Appeal No: UKEAT/0295/13/GE
UKEAT/0297/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2013

Before

MR RECORDER LUBA QC

(SITTING ALONE)

UKEAT/0295/13/GE

MISS V AKANU-OTU	APPELLANT
SECRETARY OF STATE FOR JUSTICE	RESPONDENT

UKEAT/0297/13/GE

MR M AHMADI-ASSALEMI	APPELLANT
NCR LTD	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

UKEAT/0295/13/GE

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UKEAT/0297/13/GE

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SUMMARY (EAT/0295/13/GE)

PRACTICE AND PROCEDURE – Striking-out/dismissal

Strikeout of a race discrimination claim, following non-payment of a deposit required by a Deposit Order (DO). Appeal listed to be heard (jointly with another) because the sole amended ground, permitted to proceed to full hearing, raised issues of potential importance as to the interface between the time to pay allowed by the DO and time limits for review/appeal.
In the event that ground not pursued.

Instead, the Claimant argued (with permission) only that the particular DO was defective in law because on its face it did not expressly state that strike out would be the sanction for non-payment. Consequently, the strike out order could not have been properly made given the invalidity of the DO.

HELD: there was no deficiency in the DO. It used the language used in rule 20(1). It made it clear that unless the deposit was paid, the Claimant could not continue with the claim. There was no requirement in the rules or anywhere else that a DO must set out that the way that effect would be achieved was by the legal mechanism of striking out.

Failure to give notice to the Respondent of this change of tack – in relation to the points to be argued on the appeal – until after the start of the hearing led to an award of costs.

SUMMARY (EAT/0297/13/GE)

PRACTICE AND PROCEDURE – Striking-out/dismissal

Strike out of part of a claim following non-payment of a deposit within the time required by a Deposit Order (DO). Appeal listed to be heard (jointly with another) because the grounds permitted to proceed to full hearing raised issues of potential importance as to the start date for the calculation of the time to pay allowed by the DO and whether despatch of a cheque by post two clear days before the time limit might be deemed delivery of "payment" of the deposit in time.

In the event, those broader grounds not pursued. Instead, the claimant argued only a narrow point that an application to review the striking-out order should have been allowed on the specific facts (and its rejection at a preliminary stage was perverse) or that the application for review should have been treated as an application to extend time retrospectively for payment of the deposit (and not to have so treated it was perverse)

HELD: given the experience that the Employment Judge already had from his prior case management of the claim, and given the terms in which the review application was expressed, it was not possible to say his decision to assess the application for review as having no real prospect of success was perverse. Likewise, the terms of the application for review (made by solicitors) could not reasonably be construed as an application to extend time and it was not perverse for the Judge not to exercise that power of his own motion.

Failure to give early notice to the Respondent of his change of tack – in relation to the points to be argued on the appeal – led to an award of costs.

MR RECORDER LUBA QC

Introduction

1. These two appeals, which HHJ McMullen QC directed should be heard together, are concerned with the consequences of the use by Employment Judges of the power to make a deposit order. Such an order requires payment of a deposit by a party to proceedings in the Employment Tribunal as a condition of permitting that party to pursue a particular contention that they would otherwise wish to put forward.

2. The two appeals have the following features in common. In each case, a pre-hearing review was conducted in Employment Tribunal proceedings by an Employment Judge sitting alone. As a result of the material considered on those reviews, each Employment Judge made a deposit order. In each case, it so happened that the party to whom the deposit order was directed was the Claimant. In each case, the Claimant failed to pay the required sum within the prescribed period of 21 days. In the light of that default, in each case an Employment Judge subsequently made an order striking out the claim, in the one case in whole, in the other case in its material parts.

3. Before coming to the issues that arise on these two appeals or to the particular facts of each case, it is necessary to identify and describe the powers of Employment Judges relating to deposit orders.

The deposit rules

4. The orders made in the instant cases arise from the application of the terms of rule 20 of the procedural rules for Employment Tribunals, set out in the **Employment Tribunals**

(Constitution and Rules of Procedure) Regulations 2004 SI/1861 in Schedule 1. Rule 20 provides:

> **"(1) At a pre-hearing review if a chairman considers that the contentions put forward by any party in relation to a matter required to be determined by a tribunal have little reasonable prospect of success, the chairman may make an order against that party requiring the party to pay a deposit of an amount not exceeding £500 as a condition of being permitted to continue to take part in the proceedings relating to that matter.**
>
> **(2) No order shall be made under this rule unless the chairman has taken reasonable steps to ascertain the ability of the party against whom it is proposed to make the order to comply with such an order, and has taken account of any information so ascertained in determining the amount of the deposit.**
>
> **(3) An order made under this rule, and the chairman's grounds for making such an order, shall be recorded in a document signed by the chairman. A copy of that document shall be sent to each of the parties and shall be accompanied by a note explaining that if the party against whom the order is made persists in making those contentions relating to the matter to which the order relates, he may have an award of costs or preparation time made against him and could lose his deposit.**
>
> **(4) 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 chairman may allow in the light of representations made by that party within the period of 21 days;**
>
> **a chairman 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.**
>
> **(5) The deposit paid by a party under an order made under this rule shall be refunded to him in full except where rule 47 applies."**

5. The sum mentioned in rule 20(1) was increased from £500 to £1,000 by the **Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2012** with effect from 6 April 2012. On 29 July 2013, rule 20 (which I have just recited) was repealed and replaced by rule 39 of the new Employment Tribunal Rules, set out in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** SI/1237. The new rule is in these terms:

> **"39 (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

6. It will be noted that there are differences of terminology and of content between old rule 20 and new rule 39. The instant appeals fall to be determined only under the old rule 20, as the relevant orders made in these appeals pre-dated 29 July 2013. It may be noted that rule 20 itself was a replacement, expressed in different language, for the original power to make deposit orders which had been contained in the **Employment Tribunals Rules of Procedure 1993** at Schedule 1 rule 7.

The issues on the appeals

7. From the grounds of appeal advanced by the parties, it had appeared to HHJ McMullen QC that points of general application in relation to the operation of rule 20 might fall for consideration by this Appeal Tribunal. Indeed, in one of the skeleton arguments before me three such issues were said to arise on one of the appeals. They were described in these terms

"(1) What are the consequences of failing to pay a deposit order?

> **(2) What effect, if any, does an application for review and/or lodging an appeal have on those consequences?**
>
> **(3) What is the effect, if any, of the deposit order and the strikeout being made by different Employment Judges?"**

In the other appeal, important issues were thought to arise about the calculation of the time available to a Claimant to pay the monies ordered by deposit order and as to the meaning of the requirement to "pay" in rule 20.

8. In the event, none of those broad issues have fallen for my determination on either of these appeals. The scope of each appeal transpired to be very narrow indeed, and the points taken in each appeal bore no similarity to the points taken in the other. Against that background, I now turn to deal discretely with each of the two appeals.

Akanu-Otu v Secretary of State for Justice

9. This was a claim brought by Ms Victoria Akanu-Otu. She had been a nurse in the Prison Service. Her claim was that she had been unfairly dismissed and had been the victim of race discrimination. A pre-hearing review was convened for the purpose of addressing two issues: firstly, whether the claims were brought out of time, and secondly (if the Tribunal had jurisdiction) whether:

> **"...the complaints be struck out as having no reasonable prospect of success. Alternatively should a deposit be ordered as the complaints have little prospect of success?"**

10. Both parties attended on the pre-hearing review and had the benefit of legal representation. For the reasons given in a judgment sent to the parties on 12 September 2012, Employment Judge Griffiths determined that the unfair dismissal claim was out of time. It was, accordingly, dismissed. The Employment Judge decided that the direct race discrimination claim was in time and could proceed. There was no appeal from those two decisions.

11. Having permitted the race discrimination claim to continue on the basis that it was in time, the learned Employment Judge said this, at paragraph 4.7 of his reasons, as to the merits of that claim:

> **"As regards the claimant's claim for race discrimination the Tribunal considers that that has little reasonable prospect of success and accordingly has ordered a deposit, as detailed in the accompanying deposit order."**

The deposit order itself was then set out in a separate document, headed "Deposit order". The first sentence of the deposit order reads:

> **"The Employment Judge considers that the Claimant's contentions relating to her claim of race discrimination have little prospect of success."**

12. The Judge's grounds for so concluding are then set out as part of the same document in three numbered paragraphs under the heading "Grounds". The deposit order then continues in these terms:

> **"The Claimant is ORDERED to pay a deposit of £300 not later than 21 days from the date this order is sent as a condition of being permitted to continue to take part in the proceedings relating to that matter. The Judge has taken account of any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit."**

13. As a result of that order, the Claimant was required to pay a deposit of £300 by the date 21 days hence, that is to say by 3 October 2012. She did not make that payment by that date. Accordingly, on 10 October 2012 the Respondent employer applied for the race discrimination claim to be struck out for failure to pay the deposit. That application made by letter was copied, very properly, to the Claimant's legal representatives.

14. Having considered it, on 18 October 2012 Employment Judge Southam issued a judgment striking out the claim. The reasons given were as follows:

> **"The Claimant was ordered to pay a deposit of £300 following a pre-hearing review held on 22 August 2012. The order was sent to the Claimant on 12 September 2012. The Claimant has failed to pay this deposit. The claim of race discrimination is therefore struck out."**

15. Subsequently, by a Notice of Appeal lodged at this Employment Appeal Tribunal, the Claimant has sought to re-open the question of the dismissal of her claim by virtue of the orders to which I have referred. The appeal came before HHJ McMullen QC at a hearing on 13 May 2013. He was unimpressed by the grounds of appeal that had originally been put forward on behalf of the Claimant. He recorded that the appeal was permitted to proceed:

> **"...solely on the following Amended Ground of Appeal, the remaining Grounds of Appeal being dismissed. Once an Employment Tribunal deposit order was made, what were the consequences of non-payment within three weeks when an unsuccessful appeal and/or application for review was made within 42 days, the deposit order being made by Employment Judge A and the strikeout by Employment Judge B."**

16. As I have already indicated, that amended ground of appeal appeared pregnant with three issues. Those are the issues I have already identified at paragraph 7 above. Thereafter there was, unhappily, some confusion between the parties, and those responsible for the case management of the appeal at the Employment Appeal Tribunal, as to the precise scope of any further matter that might be considered at the full hearing of the appeal and indeed as to whether the Appellant was pursuing, and only pursuing, the matters I have reproduced from HHJ McMullen's order. Unhappy as that confusion was, and in part it was attributed to the uninvited filing of an extended document purporting to be an Amended Notice of Appeal, nevertheless it became immaterial. That is because, when the matter was called on, Mr Ogilvy, appearing for the Claimant, made it plain that he wished to proceed with the appeal only on two narrow points of law. First, that the deposit order was defective because it did not spell out on its face that the consequence of non-payment would be the striking out of the race

discrimination claim. Second, that the deficiency of the deposit order in that respect operated to debar a subsequent Employment Judge from acting upon it by way of making a strike-out order. Put shortly, without a clear warning of a strike-out in the deposit order the sanction of striking out could not lawfully and properly be imposed.

17. Although this was not how, at least until the outset of his argument, the Respondent or I had understood Mr Ogilvy to be putting the Claimant's case, nevertheless Mr Purnell, appearing for the Respondent, made no objection to the appeal being confined to the points identified by Mr Ogilvy or pursued upon them. He indicated that he could address the replacement grounds without prejudice. In order to save time and inconvenience, and to enable the argument to proceed, I waived the need for any formal application to amend the Notice of Appeal and I did not require the reduction of the new grounds to writing. Those I have just reproduced in this judgment were noted by me directly from Mr Ogilvy in the course of his submissions.

18. I come then to the competing contentions of the two parties on these two grounds. Mr Ogilvy took me immediately to the material or operative words of the deposit order contained in the second sentence. I repeat that those words were as follows:

> **"The Claimant is ORDERED to pay a deposit of £300 not later than 21 days from the date this order is sent as a condition of being permitted to continue to take part in the proceedings relating to that matter."**

"That matter" clearly refers directly back to the claim of race discrimination referred to in the first sentence of the deposit order, which I have already reproduced earlier in this judgment.

19. Mr Ogilvy's submission was that the words used in the deposit order contain no reference to the terms "strike-out" or "striking out". They do not say expressly that the consequence of default in making payment will be that the relevant claim will be struck out. Mr Ogilvy contended that it would be unfair for a party to be subjected to a sanction not foreshadowed by an order warning of the imposition of the sanction. In support of those propositions he took me to a judgment of this Employment Appeal Tribunal in **Rogers v Department for Business, Industry and Skills** UKEAT/0251/12/SM. That Judgment was delivered by HHJ Shanks on 28 February 2013. That was a case about an unless order, that is to say an order made by an Employment Judge pursuant to the powers contained in rule 13 of Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**. Rule 13(2) reads:

> **"An order may also provide that unless the order is complied with the claim, or as the case may be the response, shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under Rule 19 or hold a pre-hearing review or Hearing."**

20. In the **Rogers** case itself, the claimant had brought several different claims. The material order in that case had read as follows:

> **"Unless the Claimant provides the following further and better particulars of his claims for unfair dismissal, race, sex and age discrimination on or before the 2nd November 2011 the whole or part of his claims will be struck out. A copy of the further and better particulars must be sent to the Tribunal and a copy to the Respondent's representative."**

21. The order just recited was not complied with by Mr Rogers. An Employment Judge subsequently struck out his discrimination claim. On his appeal, HHJ Shanks said this, at paragraph 16 of the judgment:

> **"So far as the unless order is concerned it seems to me that the Employment Judge's decision really cannot be supported for two reason. First, the order, which I have already read out, is just not clear as to the consequences of a failure to comply."**

Judge Shanks then sets out the terms of rule 13(2) to which I have already referred. Paragraph 16 of his judgment continues in these terms:

> **"The order in question in this case does not say that the claim shall be struck out, it says the whole or part of his claims will be struck out. It seems to me that that leaves things hopelessly ambiguous as to what is to happen. ... It seems to me that an unless order, having draconian consequences, must record exactly what is going to happen if it is not complied with and this one unfortunately was ambiguous..."**

He continues:

> **"The order on its face just is not clear enough, so I am afraid it was wrong to conclude that any claim had automatically been struck out as a consequence of any failure to comply with the unless order."**

22. Mr Ogilvy submitted that the instant case was directly analogous. The deposit order had not told the Claimant in terms that unless she paid the deposit her claim would be struck out. It was, accordingly, ambiguous or deficient and could not properly have been relied on when a subsequent Judge came to consider, at the Respondent's invitation, whether the claim should be struck out and then made a strike-out order.

23. Mr Purnell, in response for the Secretary of State, took three points. Firstly, he submitted, there was no requirement in the rules or elsewhere for a deposit order to set out that strike-out was a consequence of non-compliance. Secondly, he submitted, the only requirement as to what a deposit order must set out is given in rule 20(1) and the wording used here complied with that. Thirdly, he submitted, there was no unfairness to the Claimant because: (1) she had known at the pre-hearing review of the strike-out possibility; (2) the order had been accompanied by notes which had illuminated that possibility; (3) she had been legally represented; (4) she had been given notice of the application to strike out; and (5) there was no evidence that she had in fact experienced any prejudice or unfairness. Further, Mr Purnell

sought to distinguish **Rogers** as a case in relation to a different rule and a different type of rule. The order in that case might be considered to be ambiguous, he submitted, but there was no ambiguity on the face of the order in the present case.

24. In my judgment, this appeal must be dismissed, essentially for the reasons given by Mr Purnell. First, and most obviously, the deposit order did spell out its effects. The language used could scarcely have been clearer. It made plain that a payment of the deposit was required "as a condition of being permitted to continue to take part in the proceedings". Non-payment would, as those words conveyed, lead to an inability to pursue the claim. That is the very language of rule 20(1) itself. Mr Ogilvy was wholly unable to provide a satisfactory explanation as to why it might have made any difference had the language actually used - "as a condition of being permitted to continue to take part" - been substituted with a rubric such as "If you do not pay in time, your claim will be struck out". There is, in my judgment, no requirement in the Rules to mention strike-out in the deposit order as a method of achieving the legal effect consequent on non-payment. The procedural rules could easily have provided that the express consequence, i.e. strike-out, be mentioned in the terms of the deposit order. They do not do so. The Rules assume that those who wish to identify the precise manner in which the consequence of default will be given legal effect can find out by consulting the procedural rules themselves. Rule 20(4) spells the consequences out. In my judgment, these matters alone are sufficient to dispose of the appeal. In the light of them, there was no defect in the deposit order and accordingly there was no bar to the making of the strike-out order which was subsequently made.

25. However, I would add this. Although one cannot normally have regard to the notes which accompany an order for the purposes of determining the legal adequacy of an order, the

notes in this case are not simply administrative guidance accompanying a judicial order. Rule 20(3) expressly requires that the order shall be accompanied by a note. There is no doubt that a note did accompany the order in this case and that it was integrally linked to the order here made. The note is headed with the same case number as the order. It is headed with the words "Employment Tribunals Rules of Procedure 2004 Rule 20(3)". It bears the same footer rubric as the actual order itself: that is to say "Rule 20(3) deposit order and note". Mr Ogilvy suggests that no real weight can be given to this note or its content because the only prescribed function of the note is that identified in rule 20(3) itself: that is to say that the note must explain:

> **"that if the party against whom the order is made persists in making those contentions.., he may have an award of costs on preparation time made against him and could lose his deposit."**

26. Certainly that text would indicate that the main function of the note is to explain that, even if payment is made of the deposit in time, there may be other consequences for the party to whom the deposit order notice is directed.

27. In my judgment, however, it is important to note that the function of the accompanying note is not limited to simply conveying the explanation that rule 20(3) requires. Put another way, the requirements of rule 20(3) are not exhaustive as to what the notice may contain. In this case, the notice provides as follows, at paragraph 3:

> **"The party against whom the deposit order has been 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)."**

28. Accordingly, if the deposit order in the instant case had in any way been wanting in its wording considered without the note, the text at paragraph 3 of the mandatorially attached note would in my judgment have made good that deficiency. On this point, I note that the coupling

of the order with a note is a requirement carried forward in the new rule 39(3). Moreover, the new rule states the function of the note more expansively. It provides that "the paying party must be notified about the potential consequences of the order." Accordingly, it is likely for the future that the point here taken under rule 20 is even less likely to be available to an appellant in respect of orders promulgated under the new rule.

29. I add that, in my judgment, whether a deposit order was legally valid or not cannot turn on whether it in fact misled or caused unfairness to any particular recipient. But for good measure I accept Mr Purnell's submission that in this case there is no evidence that the Claimant was misled or confused by the terms of the order. That is unsurprising given the history of the reason for the calling of the pre-hearing review, of the content of the note and of the fact that throughout the proceedings she had legal representation.

30. As I have indicated, this appeal must be dismissed for the reasons I have given.

Mr Ahmadi-Assalemi v NCR Ltd

31. This was a claim by a serving employee, Mr Massoud Ahmadi-Assalemi. He brought Employment Tribunal proceedings raising several claims against his employers. The Employment Tribunal directed a pre-hearing review. Its function was to give consideration as to "whether the Tribunal has jurisdiction to hear the Claimant's complaints of race discrimination and age discrimination, having regard to the time limit". The pre-hearing review was conducted by Employment Judge Mahoney on 13 July 2012. Although the Claimant did not himself attend, both parties were legally represented. It is clear from the extensive reasons provided by Employment Judge Mahoney in relation to the outcome of the pre-hearing review that he had become intimately familiar with the nature and detail of the Claimant's claims and

of the specific allegations made within them. He ruled that some were brought in time and some out of time. Having made those rulings, he said this, at paragraph 34.1 of his reasons:

> **"In respect of allegations 3 and 7 (part relating to expenses), which are in time, I consider these claims to have little reasonable prospect of success. In view of the Claimant's income of £48,000pa he clearly has the means to pay a deposit. In these circumstances I order a deposit of £500 to be paid as a condition of continuing with these allegations in respect of both the age and race discrimination complaints, making a total of £1,000 if both age and race discrimination complaints are to proceed."**

32. Accordingly, his judgment provided at paragraph 2 that "the Claimant's complaints referred to as 3 and part of 7 (relating to expenses) of the Schedule are in time. However, the Tribunal considered that these allegations have little reasonable prospect of success and the Claimant was ordered to pay a deposit of £500 in respect of both these claims, namely for age and race discrimination, making a total deposit ordered of £1,000".

33. That judgment and reasons were promulgated on 25 July 2012. The judgment and reasons were accompanied by a note given in accordance with rule 20(3). That note was in precisely the same terms as the note I have referred to in the appeal in respect of which I have given judgment. Pursuant to that order, payment was required from the Claimant by 15 August 2012. Such payment was not made by that date, nor was any application made to extend time before that date was reached. Payment was received in the form of a cheque from the Claimant's solicitors, out of time, on 20 August 2012. In those circumstances the matter came back before Employment Judge Mahoney. He gave a judgment on 25 September 2012. His judgment provided, at paragraph 1:

> **"The Claimant's complaints [referred to a Number 3 and part of 7 (relating to expenses) of the Schedule] set out at paragraph 2 of the Tribunal's Reserved Pre-Hearing Review Judgment sent to the parties on 25 July 2012 are struck out by reason of the failure of the Claimant to comply with Rule 20(4) Employment Tribunal Rules of Procedure 2004."**

34. His reasons, given in five short paragraphs, record that no application for leave to extend time had been received by the Tribunal, and at paragraph 5 provide as follows:

> **"As the deposit was received outside the 21 day period required by Rule 20(4)(a) and no application to extend the time was received under Rule 20(4)(b) these two complaints to which the deposit order relates are struck out."**

Accordingly, Employment Judge Mahoney also directed that the sum of £1,000, received on 20 August, should be returned to the Claimant.

35. Mr Ahmadi-Assalemi pursued an appeal to this Employment Appeal Tribunal against the strike-out judgment. That appeal was, given the terms of rule 20(4), doomed to fail. It was so identified at a sift by a Judge of the Employment Appeal Tribunal. Notwithstanding that, the Claimant exercised his right to renew the matter at an oral hearing before a Judge of this Employment Appeal Tribunal. At that hearing, Wilkie J directed that the appeal, being hopeless, should not proceed further and he dismissed it.

36. The appeal which comes before me is not directed to the strike-out order of 25 September 2012, but to a later order of the same Employment Judge, this time made on 7 November 2012. That order was an order rejecting the Claimant's application for a review of the strike-out order. It reads as follows:

> **"The Tribunal refused the Claimant's application dated 26 September 2012 to review its Judgment in respect of [an] order for a deposit on the basis that there are no reasonable prospects of success in respect of such an application as a matter of law."**

37. The powers being exercised by Employment Judge Mahoney in relation to the decision promulgated on 7 November 2012 are not in dispute. He was giving preliminary consideration

to an application for review under rule 35(3) of the **Employment Tribunal Procedure Rules 2004**. That provides that:

> **"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."**

38. As Ms Darwin for the Respondent to this appeal submits, the wording used by Employment Judge Mahoney represents a consideration by him that, even if there were grounds for a review under rule 34(3) this was not an application for review which had reasonable prospect of success: that is to say, he was acting upon the second of the two options expressed by the closing words of rule 35(3). If the Judge had been satisfied that the matter had a reasonable prospect of success, it would have been on the basis that the Claimant could have made out one of the grounds identified in rule 34(3). Those provide, so far as material:

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

39. It had been understood, as I have already indicated, that points of general application were being pursued on this appeal as to whether Employment Judge Mahoney had erred in law in refusing the application for a review. Those points were believed to turn on whether the cheque had in fact been received in time and, by reference to that, the correct date from which time should be calculated to have run. Moreover, it was possible that the appeal was going to raise a general point as to the date on which the deposit was paid when it was paid by cheque. In the event, that was not how the case was put by Mr Charles Price, appearing for the Claimant.

40. It is right to say immediately that he is not counsel who settled the Notice of Appeal. Having considered the grounds set out in the Notice of Appeal, he pressed the appeal only on one narrow ground, that is to say that the decision made by Employment Judge Mahoney on 7 November 2012 was perverse. He limited his challenge to that single ground, notwithstanding the high threshold which any appeal must surmount in order to be successful in the light of decisions of this court and the Court of Appeal, not least the decision in **Yeboah v Crofton** [2002] IRLR 634. The case on perversity was put thus by Mr Price. First, he said that, faced with the review decision letter which was submitted in this case, no reasonable judge could fail to have been satisfied otherwise than that there was a reasonable prospect of the decision being successfully varied or revoked pursuant to the grounds in rule 34. Alternatively, he submitted, the decision was perverse because no reasonable judge would have failed to treat the application for review as a late application to extend time under rule 20(4)(b).

41. In the light of the way in which the appeal was put, it is necessary to go immediately to the terms of the letter seeking a review, which was submitted by the Claimant's solicitors on 26 September 2012. That letter reads as follows:

> **"Dear Sirs**
>
> **Re: Ahmadi-Assalemi v NCR**
>
> **Case Number 3304152/2011**
>
> **We act for the Claimant in this matter, Mr Ahmadi-Assalemi**
>
> **Rule 34**
>
> **We have received Employment Judge Mahoney's judgment dated 25 September 2012 (copy enclosed for your kind reference). We are respectfully requesting that the Tribunal reviews the aforementioned judgment and that rule 34(3)(a) and/or (e) are relevant.**
>
> **The Tribunal, following a PHR on 13 July 2012, ordered by way of a reserved judgment dated 25 July 2012 (received on 30 July 2012) that the Claimant pay a total deposit of £1,000 within 21 days. Therefore the relevant date was 15 August 2012. However, it would be a more than reasonable point to suggest that actual notice of the order was not received until (Monday) 30 July 2012 (copy enclosed bearing a date stamp of 30 July 2012). Taking this into consideration a further and alternative relevant date would be 20 August 2012.**
>
> **We took our client's instructions following receipt of the order on 30 July 2012 and were duly in a position to forward a total deposit cheque by way of covering letter dated (Monday) 13**

August 2012 (copy enclosed). We posted such and therefore deemed service would be (Wednesday) 15 August 2012.

We would respectfully request that the Tribunal considers when actual notice of the Order dated 25 July 2012 was received and its effect as to any compliance/issue of the 21 day rule.

In any case, the covering letter was dated 13 August 2012 and the Tribunal states that it was received on 20 August 2012. We would respectfully ask the Tribunal to consider administrative issues which may have slowed down the registration of the total deposit cheque.

The Claimant respectfully submits, having considered the above and the general contents of the letter, that the Tribunal reviews its judgment in relation to the possibility that there may have been an administrative delay causing the total deposit cheque to be registered as being received on 20 August 2012 and that it would be in the interest of justice to conduct and give effect to this review.

Rule 20(4)(b)

Further and/or in the alternative the Claimant submits that he is within the 14 days period following the 21 days period in which to make representation but the critical point here is that the Claimant respectfully submits that [he] has paid the total deposit cheque within the relevant date and/or before the further relevant date as stated above. The Claimant maintains the above circumstances for the Rule 34 be repeated for this rule 20(4)(b).

Please confirm receipt of the above and that it has been placed within the Tribunal's file of the matter.

Yours faithfully

Hoffman-Bokaei"

42. Mr Price submits that three points emerge from that letter in support of the application for a review. The most important of them is the proposition made in the third paragraph of the letter under the heading "Rule 34", that the envelope containing the cheque and a covering letter was posted on Monday 13 August 2012, that is to say two clear days before the expiry of the time limit at the end of Wednesday 15 August 2012. That was said to be a point which might go to both 34(3)(a) and 34(3)(e). Further, Mr Price submitted that, on its true analysis, two further points in support of the review emerge from the terms of the letter. First, that in the fifth paragraph, under the heading "Rule 34", and in the sixth paragraph, the Claimant's solicitors were making the point that there had been here an administrative error, either by the Postal Service or other operatives, once the letter of 13 August 2012 had been passed to the Postal Service or, alternatively, an administrative mishap which had prevented the cheque being stamped as received by the Employment Tribunal Office until 20 August. That matter would go again to the issue of whether grounds 34(3)(a) or (e) were satisfied. Finally, and perhaps in

order to give weight to the first two points, as well as being a separate matter, Mr Price relied on the fact that the second paragraph, under the heading "Rule 34", made the point that the Claimant had had less than the full 21 days contemplated by the order because the order having been made on 25 July was not received by him until 30 July. Those points, taken together, and read in the context of the letter as a whole, would have compelled any reasonable Employment Judge to allow a review to go forward.

43. In addition to that submission on the first part of his perversity challenge, Mr Price relied on the further text in the final full paragraph of the letter dealing with rule 20(4)(b). He acknowledged that the text there set out did not in explicit terms ask for a retrospective extension of time, but he submitted that no reasonable Employment Judge, faced with the wording there appearing, would do anything other than consider it to be a retrospective application for an extension of time.

44. For the Respondent, Ms Darwin submitted that this was a wholly artificial reconstruction of the application for review. On a proper analysis, she submitted, what the application for review was really doing was asserting that the payment had been made in time on a proper construction of the relevant time limits. In those circumstances what was being addressed to the Employment Judge was really a disguised appeal, wrapped up as an application for review. Even if that was not right, she submitted that it was open to the Employment Judge, having considered the letter, even if as reconstructed and construed as Mr Price contended, to regard it as one which did not disclose a reasonable prospect of success on a rule 34 review. Moreover, she submitted that it was highly artificial to construe the closing paragraphs of the letter as an application to extend time. To make good the latter point, she sought my permission to adduce, by way of fresh evidence, a statement made by the

solicitor with conduct of the proceedings for the Claimant, which statement had been made after the event and had not been available to the Employment Judge when the decision of 7 November 2012 was promulgated.

45. The application to admit this fresh evidence was, somewhat surprisingly, opposed by Mr Price. I say "surprisingly" because it is his document, or rather his client's document, included by his instructing solicitors in the appeal bundle at their rather than the Respondent's insistence. It seemed to me, in those circumstances, that I ought to consider the content of the witness statement *de bene esse*. Having done so, I am satisfied that it is material proper to take into account in determining whether, on a true construction of the terms of the application for review, it really could be construed as an application to extend time.

46. In the witness statement, Mr Golnar Bokaei, the solicitor with conduct says this, at paragraph 8:

> **"An extension of time (application) in which to deal with the above was not considered necessary because I had no reason to suspect that further time would be needed as such was posted on Monday 13 August 2012."**

47. In the light of that, Ms Darwin submits that it is plain that the solicitor with conduct knew of the possibility of making an application to extend time pursuant to rule 20(4)(b) and, despite the knowledge that he could make such an application, had not made one before seeking the review, nor had he made one in terms in addition to the seeking of the review. It was, in Ms Darwin's submission, an impermissible reconstruction of the application for review to construe it as, at least in part, including an application to extend time.

48. In my submission the argument of Ms Darwin must prevail. It is plain from the terms in which he expressed himself that the Employment Judge was taking the view that there might be material set out in the review decision which might get within rule 34(3)(a) or 34(3)(e) or perhaps both. But he was taking the view that, even if that was so, there was no reasonable prospect that the decision to strike out for non-payment of the deposit would be varied or revoked. Mr Price is in those circumstances driven to submit that the Judge reaching such a conclusion must have taken leave of his senses and I reject that submission. Certainly, it is true that, as the decision in **Sodexho Ltd v Gibbons** [2005] ICR 1647 amply demonstrates, a different Employment Judge might have dealt with the matter differently. Another Employment Judge might have decided to very flexibly interpret the application for review, but here the application for review was coming before an Employment Judge intimately familiar with the case and the background to it. He had been seized of the matter in some detail and he had known that there were already issues in relation to compliance with the time limits in this case. He was exercising what, on any view, was a judgment or a discretionary adjudication as to whether or not the review, on its face, disclosed a reasonable prospect of success on a full consideration. I was reminded by both parties of the guidance given in **Governing Body of St Albans Girls' School v Neary** [2010] ICR 473 as to the restraint the Appeal Tribunal should show in interfering with such a judgment or such an exercise of discretion. In my judgment, the high threshold necessary to disturb the exercise of discretion or the making of a discretionary judgment is not met, and it is certainly not met in this case where the only ground on which the challenge is advanced is perversity.

49. I reach the same conclusion in relation to the second way in which Mr Price put the case on appeal: that is to say, that no reasonable Judge would have done other than to have accepted the application for review as in fact being a retrospective application to extend time. I accept

Ms Darwin's submission on this aspect of the case too. It might be that a different Judge, perhaps one not as familiar as this Judge with the particulars of the specific case, would have extended time by taking a very generous view of the way in which the letter seeking review could be understood. This Employment Judge did not take that approach. It seems to me that it was open to a reasonable Employment Judge, seized of all the relevant material, to take that view. In short, perversity has not been established in relation to that matter either.

50. Finally I should observe that, in his skeleton argument for this appeal, Mr Price had put the case for the Claimant in yet a further formulation. Indeed it is right to say that he took every point reasonably open to the Claimant in pursuit of this appeal. His point was that rule 10 of the Employment Tribunal Rules contained a very wide-ranging power, available to the Employment Judge, of his own initiative. As the **Sodexho** case had demonstrated, that power was sufficiently wide to have enabled the Judge, acting pursuant to rule 10(2)(e), to have retrospectively extended the time for compliance with the original deposit order by amending or varying that order. Mr Price would have submitted that no reasonable Judge, properly directing himself, could have failed to seize the initiative and exercise that power on the basis of the material as it stood on 7 November 2012. That matter did not form any part of the Notice of Appeal. It made no reference to regulation 10 whatsoever. It is right to say that Mr Price mentioned rule 10 in his skeleton argument, but there was no application to amend the Notice of Appeal. Moreover, the rule 10 point was not put in the application for review or at any time thereafter. It was not put to the Employment Judge. It was not put in the Notice of Appeal, and in my judgment it is far too late for the point to be the subject of an application for permission to amend the notice at this stage. In any event, I would have considered the amended ground of appeal hopeless on its merits. It seems to me that it cannot be asserted that it is for an Employment Judge to scrabble about in procedural rules to find a way of doing something that

the legal representatives of the Claimant have not asked him to do or intimated he should consider doing.

51. For all of those reasons, the second of these appeals is also dismissed.