Appeal No. UKEAT/0245/13/SM
UKEAT/0246/13/SM
UKEAT/0250/13/SM
UKEAT/0251/13/SM
UKEAT/0252/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 November 2013
Judgment handed down on 6 February 2015

Before

HIS HONOUR JEFFREY BURKE QC

(SITTING ALONE)

MR M BENNEY APPELLANT

DEPARTMENT FOR ENVIRONMENT FOOD AND RURAL AFFAIRS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK BENNEY (The Appellant in Person)
For the Respondent	MR ADAM TOLLEY (of Counsel) Instructed by: Treasury Solicitors Department One Kemble Street London WC2B 4TS

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SUMMARY

PRACTICE AND PROCEDURE

Review

Compromise

By the first of two appeals, the Claimant appealed against the decision of a Regional Employment Judge to reject at the preliminary consideration stage his application for a review of a decision of a different Judge to reject his claim for interim relief on the ground that he had been dismissed for making protected disclosures. Since that decision the Claimant had settled his unfair dismissal claim for a substantial sum by a COT3 form; his claim was dismissed upon withdrawal; the file had been destroyed as a result. HR subsequently discovered that documents disclosed to him prior to the settlement, which he knew had been redacted, had been redacted so as to remove passages which, on his case, revealed the true reason for the dismissal. He therefore sought to have the interim relief application reviewed on the basis of new evidence. A Regional Employment Judge decided that it was not practicable for the original Judge to deal with the application and considered it herself; she dismissed it.

Held.

(1) The word "practicable" in Rule 35(3) of the **2004 Rules** had to be construed bearing in mind the overriding objective and was not limited to cases in which the original Judge was dead, too ill or beyond the reach of electronic or telephonic communication. The Regional Employment Judge had to consider an issue of fact and degree; her decision could not be attacked other than on perversity grounds; she had reached a permissible decision.

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(2) If that was wrong, the factual existence of impracticability was not a "precedent fact" which, if not present, deprived the Regional Employment Judge of jurisdiction to deal with the application and rendered her decision a nullity, with the effect that any other grounds for rejection of the application were to be discounted. The analogy with administrative law cases was not appropriate. Impracticability was one but only one of the issues which the Regional Employment Judge had to consider. **Manning v British Telecommunications Ltd** (EATPA/1033/05) applied.

(3) The Regional Employment Judge was entitled to reach the decision that an extension of time to apply for review should not be granted; she had considered the issue and had resolved it against the Claimant as she was entitled to do.

(4) In any event the unfair dismissal claim had been dismissed as a result of a binding agreement between the parties, pursuant to which the Claimant agreed not to make any further appeal or application. He disclaimed any intention of seeking to have the agreement set aside; it was still binding. There was no existing claim in the course of which the review application could be made.

By the second appeal, the Claimant appealed the decision of the previous President of the Employment Tribunal rejecting his claim to a preparation time order in respect of his preparation of the case. Held that that decision by the President was a judicial decision; but the appeal must fail for the reasons set out at (4) above.

HIS HONOUR JUDGE JEFFREY BURKE QC

The Appeals

1. I need to start this judgment by explaining why it has as its head the numbers of what appear to be five appeals presented to the Employment Appeal Tribunal.

2. The Appellant before me, Mr Benney, has presented two Notices of Appeal to the Employment Appeal Tribunal, to both of which the Department for Environment, Food and Rural Affairs ("DEFRA") is the Respondent. The first of those appeals relates to his failed application for a review of a judgment of Employment Judge Byrne in the Reading Employment Tribunal dated 14 May 2010; because in his Notice of Appeal presented on 31 May 2012 Mr Benney challenged four different decisions arising out of that review application, his Notice of Appeal was given four different appeal numbers. However, for reasons which will become clear, it is not necessary now to distinguish between those four numbers.

3. The last of the appeals relates to a decision made by the previous President of the Employment Tribunals, Judge Latham, by which he rejected an application by the Claimant for, *inter alia,* a time preparation order under Rules 10 and 42 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**; those Rules have, of course, now been replaced; but they were current at the time relevant to the present appeals.

4. I heard the appeals on 21 November 2013. On 1 December Mr Benney put in a further bundle of documents which included a decision of the EAT in **Flatley v Cleveland Police**

Authority (HHJ McMullen QC EAT/0691 & 0620/12, 24 September 2013). On 24 January 2014 he sent an e-mail to the EAT, to which he attached a copy of the report of the Committee of Public Accounts of the House of Commons published on 24 January 2014. In another document he sent to the EAT a copy of a further authority. All of those sendings were copied to the Treasury Solicitors who have not provided any response, save that, in respect of the last of those e-mails in time, they replied saying that Mr Benney had not put in an application for permission to put in further material and that they did not propose to provide a substantive response unless so directed by the EAT. I have not found it necessary to give any direction to that effect.

5. I have, however, in Mr Benney's interests, taken all of those subsequent materials into account. In reaching the decisions set out in this judgment I have considered those materials, all of the materials put before me at the time of the hearing and all of the authorities. I do not intend and do not need to go through them all in this judgment; but all have been considered. The further submissions do not explain the substantial delay on my part in producing this judgment, for which I apologise to the parties.

The History

6. The history which has led to these appeals is long and complex. I shall attempt to summarise it as briefly as I can. Mr Benney is a member of the Bar who, after his pupillage, may or may not have spent some time in practice before he became employed by the Treasury Solicitors; he was so employed from 1992 to 2002 and was then transferred to DEFRA for whom he worked until he was dismissed in December 2009.

7. In 2008 a dispute arose between him and his employees about the proposed introduction within DEFRA of an individual performance management system ("IPM") Mr Benney was strongly opposed to the introduction of that system or at least to its introduction without a proper trial; he complained about it, including to the Permanent Secretary of DEFRA, to such a degree that his employers regarded his behaviour as misconduct. He sought to challenge the introduction of IPM by seeking judicial review; but that failed. It appears that there was also a claim which Mr Benney made in the county court for breach of contract; but that also appears to have made no progress and was dismissed in 2009.

8. In January 2009 he raised a grievance against DEFRA, which did not succeed. Later that year he was, after disciplinary proceedings, given a formal written warning. His appeal against that sanction failed. He went off work through stress before that appeal was decided; when he was fit to return he was asked to give an undertaking that he would not resume his campaign within DEFRA. He did not give that undertaking and was dismissed, ostensibly for failing to do so.

9. On 15 December 2009 he presented an ET1 to the Employment Tribunal, claiming that he had been unfairly dismissed and other relief. In it he claimed interim relief under section 128 of the **Employment Rights Act 1996**, on the grounds that he had been dismissed for the automatically unfair reason that he had made protected disclosures; he has claimed that he made numerous such disclosures during the course of his campaign against IPM; they were protected disclosures, he contended, because they disclosed information which in his reasonable belief

tended to show that DEFRA was failing or was likely to fail to comply with legal obligations to which it was subject; see section 43B(1)(b) of the **1996 Act**.

10. DEFRA resisted Mr Benney's unfair dismissal claim and, in a separate response dated 15 April 2010, replied to the interim relief application. In that document they maintained that Mr Benney had been dismissed for misconduct, namely for failure to comply with the requirements made of him in DEFRA's letter of 24 November 2009 that he should provide the undertaking I have earlier described. They denied that the dismissal was based on Mr Benney's making protected disclosures. At some stage in the history Mr Benney produced a schedule of 39 alleged protected disclosures. In their response DEFRA asserted that none of what were said to be protected disclosures were disclosures falling within section 43B; they did not disclose information of a failure to comply with any legal obligation; and it was asserted that the purported disclosures were not made in good faith or were not reasonably believed by Mr Benney to be true, and could not therefore be relied upon by Mr Benney.

11. The interim relief application came before Employment Judge Byrne on 5 May 2010. He rejected it in a judgment with reasons sent to the parties on 14 May. Mr Benney, in order to succeed, had to establish not only that he was likely to succeed in proving that he had been dismissed for making protected disclosures but that he had high prospects of so succeeding; the grant of interim relief, which can have the effect of securing to a Claimant remuneration as if he had not been dismissed up to the date of the substantive hearing, has been said to be appropriate only in exceptional cases where there is a "pretty good chance of succeeding".

12. Employment Judge Byrne in his reasons set out the history; it is more helpful to quote his relatively brief exposition of the position of the parties and of his conclusion than to seek to summarise it. They were, in paragraphs 6.7 to 6.10 and 7.1 of his reasons as follows:

> **"6.7. He was off work unwell and was referred to occupational health in November 2009 when it was confirmed that he was then fit to return to work. By letter dated 24 November, the Respondent wrote to him stating that his return to work was conditional upon his complying with the reasonable instruction, namely to conduct himself in accordance with the requirements of the performance management system and was told "[DEFRA] will no longer tolerate, in any form whatsoever, your continuing campaign against the system and/or those who were involved in it's introduction. If you do not feel that you are able to abide by this reasonable instruction then place inform us by your return." He was asked to give an undertaking to that effect by 1 December. In the absence of an undertaking he was dismissed by letter dated 8 December on the grounds of "failing to comply with reasonable instruction."**
>
> **6.8. In essence the Claimant's case is that he quite properly raised concerns about IPM and that those concerns amounted to protected disclosures within the meaning of Section 43B (b) in that the Respondent was in breach of the implied term of trust and confidence, as a result of the method of implementation of IPM, the handling of his associated grievance, their conduct of the judicial review, the disciplinary proceedings and "deliberate concealment" of relevant matters. The Claimant further submitted that he reasonably believed the matters disclosed tended to show one or more of the circumstances set out in Section 43(1)(b), and that he acted reasonably and in good faith at all stages in the dispute.**
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> **6.9. The Respondent's case is, in essence, the Claimant did have issues with the implementation of IPM, that he raised a grievance which was addressed, and that he was subsequently disciplined due to his conduct, and that he was ultimately dismissed for failure to comply with a reasonable instruction.**
>
> **6.10. Having considered the correspondence and documentation directed to by the Claimant, it is clear that there has been a long running and extensive dispute between the parties. The Claimant is convinced that the reason for his dismissal is correct and sought to persuade me that perception was borne out by documents he took me to in the course of the Hearing. However, whilst the documents he took me to may be capable of the interpretation he puts on them, they are equally capable of an interpretation which would favour the Respondent's argument. The Claimant appeared to accept, when he made his submissions to me, that his claim of Section 103A dismissal was perhaps not as clear cut as he had first sought to argue. He said "My disclosures are candidates to meet the test - I think the disclosure after 14 August (there are 5 that predate 14 August) are likely to meet the test - they are progressively more likely".**
>
> **7. Conclusion**
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> **7.1. It is clear to me, having considered the material put before me that there are substantial areas of argument and dispute between the parties, both as to the interpretation of documentary material and to the underlying reasons for the conduct of the individuals in the course of this dispute. The numerous fundamental areas of dispute of this case are to be determined at a final Hearing. It is possible that the Claimant may be successful in establishing that the protected disclosure was the sole or principal reason for his dismissal, notwithstanding the Respondent's assertions to the contrary. It is, however; equally possible that the Tribunal will come to the conclusion that it was his conduct in failing to comply with the reasonable instruction which was the principal cause of his dismissal. In those circumstances I simply cannot come to the view that it is likely that, on determining the complaint of automatically unfair dismissal under Section 103A ERA that the Tribunal will find that the reason for dismissal was that the Claimant had made protected disclosure or disclosures. For all those reasons, applying Section 129 ERA and the relevant case law, I dismiss the application for interim relief."**

13. Mr Benney appealed against that decision. He was represented in the EAT by no lesser an advocate than Karon Monaghan QC, who was appearing under the Employment Law Appeal Advice Scheme at a hearing in front of Langstaff J under Rule 3(10) of the **Employment Appeal Tribunal Rules**, i.e. an oral hearing to consider whether his appeal had any reasonable prospects of success after it had been decided, at the sift stage of the EAT's procedures, that it did not have such prospects. After considering the authorities Langstaff J concluded, having given anxious considerations to the submissions which Miss Monaghan had made, that Employment Judge Byrne had applied the right test and that the appeal had no reasonable prospect of success.

14. The next significant event is the settlement of the Claimant's unfair dismissal claims. On 23 December 2010 the Claimant signed and on 4 January 2011 the Treasury Solicitors signed an agreement, in what is commonly described as COT3 format under the auspices of ACAS pursuant to which he agreed in return for a payment of £128,000 gross to withdraw "the Proceedings" defined as, in effect, his existing claim to the Employment Tribunal, to procure the dismissal of that claim on withdrawal and to withdraw any outstanding application or appeal to the EAT arising from the proceedings and not subsequently to make or review any such application or appeal; see paragraphs 1.7, 2.1.1 and 2.1.2 and 2.1.3 of the agreement document. As a result, on 12 January 2011 Mr Benney's Tribunal claim was dismissed upon withdrawal. The agreement was a comprehensive agreement bringing to an end, in return for a substantial payment, all aspects of that claim. Subsequently, in 2011 the Claimant pursued a **Freedom of Information Act** application against DEFRA, as a result of which he eventually obtained disclosure of documentary material which he had not had before. There are three documents

which are said to have been relevant. They are: (1) minutes of a meeting held in 2008 and chaired by Dame Helen Ghosh, the Permanent Secretary of DEFRA; (2) a document entitled "Background Note" which is undated but which was clearly prepared after 24 November 2009 when DEFRA requested Mr Benney to enter into the undertaking to which I have referred earlier; (3) a document entitled "Assessment of current position re dismissal" dated 3 December 2009. The second and third of those documents had been disclosed in a redacted form in November 2010. In January and April 2012 they were, in response to the **Freedom of Information Act** application, disclosed in unredacted form.

15. I shall say something later about the extent to which it is relevant to consider the content of those documents, redacted and unredacted. For the moment it suffices to say that Mr Benney has, ever since they were disclosed in unredacted form, relied upon them as showing that the reason or principal reason for his dismissal was his protected disclosures and that the non-disclosure of those documents in full was evidence of a less than full and frank response by DEFRA to their original disclosure obligations. Indeed as a result of his conviction that DEFRA had behaved dishonestly in terms of the disclosure which had been made to him and DEFRA, Mr Benney sought to bring contempt proceedings against DEFRA, named individuals and the Treasury Solicitors (on the title page of the judgment of the Administrative Court only the employers rather than the employees of DEFRA appear but paragraph 1 of the judgment of Collins J refers to Mr Benney seeking to pursue individuals) based on their failure to disclose in full the two partially redacted documents to which I have referred. The Divisional Court, in that judgment, with which Hallett LJ agreed, expressed the following views:

> **"7. He has produced a document setting out 11 separate contempts, but they all essentially depend upon the same matter; namely, the failure to disclose the documents themselves and more particularly, the parts that were redacted. Having seen the documents, it is**

understandable why the view, even if it may have been wrong, was taken that the documents were covered by a combination of legal professional privilege and without prejudice, because there had been without prejudice discussions between the applicant, through his union representative, and the department.

8. Furthermore, so far as the involvement of the Treasury Solicitor was concerned, the memoranda to an extent were indications of what was going to be sought by way of advice. I am prepared for my part to accept for the purposes of this stage of consideration, but I make no final findings, that there ought to have been disclosure of most, perhaps even all, of the relevant documents, but to say that is far from establishing that there is a basis for allowing contempt proceedings to be pursued.

9. In order to establish contempt in circumstances such as this, it will be necessary to show that the failure to disclose was not only deliberate in the sense that the existence of the documents was known, but also, and this is crucial, that it was done knowing that they ought to have been disclosed and effectively, being a party, whether by one or more of those concerned in DEFRA or the Treasury Solicitor to an act which we know to be contrary to the requirement of disclosure to fail to disclose them. That, it seems to me, the applicant is unable to establish.

…

11. In all the circumstances, one can perhaps understand why Mr Benney is upset at the situation, but having read the documents, I am not able to see how their disclosure could have affected the decision of Byrne HHJ. It is the disclosure before him that is perhaps the most important because, as Mr Benney says, he was not able to establish his right to an interim payment. He would, he thinks, have been able to do so had Byrne HHJ seen these documents. I am afraid that for my part I am quite unable to accept that that is indeed the position.

12. Mr Benney was asked what the purpose was behind this application at this stage. He accepts, of course, that he has a personal interest because he feels that he has not been treated properly in the way that the litigation has been conducted, but he asserts that there is a public interest, and I mention it as well, because of the importance of indicating that the obligation to disclose is of paramount importance.

13. That is [well known]. I do not doubt that DEFRA and indeed all government departments are fully aware of their disclosure obligations. Indeed, the Treasury Solicitor has relatively recently taken steps to ensure by way of a document that departments are fully aware of the obligations upon them. The court has, from time to time, made that entirely clear.

14. It seems to me, I am afraid, that there really is, quite apart from anything else, no public interest requirement that this application should go ahead. It is not something which will do Mr Benney himself any good at this stage other than to, as he says, get a recognition that there was a failure to comply with the overall requirements of disclosure."

At the end of the judgment the Administrative Court sought to discourage Mr Benney from pursuing further the matters which he had raised.

16. Separately Mr Benney had made an application to the Information Commissioner for further disclosure by DEFRA. The Information Commissioner decided that Mr Benney's request was vexatious. On 10 October 2013 the First-Tier Tribunal General Regulatory

Chamber (Information Rights) rejected Mr Benney's appeal against that decision, saying at paragraph 29 that it was entirely clear that in relation to the alleged non-disclosure there had been no conspiracy or misconduct and at worst there had been a minor "cock-up" of no significance to the conduct of litigation.

17. Mr Benney has not made any attempt to have the settlement of his claim set aside; the agreement reached at the end of 2010 and at the beginning of 2011 remains effective.

18. Meanwhile Mr Benney had pursued another course to ventilate his concern about what he regarded as dishonest and conspiratorial non-disclosure. On 12 April 2012 he applied for a review of the interim relief decision reached by Employment Judge Byrne in May 2010. By that time Employment Judge Byrne was no longer an Employment Judge at the Reading Employment Tribunal, as he had been 23 months earlier; he had been appointed Regional Employment Judge in the East Anglia region and was based at Huntingdon. As a result the application was put before Regional Employment Judge Gay, the Regional Employment Judge for the region in which the unfair dismissal claim had been started and to which the application was made (hereafter "Judge Gay"). She decided that it was not practicable to put the application before Regional Employment Judge Byrne (hereafter "Judge Byrne") and to deal with it herself. She did so and dismissed the application, for reasons to which I will come, on 26 April 2012. Although her judgment did not say so, Mr Benney accepted that at that time the file relating to his unfair dismissal claim was no longer available; it had been destroyed; the subsequent decision of the former President demonstrates what I have always understood to be

the position, that the file in a claim to the Employment Tribunal is destroyed when that case is finally dismissed upon withdrawal.

19. Having received the decision of Judge Gay, Mr Benney applied to the Employment Tribunal for revocation or review of that judgment and applied to have that application considered by a Judge other than Judge Gay. All those subsequent applications were also rejected. He then appealed against the following four decisions: (1) Judge Gay's judgment refusing him an extension of time in her judgment of 26 April 2012; (2) in the same judgment refusing his application for a review; (3) the refusal of the Employment Tribunal to revoke or review Judge Gay's judgment; and (4) the refusal to grant a preliminary consideration of his application for a review of that judgment.

20. I will complete the history before turning to the criticisms of Judge Gay's judgment, as I must. Those appeals to the EAT were rejected at the sift stage of the EAT's procedures by HHJ Shanks. As he was entitled to do, Mr Benney sought an oral hearing under Rule 3(10) of the **EAT Rules**. That hearing took place before HHJ Serota QC on 24 April 2013; the learned Judge was good enough to explain the history and his conclusions in detail in a judgment which he said he was giving for the purpose of informing others of the reasons why he was allowing certain aspects of the appeals to go through to a Full Hearing. I am grateful to Judge Serota for taking the time and trouble to do so; his judgment has been of considerable assistance to me in gaining an understanding of the complex history which I have attempted - I fear at some considerable length - to summarise and of the reasons why these appeals have been permitted to proceed, in part, to the Full Hearing which took place before me.

21. Judge Serota permitted three grounds of appeal against Judge Gay's review decision to go through to a Full Hearing. They are:

> **"(A) Did Regional Employment Judge Gay have jurisdiction to entertain the preliminary consideration of the Claimant's application for a review of the decision of Employment Judge Byrne by reason of it being practicable as opposed to impracticable for Employment Judge Byrne to have undertaken the preliminary consideration.**
>
> **(B) If Regional Employment Judge Gay lacked jurisdiction, was her decision a nullity.**
>
> **(C) If the decision of Regional Employment Judge Gay was not a nullity was her refusal to extend the time for making the application, for a review outside the proper exercise of her discretion."**

All other grounds of the appeals were withdrawn. It is clear from Judge Serota's judgment that he concluded that grounds A and B were arguable but was not to be taken as expressing a view as to the ultimate merits of Mr Benney's arguments; and as to ground C he allowed the appeal on the merits to go through on the basis that he did not want to deprive Mr Benney of the ability to argue that the Judge was wrong to refuse to extend time.

22. In the final part of this account of the history, I turn to the other appeal before the EAT. In about May or June 2012 (the precise date is not clear to me) Mr Benney sought a number of remedies from the Employment Tribunal. Probably because it was thought that he was complaining about the conduct of one or more of the Judges or members of staff of the Tribunal who had been involved in his case, the correspondence was put before the then President. It is not in dispute that one remedy which he sought was a preparation time order under Rule 42 of the then **Employment Tribunals Rules** in respect of the hearing of his interim relief application in 2010. It appears that he was also making an application under Rule 10, i.e. by way of the exercise of case management powers, that DEFRA should provide a witness statement or something similar about the course of events relating to disclosure.

23. On 25 July 2012 the President wrote to a letter to Mr Benney in which he rejected the applications on the ground that there was no live claim in the course of which any application could be made.

24. By the second appeal Mr Benney appeals against that decision of the President. The appeal was considered at the sift stage of the EAT procedures by HHJ Clark, who rejected it principally on the basis that it was not a judicial decision. At the Rule 3(10) hearing Judge Serota concluded that, in the light of the EAT's decision in **Grant v In 2 Focus Sales Development Services Ltd** (EAT/0310 & 0311/06 Elias P presiding, judgment 30 January 2007), that it was arguable that the decision of the President was a judicial decision. He therefore allowed the second appeal to go through to a Full Hearing.

The Review Application

25. Three issues arise under the first appeal, that against the decision of Judge Gay. They are: (i) the "practicable" issue. Was she entitled to conclude that it was not practicable for Judge Byrne to consider the application? (ii) If she erred in so concluding, what was the effect of that? Did that render her decision a nullity, as Mr Benney contends, with the effect that other reasons for the rejection of the application are irrelevant? Or does her decision, insofar as it was based on other grounds, stand - subject to any attack on those other grounds? (iii) The merits issue - did the Judge err in law in reaching the conclusion which she reached on the merits of the application? Basing himself on the nullity point, Mr Benney argues that I should not and cannot enter into the merits arguments.

26. Before I turn to consider each of those issues, I need to set out the basis of the decision from which those issues arise and the terms of the rule which applied.

27. The relevant rule is Rule 35 which, insofar as it is relevant, is in these terms:

> **"(1) An application under rule 34 to have a decision reviewed must be made to the Employment Tribunal Office within 14 days of the date on which the decision was sent to the parties. The 14 day time limit may be extended by [a chairman] if he considers that it is just and equitable to do so.**
>
> **(2) The application must be in writing and must identify the grounds of the application in accordance with rule 34(3), but if the decision to be reviewed was made at a hearing, an application may be made orally at that hearing.**
>
> **(3) The application to have a decision reviewed shall be considered (without the need to hold a hearing) by the [chairman] of the tribunal which made the decision or, if that is not practicable, by -**
>
> > **(a) a Regional [Chairman] or the Vice President;.**
> >
> > **(b) any chairman nominated by a Regional [Chairman] or the Vice President; or**
> >
> > **(c) the President;**
>
> **and that person shall refuse the application if he considers that there are no grounds for the decision to be reviewed under rule 34(3) or there is no reasonable prospect of the decision being varied or revoked."**

28. I need to set out a substantial proposition of the judgment of Judge Gay which was as follows:

> **"1. Under cover of an e-mailed letter received on 13 April 2012 the claimant made an application for review of the judgment rejecting his application for interim relief, promulgated to the parties on 14 May 2010. He had sent a series of e-mails from 5 April 2012, initially referring mainly to his application to the Attorney General to have the respondent prosecuted for contempt of court and mentioning, almost as an aside, that he felt it was too late to proceed with an application for review. On 19 April he notified the tribunal that there was to be no prosecution and that the review application could therefore proceed unimpeded.**
>
> **2. Rule 35(1) Employment Tribunal Rules 2004 ('the Rules') provides that the primary time limit for presenting an application for review is within 14 days from the date on which the judgment is promulgated, but this may be extended if it is considered just and equitable. Rule 35(3)(a) of the Rules provides for preliminary consideration of an application for review without the need to hold a hearing. The application is to be rejected if it is considered that there are no grounds within rule 34(3) for a review or if there is no reasonable prospect of the judgment being revoked or varied. The preliminary consideration of a review application is to be by the judge who made the original decision unless that is not practicable in which case it is to be done by the regional employment judge or a different judge appointed by the regional employment judge.**

3. In the present case it is not practicable for the preliminary application to be carried out by the employment judge who made the original decision because he has left the region. I therefore determine it as the regional employment judge for the London North and West region which includes Reading Employment Tribunals where this case was heard.

…

5. The basis of the review application is that the claimant has new evidence about which he could not reasonably have known at the time and/or that the interests of justice require a review.

6. The new evidence is part of a note created by Teresa Newell, deputy director, employment relations and engagement for strategic HR within the respondent on 3 December 2009. A heavily redacted version of it was disclosed by the respondent in November 2010 as part of case preparation. The claimant obtained a further, less heavily redacted version on, he says, 2 April 2012, pursuant to a freedom of information request. He made that request, he further says, because he was planning to sue his union for breach of contract and professional negligence.

7. The claimant submits over 24 pages that:

> **7.1. He could not have known of or obtained the material earlier. It only came to light because he was contemplating suing his trade union;**
>
> **7.2. The material was improperly redacted when disclosed in November 2010 (indeed, in a separate application the claimant suggests that it was a contempt of court) and would have been probative evidence because one sentence in the previously redacted paragraphs casts doubt on the reason for his dismissal asserted by the respondent. So it would have increased his prospects of succeeding at the interim relief application and with a continuing income he would not have been in such dire financial straits that he settled his claim, as he now asserts, below its value.**

8. The previously-redacted paragraphs of the 3 December 2009 note relate to an unsuccessful attempt to compromise the then-existing dispute between the claimant and the respondent, shortly before his employment actually terminated. They summarised the position, as the respondent saw it, in respect of a series of without prejudice discussions and correspondence apparently instigated by the claimant (at least in part through or with his union representative) with a view to the agreed termination of the employment and the resolution of possible legal claims. Ms Newell records that the claimant required a compulsory early departure package and the immediate resignation of two of its employees with whom he had been at odds - and then included the sentence on which the claimant now seeks particularly to rely, as follows:

> **'I believe that this, together with Mr Benney's previous grievance related to the fact that he was prevented from applying for VER/S under the 2007 scheme, casts doubt on his commitment and interest in continuing to work for [DEFRA].'**

Consideration of the application

9. I now consider the factual basis of the application on the basis of the law. Neither strand of the submission summarised at paragraph 7 above is persuasive. Each fails for two separate reasons.

10. As to 7.1, first, it was always open to the claimant to make a freedom of information request. The proposed action against the union relates to the termination of his employment/his loss of wages, so it is not a recent matter but founded on the very events with which his tribunal claim was concerned. He has not said when he made the request. Second, the claimant knew from November 2010 that the 3 December 2009 note was about the decision to dismiss him and that it had been partially redacted so that he did not have all of it. He could not have known what it said, but he knew there was undisclosed material relating to the dismissal. I am in the dark as to when he took further steps to obtain further papers including this note, outside the litigation, but I consider it highly unlikely that the freedom of

information process took more than a year to provide him with the note. There must have been considerable delay initially.

11. As to 7.2, I am clear from reading the paragraphs helpfully highlighted by the claimant that they were properly redacted and would never have been the subject of a disclosure order in the litigation. If they had otherwise come into the claimant's hands, they would not have been admissible in evidence. The relevant paragraphs relate entirely to material that was properly marked without prejudice: they describe off-the-record attempts to resolve a dispute between parties which, because it was not resolved, gave rise to the litigation that was contemplated at the time. The covering email refers to consideration of the legal position. Indeed, it may be that Ms Newell was giving or passing on an opinion on the legal position to decision-makers within the respondent, which might engage legal professional privilege. These paragraphs do not reveal iniquity or impropriety or anything which would cause privilege to be waived.

12. The second point in relation to 7.2 is merits-based and independent of the first. Quite simply, the sentence on which the claimant seeks to rely does not bear the weight, importance or meaning which he seeks to give it. It does not suggest any reason other than the one repeatedly given by the respondent for the dismissal, namely (as, for example, at the top of the 3 December note) that the trust and confidence necessary between employer and employee in an employment relationship had irretrievably broken down. Even if it could possibly begin to do so, it does not go any distance towards meeting the high burden which the claimant bore at the interim relief proceedings in the employment tribunal."

29. She therefore concluded at paragraph 13:

"In the circumstances the application for review of the judgment is rejected because:

- it is made almost 22½ [months] out of time without adequate explanation for delay. There must be finality in litigation and it is not just and equitable to extend time in the absence of a proper explanation. Further or alternatively, since the application is so weak it would be unjust and inequitable to require the respondent to incur expense in respect of it; and further or alternatively again,

- there is no ground under rule 34(3), because the intended new evidence is inadmissible and/or wholly unpersuasive, and no reasonable prospect of the judgment being revoked or varied."

The "Practicable" Issue

30. I have already set out the terms of Rule 35(3) of the **2004 Rules**. The word "practicable" in that sub-rule is repeated in the **2013 Rules**, in the context of "reconsideration" which has replaced "review"; see Rule 72(3). Mr Benney submits that the word "practicable" in those sub-rules does not mean "suitable" or "convenient" but that it means "feasible"; he contends that it was wholly feasible for Judge Byrne to undertake preliminary consideration of his application for a review and to decide whether a review should be permitted to proceed. It is

only not feasible or not practicable for the Employment Judge who made the decision in respect of which the review is sought to decide upon a review application if he has retired, is incapacitated or has died; if he is not beyond the reach of postal or electronic communication, he must deal with the application, it is submitted, because it would not be impracticable for him to do so.

31. Mr Benney supported that construction by reference to two decisions of the EAT upon the meaning of "reasonably practicable" or "not reasonably practicable", which has, since the origin of unfair dismissal jurisdiction, been relevant to the three-month time limit for a claim made under that jurisdiction (and others). So far as unfair dismissal is concerned, that provision is to be found in section 111(2) of the **1996 Act** which provides:

> **"[Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal -**
>
> > **(a) before the end of the period of three months beginning with the effective date of termination, or**
> >
> > **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."**

32. The first of those authorities is **Singh v Post Office** ([1973] ICR 437), in which the EAT, presided over by Sir John Brightman, held that "practicable" in the provision then equivalent to the current section 111 of the **1996 Act** but without the extra word "reasonably" which was added in 1974, meant "feasible". There are many other decisions post 1974 to that effect, particularly those of the Court of Appeal in **Palmer v Southend on Sea Borough Council** ([1984] ICR 372) and in **London Underground Ltd v Noel** ([1999] IRLR 621), in which Gibson LJ said that the jurisdiction to extend time on a not reasonably practicable basis was not

to be exercised on the basis of "in all the circumstances" or on the basis of what is just and reasonable.

33. Thus the test to be used in a section 111 case and the meaning of "practicable" in that section are clear; and Mr Benney submitted that on the facts of this case, on any permissible construction of the word "practicable" in Rule 35(3) which did not include the word "reasonably", it was practicable for Judge Byrne to consider his application and, it followed, Judge Gay should not have done so. He put his arguments at greater length and in greater detail but will, I hope, accept that I have correctly summarised their central thrust.

34. On behalf of DEFRA Mr Tolley submitted, by contrast, that there is no authority on the meaning of "practicable" in Rule 35(3) or of its statutory replacement. He suggests that some assistance can be derived from the decision of the EAT in **Purohit v Hospira (UK) Ltd** (EAT/0361/11, HHJ McMullen QC sitting alone, judgment 18 April 2012) in which it was held that on a review application the Employment Tribunal had a discretion to call for input from the Respondent before deciding whether to reject a review application at the preliminary consideration stage. However I do not see that Mr Tolley can properly derive any help from that decision. The EAT concluded, at paragraph 28, that the Employment Judge had power to call for submissions from the Respondents under the case management rule, Rule 10. It is difficult to take that decision further than as an example of the need to approach Rule 35(3) pragmatically.

35. More persuasive are Mr Tolley's submissions that:

(1) Judge Gay had to exercise a discretion or make a factual finding as to whether it was practicable for the application to be put before Judge Byrne; and her decision should not therefore be overturned unless an error of law or perversity was made out.

(2) The proper construction of "practicable" in Rule 35(3) is informed by the overriding objective - which brings into consideration issues of proportionality, expedition, fairness and the saving of expense.

(3) Consideration of those matters leads to the conclusion that it was open to Judge Gay to base her decision on what was sensible or practicable.

(4) In the light of the time which had passed, namely just under two years, the possibility that Judge Byrne would be able to bring any valuable knowledge to bear on Mr Benney's application which Judge Gay could not was, on any realistic basis, non-existent. No file could have been available to him. He would not have been in any better position to carry out preliminary consideration of the review application than was his colleague who did so.

36. I have come to the conclusion that Mr Tolley's submissions are to be preferred. The comparison with the section 111 jurisdiction is, in my judgment, not compelling. Under that jurisdiction the Employment Tribunal and appellate courts have always been concerned that it relates to a time limit which, in the interests of finality and the avoidance of late claims, needs to be strictly applied. The statutory exception to the primary time limit is to be applied, according to the authorities, in narrow circumstances and is different from the three-month time limit which exists in a discrimination case where the time limit can be extended if it is held to be just and equitable to do so. The difference between the two statutory time limits and

exceptions underlines the narrowness of the exception in unfair dismissal cases and those which are subject to the same or similar provisions as to time. However it is worth mentioning that although it was not expressly referred to in any event before me, I hope to be forgiven for mentioning **Dedman v British Building** ([1974] ICR 53) in which Lord Denning MR and Scarman LJ agreed, in consulting the predecessor of section 111 in the **Industrial Relations Act 1971**, in which the word "practicable" was not moderated by "reasonably", that "practicable" had to be given a liberal construction and had to be applied with the exercise of common sense.

37. Under Rule 35(3), the issue relates to a very different concept from that of time limits; it is whether one Judge or another should address the preliminary consideration of an application for review; and the same test is provided, if a review is granted on preliminary consideration, for the hearing of that review itself; see Rule 36(1).

38. The question as to which Judge should hear - or in an appellate context should have heard - a review application, in my judgment necessarily brings into play the words of the overriding objective. What is practicable has to be considered in terms of dealing with the review application expeditiously, proportionately, fairly and in such a way as to save expense. I should add that, in his oral argument, Mr Benney expressly accepted that in considering the practicability issue for the purpose of Rule 35(3) the overriding objective was relevant.

39. Whether it is in any individual case practicable for the original Judge to decide upon the application for review must be a question of fact, to be decided in all the circumstances. I do

not accept that the circumstances in which it can properly be said to be impracticable for the original Judge to hear and consider the review application are limited to cases where the Judge has retired, died or is too ill. The words of the rule embrace wider considerations. They can, when properly applied, permit another Judge to decide that it is not practicable for the case to be sent back to the original Judge if the original Judge is away from work for a lengthy period to care for a family member or on a sabbatical or if the original Judge is involved in an extremely heavy and difficult case and does not feel able to give his attention to another case which may involve considerable detail.

40. That the issue is one of fact can be seen from an examination of how the issue should be approached if the original Judge were, for example, to be ill at the time that the application for a review is made. The length or expected length of his absence from work would be relevant. So would the extent to which papers, authorities and other documentation would have to be considered. A Judge who was away from work but not ill, or not so ill, that he could not look at a file might be willing to take an application which could be looked at and resolved briefly; but it might be thought to be impracticable to ask him to do so if the application was of greater substance.

41. In this case the original Judge had moved away from the region in which the proceedings had been commenced and continued. The file had been destroyed. There was no reason to think that the original Judge would be able to bring anything substantial to the consideration of the review application 23 months after his original decision. Under Rule 35(1) an application for a review should be made within 14 days of the date on which the decision of which review

is sought was sent to the parties, subject to extension on a just and equitable basis. If an application for a review is made within that time, the original Judge would, of course, be expected to have some recollection; but here the gap between Judge Byrne's decision and the application for a review was one of just under two years. It is true that in paragraph 3 of her judgment Judge Gay referred only to the fact that Judge Byrne was now in a different region; but she had referred to the relevant dates in paragraph 1 of her judgment and to the fact that the file had been destroyed in paragraph 4. At paragraph 7 she referred to the fact that the application was made over 24 pages; these were relevant facts which she was entitled to take into account; and her judgment must be read as a whole, according to well-known principle. She was considering a matter of fact and degree; she could only be said to have erred in law if she reached a decision which was perverse; i.e. one which has been clearly demonstrated to have been a decision which she could not reasonably have reached. See the decision of the Court of Appeal in **Yeboah v Crofton** ([2002] IRLR 634) at paragraph 93 per Mummery LJ. Mr Benney has not persuaded me that her decision falls within that category.

42. I should add that it is possible that the merits of the application might also affect practicability. If the application were patently hopeless, why could it not be said to have been impracticable to take up another Judge's time with what was already being considered by a Regional Employment Judge? I do not, however, need or intend to build that factor into my conclusions on this issue; and I do not do so.

Nullity

43. I now turn to consider whether, if I am wrong in my conclusion on the practicability issue and if Judge Gay erred in her conclusion on that issue and should have transferred the application to the original Judge, her decision upon the review application was a nullity.

44. Mr Benney submits that she could only address his application under Rule 35(3) if, as a matter of objective fact, it was not practicable for the original Judge to consider his application. The impracticability of his considering the application was, he submits, a precedent or antecedent fact to the carrying out by another Judge other than the original Judge of the judicial function of considering the application under Rule 35. The importance of the point is that if Judge Gay was wrong in deciding that it was impracticable to refer the application back to Judge Byrne, her decision must be regarded as a nullity and of no effect; and thus the facts that she rejected the application and the extension of time sought on the merits and at a time when Mr Benney's unfair dismissal claim stood dismissed pursuant to the compromise agreement which Mr Benney had made and had not sought to set aside was irrelevant; the error as to impracticability was fatal.

45. In his written submissions and orally Mr Benney referred to a number of authorities. For reasons which will become clear I do not need to refer to them all, although I assure Mr Benney (again) that I have considered all the authorities in the agreed bundle, in his supplemental bundle, and subsequently sent to me. I propose to refer briefly to the authorities to which Mr Benney took me in the course of his oral submissions. I need to state, though, that authorities as to duties of disclosure, such as **Birds Eye Walls Ltd v Harrison** ([1985] IRLR 47) or as to

an error of law which is corrected on appeal, e.g. **Martins v Marks & Spencer plc** ([1998] IRLR 326) or **Bache v Essex County Council** ([2000] IRLR 153) are of no assistance for present purposes. Although his claim that DEFRA's failure to make a proper disclosure is at the heart of Mr Benney's purpose in pursuing the present and other proceedings, I am not concerned, so far as this point is concerned, with the rights or wrongs of the alleged non-disclosure.

46. The first authority to which Mr Benney took me on this part of this appeal is **R v Shoreditch Assessment Committee ex parte Morgan** ([1910] 2 KB 859). The lessee of a public house asked, in effect, for a reconsideration of the Poor Rate levied on the premises on the grounds that the value of the premises had been decreased as a result of a substantial increase in the licence duty payable. The application was made to the parish overseers who were statutorily obliged to send a "provisional list" to the relevant assessment committee; if they did not do so, that committee had to appoint a person to provide such a list. The overseers did not obtain a provisional list; and the assessment committee decided without such a list that there had been no reduction in the value of the premises such as to justify the appointment of a person to make a provisional list. The Court of Appeal upheld the decision of the Divisional Court that the assessment committee had no jurisdiction themselves to decide the issue of reduction in value.

47. At page 879 Farwell LJ said:

> **"The existence of the provisional list is a condition precedent to their jurisdiction to hear and determine … No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court …"**

48. The situation in that case differs from the present situation because, as the Court of Appeal held, the assessment committee had no jurisdiction at all to act as they did. There was a statutory prerequisite to their acting at all, namely the making of a provisional list. The Employment Judge in the present case was required as a judicial act to determine whether reference of the application to the original Employment Judge was impracticable and, in order to do so, she had to exercise case management powers. In addition to the issue of impracticability, she also had to consider delay and merit. If she erred in law, then her decision would be open to appeal to the Employment Appeal Tribunal and thereafter through the standard appeal process enshrined in statute. In my judgment, the existence of impracticability was not a condition precedent to all that followed; it was simply one of the issues which the Employment Judge had to decide.

49. Mr Benney then took me to the well-known decision of the House of Lords in **O'Reilly v Mackman** ([1983] 2 AC 237). The issue there was whether the plaintiffs could proceed by ordinary writ or originating summons to claim that decisions of a prison board of visitors imposing penalties on them were void and of no effect by reason of breach of the principles of natural justice or whether they were restricted to seeking relief by way of judicial review, for which they were out of time. In the House of Lords, Lord Diplock, with whose speech the remainder of their Lordships agreed, at pages 275H to 276B referred to the well-known distinction in administrative law between a mandatory and a directory procedural requirement in these terms:

> **"… In exercising their functions under rule 51 members of the board are acting as a statutory tribunal, as contrasted with a domestic tribunal upon which powers are conferred by contract between those who agree to submit to its jurisdiction. Where the legislation which confers upon a statutory tribunal its decision-making powers also provides expressly for the procedure it shall follow in the course of reaching its decision, it is a question of construction of the relevant legislation, to be decided by the court in which the decision is challenged,**

> **whether a particular procedural provision is mandatory, so that its non-observance in the process of reaching the decision makes the decision itself a nullity, or whether it is merely directory, so that the statutory tribunal has a discretion not to comply with it if, in its opinion, the exceptional circumstances of a particular case justify departing from it. …"**

50. He held that the requirement of natural justice in the course of disciplinary proceedings was so fundamental that a failure to observe natural justice would render a decision reached as a result of such failure void; but all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review; and public policy required that the plaintiffs should have proceeded by that manner.

51. Mr Benney relied in particular on the paragraph in the speech of Lord Diplock at page 283E to F in which he said:

> **"This reform may have lost some of its importance since there have come to be realised that the full consequences of *Anisminic* case, in introducing the concept that if a statutory decision-making authority asks itself the wrong question it acts without jurisdiction, have been virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void ab initio provided that its validity was challenged timeously in the High Court by an appropriate procedure. Failing such challenge within the applicable time limit, public policy, expressed in the maxim omnia praesumuntur rite esse acta, requires that after the expiry of the time limit it should be given all the effects in law of a valid decision."**

But that paragraph does not, in my judgment, assist in the present case. There is not in this case a public law issue; nor is it a case in which it can be said that the Employment Judge asked herself the wrong question. She considered the correct question. **O'Reilly v Mackman** does not, as I see it, help Mr Benney towards the conclusion which he seeks, namely that if Judge Gay made an erroneous decision of fact on impracticability that had the effect that the remainder of her decision was a nullity.

52. In **R v Croydon LBC and R v Lambeth LBC** ([2009] 1 WLR 2557) the House of Lords had to consider the duty of a local authority to provide accommodation for children in need. The statutory words imposed such a duty in the case of "any child in need in their area who appears to them to require accommodation"; see the **Children Act 1989**, section 20(1). It was held that, although it was for the local authority to decide whether a child seeking accommodation was in need, whether the applicant was a child was a fact precedent to the local authority's powers under the **Act** and any issue as to that was subject to ultimate determination by the Court.

53. I do not doubt that the "fact precedent" principle can arise in the field of consideration of the powers of an administrative or quasi-judicial body such as a local authority; I do not see, however, any persuasive parallel between what was or was not within the powers of a local authority to consider under the **Children Act** on an issue such as that which I have set out and an issue which an Employment Tribunal, which is not an administrative or quasi-judicial body, has to decide pursuant to its rules; and my hesitation over Mr Benney's courteous but persistent attempt to persuade to liken the present case to the situations in the decisions to which I have referred was well-founded; for Mr Benney next drew my attention to the decision of HHJ McMullen QC in the EAT in **Manning v British Telecommunications plc** (EATPA/1033/05, judgment 15 March 2006). One of the matters which Judge McMullen considered in what was another hearing under Rule 3(10) of the **EAT Rules**, was whether there was any merit in the Appellant's complaint that the preliminary consideration of his review application under Rule 35 was carried out not by the Employment Judge who had heard the original case but by that Employment Judge together with one of the Tribunal members who had sat with him at the

original hearing. Mr Benney submitted that the EAT had decided, at least provisionally, that the preliminary consideration had involved an irregularity and that it was open to me to hold that that irregularity caused the decision to be a nullity. A closer look at the EAT's judgment reveals that, at paragraph 43, it was concluded that the hearing before the Employment Judge and his colleague was a full Review Hearing and not a preliminary consideration, but at paragraphs 43 to 46 the EAT said:

> **"43. In substance and in reality, a review was conducted by the full Tribunal [properly constituted as it then was of the Chairman and one member]. I am well aware from the passages I have referred to above that the language is contra-indicative. But this case took place over two days, the Respondent put in written submissions which were considered, the Claimant had an opportunity to put the material which he wanted before the Tribunal. I have never seen a two-day preliminary consideration for a review and as I look at the six pages of this judgment, it leaves me with the impression that this was, indeed, a review. If that is so, as Mr Manning accepted, he would not have had a complaint. He also accepted that he could not complain of having a hearing, which is what he did, where the Respondent was not there to cross-examine him [and address oral submissions to the tribunal]. As a matter of law, the Chairman was required to order a review if he did not reject it for Rule 35(4) provides that "If the application for a review is not refused the decision shall be reviewed". It was not refused by the Chairman but steps were taken to list a hearing. The application must therefore have passed the preliminary stage and what occurred could only be a review.**
>
> **44. If I am wrong, I am anxious to take a practical approach to this case which is proportionate to the issue raised by the Claimant. That is £80 of costs incurred in photocopying and some unquantifiable additional stress. One way is to consider that the preliminary consideration of this was taken by the Chairman, albeit in company with the lay member, Mrs Thurston. That does not get over the Claimant's criticism that the Respondent had an input into it. However, I do not regard that as fatal. It would have been open to the Chairman in Chambers to have called for assistance from the Respondent. There is no bar to that; there is no proscription on the way in which the Chairman should conduct a preliminary consideration. A hearing may be conducted; representations may be sought.**
>
> **45. In my judgment, the preliminary consideration was, in fact, undertaken by the Chairman, albeit with Mrs Thurston there and the judgment is not to be reduced to a nullity by what might appear to be the irregularity in relation to Rule 35(3). I can see no disadvantage in a Chairman who wishes to have the contribution of members to the decision to conduct a preliminary hearing on a review doing just that and so I would reject the technical complaint.**
>
> **46. In any event, it seems to me that the way in which the Tribunal has approached its own reasons is a sufficient justification for this case. It has enabled me to add the reasons in this judgment to the substantive reasons and to assist the conclusions which I have made. As I have indicated, the Claimant was successful in some of the points he made. I, too, must consider the overriding objective. To all intents and purposes, the Claimant has had a review of the judgment at which he has failed. Since he has failed on the substantive judgment, it is clear that there is no reasonable prospect of success of the appeal on the review, the Tribunal having taken all steps which it felt appropriate to adjust its reasons in the light of the application which was made to it. The appeal against the review is dismissed."**

54. In those paragraphs the EAT was clearly expressing the view that the irregularity created by preliminary consideration of the review application (if that is what had occurred) by the Employment Judge and one of his members did not render the decision a nullity and that the overriding objective had a part to play in considering the effect of that irregularity. It would of course be a mistake to put too much weight upon that judgment on a Rule 3(10) hearing in which the Appellant was in person and the Respondents were, of course, not represented. However, having put that decision before me, Mr Benney expressly accepted - and I made a particular note of his acceptance - that in deciding whether there had been an irregularity which rendered the decision of Judge Gay a nullity I was entitled to take into account the answer to the question - would the identity of the Judge who considered his application have made any difference to the outcome - and that the overriding objective would be a relevant factor in deciding whether the irregular decision should be said to be a nullity.

55. It is important that I should take care before proceeding on the basis of an apparent concession made by a litigant in person; but Mr Benney is a litigant in person with lengthy experience and detailed knowledge of the law; and the concession which he made was, in my judgment, appropriately made. It represented what, in my judgment, is the correct law; and applying that correct law I have no doubt that Judge Gay's decision was not a nullity if she was in error on the issue of practicability. All the points relating to the overriding objective which I made in considering the practicability (whether rightly or wrongly) are relevant to considerations of the effect of the decision which is now appealed against. It has not been demonstrated that, after the expiry of nearly two years, Judge Byrne would have been in a better position to decide upon Mr Benney's application than was Judge Gay. The preliminary

consideration contemplated by Rule 35(3) is ordinarily carried out on paper; the rule itself expressly prescribes that there need not be a hearing; either Judge would have had the same papers before him or her and no others. A decision on the part of Judge Gay not to go ahead with a paper consideration of the application which was in fact in front of her and to set in motion the process of seeking to transfer it out of the region and to Judge Byrne would have caused delay and some administrative cost; and the application was made ostensibly as part of proceedings which had been finally compromised and, in effect, no longer existed. I adopt, into my reasoning here, all that I said about the considerations to which the overriding objective gives rise earlier in this judgment.

56. Mr Tolley relied, in addition to **Manning**, on a different argument, based on the decisions of the Court of Appeal, in **Coppard v Customs and Excise Commissioners** ([2003] QB 1428) and **Baldock v Webster** ([2006] QB 315). In **Coppard** the Claimant claimed damages for breach of contract in the Queen's Bench Division of the High Court. Liability was admitted; and there was to be a hearing to assess damages. Without objection, the assessment was made by a circuit Judge who had been appointed to the Technology and Construction Court. Judges of that court regularly sit as Judges of the Queen's Bench Division; but by an oversight the particular circuit Judge who made the assessment of damages had not been formally appointed to sit in that division. The Claimant was awarded only nominal damages; he discovered the defect in the Judge's appointment; and the Court of Appeal had to consider its effects. The Court of Appeal held that there was an established doctrine of a "Judge in fact" or "Judge de facto" which applied to validate the decision of a Judge who was believed to have authority to sit and decide the case in question and did not know and had not shut his eyes to the

obvious that he lacked that authority; see paragraphs 24 and 40 of the judgment of the court. The purpose of the doctrine was the maintenance of stability and confidence in the legal system and the interests of certainty and finality; see paragraphs 8, 16 and 32 of the judgment of the court.

57. In **Baldock** a similar situation arose. A Recorder who had not been appointed to sit in the High Court, had listed before him, when he was sitting in the county court, a preliminary issue in a case which was proceeding in the local district registry. When the defect in his authority to sit came to light, the Claimant appealed. The Court of Appeal followed **Coppard** and applied the doctrine of the Judge in fact. Mr Tolley relied on paragraph 21 in which Arden LJ said:

> **"I agree with the judgment that Laws LJ has given. In applying the public policy to which Laws LJ Laws has referred, the public is also protected by the fact that the county court and the High Court are both parts of the established judicial system of England and Wales. The judge was a properly appointed member of the part-time judiciary, and, if grounds had existed, his decision could have been the subject of an appeal on its merits."**

He submitted that Judge Gay plainly believed that she had jurisdiction and that Mr Benney should not be permitted to undermine her decision on technical grounds and should be limited to attacking her decision on the merits.

58. There is, in my judgment, a clear distinction between a case in which a Judge believes that his appointment is such as to qualify him to hear the case before him and it later turns out that it was not - to which the "Judge in fact" principle may apply - and one in which the Judge makes a mistake in law or as to a precedent fact to his jurisdiction which has not been established, as in **R v Lambeth London Borough Council** (see above). There was no defect in Judge Gay's appointment. It could be said that the need for certainty and finality provides a

strong reason for concluding that, if it was not impracticable for Judge Byrne to deal with Mr Benney's application, as long as Judge Gay did not believe that it was not impracticable or turned a blind eye to the obvious - neither of which is alleged - she should be regarded as being de facto permitted to act as she did. On the other hand the lifting of what is a narrow and unusual principle from its role as set out in **Coppard** and **Baldock** should not, I suspect, be permitted to the extent that it could be made to apply to substantive issues between the parties as opposed to issues of authority and appointment. I am not prepared to go that far.

59. In any event I do not need to do so. In my judgment the nullity case fails for the reasons I have set out in paragraphs 53 to 55 above. For the reasons I there set out if, contrary to my first conclusion, Judge Gay erred in what she found as to impracticability, that does not render her decision as a whole a nullity; her decision can be upheld if Mr Benney's application would in any event have failed on other grounds.

Extension of time

60. Judge Gay dealt with that issue at paragraphs 9 to 13 of her reasons, which are set out at paragraph 21 above. She concluded that there had been considerable delay on Mr Benney's part and that the redactions did not have the weight which Mr Benney sought to put on them.

61. Mr Benney accepted that to make a successful attack on those conclusions he had to demonstrate perversity. I have earlier in this judgment set out the test for perversity.

62. It is helpful before turning to the arguments as to extension of time to extract from the long history which I set out in the early part of this judgment a brief chronology of the important dates which are as follows:

08/12/09	Dismissal
15/12/09	Presentation of ET1
05/05/10	Claim for interim relief heard by Employment Judge Byrne; judgment on 14/05/10
…/11/10	DEFRA disclose documents, including the three documents which were redacted
03/12/10	Settlement approved in principle
27/12/10	COT3 form signed
12/01/11	Employment Tribunal claim dismissed by consent
…/02/11	Settlement cheque paid
22/08/11	Freedom of Information request to DEFRA
11/01/12	Unredacted version of Background Note disclosed; described by Mr Benney as the "key breakthrough"
02/04/12	Unredacted version of assessment document disclosed
12/04/12	Application for review of decision of 14/05/10

63. Mr Benney's detailed submissions can be summarised, I hope not unfairly, in this way:

(1) The redactions were not justified by legal professional privilege. They were used by DEFRA to their advantage.

(2) Judge Byrne was misled by the redactions.

(3) Judge Gay was incorrect to consider that there had been considerable delay by Mr Benney in making the Freedom of Information request. The delay was caused by DEFRA'S equivocation.

(4) Judge Gay did not carry out any consideration of whether it was just and equitable to extend time.

(5) The view taken by the Judge that there was no merit in the application was based on a false premise; she failed to understand that Mr Benney had made his Freedom of Information request in order to gain material which he wished to use in a claim against his trade union; he had no reason to believe that there had been improper redactions. The Employment Judge had erred in principle in considering that there had been delay.

64. In the course of oral argument Mr Benney conceded that he had known of the redactions in November 2010; he did not know what had been redacted but did not challenge the redactions at a CMD which was heard on 26 November 2010. He asserted that he did not know that the redactions were "improper" - to use his word - until 2012.

65. Mr Benney referred me in particular by way of authority, to the decision of the EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board** ([2012] IRLR 4) in which the EAT, presided over by HHJ McMullen QC, at paragraph 122, in the context of an issue as to whether an application by a Claimant who had failed before the Tribunal to put in new evidence should have been made to the Tribunal rather than the EAT, concluded that the application should, if at all, have been made to the Tribunal. It was relevant to consider

whether such an application to the Tribunal had to be made within the 14-day primary period for a review application. At paragraph 122 the EAT said:

> **"There is a restricted window to make applications for review to an employment tribunal (14 days) but the logical conclusion of a right to make an application based on new evidence is that it can be made at any time, whereas applications based on the interests of justice arising out of some mishap at the tribunal will become known at the time or within 14 days thereafter. A preliminary consideration of an application for review is given by the employment judge who heard the case and unless he or she forms the view that one of the sub rules is not complied with or there are no reasonable prospects of success the review must be conducted, see rules 35(3) and 36(1)."**

66. I do not disagree with the conclusions set out in that paragraph; but I do not see how they can be said to get Mr Benney home. The fact that an application based on new evidence - and Mr Benney based his application on the discovery of the redactions and their impact - may be made at any time does not prevent the Tribunal from considering the nature and effect of delay in making it. Mr Benney also referred me to **London Borough of Southwark v Afolabi** ([2003] ICR 800), in which the Employment Tribunal had permitted the Claimant to proceed with his discrimination claim after a delay of nine years. The employer's appeal against that conclusion was dismissed by the EAT and their decision was upheld by the Court of Appeal. The Court of Appeal held that it was only in a wholly exceptional case that a Tribunal could properly conclude that, despite a delay of a magnitude approaching anything like nine years, it was just and equitable to extend time and it could not be shown that the decision to extend time was made in error of law. At paragraph 32 Peter Gibson LJ said:

> **"I think that it would have been better if the employment tribunal had delayed its decision on extending time until it had heard the evidence and submission on the substantive complaint. That complaint was within a relatively small compass with limited evidence to be called. But I am not able to go so far as to say that the employment tribunal was perverse or otherwise made any error of law in deciding to extend time before it went on to deal with the substantive complaint. That decision was one well within the proper ambit of its discretion."**

67. I am sure that Mr Benney will appreciate that a comparison of the length of delay in one case with that in another is unimpressive. He suggested that if Judge Gay had dealt with the delay issue separately from the other issues relating to the merits she would have reached a different conclusion; but he agreed that she was not obliged to approach the issues in that way. The exceptional facts in **Afolabi** do not assist Mr Benney, or me; cases in which the delay has been very short are regularly the subject of Tribunal decisions that time should not be extended; **Afolabi** assists me, in my judgment, only insofar as it demonstrates how difficult it is, in this area, to succeed in attacking a Tribunal's decision on appeal.

68. In my judgment Judge Gay was entitled to decline to extend time on the basis of delay. She did not reach her decision on the basis that Mr Benney had seen the redacted portion of the relevant documents long before he sought a review; he had not; she said that he knew that there had been redacted material relating to his dismissal and could have made his Freedom of Information request much earlier; there has been considerable delay initially. Nothing which Mr Benney has said or written persuades me that the Employment Judge, in paragraph 11 of her reasons, reached a perverse conclusion as to delay. The summary chronology I have set out shows that there was a delay between the disclosure of the redacted documents and the Freedom of Information application. It was Mr Benney's case that he had made that application for reasons which did not directly relate to and were not intended to support his unfair dismissal claim; but the whole history shows that he was deeply suspicious of DEFRA's actions in relation to him; he could have sought to obtain the unredacted versions of the documents earlier; he could have done so before he entered into the settlement. Judge Gay said that she was in the dark as to when Mr Benney took further steps to obtain further papers; but the

chronology I have set out shows that he received an unredacted copy of the Background Note in January 2012. Thereafter there was further delay; but I accept that Judge Gay did not specifically identify that delay.

69. In the circumstances I have set out, I am wholly unpersuaded that, in relation to delay, Judge Gay reached a conclusion which no reasonable Judge could reach. Perversity has not been established. Nor do I accept the argument that she did not exercise her discretion to extend time for making of a review application on a just and equitable basis. In paragraph 13 she expressly concluded that it was not just and equitable to extend time in the absence of a proper explanation of delay.

70. In relation to the merits Mr Benney relied upon what Judge Serota had said about the possible importance of the redactions at paragraphs 13 and 14 of his judgment on the Rule 3(10) hearing in these appeals. Mr Benney submitted that the redactions concealed a demonstrable connection between the dismissal and his protected disclosures.

71. Mr Tolley pointed out that that issue had been considered by the Administrative Court in the contempt proceedings which I have earlier described and which were based on the asserted failures of disclosure. The Administrative Court decided that the contempt proceedings should not be permitted to go ahead. Collins J said at paragraph 11:

> **"11. In all the circumstances, one can perhaps understand why Mr Benney is upset at the situation, but having read the documents, I am not able to see how their disclosure could have affected the decision of Byrne HHJ. It is the disclosure before him that is perhaps the most important because, as Mr Benney says, he was not able to establish his right to an interim payment. He would, he thinks, have been able to do so had Byrne HHJ seen these documents. I am afraid that for my part I am quite unable to accept that that is indeed the position."**

72. The issue had also been considered by the First-Tier Tribunal, as I have, again, already set out. That Tribunal's decision, dated 10 October 2013, need not be cited; I have already set out the most relevant conclusion for present purposes, at paragraph 29.

73. Mr Tolley submitted in his Skeleton Argument that the conclusion of the Administrative Court created an issue estoppel; but that point of law was not considered in any detail before me; and Mr Tolley eventually adopted the position that the issue estoppel might become relevant if I decided to allow the appeal and there was a remission. Mr Benney submitted that there was no issue estoppel because the Administrative Court was deciding only whether there were grounds for his contempt application to go forward. However I need not consider the conclusions of the Administrative Court further beyond saying that I am not, in my judgment, bound by the conclusions of that court as to the nature and effect of the redactions. Nevertheless, having considered them I have come to the same conclusion. I have been through the relevant documents again. I cannot see that the redacted parts of the Background Note document would have assisted Mr Benney in his interim relief application. The redacted portion of paragraph 3 of that document sets out a history which led to without prejudice discussions following his having carried out a campaign against the Department. The reference to that campaign was not redacted. What was redacted was that part of paragraph 3 which dealt with the settlement process which followed. It is true that there is a reference in that part of the paragraph to Mr Benney's being unable to apply for voluntary early departure in 2007; but there is nothing which indicates that the dismissal which followed the Background Note was based on Mr Benney's protected disclosures. I take a similar view of the second redacted document upon which stress was laid, the assessment document. I do not need to go into detail

because, in relation to that document and any other, I must remind myself that it is not my view which is required. The question is - was Judge Gay's view that the redactions did not fall outside the scope of legal professional privilege and did not bear the weight which Mr Benney sought to put on them such as to have any bearing on his prospects of winning his interim relief application perverse?

74. I should add that Mr Tolley accepted that the last sentence of paragraph 5 of the assessment document might be said to have fallen outside legal professional privilege. But if that be correct, nevertheless in my judgment it cannot be said that it constituted compelling material which would have made a difference to the application before Judge Byrne. It did not show that the dismissal was for an inadmissible reason as opposed to a breakdown of trust and confidence over a long history.

75. Accordingly I am satisfied that Judge Gay's decision as to the strength or otherwise of the redacted material has not been shown to have been perverse; it was a decision which was open to her and which has been reached by others since. HHJ Serota may, on a provisional assessment, have taken a different view; that demonstrates the importance of a correct judicial approach to an appeal such as this. Judge Gay's conclusion cannot be successfully undermined on the basis that it was arguably wrong or that one view means that it was wrong; it must be overwhelmingly demonstrated that no reasonable Tribunal could have reached the conclusion.

The Agreement

76. It was part of DEFRA's submissions that this appeal should not succeed on any of its grounds because the agreement between the parties in the COT3 form was binding between them and had the effect that Mr Benney's claim has been finally dismissed; there is therefore no live claim in respect of which an application for a review could succeed and Mr Benney had by the agreement expressly contracted not to make any such application. His application was therefore an abuse of the process.

77. I have referred to this point before in this judgment; but it is now time to address it in more detail. I have already set out the relevant terms of the agreement document.

78. Mr Benney relied on this issue upon the decision of the Supreme Court in **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** ([2013] UKSC 46). The Supreme Court had to consider the effect of conflicting decisions of the Court of Appeal which had held that the Claimant's patent was valid and had been infringed by the Defendants and the subsequent decision of the Technical Board of Appeal of the European Patent Office which, between the parties, produced very different results. The Court of Appeal declined to vary its order in the light of the European decision partly on the basis that the issues between the parties were *res judicata*. In their judgments Lord Sumption and Lord Neuberger, with whom the other members of the Supreme Court agreed, gave what I might respectfully describe as an illuminating analysis of the distinctions between the doctrines of cause of action estoppel, issue estoppel and merger, including the much discussed principle in **Henderson v Henderson** ([1843] 3 Hare 100). It was held that the purpose of the principle of *res judicata* was to support

the good administration of justice, the interest of the public and the parties by preventing abusive and duplicative litigation.

79. I do not need to give way to a temptation to delve more deeply into the Supreme Court's exposition, alluring though it is. Mr Benney's point, based on those judgments, was that the issue as to whether the redactions made a relevant difference had never been decided and that he was not barred in any respect by any form of the doctrine of *res judicata* from advancing his case on that issue. He was, however, tilting at a windmill which does not exist. Mr Tolley's argument as to the effect of the agreement between the parties has not been based on *res judicata*, save in one respect which I will come to in considering the second appeal; if it had there would inevitably have been much greater consideration of authority than was put before me and much more debate of the meaning and effect of the decision of **Virgin Atlantic** on the present case. Mr Tolley's argument was that Mr Benney's unfair dismissal claim has been fully disposed of by the agreement in the COT3 form and the consequent final dismissal of his claim. Had the agreement not been in the form which it took it would not have been binding; see section 203 of the **Employment Rights Act 1996**; but it has not been suggested that the formalities required by that section if the agreement was to be binding were not complied with; they were.

80. Mr Benney drew my attention to the **Misrepresentation Act 1967**, pursuant to which he is not without remedy against DEFRA while the agreement subsists. He may seek damages for the misrepresentations which he maintains DEFRA perpetrated. I am not to be taken as making any comment as to the merits of any such claim; such a claim will not do anything to undermine

the binding nature of the agreement between Mr Benney and DEFRA unless or until it is set aside; and Mr Benney expressly does not seek to do so; he disclaimed any intention of doing so. He suggested that he could seek a declaration that certain clauses of the agreement should be regarded as inoperable or should be set aside by reason of misrepresentation; I do not say anything about whether he could do so; but at this stage he has not done so, and the terms of the agreement are binding and enforceable. The unfair dismissal claim has been and stands dismissed. It is not difficult to see why Mr Benney has not sought to undo the agreement; but his motives are not relevant.

81. It follows in my judgment that for this reason alone, the application for a review was bound to fail. Judge Gay did not decide on that basis; but in my judgment Mr Benney has agreed not to make such an application or to present this appeal; and there are no extant proceedings in the course of which either the application or this appeal could be brought. The appeal is therefore an abuse of the process and should be dismissed on that basis, if for no other reason.

82. I should add that, as part of the additional material which Mr Benney sent to me, I have considered the Committee of Public Accounts' report on confidentiality clauses and special severance payments. That report is critical of some aspects of the contents of compromise agreements and special severance payments and their use to terminate employment contracts in the public sector; but it does not change the law and does not affect the issues which I have had to consider. I make no comment as to whether the agreement into which Mr Benney entered

with DEFRA would or would not fall into any areas criticised in that report; that report cannot undo or diminish the effect in law of any binding contracts entered into before it.

The Second Appeal

83. I have set out the history leading to the applications which were referred to the then President at paragraphs 22 to 24 above. I repeat that, as set out by Judge Serota, at the Rule 3(10) hearing in this appeal, it is only the application made by Mr Benney for a preparation time order which is now the subject of this appeal. The other aspects of the Notice of Appeal against the President's decision are not now live.

84. I do not need to spend time on the point made at the sift stage as to the absence of a judicial decision on the part of the President. HHJ Clark probably did not have the letter or letters which contained Mr Benney's applications to which the President was responding (and I am not sure that I have them either) and he may not have appreciated that one of Mr Benney's applications was for a preparation time order. Clearly some of the matters to which Mr Benney referred and to which the President was responding contained complaints about members of staff and/or a Judge or Judges and did not give rise to a judicial decision; but I am satisfied that the request for a preparation time order did. Mr Tolley does not contend either that Mr Benney had not made an application for a preparation time order or that in rejecting that application the President was not making a judicial decision.

85. When Mr Tolley made that concession at the hearing before me, Mr Benney was clearly taken aback; but he quickly recovered and put forward the following submissions:

(1) The President had not purported to exercise the discretion given to him under Rule 42(5) to permit the application to be made albeit that it was made well beyond 28 days after the issuing of the interim relief judgment; he merely confirmed a decision taken by the Tribunal staff to decline to process the application.

(2) There was evidence that DEFRA had deliberately redacted parts of the document which would have aided Mr Benney's interim relief application and that they had acted vexatiously, disruptively or otherwise unreasonably so that a preparation time order could be made under Rule 44. He relied upon HHJ Serota's view of the possible effect of the redactions to which I have referred earlier.

(3) The agreement document did not prevent him from pursuing his application for the reasons set out above when I considered that topic in relation to the first appeal and because Rule 42(5) entitled him to consideration by the Employment Tribunal of his application for a preparation time order even though the primary time limit had expired; the agreement did not bar that process.

86. Mr Tolley, on the merits issue, returned to the decision of the Administrative Court. In this second appeal, too, he did not expressly rely on issue estoppel. Therefore leaving that point aside, I do not intend or need to repeat any of what I have said about the effect of the redactions in addressing the first appeal. Had the President considered the merits of the arguments about the redaction - and there is no evidence that he did so or, indeed, that he had those arguments before him save insofar as they were set out in what Mr Benney had said to him - he would not, in my judgment, have been bound to reach the same conclusion as that reached by the Administrative Court; it is highly likely that he would have done; but that an opposite view is

possible is clear from Judge Serota's judgment. There were, however, compelling reasons why the President did not need to deal with the application on its merits and Mr Benney's appeal against the President's conclusion must fail.

87. The first reason is that the compromise agreement between the parties was binding upon them; by that agreement Mr Benney had agreed that the proceedings would be dismissed on withdrawal; and they had been finally dismissed. At the time of the President's decision the proceedings in the course of which Mr Benney made his application had come to a final conclusion; the file had been destroyed as an administrative act as a result. Therefore there were no proceedings in the course of which the application could be made or decided. More specifically, although pursuant to Rule 42(5) an application for a preparation time order may be made at any time later than 28 days from the issuing of the relevant judgment if the Tribunal considers that it is in the interests of justice, there were no proceedings at the time when Mr Benney purported to make the Rule 42 application.

88. Further, Mr Benney had expressly undertaken not to make any such application or to bring any appeal; I have covered this aspect in dealing with the first appeal.

89. Accordingly the President rejected Mr Benney's application for sound reasons at paragraphs 2 to 4 of his decision letter; those conclusions were not in error of law.

Conclusion

90. For the reasons I have set out both appeals are dismissed.