtedly it should be."*

24. In their view:- *"… the question must be whether or not there is any reasonably arguable case that if the parties had been alerted to the authority relied upon by the tribunal, they would, or might have made submissions which would, or might, have produced a different result, or, … might have examined the evidence in a different and more extensive way."*

25. Having approached the matter in that way, they rejected the appeal saying:- *"We do not think that there was any reasonable prospect at all of persuading a tribunal, properly directed, to take any different view in respect of the application under 13(1)(e) than that which it did. There was here nothing which was capable, as we see it, of amounting to a mitigating factor or circumstance such as referred to in the Deria case. …… no material injustice was caused to the appellant or, put colloquially, there is no reasonable argument that the decision would have been any different*."

The appellant's case.

26. To précis Dr Cohen's submissions:-

i) The decision of the Employment Tribunal in refusing to remit was unjust because of the serious procedural irregularity and was a breach of his right to a fair hearing enshrined in Article 6 of the European Convention on Human Rights.

ii) His primary case is that since the authorities followed by the Employment Tribunal "could be viewed as somewhat esoteric", but were nonetheless central in the sense of their being "relevant, significant and material" to the decision, the failure to ensure that the parties had an opportunity to consider and make representations upon them rendered the hearing unfair.

iii) That test of centrality derived from the judgment of His Hon. Judge Serota Q.C. in ***Albion Hotel (Freshwater) Ltd. v Maia E Silva*** [2002] IRLR 200. That test was not qualified by the need to show a "material injustice" as His Hon. Judge Peter Clark held in *Nelson v Carillion Services Ltd.*, a decision of the Employment Appeal Tribunal promulgated on 28th June 2002.

iv) It is, therefore, wrong to consider whether his knowledge of the principles in *Deria* and *Lindsay* would have made a difference to the original decision. Furthermore, if this question does arise, it is only the original tribunal that is able to determine whether or not it would have made a difference to it.

v) If the appellate tribunal or appellate court is able to deal with that question, then it should hold that there was a good mitigating circumstance, namely the failure on the part of Mrs Sheridan to comply with the tribunal's directions. Had she filed a witness statement and served a schedule of her loss as she should have done before the first hearing, he would have been able to raise in time the matters upon which he now wishes to rely.

vi) Although the fact that he is not legally qualified is not a mitigating circumstance of itself, it is relevant to considering the reasonableness of the explanation he proffers for not adducing the evidence at the first hearing.

vii) If material injustice is a necessary ingredient, the appellant has suffered it.

The respondent's case.

27. Mr Damien McCarthy, who now appears on her behalf, submits that the appellant has to establish a material injustice. It is, therefore, necessary for the appellate tribunal or court to consider what difference it would have made had he been aware of the authorities concerned. Lack of professional qualification or experience can never be a mitigating circumstance. The receipt of additional indications of Mrs Sheridan's employment would not mitigate the fact that the point could reasonably have been taken on the material that was available at the time.

Conclusions.

28. Not to be afforded a fair hearing would be an obviously serious procedural irregularity sufficient to allow the appeal. The real question is, however, whether what happened was seriously irregular and unfair.

29. It is not contended, and rightly so, that there is a serious irregularity simply because a judge (and for present purposes that includes the tribunal) cites in his or her judgment decided cases which had not been referred to in the course of the hearing. Judicial research would be stultified if that were so and if the parties had to be given the opportunity to address each and every case eventually set out in the judgment.

30. The test applied by His Hon Serota Q.C. in *Albion* was this:-

> *"34. … In our opinion the right to a fair hearing requires notice of all material matters of fact and law to be given to the parties, if the Employment Tribunal wishes to make a determination on points not argued by the parties. The consideration of the three authorities to which we have referred by the Employment Tribunal in the present case was material to their decision. Even though no complaint was made as to the principle to be deduced from these authorities, the application of that principle to the facts was highly material to the decision. The parties were not able to make submissions as to the relevant acts that were material …*
>
> *35. In our opinion where an Employment Tribunal considers that an authority is relevant, significant and material to its decision but has not been referred to by the parties, it should refer that authority to the parties and invite their submissions before concluding its decision. This is more than mere good practice. Failure to do so may amount to a breach of natural justice and of the right to a fair hearing."* (Emphasis added).

31. Dr Cohen sums up that test of relevance, significance and materiality as meaning that the authority must be central to the decision. In my judgment I can accept those epithets insofar as they convey the meaning that the authority must be shown to be central to the decision and not peripheral to it. It must play an influential part in shaping the judgment. If it is of little or no importance and serves only to underline, amplify or give greater emphasis to a point that was explicitly or implicitly addressed in the course of the hearing, then no complaint can be made. If the point of the authority was so clear that a party could not make any useful comment in explanation, then it matters not that the authority was not mentioned.

32. Thus it seems to me, the authority must alter or affect the way the issues have been addressed to a significant extent so that it truly can be said by a fair-minded observer that the case was decided in a way which could not have been anticipated by a party fixed with such knowledge of the law and procedure as it would be reasonable to attribute to him in all the circumstances.

33. There is, however, an important caveat. This is not intended to be an all-encompassing test. It is, in my judgment, impossible to lay down a rigid rule as to where the boundaries of procedural irregularity lie, or when the principles of natural justice are to apply, or what makes a hearing unfair. Everything depends on the subject matter and the facts and circumstances of each case.

34. I cannot accept Dr Cohen's submission that the proper approach is limited to establishing the centrality of the decided authority to the decision in question. That is the first stage of the enquiry. As Judge Serota said, failure to give a party the chance to address the authority *may*, not *must*, amount to a breach of natural justice. The hearing will not have been unfair if it has caused no substantial prejudice to the party claiming to be aggrieved. It must, therefore, also be shown, as Judge Peter Clark held in *Nelson*, that a material injustice has resulted. In his view *"Judge Serota was not stating a new proposition of law"* in setting out the tribunal's opinion in paragraph 35 of his judgment which I have

cited above. In *Nelson*, it was clear from their reasoning that the tribunal considered that the authority of which the appellant was unaware was relevant because they cited it in their reasons. He held:- *"The real question, it seems to us, is whether that case significantly added to the learning which had been cited by the parties."*

He held that it was not and:- *"In these circumstances we are not persuaded that the tribunal's own recourse to that authority in fact caused any material injustice to the appellant."*

35. Applying that approach, I ask first whether ***Deria*** was "central" to the tribunal's decision. In ***Deria*** Bristow J. followed the judgment of Phillips J. in ***Flint v Eastern Electricity Board*** [1975] I.C.R. 395 where the question was whether, and if so in what circumstances, where what is now rule 13(1)(d) precluded a review on the ground that new evidence was available, a review based on the availability of fresh evidence might be open under rule 13(1)(e). It is important to note that the success of the application for a review depended upon that new evidence being admitted. So it does in the case before us. It was in those circumstances that the application of rule 13(1)(e) had to be considered "keeping an eye" on the terms of rule 13(1)(d). Phillips J. held at p.404:- *"But I do think that it is necessary in a case which otherwise falls within paragraph (d) … to find some other circumstances, some mitigating factor, to make it such that the interests of justice require such a review."*

36. I can accept that at first blush the ground provided under (e) is a broad, freestanding ground not linked to the separate ground under (d) and that it is reasonable so to understand it. It may not be immediately apparent, as Bristow J. held in *Deria* at p.202, that:- *"… in logic and in law this (that which is in the interests of justice) has to be geared to the rule [13(1)(e)] provisions and not to the nature of the dispute at large."*

37. In my judgment this is a refinement and gloss upon the ordinary wide meaning of the words in (e) of such a kind that the tribunal ought to have directed Dr Cohen's attention to it. There is force in his submission that the omission was all the more surprising in view of the fact that, on the facts we are assuming to be accurate, the tribunal had the report before them with the relevant passages already underlined. Dr Cohen's submissions had been broadly based when a narrower focus was required in view of the fact that his case was essentially dependent upon the new facts being admitted in evidence.

38. The vital question, in my judgment, is whether it would have made any difference to the outcome if Dr Cohen had been armed with this authority. That is a question for this court to answer. It is not a matter we must refer back to the original tribunal.

39. Not having appealed against the decision refusing to remit on the grounds set out in rule 13(1)(d), Dr Cohen has to accept the findings made in that regard namely that it was clearly foreseeable given the existence of documents 70 and 71 that Mrs Sheridan was seeking employment at some point around the date of the receipt of the request for a reference on 28th July 2000. He had, therefore, to establish some exceptional circumstance or some mitigating factor *"to temper in [his] favour … the rigour of the terms of rule [13(1)(d)]"*. Had he known that is how the court would approach rule 13(1)(e) he would have sought to mitigate his failure to spot the point hidden in the eighty page bundle of documents by drawing attention to Mrs Sheridan's own failings to comply with the tribunal's directions. Particular emphasis is laid in this connection upon the respondent's failure to serve her schedule of loss until after the hearing before the Employment Tribunal. As the appellant's skeleton puts it (paragraph 32(c): *"the appellant failed to appreciate the importance of the documents in the bundle on the issue of liability because it never saw the respondent's schedule of loss until after the main hearing."*

But all that the schedule disclosed was that the appellant had received reduced salary from the appellant up to 28th July 2000, and earnings from Butlins for the 14 weeks from 2nd August to 9th November 2000. Accordingly, in my judgment, no reasonable tribunal directing itself properly would in these circumstances have accepted Dr Cohen's submission. The Employment Appeal Tribunal dismissed it saying in paragraph 141:- *"… it [Dr Cohen's submission] is asserting that there would have been notice if certain steps had been taken. But that assertion is irrelevant in the light of a finding by the Employment Tribunal that there already was such notice, which should have caused a reasonable advocate,*

enquirer or representative to find and produce the new evidence. The fact that there might have been further indications to the same effect cannot take away from, or mitigate the failure to take notice in the first case."

40. If the facts could have been discovered with reasonable diligence, remission will be refused. If the evidence could have been obtained, it should have been obtained and it is no sufficient excuse to mitigate that consequence to assert that the facts would have been more easily revealed if Mrs Sheridan had complied with her obligations. The hearing proceeded despite Mrs Sheridan's failure and it is too late to use that failure to excuse his own shortcomings.

41. Dr Cohen is driven, therefore, to add his lack of forensic skill to the mitigation he seeks to advance. That leads me to deal with *Lindsay*.

42. I am not persuaded that *Lindsay* was central to the decision. Drawing attention to it during the course of the argument would not have altered or affected the way in which this part of the case was being presented. It served to show that the argument being advanced by Dr Cohen was wrong. If he had been told that his forensic shortcomings were no excuse, nothing he could have said would have made any difference to that point and his position could never have been improved. A generous latitude of indulgence may be afforded litigants in person as part of the court's or tribunal's endeavour to maintain a level playing field for all litigants, but as Mummery J. held in *Lindsay*:- *"Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review."*

43. The interests of justice do not demand that any shortcomings in a litigant in person's presentation of his or her case should be overcome by affording the litigant the indulgence of the chance to do better second time round. I am satisfied that there was no serious procedural irregularity in referring to *Lindsay* without it having been disclosed to him and the hearing was not rendered unfair by the omission to refer to it during the course of the hearing.

44. I pay tribute to Dr Cohen's presentation of his case. He presented his arguments skilfully and concisely backed by immaculately prepared documents. I regret that he labours under this sense of injustice. I am, nonetheless, satisfied that the unfortunate manner in which judgment was delivered does not amount to a serious irregularity or a denial of his right to a fair hearing. In my judgment this appeal should be dismissed.

Lord Justice Buxton :

45. I respectfully agree with my Lord's analysis of the question set out in his §1 that was posed to this court by the EAT. As the appeal progressed, however, I came increasingly to doubt whether that question was necessary for decision in order to dispose of the appeal.

46. The Tribunal, in §3 of its Extended Reasons of 1 November 2001, made a finding, not challenged before us, that the schedule of loss and the letter from Butlins were not "new" evidence. That, as I understand it to be agreed, disposed of any ground of review under Regulation 13(1)(d). Further, granted that finding, and leaving entirely out of account any general principle to be deduced from *Deria*, it is difficult or impossible to see what other ground there could be for re-opening the original hearing under Regulation 13(1)(e). The only possible ground was that which is quoted in my Lord's §15, Dr Cohen's handicap in not being a professional advocate. It scarcely needed authority, in the shape of *Lindsay* or otherwise, to reject that contention. True it is, as Dr Cohen reminded us, that Tribunals permit, even perhaps encourage, lay representation; but that gives no more licence than where professional advocates are engaged to attempts to reargue the case if on reflection the representative thinks that it could have been better put.

47. That is particularly so where, as here, no specific error can be attributed to the nature of the advocacy. I appreciate that Dr Cohen says before us that, armed with the new evidence, he would have rigorously cross-examined Mrs Sheridan as to her credibility; but that overlooks the Tribunal's finding that the "new" evidence did not add to what was already before the Tribunal and available to the cross-examiner, professional advocate or not.

48. The latter difficulty also affects Dr Cohen's argument before us that the "mitigating circumstance" that caused the interests of justice to require a review was, not merely his general inability as an advocate to identify the significance of the material that was available at the trial, but also and in particular Mrs

Sheridan's failure in the late service of the schedule of loss. Had she kept the rules, Dr Cohen would have had the new documents at the trial, their significance would have immediately have impressed themselves upon him, and he would have used them as already indicated. It appears from § 2.2.3 of the Grounds before us that this point was indeed taken at the review hearing. The Tribunal did not refer to it, and were right not to do so. The significance of the documents was not as documents, but as to the state of affairs that they revealed. The Tribunal found that that was already known to the employers at the time of the hearing. I appreciate that Dr Cohen urges before us that the new information was different from and more significant than that which was apparent from his company's own correspondence: but that is not what the Tribunal found. Granted that finding as to the employers' knowledge, justice cannot possibly require a review because there was another means to the same knowledge that was kept from them.

49. In truth, the main point of this appeal, and indeed almost the whole content of the Grounds of Appeal, is the failure of the Chairman to put to the parties at the review hearing the two cases that he referred to in his ruling. That is said to have deprived the employers of their "absolute right" to a fair trial, in breach of article 6. If HHJ Serota QC intended, in §34 of his judgment in *Albion Hotel*, to say that any failure to refer parties to material authority rendered the proceedings necessarily unfair (and I very much doubt whether he did so intend), then I am unable to agree. It is central to the procedural provisions of article 6 that an assessment must be made of the fairness of the proceedings as a whole. One authority amonst many to that effect is *Nielsen v Denmark* (1988) 11 EHRR 175[52]. A procedural failure, even one such as the present, will not lead to the proceedings being quashed or set aside unless substantial unfairness has occurred. I am satisfied, as was the EAT, that the outcome would not have been different had the Chairman taken the course that Dr Cohen urges. That is not only because of the considerations relied on by the EAT, but also for the more fundamental reason set out above that, once the Tribunal had found as it did as to the "new" evidence, there was as a matter of fact, not just of law, no room for recourse to Regulation 13(1)(e).

50. It would of course have been a lot better had the Chairman told the advocates of the authorities that he intended to cite, if for no other reason than to avoid the subsequent extensive use of court time over a dispute in which some £3,000 is in issue. But his failure to do so cannot possibly justify the allowing of the appeal. It may also be noted that the only effect of such a decision would be remission of the case to a further enquiry in which, because of the unchallenged findings already made by the tribunal, the outcome would inevitably be the same.

Lord Justice Mance :

51. I agree with both judgments.

Order: appeal dismissed with costs agreed at £3,000 plus VAT.

(Order does not form part of the approved judgment)

Malcolm Cohen, Director, on behalf of the Appellant

Damian McCarthy instructed by the Respondent