TC05603

Appeal number: TC/2016/00341

PROCEDURE – whether to set aside decision – application to set aside not within rule 38 of FTT Rules - application treated under rule 42 as application to appeal– whether application for review may be made by party to decision – held yes, but same result achieved by PTA application – whether to consider review – no error of law shown on any ground –whether to give permission to appeal – no on all grounds but one (bias or appearance of bias or predetermination) – PTA application allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

COULDWELL CONCRETE FLOORING LTD (No. 2) **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

Having considered an application by Dr R A Milton of Milton & Co, the Appellant's representative, to set aside or to review or to seek permission to appeal against the decision of the Tribunal released on 22 November 2016, the Tribunal decides as follows.

DECISION

Introduction

1. On 26 October 2016 the Tribunal (Judge Richard Thomas and Mrs Gay Webb) sitting in public at the Employment Tribunal, City Exchange, Albion Street, Leeds, heard the appeal by Couldwell Concrete Flooring Ltd ("the appellant") against three decisions made by the respondents ("HMRC") in relation to the appellant's liability to pay Class 1A National Insurance Contributions in respect of benefits from the provision of cars for three of its employees' private use.

2. In that hearing Dr Robert Milton of Milton & Co, Accounting & International Taxation and Corporate Legal Services, represented the appellant and Mr Anthony Burke, an officer of HMRC, represented the respondents.

3. On 22 November 2016 the Tribunal released our decision. In that decision we dismissed some of the appellant's contentions and upheld others, with the result that we varied all of HMRC's decisions.

4. On 24 November 2016 Dr Milton wrote to the Tribunal applying for permission to appeal ("PTA") to the Upper Tribunal. He also requested a review of the decision. And he also applied to have the decision set aside. The letter was referred to me on 19 December 2016 to consider.

5. An application to set aside would normally be made before a PTA application because, if the decision is set aside, the reason for making the PTA application falls away. This is reflected in rule 39(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273 (L.1)) ("the F-tT(Tax) Rules" – in this decision a reference to a "rule" without more is to a rule of the F-tT(Tax) Rules). Rule 39(2)(c) extends the time for making a PTA application to 56 days after a notification of an unsuccessful application to set aside. All of Dr Milton's applications were in time.

6. In this case I am taking Dr Milton to be making his PTA application on a precautionary basis in case his set aside application is unsuccessful. I have dealt with both.

7. As to the request for a review, Dr Milton's careful choice of words ("request" rather than "application") reflects that under the F-tT(Tax) Rules it is not open to an appellant to seek a review of a decision. Under those rules the question whether a decision should be reviewed is one for the judge dealing with a PTA application and is a mandatory step before considering the PTA application. But see §§31 to 41.

The application to set aside

The law

8. Rule 38 of the F-tT(Tax) Rules provides:

"**Setting aside a decision which disposes of proceedings**

38.—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) is satisfied.

(2) The conditions are—

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) there has been some other procedural irregularity in the proceedings; or

(d) a party, or a party's representative, was not present at a hearing related to the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

(4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable."

9. There are thus two conditions to be fulfilled by the appellant. The application must be made within 28 days of the date the Tribunal released the decision. Dr Milton's application, dated two days after the release and sent by email, was received by the Tribunal in time.

10. The second condition is that appellant must show that the application falls within one of the four categories in paragraph (2) of rule 38. Dr Milton makes his application specifically by reference to rule 38(2)(c). I consider whether Dr Milton has met this condition below.

11. Meeting those two conditions does not automatically result in the decision being set aside. The judge has to consider whether to set it aside would be in the interests of justice, and I also consider that question below.

Is a paragraph (2) condition met?

12. I set out in full, and verbatim, Dr Milton's grounds for seeking the set aside. Matters in square brackets are my interpolations. I have added the numbering for ease of reference:

> "3 supra [the application to set aside] is made on grounds of procedural irregularity.

Beginning with 3 first.

(1) At page 17, S95 of the decision, Judge Thomas and Mrs Webb chose to deliberately insult the appellants representative.

(2) This insult is entirely unjustified and is completely unnecessary to the decision; the decision could have been made perfectly well without this entirely gratuitous attack on the representatives appellant [this should I assume be "appellant's representative"].

(3) Moreover, the Tribunal would have known that this decision will be published and that this utterly unjustified insulting comment would be available to anyone that reads the judgement.

(4) Writer is the Dr Milton in question who regards this conduct on the part of Thomas and Webb as disgraceful and, candidly, a deliberate act of spite as there can simply be no possible reason to use such extreme and insulting terms.

(5) Indeed, Mr Thomas and Mrs Webb would not dare to insult writer unless they were able to hide behind a position that they have been given and thus writer considers this behaviour as an abuse of authority on the part of Mr Thomas and Mrs Webb.

(6) It is thus in the interests of justice that the decision be set aside (it is not just to gratuitously make and publish insulting and unjustified comments regarding a representative that are then made available in the public domain and available for all other professional representatives and the respondents – with whom Dr Milton deals on a daily basis – to see and refer to.

(7) And the making of such comments most definitely compasses " some other procedural irregularity in the proceedings".

13. The part of paragraph 95 of the decision about which Dr Milton complains is this:

> "95. This is because we consider that Dr Milton's argument is not only plainly wrong, but fanciful in the extreme."

14. Shortly after I had prepared a first draft of this decision, a decision of the Administrative Appeals Chamber of the Upper Tribunal was released which dealt with the question of a Tribunal setting aside its decision, specifically rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 (L. 15)) ("UT Rules"). The decision, *SK v Secretary of State for Work and Pensions* [2016] UKUT 529 (AAC) ("*SK*"), is that of Judge Edward Jacobs, the author of *Tribunal Practice and Procedure*. The decision is worth setting out in some detail:

> "7. I now explain why these matters are outside the scope of rule 43. This is because that rule is limited to matters of procedure and what the claimant says is a matter of substance. In other words, the rule is concerned with how the Upper Tribunal handled the claimant's application for permission to appeal. It does not provide a means of challenge to the decision itself or the reasons on which it is based. The points the claimant makes in respect of her self- employment do not

relate to how this tribunal dealt with her application. Rather, they challenge the correctness of my decision on the merits of her application.

8. Powers like that conferred by rule 43 have been consistently interpreted as applying only to procedural irregularities and not as including challenges to the substance of the tribunal's decision or reasons. That is how rule 43 has been interpreted by the Tax and Chancery Chamber of the Upper Tribunal in *Tager v Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 663 (TCC):

> '18. The error on which Miss McCarthy relies is not of the same character. It occurred, not because a document which should have been available to me was absent, because Mr Tager was not present, or for any similar reason, but because (if Miss McCarthy is right) I failed to understand the evidence available to me, or made a finding which was not supported by that evidence. That is, classically, a judicial rather than procedural error. In my view the manner in which the rule has been drafted makes it clear that it was intended to apply only in the case of failings which have led to a flawed hearing, and that it cannot be extended to encompass judicial errors.'

9. The Upper Tribunal has also given the same interpretation to the equivalent power in rule 45 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) in *R (LR) v First-tier Tribunal (Health, Education and Social Care Chamber) and Hertfordshire County Council* [2012] UKUT 213 (AAC), [2013] AACR 26:

> '46. ... What is contemplated by a 'procedural irregularity' can be inferred both from the existence of the distinct enabling power to provide for a set aside in Schedule 5 of TCEA, contrasted with section 9 of that Act, and from the residual category which forms rule 45(2)(d) coming after a list of procedural difficulties such as documents going missing, people not attending and so on. I respectfully agree with Judge Jacobs, writing extra- judicially in 'Tribunal Practice and Procedure' (Second Edition) at page 535 where he observes that 'the power is limited to procedural errors; it does not allow a decision to be set aside for matters that relate to the substance of the decision'. I accept however that if, contrary to my view, there had been a point of substance, it could potentially have been dealt with by way of review under rule 49.'

…

12. The scope of the enabling power under which rule 43 was made is also important, as it controls its permissible scope. The Social Security Commissioners in *R(U) 3/89* interpreted their equivalent power by reference to the enabling provision, which applied only to procedure:

> 24. … This provision is authorised under paragraph 1 of Schedule 13 to the Social Security Act 1975. It does not extend further than procedural irregularities …

> The same is true of rule 43. It is made under the authority of section 22 of, and paragraph 15(2) of Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007. Section 22 provides for 'rules … governing … the practice and procedure' of the First-tier Tribunal and the Upper Tribunal. And paragraph 15(2) is found in Part 1 of the Schedule that 'makes further provision about the content of Tribunal Procedure Rules' (paragraph 1(1))."

15. I have also found useful the decision in *Tager v Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 663 (TCC) (Judge Colin Bishopp, sitting at first instance) ("*Tager*") and it, like *SK* is binding on me. At [17] (the paragraph before the one quoted above in *SK*) the decision discusses rule 43(2) of the UT Rules thus:

> "17. While I agree that the phrase [the wording of rule 43(2)(d) – my interpolation], by its own terms, invites a wide interpretation, and makes it clear that what appears in paras (a) to (c) does not represent an exhaustive list, it is apparent from the manner in which the conditions are set out that para (d) must be read in its context, and be interpreted consistently with what precedes it. The prior paragraphs provide examples of errors affecting the conduct of a hearing: thus paras (a) and (b) do not relate to a document which a party has omitted to produce because he did not then realise its evidential significance, but which he now, belatedly, wishes to introduce, but to one which was not available to the tribunal, or to one party, because of a transmission error. Paragraph (c), as worded, is a little odd because rr 37(4) and 35 provide for circumstances in which a hearing may properly proceed in the absence of a party (a factor reflected in the different order in which the conditions are listed in the corresponding rule, r 38, of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) and what is plainly meant is a case in which the tribunal erroneously believed that it was in order to proceed in the party's absence when it was not, for example in a case in which a party did not attend because the tribunal failed to notify him of the hearing or if he was prevented by an unforeseen circumstance from attending."

16. As Judge Bishopp points out in *Tager* at [17], the F-tT(Tax) Rules differ in one relevant respect from the UT Rules. That is in the placement of the "residual" (as it is referred to the quoted passage in [9] of *SK*) sub-paragraph which in rule 43(2) of the UT Rules is placed fourth and last, but is the third of four in the F-tT(Tax) Rules. Judge Bishopp suggests that the difference is because the Upper Tribunal has available to it rules that provide for exclusion of parties from the hearing (rule 37(4) UT Rules). I do not think that this can be the reason because this Tribunal has a similar but slightly less extensive power in rule 32(4) of the F-tT(Tax) Rules.

17. In fact the F-tT(Tax) Rules, in placing the residual provision next to last, differ from all the procedural rules of all the other Chambers of the First-tier Tribunal. The residual provision also comes last in paragraph 15(2) of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007 ("TCEA") which schedule sets out the powers (vires) available to the Tribunal Procedure Committee when making procedure rules. There is no clue in Explanatory Notes or Memoranda for the F-tT(Tax) Rules why the

order of the sub-paragraphs is different for the Tax Chamber from either TCEA or any of the other procedure rules. It can hardly be the case that non-attendance by a party or their representative is regarded as not being a procedural irregularity in the proceedings in the Tax Chamber but is such an irregularity in the other Chambers of the Upper Tribunal.

18. As it happened, one party, the appellant company, was not present at the hearing by any of its directors or officers. Dr Milton was of course present as its representative but does not seek to have the decision set aside on the basis of rule 38(2)(d).

19. I do not consider that what Dr Milton complains of, an allegedly malicious and gratuitously insulting reference to him, is a procedural irregularity as that term is explained in *SK* and in the cases quoted there, including *Tager*. A procedural irregularity to be within sub-paragraph (c) has to be of the same kind as those in sub-paragraphs (a) and (b) which are specific examples of the commonest procedural irregularities.

20. Those irregularities referred to in sub-paragraphs (a) and (b) are irregularities caused by one or other party, and possibly in the case of sub-paragraph (b) by the Tribunal staff, "things like documents going missing, people not attending and so on" as is said in the decision quoted in [9] of *SK*. Making an alleged insulting comment about a party's representative is no more a procedural irregularity than Judge Bishopp's alleged misunderstanding of the evidence put before him in *Tager*. I therefore hold that none of the conditions in rule 38(2) of the F-tT(Tax) Rules is met, and that I have no power to set aside the decision.

21. In addition though, even if what we said in paragraph 95 of our decision did amount to a procedural irregularity, for it to be within rule 38(2)(c) it has to have occurred "in the proceedings". Appeal proceedings are started by the notifying or making of an appeal to the Tribunal (rule 20). When they are finished is not quite so clear. In his valuable book *Tribunal Practice and Procedure* Judge Jacobs refers to a case that considers this question, *Virdi v Law Society (Solicitors Disciplinary Tribunal intervening)* [2010] EWCA Civ 100 ("*Virdi*"). The issue was whether the fact that the Tribunal's clerk retired with the members of the tribunal to consider their decision and assisted in the drafting of the reasons for the decision was a matter of procedure. In the only reasoned judgment, Stanley Burnton LJ said, starting at [33]:

> "In my judgment, the procedure of the tribunal included their withdrawing to consider their decision in private with their clerk and her role in this case. Mr Beaumont submitted that the procedure of the tribunal within the meaning of r 31(a) is confined to the trial process. There is no basis for so limiting the rule. The procedure of the tribunal did not come to an end when they retired to consider their decision. As was held in *Baxendale-Walker v Law Society* [2006] 3 All ER 675, once they had announced their decisions, both on whether the appellant had been guilty of serious professional misconduct and on sanction, they were functus officio in that they could not reconsider or change those decisions; but they retained the power and the duty to provide

> adequate written findings. The provision of formal written findings is as much part of the procedure of the tribunal as the trial process and the announcement of their decisions. But if I am wrong about this, I have no doubt that the tribunal had implied power, if power was required, to permit or to invite their clerk to retire with them and to assist them in the manner she did in this case.
>
> [34**]** The assistance of the clerk in drafting the formal written findings of the tribunal occurred and occurs after the decision of the tribunal has been given orally and its formal order filed with the Law Society. At that point the decision is effective, and the tribunal has no power to reconsider it: *Baxendale-Walker*'s case at [23]-[28]. It follows that what occurs subsequently cannot in general give rise to a ground of appeal against the decision."

22. What happened in our case, unlike some in this Tribunal, was different so far as post-hearing matters are concerned. In this case we informed the parties at the end of the hearing that we would reserve our decision, and we gave no indication what our decision would be, particularly as we invited the parties to make further submissions on some points. The members of the Tribunal discussed the case after the hearing and came to general agreement on some matters, pending the further submissions. As is usual in reserved cases Judge Thomas prepared a first draft of the decision, after having received and considered the further submissions, and sent it to Mrs Webb for her comments. The final version prepared by Judge Thomas, after incorporating those and subsequent comments on successive drafts, was then sent to the Tribunal staff in Birmingham for release. That final version both contained our joint decision and gave the reasons for it, but in the usual manner named only Judge Thomas as giving the decision and reasons.

23. I have gone into more detail than usual about the process for two reasons. One is to show that even if the proceedings were still alive up to the moment we issued the decision, there was no irregularity in the procedure such as was alleged in *Virdi*. No one who was not entitled to intervened in the decision and the decision took the post-hearing submissions into account. The second is to make it clear that if there are irregularities in the proceedings (which is of course denied) Mrs Webb had, contrary to Dr Milton's suggestions in §12(1), (4) and (5), nothing to do with them. She did not draft paragraph 95 or suggest the words in it or use those words: I did all those things.

24. In my view it is at least arguable, on the basis of *Virdi*, that the insertion of the words complained of in the draft decision took place during the proceedings. But the insertion and publication of those words was not a procedural irregularity, for the reasons given in §§19 and 20.

Is it in the interests of justice to set the decision aside?

25. But even if there had been a procedural irregularity in the proceedings, it is only if I consider edit to be in the interests of justice to set aside the decision that I should do it. In my view it would only have been in the interests of justice to set aside a decision if the irregularity complained of would have led, if it hadn't happened, to the decision being different. Dr Milton has said that if the "insulting" comment had been

removed, the decision "could have been made perfectly well" (§12(2)). I take him to mean that the decision would have been the same.

26. But even if that is not what he is implying, I consider that the decision would inevitably have been the same had paragraph 95 been omitted, or had it said something like "We do not agree with Dr Milton's argument on this point". Dr Milton considers the decision to be wrong, but that is something he can and does challenge in his PTA application.

Decision on the application

27. For the reasons given above I would, had rule 38 been the only power available to me, dismiss the appellant's application to set aside the decision. But I have another power, in rule 42, to treat an application for a decision to be set aside as an application for, among other things, permission to appeal against the decision. Dr Milton's application to set aside seems to me to be capable of being read (particularly at §12(4)) as an accusation that the Tribunal was biased against him. In his PTA application he also implies that the Tribunal had predetermined the particular issue in the decision about which he seeks permission to appeal, and predetermination is a form of bias.

28. I consider that all questions of bias or apparent bias raise points of law, not irregularities in procedure, and that they should all be dealt with together (and I deal with them in detail below). I therefore exercise the power in rule 42 to treat his application to set aside the decision as putting forward a ground of appeal in addition to those he has put forward in that part of his letter which is a PTA application.

29. I remark that rule 42 seems to be drafted on the assumption that it is open to a party to apply to have a decision reviewed. I consider that further below.

Appeal rights

30. A decision of the tribunal to set aside its own decision is not appealable, by virtue of s 11(5)(d) of TCEA. This classifies as an unappealable "excluded" decision a decision of this Tribunal to set aside its own decision. But s 11(5) TCEA does not make a decision *not* to set aside an excluded decision. I therefore accept that had I in fact made a decision not to set aside, the appellant would have had a right of appeal against that decision. But I consider that as I have treated the set aside application as an application for permission to appeal the 22 November 2016 decision of the Tribunal, there can be no right of appeal against a decision not to set aside the 22 November decision, as I have not made any such decision. That still leaves the question whether my decision under rule 42 to reclassify the application to set aside as a PTA application is appealable. I consider that it is (see §123).

Application for a review of the decision

Can a party apply for a review?

31. Section 9 TCEA covers reviews of decisions of the First-tier Tribunal. Omitting irrelevant parts, it says:

"(1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).

(2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable—

(a) of its own initiative, or

(b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.

(3) Tribunal Procedure Rules may—

(a) provide that the First-tier Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules;

(b) provide that the First-tier Tribunal's power under subsection (1) to review a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules is exercisable only of the tribunal's own initiative;

(c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure Rules may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules;

(d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the First-tier Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules.

(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—

(a) correct accidental errors in the decision or in a record of the decision;

(b) amend reasons given for the decision;

(c) set the decision aside.

…"

32. The only substantive F-tT(Tax) Rule relating to reviews is rule 41 which in paragraph (1) says:

"**41 Review of a decision**

(1) The Tribunal may only undertake a review of a decision—

(a) pursuant to rule 40(1) (review on an application for permission to appeal); and

(b) if it is satisfied that there was an error of law in the decision."

33. It seems then that rule 41 is made under s 9(3)(d) TCEA in that it limits the grounds on which the Tribunal may review its decision to a question of law. But the rule's opening words purport to deny the right to a review on an application by a party as it says the Tribunal may only review pursuant to rule 40(1) (PTAs), which provides:

> "(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 41 (review of a decision)."

34. Thus the combined effect of rule 40(1) and rule 41 is that a request or application for a review independent of a PTA application is not permitted, and that the tribunal must of its own motion review a decision when it receives a PTA application, but may only review a decision if it is satisfied there is an error of law in the decision.

35. But a statutory instrument such as the F-tT(Tax) Rules cannot simply oust a right given by primary legislation such as that in s 9(1) and (2)(b) TCEA unless the primary legislation provides for it to (see *Bennion on Statutory Interpretation* Code section 58). Section 9(3)(d) TCEA does not do that – it limits the *grounds* on which the review may be undertaken (in the F-tT(Tax) Rules an error of law). In relation to an application to review, s 9(3)(a) TCEA allows the procedure rules to set out a *category* of decision which may not be reviewed at all, but the F-tT(Tax) Rules do not do that. Section 9(3)(c) TCEA limits the *grounds* on which an application by a party for a review may be made but the F-tT(Tax) Rules do not do that either.

36. The paragraph most pertinent to this question is paragraph (b) of s 9(3). It provides that procedure rules can determine what *description* (type) of decision can only be reviewed on the Tribunal's own initiative. Rule 41 says that any decision at all may be considered for a review but only if there is a PTA. That does not seem to me to be setting out a description of a decision, but a precondition to a review being considered.

Conclusion on right of party to apply

37. I conclude then that it is at reasonably arguable that an appellant may, without making a PTA application, make an application by virtue of s 9(3)(c) TCEA for the tribunal to consider whether to review its decision. I am fortified in this view by references in the F-tT(Tax) Rules to an *application* for a review. There is rule 42 which expressly refers to "an application for a decision to be … reviewed". Rule 39(2) also points in that direction as it says:

> "(2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 56 days after the latest of the dates that the Tribunal sends to the person making the application—
>
> (za) the relevant decision notice;
>
> (a) … full written reasons for the decision;

(b) notification of amended reasons for, or correction of, the decision following a review; …

…"

Rule 39(2)(b) assumes that a review may be undertaken before an application for permission to appeal is made.

38. This is all somewhat academic in this case as Dr Milton has made a simultaneous PTA application and so I am bound to consider whether to review. It is not though entirely academic, as I have decided to exercise the power in rule 42 and that expressly allows me to treat Dr Milton's application to set aside the decision as an application for the decision to be reviewed.

39. If I am right that Dr Milton's "request" for a review could be treated as an application under s 9 TCEA independently of his PTA application, then I think that in principle I am not limited to deciding to review only where there is an error of law. The other possibilities are that I could review if there was an error in fact finding or simply a slip, but the latter could anyway be corrected under rule 37. Dr Milton has not identified any error of fact that we might have fallen into so I intend to consider only whether there is an error of law. To so limit myself would make an independent s 9 TCEA application in this case consistent with rule 41.

40. Because I am considering, in dealing with both applications, only whether there is (actually or arguably) an error of law and because an appeal against the decision may only be made on a point of law, I intend to consider together the grounds for review and for permission to appeal (including those grounds given in relation to the set aside application which I am treating as a review and PTA application).

The grounds for review and permission to appeal

Approach to the applications

41. In relation to each ground I decide whether there is an error of law that could lead to a review, or whether there is an arguable ground of appeal on a point of law (so that I should give permission to appeal), or whether there is no arguable ground in law in which case I neither consider whether to carry out a review nor give permission to appeal.

Paragraph 95 of the decision

42. Dr Milton's arguments here are set out verbatim (again with my interpolations in square brackets) and again I have numbered them for convenience and ease of reference:

"Errors of law.

(1) The decision at page 17 S95 (35) is wrong in law. ["S" I take to be the paragraph of the decision, and "(35)" to be the line number on that page]

… [This sentence relates to the matter covered in more detail at §§61 to 79]

(2) Page 15 S79 sets out the law on whether a private use deduction is allowable.

(3) Is [It] states that the payment is " required in that year".

(4) But it does not say " the requirement to make a payment must arise in that year".

(5) S91 page 17 of the decision cites a precedent that states that the requirement to make the payment can arise in later years.

(6) Thus P17 S95 (35) is wrong in law.

(7) The personal use has been fully reimbursed."

43. Lines 35 to 37 of page 17 in paragraph 95 say (again with my interpolation in square brackets):

> "That requirement [the requirement mentioned in s 144(1) Income Tax (Earnings and Pensions Act 2003 "(ITEPA")] has to be imposed by the employer or other person making the car available as a condition of, and therefore at the time, the cars are made available, not many years later."

44. This passage must be seen in the light of the previous sentence of paragraph 95:

> "The [HMRC] decisions may be the reason why the payments were made but they cannot impose a requirement as mentioned in s 144(1)."

45. And paragraph 95 as a whole (ignoring the "insulting" remarks that Dr Milton complains of) must be seen in the light of some previous paragraphs:

> "81 Dr Milton argued that the "entirety of the alleged benefits up to 12/13 have been reimbursed". The bank statements when compared with the calculations issued by Mr Lawrence demonstrated this.
>
> 82 He argued that if the payments were made too late, as HMRC alleged, then Finance Act 2008 would have the effect that a claim for error or mistake relief could have been made up to four years after the year concerned.
>
> 83 HMRC's submissions on this were that no evidence had been submitted by way of personal or company records to confirm this was done and nor have any calculations been provided to show how the reimbursements were calculated.
>
> 84 It will be seen that neither party's submissions addressed the terms of s 144(1).
>
> 85 We therefore asked Dr Milton what evidence he had to show that it was a condition of the cars being made available for each of the three Couldwell's private use that the Couldwells were required to make the reimbursement.
>
> 86 He answered that there was nothing that the appellant had required of the employees, but that it was the issue of the decisions alleging that benefits had been provided ignoring that the cars were pooled cars that

was the requirement. It had made it necessary for the employees to pre-empt HMRC's incorrect imposition of NIC (and income tax).

87 We accept that Dr Milton has shown that the Couldwells did make payments to reimburse the appellant for private use of the cars."

46. Section 144(1) ITEPA (as it applied in the years concerned) said:

> "(1) A deduction is to be made from the provisional sum calculated under step 7 of section 121(1) if, as a condition of the car being available for the employee's private use, the employee—
>
> (a) is required in the tax year in question to pay (whether by way of deduction from earnings or otherwise) an amount of money for that use, and
>
> (b) makes such payment."

47. Taking Dr Milton's arguments in §42 in turn:

(1) is Dr Milton's proposition.

(2) is correct as a statement of fact.

(3) is not a verbatim quote from s 144 which states "is required in the tax year in question to pay".

(4) says that the requirement to pay need not arise in that year. I agree with Dr Milton if what he means is that the payment need not be made in the year. But the words of the statute "is required in the tax year in question to pay" can only be read as saying that it is the *requirement* that must be imposed in the tax year. Actual payment is dealt with in paragraph (b), and cannot also be covered by paragraph (a).

(5) refers to the case of *Marshall v CIR* [2013] UKFTT 46 (TC). This is a decision of this Tribunal so is not technically a precedent. That case (in which I sat as a member before I became a judge) decided that the payment described in s 144(1)(b) need not be made in the "tax year in question". It does not say that the requirement need not exist in that tax year. Again Dr Milton is misinterpreting the words of s 144(1)(a) to cover the date of payment as well as the date of imposition of the requirement.

(6) does not therefore follow at all.

(7) is true but irrelevant.

48. Dr Milton adds some further arguments "for the avoidance of doubt". Again I quote them verbatim (but with numbering added):

> "At P15 S79 the requirements of for the personal use payments to be allowed are:
>
> (1) There is a requirement to make the payment. There is such a requirement and thus this condition has been met.
>
> (2) The payment is made. And it has been. Thus that requirement is met.

(3) The payment is required in the tax year in question. And there is a requirement in the tax years in question. Thus that condition has been met.

(4) The comments at P17 S95 (35) "and therefore at the time the cars are made available" is thus wrong in law.

(5) And it is not the "decision" (of HMRC) spoken of that is the reason the payments were made.

(6) It is the requirement imposed by the employer.

(7) There is no law at all that prevents an employer imposing a requirement retrospectively.

(8) And that is the case here.

(9) The employer has made a requirement that a reimbursement is made in a tax year.

(10) And the reimbursement has been made."

49. The problems I see with this submission are, first, that, contrary to §48(7) and (10), there was no evidence at all before us that the employer had imposed a condition on the employees requiring them to reimburse it for those employees' private use. In particular, there was nothing in the witness statements of Mr and Mrs Couldwell giving any evidence of any conditions imposed by their employer (see the decision at [34]).

50. Second, the notes of the meeting between HMRC and the Couldwells which was the main evidence in the case did not mention any conditions or requirements (see the decision at [19]).

51. Third, §48(6) and (9) is contradicted by what we record Dr Milton as saying to us at [85] and [86] of the decision:

> "85. We therefore asked Dr Milton what evidence he had to show that it was a condition of the cars being made available for each of the three Couldwell's private use that the Couldwells were required to make the reimbursement.
>
> 86. He answered that there was nothing that the appellant had required of the employees, but that it was the issue of the decisions alleging that benefits had been provided ignoring that the cars were pooled cars that was the requirement. It had made it necessary for the employees to pre-empt HMRC's incorrect imposition of NIC (and income tax)."

52. Fourth, §48(6) and (9) are also contradicted by the skeleton argument that Dr Milton produced for the hearing, which at [20] says "the … reimbursements were made merely to stop HMRC continually pestering the company and were not an admission of liability".

53. §48(2) and (3) are irrelevant to the question of whether the requirement in paragraph (a) of s 144(1) is met.

54. The words extracted from [95] of the decision set out in §48(4) are not wrong in law because the requirement condition has to be in place in the tax year in question by virtue of s 144(1)(a) ITEPA.

55. §48(5) is contradicted by Mr and Mrs Couldwell's evidence and Dr Milton's skeleton.

56. §48(7) and (8) are wrong because the requirement has to exist in the tax year in question, ie the tax year for which the benefit is being calculated – s 144(1)(a) ITEPA.

57. §48(10) is true but irrelevant.

58. Further, there is no evidence that any requirement had been imposed by anyone unless one counts Dr Milton's suggestion that the HMRC decisions were what imposed the requirement. Thus the answer in §48(1) may be literally correct if one does count the HMRC decisions, but they cannot possibly be regarded as making it a condition of the availability of the cars for private use that a reimbursement is made, and in any event Dr Milton is now resiling from that suggestion.

59. For the reasons given above there is no error of law in our decision that the payments made for private use do not meet the conditions in s 144 ITEPA. I therefore do not intend to review the decision on that ground.

60. I also do not consider it even arguable that our decision was wrong. There was no evidence that a condition had been imposed by the employer as to private use payments and none that it had been imposed in the tax years in question. On the contrary the witness statements and Dr Milton's skeleton assert that any "requirement" was in the decisions of HMRC. I therefore deny leave to appeal on this ground.

Paragraph 89 of the decision.

61. This paragraph reads:

> "We think that Dr Milton raised the error or mistake point because he had read HMRC's skeleton and noticed what it said was the wording of s 144(1)(b). The skeleton said that that paragraph read "and pays that amount in that year". Thus, he must have thought, a reimbursement of the 2009/10 cash equivalent must be paid in 2009/10 and not in 2013/14 and the same would apply to all subsequent relevant years."

62. Dr Milton's arguments on this point (again verbatim and again numbered by me for reference) are:

> "The decision at page 16 S89 is wrong. [See Tribunal's interpolation after §42(1)]
>
> (1) The Tribunals "thoughts" at P16 S89 of the decision are not entirely correct. Part of the Error / Mistake (overpayment relief) aspect was to address the timing of the requirement.

(2) The requirement to reimburse would have to be a part of the employees contract of employment.

(3) As stated above, there is no legal reason why a requirement can not be imposed retrospectively.

(4) BUT IF THERE WERE error or mistake relief would address this issue.

(5) The error / mistake would be not imposing the requirement; this could be corrected by a variation of the employee contract.

(6) And that would address the evidence requirement raised at P 17 S 96 of the decision."

63. [96] of the decision says

> "A number of decisions of this Tribunal have considered whether a requirement to make private use payments existed, but they have all turned on the question whether there was evidence to show such a condition. Indeed this was also an issue in *Marshall* - §91."

64. The issue raised in §62(1) has to be seen in the context of Dr Milton's submissions to the Tribunal in his skeleton argument. At [39] of the skeleton Dr Milton said:

> "At 8 and 12 of the respondents skeleton argument it is averred that the reimbursements as above are not pertinent being out of time; it is noted from bundle Tab A 16 that … the earliest year of assessment is 10/11. The time limits imposed in FA 2008 allow the appellants until 5 April 15 for 10/11, and 5 April 16 for 11/12 and so on, to make corrections. The payments were made before that date."

65. Because we did not know which provision of Finance Act ("FA") 2008 Dr Milton was referring to, we asked him. He said he was referring to the error or mistake provisions. The only relevant provision in FA 2008 that relates to those provisions seems to be paragraph 5 of Schedule 39 which amends s 33(1) TMA to reduce to four years the time available for making an error or mistake claim where income tax is involved. That reduction however disappeared with effect for claims made after 31 March 2010 for the reasons set out below.

66. Thus it is correct that (assuming that s 33 TMA as it stood after amendment by FA 2008 applied to Class 1A NICs, a point we consider below) that the time limit for an error or mistake claim would be four years.

67. [89] of the decision was our attempt to understand why Dr Milton had raised this point in his skeleton, as it was the opposite of what he was arguing in relation to the reimbursement payments. It is not part of the reasons for our decision and does not set out any conclusion in law, and on that simple basis it discloses no error of law that may be reviewed and no arguable grounds for an appeal.

68. But I nevertheless consider Dr Milton's arguments on this point.

69. §62(2) is correct in law.

70. §62(3) is not correct – see §46(4) and (5).

71. §62(4) is Dr Milton's counterfactual but our factual. So the proposition is that s 33 TMA (error or mistake relief) would allow the appellants to succeed.

72. To give proper consideration to §62(5) I need to consider the exact wording of the relief. The s 33 TMA which gave error or mistake relief was in fact replaced for claims made after 31 March 2010 by a new version of the section and a wholly new Schedule (1AB TMA) (the section and Schedule being labelled "recovery of overpaid tax etc" and often referred to as "overpayment relief"). This legislation was inserted in TMA by Schedule 52 FA 2009.

73. The condition in paragraph 1(1) Schedule 1AB that would seem to apply here is that the appellant has been assessed as liable to pay an amount of income tax or there has been a determination or decision to that effect, but the assessee believes the tax is not due. But here there has been a decision that the appellant pay an amount of Class 1A NICs, so it is necessary to see then whether Schedule 1AB applies to Class 1A NICs as it applies to income tax.

74. Paragraph 6 of Schedule 1 to the Social Security (Contributions and Benefits) Act 1992 ("SSCBA") gives HMRC power to make regulations applying or extending with or without modification any provision of the Income Tax Acts. I have read through the Social Security (Contributions) Regulations 2001 (SI 2001/1004) and the Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) as they stood in the tax years in question and can find no evidence that s 33 and Schedule 1AB were extended to Class 1A NICs. It follows that the appellant could not have availed itself of the relief given by Schedule 1AB TMA.

75. However what I did find in NICs legislation was s 19A SSCBA headed "Class 1, 1A or 1B contributions paid in error". But this section only applies if the error was deducting Class 1A NICs and paying them to HMRC in respect of an employment which was not "employed earners employment" (a term of art in SSCBA). In this case no payments of Class 1A NICs have been made. If they had been there would have been no error of the type set out in this paragraph. The existence of this provision reinforces my finding about Schedule 1AB and Class 1A NICs.

76. But that is not all. Relief under Schedule 1A must be claimed (paragraph 3 Schedule 1AB) and it has not been. It must also be made in circumstances which do not fall within any of eight excluded cases (paragraph 2), although, given that the point is, in my opinion, moot, I have not considered in this case whether any of them would apply.

77. §62(5) (first part) is irrelevant, since s 33 and Schedule 1AB do not require an error or mistake to be identified. The second part is true, but a variation to a contract of employment to impose a requirement could only have been made for the current year (the year it was made) and future tax years. And in any event there was no evidence that such a variation had been made. It is wholly insufficient for Dr Milton

to say that it could have been done so therefore it must be treated as having been done. Income tax (and Class 1A NICs) does not work like that.

78. §62(6) is wishful thinking on Dr Milton's part in view of what I have said about the lack of evidence of any requirement in a contract.

79. Nothing in Dr Milton's points gives me any cause to doubt my conclusions in §§60 and 67.

HMRC's agreement

80. As before I will set out Dr Milton's arguments verbatim and with my numbering:

> "(1) The " astonishment" expressed by the Tribunal at P17 S93 indicates that the Tribunal had come to a conclusion before hearing all the evidence.
>
> (2) Mr Burke is one of HMRC's leading and most experienced Tribunal advocates; to state that he " had become confused" is ridiculous.
>
> (3) Mr Burke had heard the appellants representations and agreed with them.
>
> (4) HMRC accepts that the reimbursement was required and has been paid.
>
> (5) Mr Burke did not MAKE A CONCESSION ABOUT THE LAW (P17 S94), he agreed with the appellants on the facts and the law.
>
> (6) **The Tribunal should have accepted this and decided the matter with a consent order.**
>
> (7) The reasons for not accepting Mr Burke's agreement (at P17 S95) further show that the tribunal had reached it's decision before the parties had completed their submissions.
>
> (8) It is not for the Tribunal to vary the respondents agreement to the appellants case on an entirely subjective assessment that the respondents had " become confused".
>
> (9) Indeed this imputation that Mr Burke can not make rational decisions because of confusion underlines the propensity of this particular Tribunal to show startling disrespect to tax professionals.
>
> (10) P17 S94 (30) There is no "concession" to accept. There was an agreement on facts and law. How does it serve the overriding objective to refuse the respondents agreement because of a subjective deeming of "confusion"?
>
> (11) It is manifestly unjust to refuse a parties freely given agreement, especially in writing after the hearing, after which course, the Tribunal would know that the representatives of both parties would have reported to their Client / Employer what the parties had agreed at the Tribunal.
>
> (12) The refusal of Mr Burke's agreement to the respondents case is wrong in law.

(13) **The Tribunal should have disposed of the matter with a consent order.**"

81. In order to put these arguments in their proper context I set out paragraphs 93 and 94 of the decision:

> "93. Mr Burke accepted that he had provided the wrong legislation. He accepted that the payments could be taken back to the years involved. We asked him then for his views on s 144(1)(a), the "requirement" point. To our astonishment he said he agreed with Dr Milton. We said that if he was not opposing Dr Milton's argument on this condition as to requirement then we wished to know what we were doing hearing the appeal. Mr Burke had no coherent reply.
>
> 94. If in any hearing before this Tribunal counsel were to make a concession about the law then it is highly likely we would follow it and decide accordingly. But in this case we do not do so. We think Mr Burke had become confused. In any event we do not think that to accept his concession and to follow Dr Milton's submission would be in accordance with the overriding objective of this Tribunal, to deal with cases fairly and justly."

82. The first sentence of [93] needs further explanation. Mr Burke's skeleton had set out the text of s 144 ITEPA. But the version of s 144 he had set out included ss (1) as it was amended by s 25 FA 2014 and which had effect for the tax year 2014-15 and subsequent years. It was this version that had amended s 144(1)(b) to introduce the requirement that the reimbursement must have been paid in the year and which was introduced to overturn the decision in *Marshall* (see §47(5)) that there was no requirement to pay in the year in s 144(1)(b) ITEPA. The second sentence shows that Mr Burke accepted from the Tribunal that he had produced the wrong legislation and that the paragraph (b) of s 144(1) that was in force in the tax years in question in this case did not make it a requirement that there should be payment in the year.

83. I turn now to Dr Milton's arguments on this aspect of his application.

84. §81(1) is an accusation that we had predetermined the decision, a form of bias, and I deal with it in the next section of this decision.

85. §81(2) is merely Dr Milton's view. I make no comment.

86. §81(3) is a correct statement of Mr Burke's answer to the Tribunal's question as described in [93] of the decision.

87. §81(4), if it is meant to say "Mr Burke accepted" then it is correct. If it is suggesting that it is HMRC policy that the requirement in s 144(1)(a) could be imposed by decisions of its officers or could be imposed retrospectively then it is not correct. The relevant policy is set out in HMRC's Employment Income Manual 25250 and 25253. But what HMRC's policy is or their guidance says is irrelevant to the questions before the Tribunal.

88. §81(5) is simply wrong. Mr Burke's answer to the Tribunal's question amounted to his acceptance that the condition in s 144(4)(a) had been met and therefore his agreement with the appellant as to the law. I do not understand what facts it was that he was said to have agreed. There was no agreement that there was a contract in existence which imposed the condition.

89. §81(6) is Dr Milton's ground for review and appeal. It is misconceived. Under rule 34 the Tribunal may make a consent order disposing of the proceedings and may make such other appropriate provision as the parties have agreed. I accept that it would have been possible for the Tribunal to make an order during the hearing, but Dr Milton has overlooked that the Tribunal may only make such an order "at the request of the parties". No such request was made, and if it had been on the basis that Dr Milton's arguments were correct I would have refused to make such an order.

90. I also note that an order must dispose of the whole of the proceedings. The issue that the parties were apparently agreed on was not the only issue, and was not in any event applicable to Arabella Couldwell's use of a car.

91. It was also open to a party, in this case HMRC, to withdraw part of their case under rule 18. In a hearing this may be done orally. Mr Burke gave the Tribunal no such oral notice at the hearing.

92. In the absence of an application for a consent order or a notice of withdrawal, the Tribunal is bound to come to a decision and to send it to the parties.

93. §81(7) is an accusation that we had predetermined the decision, a form of bias, and as with §81(1) I deal with it in the next section of this decision.

94. §81(8) is also misconceived. The Tribunal is not bound to accept an interpretation of a statute just because both parties agree on what it means. If authority is needed for that statement it is of the highest. In *R v Montila and others* [2004] UKHL 50, the Committee said at [32]:

> "Mr Perry for the Crown submitted that it was well settled that a side note in an Act of Parliament does not constitute a legitimate aid to the construction of the section to which it relates. Mr Grenfell QC for the appellants said that he was willing to concede the point. But this is not a concession that can be accepted."

95. Mr Burke's skeleton on the reimbursement point first of all deals with s 132 ITEPA. This is because Dr Milton's skeleton had failed to specify what provision of ITEPA it was that he was seeking to rely on, and it could well have been s 132. The Tribunal had to check with Dr Milton whether his case relied on s 132 or s 144 or both or some other provision, and it was only then that Mr Burke knew he had to deal with s 144.

96. Mr Burke's skeleton dealing with s 144(1), after setting out the wrong version, understandably majored on what would have been a killer point if that had been the

correct legislation, the date of the reimbursement. He does not mention the condition in s 144(1)(a) at all.

97. Mr Burke was put on the spot when he was asked to say what his reaction was to Dr Milton's argument on s 144(1)(a). It might have been better had we not asked him that question at that point but asked him to make a submission on the point in his reply, and had he said that he wished to deal with the point after reflection in his reply or even by further written submissions we would obviously have accepted that. But his reply was not, and could not have been, in our view the product of a presenting officer who had been expecting to meet the point and who had prepared for it. It was because of the Tribunal's pointing out to him of his use and deployment of the wrong version of s 144(1) ITEPA that we considered he might, at that point, have become confused.

98. That is not, as is said in §81(9), to cast any aspersions on his professionalism. Even experienced counsel can be caught out by a "left field" question, and Mr Burke did not have the luxury of being able to consult those instructing him, as counsel would have had.

99. §81(10) betrays the same misconception as §81(8). We did not refuse the respondents' agreement if by that is meant that the respondents sought to withdraw their case or jointly with Dr Milton sought a consent order, because neither of those things was done at the hearing.

100. §81(11) is confusing. I do not know if Dr Milton is saying that there was in fact a written agreement between the parties after the hearing, or that the Tribunal should have produced some writing on the matter (other than its decision). If there was an agreement in writing between the parties after the hearing then we know nothing about it and cannot have taken it into account in our decision, nor could we possibly have known or even guessed what each party would report to its clients or employers respectively.

101. §81(12) is also wrong. There is nothing wrong in law in the Tribunal's refusing to accept that Mr Burke's answer determined the question that the Tribunal had to decide and on which it had to come to a decision that was in the interests of justice and was in accordance with the law as the Tribunal interprets it.

102. §81(13) betrays the same error as §81(6). We did not err in law in not making a consent order as we were not asked to. It is not arguable that we should have made a consent order of our own motion, as that is not possible. I therefore do not review the decision and do not give leave to appeal on this ground.

Bias (including predetermination)

103. The following paragraph (see §12(4)) of Dr Milton's application to the Tribunal of 24 November 2016 seem to raise issues of bias:

> "Writer is the Dr Milton in question who regards this conduct on the part of Thomas and Webb as disgraceful and, candidly, a deliberate act

> of spite as there can simply be possible reason to use such extreme and insulting terms."

104. The passage in the decision which this paragraph of Dr Milton's letter refers to is:

> "This is because we consider that Dr Milton's argument is not only plainly wrong, but fanciful in the extreme."

105. In *Andrew Jeffery v Financial Services Authority* [2012] UKUT B31 (TCC) ("*Jeffery*") the Upper Tribunal (Tax & Chancery Chamber) considered an application by Mr Jeffery that the nominated judge in his appeal, Judge Roger Berner, recuse himself (on the grounds that he shared an office with Upper Tribunal Judge Timothy Herrington who had been chairman of the FSA's Regulatory Decisions Committee before being appointed a judge).

106. In the decision Judge Berner, sitting with Ms Sandi O'Neill and Mr Ian Abrams, expounded the case law on bias and at [15] said:

> "15. Whilst earlier authorities provide a useful guide, every application of this nature must be decided on the facts and circumstances of each case. A wide range of authorities, and the relevant law, were examined by the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451. In summarising the position the Court (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C) said (at [25]):
>
> > 'It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see *K.F.T.C.I.C. v. Icori Estero S.p.A.* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, **a real danger of bias might well be thought to arise if there were personal** friendship or **animosity between the judge and any member of the public involved in the case**; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the

> judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); **or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.** The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.'"

107. I have highlighted in bold type the two factors listed by Court of Appeal that might be said to be relevant in this case. For the avoidance of doubt I can say that neither I nor Mrs Webb had previously sat in a hearing in which Dr Milton was a party or a party's representative (although Mr Burke had appeared as a presenting officer before Judge Thomas before this hearing), and that with the exception of *Couldwell Concrete Flooring Ltd v HMRC* [2015] UKFTT 135 (a hearing before Judge Jonathan Cannan relating to the issue of a notice to the appellant in this case under Schedule 36 FA 2008) neither of us had read any decisions in any case in which Dr Milton was a party or representative.

108. In *Jeffery* the Tribunal continued:

> "16. In *Locabail*, the Court found force in the observations of the Constitutional Court of South Africa in *President of the Republic of South Africa v South African Rugby Football Union*, 1999 (4) SA 147, 177:
>
> > 'It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or

> predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'
>
> 17. This illustrates the context in which the danger or possibility of bias must be approached by the fair-minded and informed observer. It includes the oath of independence taken by judges (including tribunal judges), and the training and experience which underpins that independence."

109. I have taken the oath of independence and Mrs Webb has taken a similar oath as a member.

110. In my view a fair-minded and informed person (I say person rather than observer because what is complained of is not what happened or was said in or before the hearing, rather in my decision which was something done in private) reading the decision would not conclude that I had any personal animosity towards Dr Milton. They would conclude that what I said in [95] was not grossly unfair to Dr Milton, particularly if they were informed enough to realise that "fanciful" is used by judges as the opposite of "realistic" in cases where the issue is whether a case has a reasonable prospect of success.

111. The fair-minded and informed person would also conclude that the passage in [95] of the decision did not insult Dr Milton or seek maliciously to lower his reputation or cast aspersions on his professional ability.

112. That fair-minded and informed person would have noted that the Tribunal accepted as valid others of Dr Milton's arguments, such as his argument that Arabella could not trigger a class 1A NICs liability in periods before she was employed (paragraphs 1, 2 and 13 of his skeleton) and that there was dual use of the two cars (paragraph 21 of his skeleton) which meant that HMRC's calculations were wrong. The Tribunal also accepted that there had been full reimbursement to the company despite a lack of convincing evidence for one payment.

113. The same fair-minded and informed person would also have noted that Mr Burke comes in for some criticism from the Tribunal, particularly for his use of the wrong legislation, a matter which had the Tribunal not noticed may have caused it to dismiss Dr Milton's case on the date of reimbursement, which instead we upheld.

114. As to predetermination it has been held that this is a form of bias. In *Jiminez v London Borough of Southwark* [2003] EWCA Civ 502 Peter Gibson LJ said:

> **"[**25**]** It is common ground that (1) a judicial decision may be vitiated by the appearance of bias no less than actual bias and that the test for such apparent bias is whether the fair-minded and informed observer, having considered the facts, would consider that there was a real

> possibility that the tribunal was biased (see *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at p 494H of the latter report per Lord Hope); and (2) that the premature expression of a concluded view or the manifesting of a closed mind by the tribunal may amount to the appearance of bias."

115. The following paragraphs of Dr Milton's application to the Tribunal of 24 November 2016 seem to raise issues of predetermination:

> (1) The "astonishment" expressed by the Tribunal at P17 S93 indicates that the Tribunal had come to a conclusion before hearing all the evidence. (§81(1))
>
> (2) The reasons for not accepting Mr Burke's agreement (at P17 S95) further show that the tribunal had reached it's decision before the parties had completed their submissions. (§81(7))

116. In fact when the Tribunal asked Mr Burke for his reaction to Dr Milton's argument on s 144(1)(a) ITEPA we had heard all the evidence in the case. But I agree that we asked Mr Burke for his reaction before the submissions had finished (indeed it was before Dr Milton had completed his submissions and before Mr Burke had started to make his).

117. But I do not think that the fair-minded and informed person, had they been present at the hearing, would have concluded from the question I put to Mr Burke that I was doing anything other than seeking to find what his reaction was to Dr Milton's proposition of law. They might have concluded from the exchange that I was sceptical of the validity of Dr Milton's argument (as indeed I was) and possibly predisposed, on the basis of reading Dr Milton's skeleton before the hearing and comparing it with the wording of s 144(1) ITEPA, not to accept it, but the fair-minded person would not conclude from that that we had prematurely expressed a concluded view or that our minds were closed. Predisposition is not the same as predetermination.

118. I am assuming that if I were to conclude that the fair-minded and informed person would find that there was actual bias or the appearance of bias or there was predetermination on the part of the Tribunal, that would amount to an error of law. It would have meant that the appellants would not have had a fair hearing, contrary to rule 2, the overriding objective of the Tribunal being to deal with cases fairly and justly. I am also assuming that if I were to conclude that there was such an error of law the Tribunal must consider whether to review the decision, and since that consideration must take into account the overriding objective (rule 40(1)), it is likely that the decision would be to review.

119. However I am not persuaded, for the reasons given above, that the fair-minded and informed person would find that there had been bias or an appearance of bias or predetermination so that there was no error of law in the Tribunal's decision. I therefore decide not to review the decision.

120. In order to obtain permission to appeal the Tribunal must be satisfied that there is at least an arguable ground of appeal. The test here is whether there is a realistic, as opposed to a fanciful or unrealistic, prospect that the appeal will succeed (see *Tribunal Practice and Procedure (2nd ed.)* Judge Edward Jacobs at 4.193, citing *Swain v Hillman* [2001] 1 All ER 91).

121. Although I have done my best to put myself into the shoes and mind of the fair-minded and informed person and to come to an objective decision, I cannot say that I must, in attempting that exercise, have been totally objective. It is possible that others who are more detached from the decision and the allegations could come to a different view about what the fair-minded and informed person would find.

122. So I cannot say that Dr Milton's arguments on bias, appearance of bias and predetermination are "clearly unfounded" (said in *R (YH) v Secretary of State for the Home Department* [2010] 4 All ER 448 to be that same as "no realistic prospect of success") so I give leave on the sole ground that the Tribunal was or appeared to be biased and had predetermined the outcome of the decision in relation to s 144 ITEPA.

Appeal rights

123. If the person who applied to set aside the decision is dissatisfied with the outcome of the application to set aside the decision (that the application be treated under rule 42 as an application for the decision to be reviewed and for permission to appeal) that person has a right to apply to the Upper Tribunal for permission to appeal against the decision to reclassify the application. Such an application to appeal must be made in writing to the Upper Tribunal at 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet *Appealing to the Upper Tribunal (Tax and Chancery Chamber).*

124. If the person who applied for permission to appeal is dissatisfied with the outcome of the application for permission to appeal the decision, that person has a right to apply to the Upper Tribunal for permission to appeal against the decision. Such an application must be made in writing to the Upper Tribunal at 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet *Appealing to the Upper Tribunal (Tax and Chancery Chamber).*

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 16 JANUARY 2017