Appeal No. UKEAT/0335/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 January 2014

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MR O OYESANYA — APPELLANT

SOUTH LONDON HEALTHCARE NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR O OYESANYA (The Appellant in Person)
For the Respondent	MR L DILAIMI (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE – Review

On an application to review an order striking-out claims for non-payment of a deposit, an Employment Judge dismissed the application without a hearing using the summary power in rule 35 of the ET Rules. The reason given was that the application had no "reasonable prospects of success".

The appeal took three points, each unsuccessful:

(1) A *reasons* challenge: in the circumstances the truncated reasons given were sufficient to meet the obligation to give reasons.

(2) A *perversity* challenge: the appeal could not surmount the high threshold necessary for such a challenge.

(3) An *own-motion* challenge: the Judge could – of his own motion – have treated the application to review as an application for a retrospective extension of time up to the date when the deposit was belatedly paid. The failure to do so, given the procedural history of the instant claims, was not an error of law.

MR RECORDER LUBA QC

Introduction

1. This is an appeal from a decision of Employment Judge Kurrein, refusing, on the papers, an application made by Mr Oyesanya for a review of an earlier Judgment of the same Judge. By that earlier Judgment the Employment Judge had declared that the claims brought by Mr Oyesanya to the Employment Tribunal Service should be struck out. The strike-out had occurred by reason of a failure on Mr Oyesanya's part to pay in time a deposit that the same Judge had earlier ordered to be paid as a condition of the claim proceeding.

The Respondent

2. The original Respondent to these proceedings in the Employment Tribunal was the South London Healthcare NHS Trust. The Trust, as I shall call it, was also the initial Respondent to this appeal to the Employment Appeal Tribunal. However, in October 2013 the Trust was dissolved and ceased to have a legal existence. The effect of section 70(1) of the **National Health Service Act 2006** is to cause the liabilities of the Trust to transfer to the Secretary of State. At the outset of the hearing of this appeal, counsel appearing for the Secretary of State, Mr Dilaimi, applied for an order substituting the Secretary of State for Health in place of the Trust as Respondent to this appeal. That order was not opposed by Mr Oyesanya and I made it.

3. Mr Oyesanya did, however, object to the Respondent participating by counsel in the hearing of his appeal. For the reasons I gave in a Judgment delivered earlier today, I refused to debar counsel for the Secretary of State from addressing me. In those circumstances, the appeal hearing proceeded, Mr Oyesanya representing himself and Mr Dilaimi representing the Respondent Secretary of State.

Factual summary

4. Before coming to the merits of the appeal, it is essential to say something about the background facts. Mr Oyesanya applied to the Trust in April 2010 for appointment to one of two consultant posts it had advertised. He was not successful. He was not even called for an interview for either of the two possible positions. In August 2010 he brought proceedings in the Employment Tribunal, claiming that he had been the victim of discrimination on the grounds set out in his form ET1. Those grounds were grounds of discrimination on the basis of race and/or discrimination on the basis of his age. By its response, the Trust contended that there had been no discrimination. It advanced the explanation that Mr Oyesanya had not been appointed, or even interviewed, because he had simply not scored sufficiently highly in the selection process when the applications of candidates were assessed. His score did not reach the level for him to be shortlisted and called for interview. Those, then, were the opposing positions of the parties on the pleaded case.

5. In October 2010 the Employment Tribunal Service promulgated standard directions for the conduct of the claim and fixed a case management discussion for 18 January 2011. The Respondent at that stage made an application to strike out the claim on the basis that it had no merit. That application was refused, although the Respondent was told that it could reapply at a later date. The case management discussion took place on the date fixed in January 2011 before Employment Judge Kurrein, sitting with two members. Prior to that hearing, Mr Oyesanya had made multiple applications to postpone it on the basis that he had not had adequate notice of the hearing. Those applications had been unsuccessful, as had been applications to review the refusal to postpone.

6. Mr Oyesanya himself did not appear at the case management discussion, but he was represented. In the statement of reasons it promulgated following the case management

discussion, the Employment Tribunal said this, at paragraph 10, in relation to Mr Oyesanya's applications to postpone and their refusal:

> **"..the Claimant thereafter did nothing to progress his claim or comply with the order. He appears to have proceeded on the basis that his application for a postponement would be granted."**

As I have indicated, no postponement was granted, and the hearing on 18 January 2011 had proceeded.

7. The Employment Tribunal, on that occasion, included the following description of their findings about the case at paragraphs 22 and 23 of their reasons:

> **"Having considered all the circumstances of the case, we concluded that...the basis on which his claims were made were so unclear that there was a real likelihood that they would have little or no prospect of success. We therefore concluded that it was appropriate to postpone the hearing on 18 January 2011 and list the case for a Pre-Hearing Review."**

8. The order promulgated following the hearing on 18 January 2011 then set out notes indicating that the order itself constituted notice of a hearing, which would take place by way of a Pre-Hearing Review on 21 February 2011. As to the function of the Pre-Hearing Review, the case management order of the Tribunal, given following the hearing on 18 January 2011, reads as follows, at paragraphs 8 and 9:

> **"An Employment Judge has directed that this case should be listed for a Pre-Hearing Review to consider whether the Claimant should be ordered to pay as a deposit as a condition of being permitted to continue to take part in these proceedings as there is reason to believe that the claim has little prospect of success.**
>
> **An Employment Judge has directed that a Pre-Hearing Review is to be held to determine whether the claim should be struck out..."**

9. In addition to promulgating its orders and reasons, the Employment Tribunal also provided the Claimant with a written guidance note comprising some eight paragraphs and

headed "Pre-Hearing Review – payment of a deposit". At paragraph 6 that guidance note reads as follows:

> **"If you are ordered to pay a deposit, you will receive instructions with the order on how to pay the deposit. You must pay the deposit within 21 days of the date the order was sent to you. The Tribunal has a discretion to extend the period for payment by up to 14 days if representations are made by you within 21 days of the date the order is sent to you."**

10. The papers generated by the Employment Tribunal Service also attached a means enquiry form so that Mr Oyesanya might provide details of his means, which might be considered by the Employment Tribunal at the Pre-Hearing Review if it came to determine that a deposit should be ordered.

11. Between the promulgation of that case management decision and order and the hearing of the Pre-Hearing Review, the Respondent applied on 10 February 2011 for an order that it receive preparation time reimbursement and also for an order that the claims be struck out on the basis that they had no merit. The Employment Judge directed that the Respondent's applications should be heard at the Pre-Hearing Review.

12. Thus it was that the Claimant in person and the legal representative of the Respondent appeared before the same Employment Judge, Employment Judge Kurrein, on 21 February 2011 for the Pre-Hearing Review. Having heard the parties, the Employment Judge was satisfied that the claims brought by Mr Oyesanya had little prospect of success. At paragraph 17 of his reasons he said this:

> **"Having considered all the matters that had been put before me, I concluded the Claimant's claims had little prospect of success. I considered his claim alleging age discrimination to have even less prospect of success than his claim of race discrimination. His claims were based on no more than assertion and speculation. He is acting in the hope that 'something will turn up'."**
>
> **I was satisfied that it would be correct in principle to order the Claimant to pay a deposit in respect of each of the claims of discrimination that he makes as a condition of his being permitted to continue them."**

13. Having then had regard to the information as to means provided by Mr Oyesanya, the Judge made a deposit order requiring a deposit of £500 in relation to the claim for age discrimination and £400 in relation to the claim for race discrimination. Both orders required payment of the sum in question: "not later than 21 days from the date this order is sent". The order itself is endorsed that it was sent to the parties on 7 March 2011. In short, the deposit order put Mr Oyesanya to his election. If he wanted to continue with both claims, he had to pay a deposit of £900 within 21 days. He could, however, elect to proceed with one and not the other provided he paid the requisite amount in relation to that claim.

14. Accompanying the deposit order and the directions, the Employment Tribunal Service promulgated a note headed "Note accompanying deposit order". Under the sub-heading "When to pay the deposit" that provides as follows, at paragraphs 3 and 4;

> **"3. The party against whom the deposit order is made must pay the deposit within 21 days of the day on which the order was sent to that party. If the deposit is not paid within that time, an Employment Judge shall strike out the claim or response of that party or the part of it to which the order relates.**
>
> **4. That party may make representations within that period of 21 days. An Employment Judge may then extend the period of time for paying the deposit by up to 14 days. If the deposit is not paid within the extended period of time, an Employment Judge shall strike out the claim or response of that party or the part of it to which the order relates."**

15. The despatch of that note is a requirement of the Employment Tribunal's Procedural Rules. The rule relating to deposit and deposit orders that is presently material is rule 20(4) of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**, Schedule 1. It provides at sub-rule (4) as follows:

> **"If a party against whom an order has been made does not pay the amount specified in the order to the Secretary either: —**
>
> > **(a) within the period of 21 days of the day on which the document recording the making of the order is sent to him; or**

(b) within such further period, not exceeding 14 days, as the employment judge may allow in the light of representations made by that party within the period of 21 days;

an employment judge shall strike out the claim or response of that party or, as the case may be, the part of it to which the order relates."

16. As the note and the rule I have just read from indicate, the obligation on Mr Oyesanya was to pay the deposit by 28 March 2011 or before that date to have sought from the Employment Judge an extension of time of up to a further 14 days, giving an absolute maximum period of 35 days. A period of 35 days would have expired on or about 12 April 2011. What in fact happened was that Mr Oyesanya applied on the 20th day, that is to say 27 March, for a review of the making of the order and for an extension of time if the order remained extant. That application for review was placed before Employment Judge Kurrein. By a letter dated 11 April 2011 the following decisions were communicated:

"Your requests for a review and an extension of time are refused.

There is no good or sufficient reason advanced by you to grant an extension of time for payment of the deposit or in which to seek a review.

There is no power to review an Order for the payment of a deposit.

In any event:-

1. An application for a review must be made within 14 days of the date on which a Judgment is sent to a party. The order that you pay a deposit was sent to you on 7 March 2011. Your letter was faxed on 27 March 2011 and is therefore out of time; and

2. You do not advance any arguable grounds on which it would be appropriate to entertain such an application."

17. In those circumstances, therefore, the Employment Judge was refusing the review of the deposit order on the basis that either there was no jurisdiction to grant it or, alternatively, that it was out of time or, alternatively still, that there was no merit in it. As to the application for an extension of time within rule 20(4), the Employment Judge was refusing it on the basis that there were no arguable grounds for the making of a time extension.

18. On receipt of that outcome, Mr Oyesanya then paid the deposit. However, the effect of the operation of rule 20(4) had been that on the 21st day, 28 March, the claim had been exposed to being struck out for non-compliance with the rule. No extension of time had by that date been granted so as to permit the deposit to be legitimately paid thereafter. Consequently on 19 April 2011 Employment Judge Kurrein promulgated a Judgment that the claim was struck out. His reasons were:

> **"1. The claimant was ordered to pay a deposit of £900.00 following a Pre-Hearing Review held on 21 February 2011. The Order was sent to the claimant on 7 March 2011. The claimant has failed to pay this deposit within the 21 day time limit. The claim is therefore struck out."**

19. Undaunted by this string of failed procedural applications, Mr Oyesanya once again applied in writing for a review. His request was framed in these terms and dated 2 May 2011:

> **"I write within 14 days in accordance with Rule 34(1) to apply for a review of the judgement striking out the claim due to the seemingly lack of payment of deposit.**
>
> **The notice accompanying the deposit order stated clearly that a party may apply within 21 days for an extension.**
>
> **As such, I applied for an extension pending the review of the decision.**
>
> **As a litigant-in-person I was given to understand that this was the appropriate approach to adopt.**
>
> **I had mistakenly believed that the issue of deposit would remain 'live' during the period of considering the extension and review respectively.**
>
> **Immediately it became apparent that the request was not going to be granted, I paid the deposit.**
>
> **This confirmed my interest in actively pursuing the claim.**
>
> **I respectfully submit that the interests of justice require such a review, namely, that the Tribunal made its decision on striking out without giving me the opportunity to pay following the consideration of request for extension and review.**
>
> **The Tribunal is reminded of the need to do justice between the parties; and that I am a litigant-in-person.**
>
> **I respectfully submit that allowing this review will be in the interests of the administration of justice and in accordance with the overriding objective."**

The Rules

20. As that application indicates, the basis upon which a review can be sought are set out in rule 34 of the Employment Tribunals Rules. A review may be permitted only on the grounds set out in rule 34(3), and those include:

> **"(a) the decision was wrongly made as a result of an administrative error**
>
> **...**
>
> **(e) the interests of justice require such a review."**

21. It will be apparent from the way in which Mr Oyesanya expressed his application for a review that he was relying exclusively on rule 34(3)(e). When a review request of this nature is made, the application is put before an Employment Judge. The powers of the Employment Judge are prescribed by rule 35. Rule 35(3) provides:

> **"The application to have a decision reviewed shall be considered (without the need to hold a hearing) by the Employment Judge of the Tribunal which made the decision...and that person shall refuse the application if he considers that there are no grounds for the decision to be reviewed under Rule 34(3) or there is no reasonable prospect of the decision being varied or revoked."**

The decision

22. Thus it was that this latest application for review, dated 2 May 2011, came to be put before Employment Judge Kurrein. He considered it and determined it. By letter dated 18 May 2011, promulgated without there having been a hearing, Mr Oyesanya was informed as follows:

> **"Your application for a review of the decision made on 19th April 2011 was referred to Employment Judge Kurrein.**
>
> **Your application has been refused as there is no reasonable prospect of success."**

23. It is the decision notified by the letter of 18 May 2011 that is the matter before me on this appeal. Mr Oyesanya tells me, and I accept this from him, that when he came to lodge the letter of 18 May 2011 with the Employment Appeal Tribunal he was told that he was obliged not only to file the decision of the Judge but also the reasons. Further, he tells me, and I accept, that pursuant to that advice from the EAT staff he telephoned staff at the Employment Tribunal Office and asked if there were reasons for the decision promulgated on 18 May. He tells me, and I accept, that, after staff having made enquiries of the Judge, he was told that the reasons for the decisions were the reasons given in the letter of 18 May 2011 itself.

This appeal

24. On that basis, and the Employment Appeal Tribunal Office having been so informed, the Notice of Appeal was lodged and was put through for a paper sift. It came before HHJ David Richardson, who was not satisfied that the grounds of appeal disclosed any grounds with a real prospect of success. But Mr Oyesanya then exercised his right under the Employment Tribunal Rules to submit fresh grounds of appeal. Those grounds were, again, dealt with on the sift and again considered by HHJ Richardson. Once again, the learned Judge determined that there was nothing in the revised grounds of appeal or fresh grounds of appeal that justified the appeal going forward.

25. As was his right under the Employment Appeal Tribunal Rules, Mr Oyesanya sought an oral hearing for a reconsideration before a Judge of the Employment Appeal Tribunal. That application came before HHJ Serota QC. For that hearing Mr Oyesanya had the great advantage of being represented by a legal representative volunteering under the ELAAS scheme. The ELAAS representative helped Mr Oyesanya to restructure his grounds of appeal and to persuade HHJ Serota that the restructured grounds of appeal did have sufficient in them to amount to a real prospect of success so that the appeal should go forward to a full hearing.

The grounds of appeal, as they appear following the amendment allowed by HHJ Serota, are dated 27 June 2003 and they are three in number. It is on the basis of those re-amended grounds that Mr Oyesanya has pursued his appeal before me today. Sadly, for whatever reason, Mr Oyesanya has not secured the services of a specialist legal representative and has therefore done his best in person to persuade me that, on all or any of the grounds, there has been an error of law justifying the setting aside of the refusal of the Judge to review his earlier decision.

Ground 1: reasons

26. Mr Oyesanya contends that the Employment Judge in this case has failed to comply with the basic duty imposed on Employment Tribunals and Employment Judges to give sufficient reasons explaining their decisions so that the parties may know why a particular conclusion has been reached. In this case, Mr Oyesanya says, the Employment Judge has failed in that duty. His statement of reasons is not, submits Mr Oyesanya, **Meek**-compliant. The reasons, as stated in the letter of 18 May 2011 come only to "There is no reasonable prospect of success". From those few words, submits Mr Oyesanya, it is quite impossible for him to understand why it is that his application for review was refused. He submits that, from the terms of the application for review, the Employment Judge ought to have gleaned at least one of two things: firstly, that he was relying on rule 34(3)(a), administrative error, namely his misunderstanding of the note about the time within which payment should be paid; alternatively, under 34(3)(e) that the interests of justice require a review because, notwithstanding the mistake, the deposit had in due course been paid.

27. Mr Oyesanya did not need to take me to the procedural rules in relation to the obligation to give rules or to the specific Judgments in the **Meek** case, as they are very familiar in this jurisdiction. I heard from Mr Dilaimi of counsel, for the Secretary of State, in response to this and the other grounds of appeal. Mr Dilaimi submitted that it was trite law that the

Employment Tribunal must give reasons for its decision, but equally trite law that an Employment Tribunal's reasons did not have to be extensive and that their extent could be appropriately measured against the circumstances. What reasons might have been appropriate after a full hearing, in the presence of both parties, might be different from what was required on a paper consideration of a procedural application. He took me to the decision of the Employment Appeal tribunal in the **Opara v Partnerships in Care Ltd**, UKEAT/0368/09/LA, an unreported decision promulgated on 15 February 2010. In that case, in the context of dealing with a strike-out order following failure to comply with an unless order, the Appeal Tribunal, HHJ Richardson presiding, noted at paragraph 47 that:

> **"The degree of reasoning required will depend on the subject matter. Where, as in *Neary*, the application is hopeless and is being disposed of under Rule 35(3) the reasoning may indeed be short."**

28. Mr Dilaimi also took me to the decision of this Employment Appeal Tribunal in the case of **Thind v Salvesen Logistics**, another unreported decision, also delivered in early 2010, this time under the reference UKEAT/0487/09/DA. In that case the Employment Judge had initially refused an application for review and the terms in which he did so were described by the Employment Appeal Tribunal as being "very short" and said simply this;

> **"Your application for a review has been refused because the Judge considers there are no grounds for the decision to be reviewed under Rule 34(3) and/or there is no reasonable prospect of the decision being varied or revoked."**

29. In the instant case, the reasons are even shorter. They are simply, as I have indicated, that "there is no reasonable prospect of success". Mr Oyesanya seizes on the decision in **Thind** to assert that the Employment Appeal Tribunal was there describing a longer letter than his as "very short" and that the shortness of the reasons in the present case is such as to amount to an error of law itself.

30. It seemed to me not irrelevant to consider what steps had been taken or might have been taken to elucidate further reasons from the Employment Judge had they been thought necessary. Firstly, and most obviously, Mr Oyesanya could himself have applied to the Tribunal for further reasons to be provided by the Employment Judge. He repeatedly told me that, as I have already described, he had enquired of the Employment Tribunal whether there were further reasons and had been told that there were not. That takes him nowhere. It is quite plain that he made no written request for further reasons to be delivered. That such a request can be made is not only self-evident but is a practice of which an instance is the **Thind** case itself. Moreover, when this matter came under the jurisdiction of the Employment Appeal Tribunal, Mr Oyesanya could have applied for further reasons to be directed from the Employment Judge by the EAT. I remind myself that he has had at least three occasions on which to do that: firstly, prior to the first sift; secondly, prior to the second sift of his new grounds; and thirdly, at the hearing before HHJ Serota. No such application appears to have been made.

31. Mr Dilaimi reminds me, in his helpful skeleton argument, that it is still possible for this Employment Appeal Tribunal to make an order pursuant to the **Barke** procedure (see **Barke v Seetec Business Technology Centre Limited** [2005] IRLR 633) seeking elucidation of the reasons or supplementation of the reasons. I fully accept that that might have been done, but in my judgment it is much too late now. It would be bordering on impropriety for me to order, in January 2014, that an Employment Judge provide further reasons for the summary determination made in May 2011 under rule 35 that a review then presented to him had no reasonable prospects of success.

32. In those circumstances I must determine whether, in the context of the present case, this Employment Judge did err in law by giving insufficient reasons by providing only the very

short explanation, "There is no reasonable prospect of success". I am satisfied that those words themselves do two things. Firstly, they show that the Employment Judge was directing himself to the correct test under the correct rule. Those words, after all, appear in rule 35(3). Secondly, the Judge was discriminating between whether there were grounds for a review under rule 34(3) or whether, alternatively, if there were grounds, there was no real prospect of success. It seems to me, therefore, that these short words of reasoning amply demonstrate that the Employment Judge was directing himself to the right provision and exercising his powers on one of the grounds available to him. Is that sufficient? Was the Judge determining this application in a particular way for reasons that the Claimant recipient could understand?

33. I am satisfied that, in the unusual context of this case, given its very particular procedural history, the Judge did meet the threshold for providing adequate reasons. The only ground advanced for a review was that the Claimant, Mr Oyesanya, had misunderstood or misread the notes dealing with the time for paying a deposit. In my judgment, the Employment Judge provided adequate reasons for refusing to review by simply describing that proposition as having "no reasonable prospect of success" in achieving a review of the earlier decision.

Ground 2: perversity

34. I turn, then, to the second ground of appeal. This is that the decision that the application for review had no reasonable prospect of success was perverse, that is to say a conclusion which no reasonable Tribunal or Judge, directing itself or himself to the application, could possibly have reached. In the ground of appeal, further particulars of the perversity are given. Four matters are advanced. Firstly, that the Appellant was acting in person. Secondly, that the notes accompanying the deposit order had not warned the Appellant that his application for an extension of time might be refused and in that case the deposit order remained as originally payable, i.e. within 21 days. Thirdly, that the Appellant had in fact paid the amount required by

the deposit order. Fourthly, that the learned Judge, although required to balance prejudice between the parties, cannot possibly have thought that the prejudice to the Claimant, Mr Oyesanya, in having his entire claims struck out could be matched or overborne by any prejudice to the Respondent.

35. Perversity challenges are always difficult. As I have already indicated, the short reasons given by the Employment Judge show that he was fully appraised of the jurisdiction he was exercising. Moreover this was an Employment Judge himself intimately familiar with the factual and procedural background to the instant case. He, it seems, had dealt with every stage of its case management. The question for him was whether, on the material advanced by the Claimant as to his misunderstanding, there was a reasonable prospect of the decision being overturned. I am satisfied that this is a case in which the Claimant has not made out the high threshold necessary to succeed with a perversity challenge.

36. As to the first point, that the Appellant was acting in person, that is certainly true. But Mr Oyesanya was, as I have indicated, able to clearly set out the basis of his review application (the interests of justice) and the circumstances calling for its exercise, namely his alleged misunderstanding. In my judgment, he suffered no prejudice by virtue of the fact that he was acting in person and required and obtained no indulgence from the Judge in that respect.

37. Secondly, it is said, as I have indicated, that the Judge acted perversely because he did not appreciate that the terms of a note accompanying the deposit order did not expressly warn that an application to extend time did not of itself operate to extend the period of time. Not only do I accept Mr Dilaimi's rejoinder that any misunderstanding on the Claimant's part was not a reasonable misunderstanding, but I accept his submission that this part of the grounds of appeal must be seen in the context of the earlier experience of this particular Employment

Judge of a similar misunderstanding on the Claimant's part (that the effect of making an application for something was to be treated as equivalent to it having succeeded). That was a misapprehension that the Employment Judge had already, at an earlier stage, had to correct. In those circumstances, it is inappropriate for Mr Oyesanya to rely on the same alleged mistake here. Moreover, in my judgment, the note attached to the deposit order is not open to criticism. It accurately reflects the terms of the procedural rule itself: rule 20(4). The wording is, in my judgment, tolerably clear, not only to a lawyer but to a non-lawyer. Indeed, if any other construction of the order were taken, the position would be, as Mr Diliani suggested to me in argument, that the simple fact of making an application for an extension of time would in every case operate as an extension of time until the application was determined. That cannot possibly be a true or reasonable construction of either rule 20(4) or of the note sent with the deposit order.

38. The third of the matters alleged to go to perversity, i.e. the fact the deposit had actually been paid is not, in my judgment, an overbearing factor. In this case the application for an extension of time was not made until the last possible moment in the original 21-day period. The maximum extension of time available was 14 days, so Mr Oyesanya must have known that his payment must, in any event, have been with the Employment Tribunal Office within 35 days. It was not. It did not arrive until the 36th or 37th day. Mr Oyesanya began to develop before me a submission that this was evidence of a further mistake on his part. That he thought he would have 14 days to pay from notice of the determination of his application for an extension of time. That assertion, with respect, does him no service.

39. As to the fourth matter advanced, that the Judge failed to balance the respective prejudice to the parties, I consider that wholly unarguable. The Employment Judge obviously knew that the effect of the strike-out order and the failure to review it would be to bring to an end all of

the Claimant's claims. He had already made his own assessment of the merits or otherwise of those claims. Indeed, that assessment had led to the very promulgation of the order. As Mr Dilaimi urged upon me, matters do not go all one way. The Employment Judge was entitled to consider, in the balance, other interests, not simply the interests of the Claimant. Those interests included the need for compliance with rules and procedural timetables, the need to deal with cases expeditiously and fairly, the need to justify, with good reasons, any indulgence such as an extension of time, and the requirement that orders of the court should be treated seriously by those to whom they are directed and complied with. In all those circumstances, I am not satisfied that ground 2 of the grounds of appeal is made out.

Ground 3 – the Judge should have extended time for compliance

40. Ground 3 of the grounds of appeal is that the Claimant, Mr Oyesanya, having paid the amount directed by the deposit order, the Judge on receipt of the application for review, or earlier, should have, acting on his own motion, extended retrospectively the time for compliance with the deposit order. There is no doubt that, by creative use of the Employment Tribunal Rules, including rule 10, an Employment Judge may grant such an indulgence retrospectively and of his or her own motion: see, for example, **Sodexho Ltd v Gibbons** [2005] IRLR 836, a decision of this Employment Appeal Tribunal (HHJ Peter Clark), which has been followed and applied since 2005.

41. It must immediately be said that Mr Oyesanya made no application under rule 10 for the retrospective exercise of the powers. That cannot be an end of the matter. There is no doubt, as **Sodexho** indicates, that the Judge had such a power even in the absence of application. What Mr Oyesanya must demonstrate is that it was, in the circumstances of this case, perverse for the Judge not to have exercised those powers. He urges in support of that proposition the very matters that he urged in support of his ground 2. I can therefore deal with this matter shortly by

saying that I found the challenge on this ground even less convincing on the question of perversity than the challenge under ground 2. As Mr Dilaimi put it, it is all the more difficult to urge that a Judge was perverse in refusing to exercise a power when a party has not even called for the exercise of that power himself.

42. For all those reasons, and in the light of each of the three grounds having failed, I have no alternative but to dismiss this appeal.