Appeal No. UKEAT/0185/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 January 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

ALICE SARAH CLARKE — APPELLANT

ABERTAWE BRO MORGANNWG UNIVERSITY HEALTH BOARD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PATRICK GREEN (One of Her Majesty's Counsel) and MS CHLOE CAMPBELL (of Counsel)
For the Respondent	MR JULIAN ALLSOP (of Counsel) Instructed by: Hugh James Solicitors Hodge House 114-116 St Mary Street Cardiff CF10 1DY

SUMMARY

PRACTICE AND PROCEDURE

The Tribunal had lost its notes of an earlier preliminary hearing at which an application to adduce expert medical evidence was refused. The Claimant applied for reconsideration. At a directions hearing, the Tribunal directed the parties to disclose their contemporaneous notes of the earlier hearing. The Tribunal also stated that, "If on consideration of those notes it is apparent that my recollection of the Claimant's own evidence, her cross-examination and the respondent's witnesses' answers is materially incorrect then I would consider that to amount to a material fact warranting further consideration of this issue." The Claimant was concerned that the Tribunal would use the parties' notes to "backfill" its own conclusions. The Claimant applied to the Tribunal to provide, from memory, a summary of its material recollection of the earlier hearing before seeing the parties' notes of evidence ("the application"). The Tribunal refused the application, noting that the parties had consented to the provision of their notes and that there had not been any material change in circumstances such as to warrant varying its order. The Claimant appealed against the Tribunal's decision to refuse the application on the grounds that there had been a material change in circumstances – namely the Tribunal's proposed course of action in relation to the notes – and that the proposed course was unfair and would be perceived as such.

Held: The appeal was dismissed. The Tribunal's proposed course of action did not amount to a material change in circumstances. The parties were aware at the time of the order to produce their notes that the Tribunal's notes were unavailable and that the Judge would be reading the parties' notes. The possibility that the Judge would, having seen those notes, compare them against his own recollection was evident from the outset. The Tribunal's proposal was not unfair. In the unusual circumstances of this case, whereby the Tribunal had lost its notes, there was nothing to

suggest that by referring to the parties' notes, the Tribunal would be doing anything other than refreshing its memory. It is unlikely that the Tribunal intended to rely upon the notes in order to 'backfill' its conclusions as alleged, or to come up with material not recorded elsewhere, and there was nothing to suggest that that was its intention. Furthermore, if the Tribunal did seek to rely on matters wholly unsupported by any evidence, then that would probably give rise to a separate ground of appeal in any event.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. This is an appeal against the case management decision of the Cardiff Employment Tribunal relating to the treatment of written notes of evidence at a Liability Hearing heard as long ago as 2012. This matter has a somewhat convoluted procedural history. The essential background facts can be stated as follows.

2. The Claimant is a nurse with over 20 years' experience. She provided her services to the Respondent NHS Trust through an agency. In April 2009, she expressed concern about the treatment received by a patient who subsequently died. Her concerns were raised with the doctor concerned. She complained to him about the treatment the patient had received. The Claimant reported the matter to the coroner on 17 April 2009 and was suspended shortly thereafter. In October 2009, the Respondent banned her from undertaking further work at the Respondent's hospital and the Claimant claim brought a whistleblowing complaint.

3. A Liability Hearing was held in April and July 2012 before Employment Judge Powell and two lay members (Mr Fryer and Mr Hamilton). The Claimant's whistleblowing complaint was dismissed. The Claimant applied for a review of that Decision on the basis that there was new evidence not previously before the Tribunal and that there had been a serious irregularity.

4. Following correspondence from the Tribunal, the Claimant submitted a further document containing her original review application and further grounds for review. That document has been referred to as the "extended review application". The grounds for seeking a review included a complaint that the Tribunal had wrongly stated that the Claimant had approached the coroner on 17 May 2009, rather than the correct date of 17 April. The significance of that error it seems

is that the decision to suspend the Claimant was taken after she had complained about the matter to the coroner, there being some evidence to suggest that the Respondent was aware that she was the one that had complained.

5. The Review Hearing went ahead in February 2013. The decision that there should be a Review Hearing was based on the fact of the extended review application, at least in part. By a Reserved Judgment sent to the parties on 4 June 2013, the Tribunal dismissed the application for a review. This is because the Tribunal concluded that the new evidence, which the Claimant sought to adduce, did not meet any of the **Ladd v Marshall** [1954] EWCA Civ 1 criteria. The Claimant was also subsequently ordered to pay costs in the sum of £4,000.00.

6. The Claimant appealed against those Decisions. Permission to appeal was refused by the Employment Appeal Tribunal ("EAT"). The Claimant appealed to the Court of Appeal against that refusal to grant permission. In March 2015, Elias LJ considered that the Claimant's appeal did raise arguable points in law and granted permission to appeal.

7. By consent, the matter went to a Full Hearing before the EAT. Unfortunately, the hearing before the EAT did not proceed smoothly. It had to be adjourned as it became apparent in the course of that hearing that the bundle prepared by the Respondent for the Tribunal below had not included the extended review application. Supperstone J directed the Employment Tribunal ("ET") to answer a number of questions in relation to the extended review application.

8. The Tribunal responded to those questions by way of a letter dated 12 May 2016. Those answers are noted as follows:

> **"3(i) The Claimant's extended application for review was received by the Employment Tribunal.**

3(ii) The extended application was before me when I made the order dated the 15th October 2012.

3(iii) Based on the available notes, examination of the Review hearing documents retained by Mr Fryer and discussion with Mr Fryer, I and Mr Fryer have no recollection of the extended application being before the Employment Tribunal at the Review hearing.

3(iv) The Employment Tribunal did not consider the extended application document but elements of that application were contained within the Claimant's skeleton argument in the bundle presented at the Review hearing (pages 93 - 110).

4(i) My notes are not available; this [sic] explained below. The notes of Mr Fryer are available and are being typed and will be provided as soon as possible.

4(ii) My notes are not available, the reason for this are [sic] explained below. The notes of the liability hearing taken [by] Mr Fryer had been reviewed by Mr Fryer and myself. There is one reference to the police and Coroner which is being typed and will be forwarded as soon as possible. For clarity Mr Fryer's note encompasses the evidence in chief and cross examination of each witness."

9. The Tribunal's answers went on to include a detailed explanation as to how the Judge's notes came to be lost. It appears that these had been inadvertently destroyed at some point between 2013 and 2016.

10. The matter eventually came before Soole J on 10 May 2017. By then of course it had been established that the extended review application was not before the Tribunal during the Review Hearing below. Soole J allowed the Claimant's appeal, holding that the absence of the extended review application from the Tribunal's consideration constituted a "*serious procedural irregularity*" (paragraph 34). The matter was remitted to the same Tribunal in order to hear the whole review application afresh. Soole J considered that this was "*simply a case of an unfortunate procedural error*" (paragraph 38) and that "*It would be unsatisfactory for the review to be conducted by a Tribunal which had not conducted the substantive [liability] hearing*".

11. The reconsideration of the review application was originally listed to be heard on 25 September 2017. However, it proved impossible for a variety of reasons to proceed with the hearing on that date, and instead a Preliminary Hearing took place for directions in respect of the remitted Review Hearing. Mr Green QC appeared on behalf of the Claimant at that hearing; he

did so by telephone, although I understand that the hearing was an oral one. Mr Green, I should note, has been acting for the Claimant throughout this matter on a *pro bono* basis. The Respondent was represented by Mr Allsop, who also appears today. I am grateful to both Counsel for their assistance.

12. The Preliminary Hearing dealt with various issues. The Tribunal noted in Reasons, sent to the parties on 4 October 2017, that:

> **"2. It was common ground between the parties that the Tribunal would require time to read documents noted below and its own notes of the 2012 liability hearing before hearing submissions. Similarly, the parties agreed that submissions were likely to exceed one day and that a two day hearing was necessary."**

13. The Tribunal decided in fact to list the matter for five days commencing on or after 1 February 2018. It was agreed that there were seven issues to be determined at the remitted hearing. These were set out at paragraph 20 of Mr Green's skeleton argument for the Preliminary Hearing. These included an issue in the following terms:

> **"(7) What is the ET's view of the reliability of [the Claimant's] evidence, having conscientiously revisited the foregoing, on the basis of the corrected chronology and having fairly approached the matters above?"**

14. The Tribunal made an Order by consent dealing with listing issues and other procedural matters. As to the documentary evidence, the Tribunal ordered as follows:

> **"3. No later than 4:00 pm 23th [sic] October 2017 each party shall send to the other copies of all contemporaneous records of the evidence and submission[s] made during … the Liability Hearing. The copies shall be in the original format created during the hearing."**

The Tribunal went on to refer to the overriding objective and the consequences of failure to comply with the Order.

15. There was an application at the Preliminary Hearing to adduce medical evidence as to the state of the patient about whose treatment the Claimant had expressed concern back in 2009. As

to that issue, the Tribunal set out the competing considerations in respect of the medical evidence at paragraph 6 to 10 of the Reasons. The Tribunal then said as follows at paragraphs 11 and 12:

> **"11. I have reached the conclusion that, with one caveat, … I am not minded to allow the parties to adduce medical expert evidence on a matter of fact. Nor would it be proportionate to consider expert opinion as to the reasonableness of the Claimant's belief on this point when the Respondent's witnesses had conceded that, if the facts were as the Claimant averred, her belief would have been reasonable.**
>
> **12. The parties, as noted below, are to disclose their respective contemporaneous notes of the hearing in the original format in which they were recorded. <u>If on consideration of those notes it is apparent that my recollection of the Claimant's own evidence, her cross examination and the respondent's witnesses' answers is materially incorrect then I would consider that to amount to a material fact warranting further consideration of this issue.</u>" (Emphasis added)**

It is that indication in the final sentence of paragraph 12 of the Reasons that has given rise to this appeal.

16. Upon receipt of the Tribunal's Decision following the Preliminary Hearing, the Claimant wrote to the Tribunal on 4 October 2017 and sought clarification in respect of two issues; the second of which was the Tribunal's comment in paragraph 12 of the Reasons. The Claimant stated that the difficulty with the Tribunal's suggested approach to the notes was that the Claimant would be unable to make any submissions on the recollection of the Tribunal on matters which are not set out in the Judgment. She therefore requested that the Tribunal provide, from memory, a summary of its material recollections, so that these are clear before the parties provide their respective notes. The Claimant's concerns were expanded upon in a detailed letter dated 13 October 2017. In that letter she said as follows:

> **"Further to my letter of 4 October 2017 and the Respondent's response to it, I write to make an application, for provision to both parties of:**
>
> > **(1) a copy of any contemporaneous written notes of evidence of the substantive hearing, which still exist, upon which the Tribunal may rely on reconsideration of its decision;**
> >
> > **(2) a brief statement identifying any recollections of the evidence given at the substantive hearing in April and July 2012 (as referred to in paragraph 12 of the PH reasons) material to the reconsideration ordered by the EAT and upon which the Tribunal may rely on such reconsideration, which are not already set out in the Tribunal's judgment.**
>
> **The reasons for making the application are as follows:-**
>
> > **1. During the PH, which my counsel attended by telephone, reference was made by the Tribunal to its recollection of the evidence and my counsel expressed concern that it**

> **would be difficult to make submissions on matters which the Tribunal recollects from 2012 but which are nowhere recorded (in the context of evidence not referred to in the judgment itself).**
>
> **2. During the PH, the Tribunal suggested that Mr Fryer's partial notes should be included in the bundle - this is was understood to refer to the notes already provided to the EAT, taking at the previous review hearing;**
>
> **3. Fairness (and the appearance of fairness) requires that any other contemporaneous record or recollection of evidence, upon which the Tribunal will rely be provided to both parties. Otherwise, it is impossible for the parties to prepare for the reconsideration hearing on an informed basis. Given that part of my review application is specifically directed to the difference between what took place at the hearing and how it was described in the judgment, this difficulty is of real significance in this case.**
>
> **…**
>
> **7. The identification of material evidence *already recollected* by the Tribunal, at the PH, highlights the importance of those recollections being recorded now, before (or at least at the same time as) the parties' notes or records are provided to the Tribunal, so that there is neither a risk of the Tribunal's recollection being tainted by the parties[']notes or records nor the appearance of such a risk."**

17. The Tribunal refused that application on 19 December 2017. In doing so it said as follows:

> **"(1) The Claimant's concern over the breadth of the issues to be considered at the Reconsideration is a matter which will be addressed after the Claimant has complied with the order as set out in paragraph 2. The original date having passed without compliance; the order is varied to require compliance by Wednesday 4th January 2018.**
>
> **…**
>
> **Those terms of the order were agreed by counsel for the parties and both elements of the Claimant's application did not disclose a material change of circumstances or raise an argument which was not considered at the September 2017 Preliminary Hearing. As the parties agreed to provide their respective contemporaneous notes by the 23 October 2017 it is proportionate and in accordance with the interests of justice that they comply with that order before addressing whether there is any need for additional information from the tribunal. Similarly, both counsel agreed to the method of clarification of the issues set out in paragraph 2 of the order."**

18. In subsequent correspondence, the Claimant explained that there had been a material change in circumstances; that change being the Tribunal's description of what it would do once it had received the parties' notes of evidence. By a letter dated 15 February 2018, the Tribunal rejected the Claimant's contention that there had been a material change of circumstances.

19. The Claimant appeals against the Tribunal's decision in December 2017 refusing her application that the Tribunal provide to the parties a copy of any notes of evidence which still

exist and, in particular, a statement setting out any recollection of the evidence given at the substantive hearing in April and July 2012. Permission to appeal was refused by His Honour Judge Peter Clark on the sift.

20. However, at a Rule 3(10) Hearing before Her Honour Judge Eady QC, the Claimant was given permission to proceed with the appeal. She noted that, although the parties had consented to the Order that they should disclose their respective notes, that was not the same as consenting to the further step that the Employment Judge would consider those notes against the Tribunal's unrecorded recollections from the earlier hearing. It was considered to be arguable that that further step constituted a material change in circumstances.

The Grounds of Appeal

21. There are two grounds of appeal. The first is that the Tribunal erred in refusing the application on the basis that the parties had consented to the Tribunal approaching the matter in the way suggested in its Reasons. The proposed approach would be unfair and/or would give the appearance of unfairness, particularly in light of the procedural history of the matter. The second ground of appeal is that the Tribunal erred in considering that the interests of justice or proportionality required or justified the refusal of the Claimant's application.

Submissions

22. Mr Green submits that the Tribunal erred in two critical respects in coming to the decision under challenge. The first is in relation to the issue of timing and the second is in relation to consent.

23. As to timing, Mr Green contends that the documents requested by the Claimant - that is the say the existing notes of evidence and the Tribunal's summary of its recollection of the evidence - were requested to be provided by the Tribunal prior to the provision to the Tribunal of the parties' respective notes of evidence. The sequence was important because Employment Judge Powell's notes of evidence had been lost.

24. The risk which had to be avoided, said Mr Green, is that of the Tribunal using the parties' notes of evidence to "backfill" its conclusions based on those notes. He submits that the fair-minded neutral observer would consider the Tribunal's suggested approach to be contrary to basic principles of fairness. That was especially so in this case in light of the procedural history of the matter, which included the fact that the Tribunal had made basic errors in relation to agreed dates which were material, if not central, to its findings; that the Tribunal had failed to consider the extended review application, notwithstanding the fact that that was one of the reasons or the main reason for ordering a review in the first place; the fact that the Tribunal had lost most of its relevant notes; and the need to avoid the Tribunal having a second bite of the cherry or a chance to defend, by improvement, a position which may in fact have been vitiated by error. It is further submitted that it only became apparent what the Tribunal intended to do once the Preliminary Hearing Reasons were received and in particular once paragraph 12 was read.

25. As to consent, Mr Green submits that the parties had not expressly consented to the procedure suggested by the Tribunal at paragraph 12 of the Preliminary Hearing Reasons. The consent was in respect of the provision of their notes of evidence to each other and to the Tribunal. In those circumstances, there was nothing to preclude the Claimant from seeking advance disclosure of the Tribunal's notes and its recollection such as it was before the parties' notes were disclosed. The issue of consent should not have been treated as decisive.

26. Mr Allsop for the Respondent submits that the parties were well aware that the Employment Judge had made reference to the fact that he had a recollection of evidence that was not recorded in the Judgment and that this prompted a discussion on the matter with the Claimant's counsel. However, Mr Allsop also submits that there was no change in circumstances such as to warrant a variation to a case management Order, and that, in accordance with the principles set out in **Serco Ltd v Wells** [2016] ICR 768, there was no basis for setting aside or varying that Order.

Conclusions

27. The starting point is that Tribunals have a very broad discretion when it comes to the making of case management Orders. It is well established that any interference with such an Order has to be "necessary in the interests of justice" in accordance with Rule 29 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. That requirement is to be interpreted as requiring, based on an objective assessment, a material change of circumstances since the making of the Order, or that the Order has been based on a material omission or misstatement, or that some other substantial reason necessitates the interference; see **Serco v Wells** at paragraphs 43 to 45.

28. The Claimant in this case contends that there was a material change of circumstances in that the Tribunal proposed an approach to the parties' notes of evidence which had not been flagged up at the hearing. It is important to understand the subject matter of paragraph 12 of the Preliminary Hearing Reasons. Those Reasons must be read in light of the preceding paragraph in which the Tribunal expressed its conclusion that "*with one caveat*" it was not minded to allow the parties to adduce medical expert evidence on a matter of fact. That caveat was then set out at paragraph 12. The Tribunal notes that the parties are to disclose their notes of evidence in the

original format. The Tribunal goes on to say that if on consideration of those notes the Judge's recollection of the Claimant's own evidence, cross-examination and the Respondent's witnesses' answers is materially incorrect then he would consider that to amount to a material fact warranting further consideration of "this issue". That reference to "this issue" can only be a reference back to the matter of the medical evidence discussed in the preceding paragraph. It does not make sense to interpret paragraph 12 as an indication by the Tribunal that it proposed to compare the parties' notes against its recollection in respect of the entirety of the case. If paragraph 12 is not read in that way, then the caveat referred to in paragraph 11 would remain wholly unexplained.

29. The implication of that analysis of the two paragraphs is that the Tribunal's proposed course of action had a relatively narrow compass. It also does not suggest that the Tribunal would seek to rely upon its recollection of material, 'come what may', in the face of any conflicting material in the notes.

30. The question is whether any of that indicates a material change of circumstances within the meaning of the passages in **Serco v Wells** referred to above. In my judgment they do not. I say that for the followings reasons.

31. Firstly, the parties were aware at the time of the Preliminary Hearing that the Employment Judge's notes of the Liability Hearing had been lost. It is not in dispute that at the Preliminary Hearing there was some indication from the Judge that he had a recollection of matters which were not recorded in the Judgment. That was not a suggestion that he had a recollection of matters that were not recorded in the evidence. Unfortunately, there is no note of the Preliminary Hearing itself providing a clear record of what the Judge is supposed to have said on this issue. It is clear, however, that Mr Green at that hearing flagged up the difficulties that that would potentially

cause; in particular, that the Claimant would have difficulty in making submissions on matters which were not recorded anywhere in the documents.

32. The Tribunal made it clear at paragraph 2 of its Reasons that "*It was common ground between the parties that the Tribunal would require time to read documents noted below*" - that being a reference to the contemporaneous records of the evidence and submissions with which the Tribunal had already been provided and its own notes of the Liability Hearing - "*before hearing submissions*". Thus, it would have been clear to the parties as of that date when those Reasons were sent, namely 4 October 2017, that the Tribunal would be reading the parties' notes and its own notes; more particularly those of Mr Fryer, in circumstances where Employment Judge Powell had no notes of his own. The possibility that Employment Judge Powell would, having seen those notes, compare them against his own recollection was apparent from the date of the Decision.

33. There appears to have been no concern at that stage about the Tribunal reading that material. All parties were aware that the Judge's notes were no longer available. By reading the parties' notes and the Tribunal's own notes before hearing submissions, the Tribunal would inevitably be doing so without having previously set out a documentary record of those matters which he was able to recollect without the benefit of having his memory jogged by what is said in the notes.

34. If there was no concern about the Tribunal reading the parties' notes at that stage, it does not seem to me that the proposal to compare the Tribunal's recollection against those notes to see to what extent the Tribunal's recollection is incorrect, materially changes the position. The

exercise which the Tribunal will be undertaking is no different in substance to what it would have been doing in any event.

35. The Tribunal's comments at paragraph 12 do not indicate a material change of circumstances, given that the approach which it set out was clearly one that had been flagged up at the Preliminary Hearing and could have been anticipated based on the terms of the Order and the Preliminary Hearing Reasons at paragraph 2. Moreover, to the extent that the Tribunal does refer to the possibility that if its recollection is considered to be materially incorrect the situation may be revisited, the outcome of that would be beneficial to the Claimant. That is because if the Tribunal concluded that its recollection was incorrect then it would warrant reconsideration of whether or not medical evidence should be permitted; that being something which the Claimant had sought from the outset.

36. The only change in circumstance was the Claimant's application for the provision of a summary of the Tribunal's recollection prior to the parties taking the agreed step of providing their notes of evidence for the Tribunal to read. However, that is not a material change for the purposes of determining whether it would be appropriate to interfere with the Tribunal's case management Order. That would be sufficient to dispose of this appeal.

37. However, it is necessary to deal with Mr Green's broader arguments as to fairness or perceived unfairness in the Tribunal's proposed procedure. Mr Green submits that there is a risk of the Tribunal, whether subconsciously or otherwise, backfilling his conclusions, and it is to guard against that risk that the Tribunal is being asked to take the unusual step of setting out in advance its recollection without reference to any of the parties' notes.

38. Mr Green candidly accepts that the step which the Tribunal is being asked to take is a highly unusual one. I would go as far to say it is almost unique, as neither counsel nor I can recall any similar such application being made. Of course, it does arise in the unusual circumstances of the original notes prepared by Employment Judge Powell having been lost. However, in my judgment, that fact alone does not mean that the Judge cannot be relied upon to consider the parties' notes of evidence without 'backfilling', as Mr Green put it, his own conclusions.

39. The parties' notes and those of Mr Fryer would serve to refresh the Judge's memory. There is nothing improper in the Judge referring to the notes for that purpose. It is what happens in courts of law up and down the land when, for example, witnesses are permitted to refer to written material to aid their recollection. The notes may confirm the Judge's memory and be consistent with it. If that occurs then there will be no real difficulty. Equally, the notes may jog the Judge's memory and may cause him to recall matters which he would not otherwise have been able to recall. Again, if those matters are recorded in the notes there will be no difficulty.

40. A difficulty might arise if, having seen the notes, the Judge is reminded of something else or the Judge claims to have a clear recollection of something which does not appear anywhere in the notes. If that were to occur and the Judge identified those additional matters, then he would face the real difficulty of having to explain how it is that he is able to recall and rely on something which does not appear in any of the available notes. That particular difficulty could arise in any case where the Tribunal identifies additional matters having seen the notes or does so before seeing them.

41. It does not seem to me that requiring the Judge to take the highly unusual step, of effectively sitting in a darkened room with a blank sheet of paper to set out what he is able to

recollect about the evidence without any material to refresh his memory, would diminish that difficulty significantly. Mr Green submitted that having a prior list of recollected matters would assist because then the parties would be aware of those matters which are said to be simply based on the Tribunal's memory and those which are arrived at having seen the notes. However, I do not see what material difference that would make. In either case, the Judge would be seeking to rely on material that is inexplicably unrecorded elsewhere. If the Tribunal did seek to rely upon material on the basis that it is not set out elsewhere, then that potentially would give rise to an error of law on the basis that findings have been made without any supporting material.

42. It seems to me that the reference in paragraph 12 of the Reasons was not meant to indicate that the Judge would be seeking to rely on matters that did not appear anywhere in the evidence. As I said, the real difficulties which the Judge would face in seeking to rely upon such matters makes it highly unlikely that that was the intention. More likely is that the Judge recalled matters which were not expressly referred to in the lengthy Judgment, which dealt with a large number of issues. Seeing the notes of evidence in those circumstances would enable him to check whether his recollection was correct. If his recollection does not appear anywhere in those notes then he will, as he states in paragraph 12, proceed on the basis that his recollection is incorrect. It is not suggested in paragraph 12 that the Judge will seek to rely upon his recollection in defiance of what is stated or not stated in the notes. For those reasons, I consider that the perceived disadvantage in the Tribunal's proposed course is more imagined than real.

43. Mr Green says that there is real substance to this Claimant's concerns given the unfortunate procedural history of the matter. At paragraph 28 of Mr Green's skeleton, reference is made to a number of matters. The first is the fact that the Tribunal made basic errors in relation to agreed dates which are material if not central to its findings. I accept that on the face of it these

errors as to date could be said to be highly material. However, the fact that an error was made, even a fundamental one, does not give rise to any suggestion the Tribunal would be unable to deal with the absence of its notes and a review in a professional and objective manner.

44. Mr Green also refers to the fact that Employment Judge Powell relied upon the fact of extended review application in ordering that a review be heard, and then determined it and ordered costs against the Claimant without considering that document. However, there is no suggestion that this was done deliberately or in some sense as a result of a biased approach against the Claimant. It was described by Soole J, as I have set out above, "*simply a case of an unfortunate procedural error*" (paragraph 38). Had there been any real contention that the Tribunal would be unable to approach its task on review in an objective and professional manner, then the appropriate course would have been to seek remittal to a different Tribunal. However, that is not the course that the Claimant took. Indeed, it is apparent from the judgment of Soole J that although there was a suggestion in the original grounds of appeal that the remission should be to a freshly constituted Tribunal, that was not something that was pressed at the appeal hearing (see paragraph 38). The Claimant has not appealed against the decision to remit to the same Tribunal. That the Tribunal's notes had been lost was known even at the date of that hearing before Soole J. In those circumstances, the arguments pursued, with great skill today, as to unfairness or perceived unfairness, are, it seems to me, somewhat misplaced.

45. Mr Green also refers to the fact that the notes had been lost. I did not understand Mr Green to be submitting that the notes were lost through any fault on the part of the Judge or the Tribunal. As such this factor cannot have any real bearing on whether it would be fair or unfair for this Tribunal to consider the parties' notes of evidence in the way that it has suggested.

A

46. The final point raised by Mr Green in support of his contention that there would be perceived or actual unfairness is the need to avoid further procedural irregularity in what is undoubtedly a very complex case with an unfortunate procedural history. It is a matter of considerable regret that we are now almost 10 years on from the original incident giving rise to this litigation. However, in my judgment, the Tribunal's case management Order in this instance does not disclose any procedural irregularity. It was a decision as to the notes of evidence which is well within the Tribunal's broad discretion in making case management Orders. It appears to me to be an entirely sensible decision in relation to a highly unusual application. It does not disclose any error of law or principle which would require or entitle this Tribunal to interfere.

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47. Grounds 1 and 2 have not been addressed separately in the Claimant's submissions. The above reasons deal with both grounds, but for completeness I would add in respect of ground 2 that there is nothing irrational, in my judgment, in the approach of this Tribunal to the notes of evidence.

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48. For all those reasons, and notwithstanding Mr Green's elegant submissions, this appeal must be dismissed.

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