Appeal No. UKEAT/0254/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 July 2017

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MISS J CHARD — APPELLANT

TROWBRIDGE OFFICE CLEANING SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DAPHNE ROMNEY (One of Her Majesty's Counsel) Free Representation Unit
For the Respondent	MR DOUGLAS LEACH (of Counsel) Instructed by: Messrs Metcalfes Solicitors 46-48 Queen Street Bristol BS1 4LY

SUMMARY

PRACTICE AND PROCEDURE - Application/claim

PRACTICE AND PROCEDURE - Preliminary issues

PRACTICE AND PROCEDURE - Time for appealing

The Employment Judge had erred in law when considering whether an error as to the correct name of the Respondent in an early conciliation certificate was a "minor error" and whether it was not in the interests of justice to reject the claim.

It was common ground that by the time the error was rectified, the claim was outside the primary limitation period. The Tribunal had decided that it was practicable to have brought the claim within the three month period and therefore refused to extend time.

The parties agreed that, pursuant to section 35(1) of the **Employment Tribunals Act 1996**, the Appeal Tribunal would decide the "minor error" and "interests of justice" issues, rather than remit the issue back to the Employment Tribunal.

The Appeal Tribunal decided, on the facts, that the error was minor and that it would not be in the interests of justice to reject the claim. The Appeal Tribunal therefore set aside the Decision and substituted a decision that the claim was in time.

The claim would therefore proceed on its merits. If the Appeal Tribunal had not found that the Tribunal had erred in law in relation to the "minor error" issue, it would have found no error in the Employment Judge's decision to refuse an extension of time.

THE HONOURABLE MR JUSTICE KERR

1. This appeal is another piece of satellite litigation in which the early conciliation provisions and time limits have led to the right to bring a claim being lost, instead of encouraging settlement of the claim.

2. The Respondent employs about 100 people at its cleaning company in Bristol. The Appellant (to whom I shall refer as "the Claimant") had worked for the Respondent for about 27 years before she was dismissed on the ground of gross misconduct. She was the Operations Manager when she was summarily dismissed on 26 August 2015.

3. She alleged in her claim that she was unfairly accused of having taken part in another cleaning business competing with the Respondent, operated by her brother, and that the procedure leading to her summary dismissal had been wholly unfair. She said that in truth she had merely been assisting her brother with his cleaning business, which operated in a different market from and did not compete with the Respondent. As this is an appeal on preliminary points, I know nothing of the rights and wrongs of those arguments.

4. The Claimant brought claims for unfair dismissal, notice pay, and compensation for failure to provide written particulars of terms and conditions. What happened then, in the Claimant's own words, was that there was a "catalogue of errors". As she said in her original grounds of appeal, anyone can make a mistake. The mistakes made in her case have proved costly to her but, so far, not to anyone else.

5. The Claimant got the legal identity of her employer wrong when applying for an early conciliation certificate at a time when she was not represented. The certificate named the controlling shareholder of the Respondent Company, one "Allister Belcher", instead of naming, as it should have done, the Respondent which is a limited company. It is common ground that it was the Respondent and not Mr Belcher personally which employed the Claimant. Subject to this appeal, as a result of that error she has lost her right to bring her claim.

6. When the Claimant became represented in October 2015, the solicitor instructed did not spot the error in the early conciliation certificate, which named the wrong party as the prospective Respondent. The solicitor filed a claim using the usual ET1 form, naming as Respondent the limited company, which it is agreed was the Claimant's employer and correctly identified in the claim form as such.

7. In the claim form, the correct early conciliation certificate number was recorded, but the name of the employer in the claim form, the Respondent, did not match the name in the early conciliation certificate of the prospective Respondent, Mr Belcher. Thereafter, the Employment Judge who considered the matter on the papers, at the very least misquoted the number of the applicable Rule. Several Rules were then inaccurately cited in a subsequent written Decision. The Claimant has an understandable sense of injustice that while mistakes were made, not just by her, only she is paying a price for her mistake.

8. The facts, in slightly more detail, are these. The early conciliation certificate was issued on 2 October 2015. The Claimant then consulted her solicitors on 30 October 2015. These solicitors wrote a letter before claim addressed to, "Mr Allister Belcher, Managing Director, Trowbridge Office Cleaning Services Limited". In that letter the solicitors set out at length the

reasons why they asserted that the dismissal had been unfair, and invited proposals for settlement.

9. None being forthcoming, the claim was issued on 3 December 2015; as I have said, it correctly named the limited company as the Respondent in the proceedings. That would have come as no surprise to Mr Belcher, as the earlier letter of 30 October 2015 plainly envisaged a claim against the company and not against him as an individual.

10. On 10 December 2015, the limitation period, extended by 15 days by reason of the early conciliation provisions, expired. On 22 December 2015, the Tribunal wrote to the Claimant's solicitors, notifying them that the claim had been rejected. The letter stated, incorrectly, that the applicable Rule was Rule 10(1)(c) of the **Employment Tribunal Rules of Procedure 2013** (set out in the Schedule to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**).

11. The letter recorded that the matter had come to the attention of Employment Judge Harper. The letter stated:

> **"I am returning your claim form because you have not complied with the requirement at rule 10(1)(c) of the above Rules, because the Respondent named on the claim form is different to that named on the Early Conciliation Certificate.**
>
> **Employment Judge Harper has decided that your claim must be rejected.**
>
> …"

12. The applicable Rule, where the name of the prospective Respondent on the early conciliation certificate is different from the name of the Respondent on the claim form, is Rule 12(1)(f), not Rule 10(1)(c). The obligation to reject the claim where Rule 12(1)(f) applies, is subject to what has been called an "escape route" whereby, under Rule 12(2A), a Judge is

bound to reject the claim "unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim".

13. Rule 12(2A) was a later insertion into Rule 12, which came into effect from 6 April 2014. Rule 12(3) provides that if a claim is rejected, the form shall be returned to the Claimant "together with a notice of rejection giving the Judge's reasons for rejecting the claim … The notice shall contain information about how to apply for a reconsideration of the rejection".

14. That notice or letter was sent to the Claimant's solicitors, but by the time it arrived, the office was closed for the Christmas and New Year period, and as a result, did not come to the solicitor's attention until 4 January 2016. The solicitor then applied for a new early conciliation certificate the same day, this time naming the Respondent as the prospective Respondent instead of Mr Belcher. He obtained the certificate, naming the Respondent, the same day.

15. Also on 4 January 2016, he wrote to the Tribunal requesting reconsideration of the decision to reject the claim. He pointed out that the Rule that had been cited was plainly not the correct one. He referred to the provision I have already mentioned, Rule 12(2A), and surmised that it was under that sub-Rule that the claim must have been rejected. In the same letter, the solicitor submitted that the error made in the previous early conciliation certificate had been a minor error:

> **"… given that Mr Belcher is the managing director and majority shareholder of Trowbridge Office Cleaning Services Limited (while the remaining shares are owned by his mother). Mr Belcher conducts the day to day running of the Respondent and for all intents and purposes operates the business as a sole trader. No other individual assists with the management of the Respondent as far as the Claimant is aware."**

16. The solicitor went on to submit that the error had been excusable as Mr Belcher had been the individual person responsible for the Claimant's dismissal. The letter also asserted

A that it would not be in the interests of justice to reject the claim, given that the Claimant had been employed by the Respondent for 27 years and had been summarily dismissed in circumstances that were such that her claim was strong on its merits.

B

17. Finally, in the alternative, the solicitors referred to the newly obtained certificate, correctly naming the Respondent, and submitted that it had not been reasonably practicable to have submitted the claim within the three month limitation period, recognising that it was out of C time, but seeking an extension of time on the basis that the solicitors had acted promptly once notified of the letter from the Tribunal, dated 22 December 2015.

D 18. As regards the latter point, it is agreed that Rule 13(4) provides that where a claim is rejected under (among other provisions) Rule 12, and a reconsideration is undertaken, if the defect has been rectified but the original decision to reject stands "the claim shall be treated as E presented on the date that the defect was rectified". It is common ground that that date in this case was 4 January 2016. It is also common ground that that is outside the primary three month limitation period, even as extended as a result of the early conciliation provisions.

F

19. On 7 January 2016, the Tribunal wrote again to the Claimant's solicitors, the matter having been referred back to Employment Judge Harper. The letter stated that the claim was now accepted as the defect had been rectified. The claim was to be treated, the letter went on to G state, as having been received on 4 January 2016. The letter went on to state:

> **"Because the original decision to reject the claim was correct but the defect which led to the rejection has since been rectified, the claim form is to be treated as having been received on 04/01/2016.**
>
> **Employment Judge Harper has directed me to write as follows. The points raised in your letter of 04/01/2016 in relation to minor error and Out Of Time will be considered in due course once a response has been entered."**

H

20. After that, a response was provided in the form of an ET3 by the Respondent. It included the contention that the claim was out of time. The Claimant's solicitors wrote, on 4 February 2016, referring the Tribunal to authorities; in particular, the decision of Langstaff J (P) in **Drake International Systems Ltd v Blue Arrow Ltd** [2016] ICR 445, the decision of HHJ Eady QC in **Science Warehouse Ltd v Mills** [2016] ICR 252, and that of the same Judge in **Mist v Derby Community Health Services NHS Trust** [2016] ICR 543 (all decisions of this Appeal Tribunal). The solicitors reiterated the point that Mr Belcher and the Respondent were very closely linked, in that he was the controlling mind and majority shareholder of the Respondent and the person responsible for any conciliation.

21. A hearing was then convened, attended by counsel for both parties, and took place on 3 May 2016. Written skeleton arguments were produced by both parties. They addressed the issues: (1) whether the error had been "minor", and whether the interests of justice required the claim to be allowed to proceed; and (2) if not, whether the claim should in any case be allowed to proceed, applying the usual tests for the obtaining of an extension of time.

22. After the matter was argued before the Judge on 3 May 2016, she sent a Judgment (without Reasons) to the parties the same day stating:

> **"The claim is dismissed on the grounds that it was presented out of time and it was reasonably practicable for the claim to have been presented in time."**

She must have been asked for Written Reasons since she supplied those in a document dated 13 June 2016, and sent to the parties the same day.

23. She stated that the procedural history had been unusual; when the claim had first come before her she had decided, in accordance with Rule 12(2A), that:

> **"3. … the claim should be rejected because the names on the Early Conciliation Certificate and the claim form were not the same. I considered that this was not a minor error, there was no similarity in the names whatsoever. …"**

24. After recording the procedural history, she went on to state the issues she had to consider as: (1) whether the decision to reject the claim presented on 3 December 2015 had been correct; (2) if it had been, whether, on a reconsideration, it remained correct; and (3) if not:

> **"… should I now reconsider that decision under Rule 70? If not, and the presentation date was 4 January 2016, and therefore out of time, was it reasonably practicable for the claim to have been presented in time? If not was it presented within a reasonable time thereafter?"**

25. She set out several authorities that were cited to her in argument, a number of which have also been cited to me. She recorded that she had been told that the failure to spot the mismatch between the name on the first early conciliation certificate and the subsequent claim had been "an oversight".

26. After setting out some of the Rules, she considered the question of whether the error that had been committed was a "minor error", at paragraph 21 of the Reasons. She said this:

> **"21. I consider that the discrepancy of the names on the Early Conciliation Certificate and the claim form did not amount to a minor error. The Early Conciliation Certificate refers to a private individual as the prospective respondent not the employing Company. Mr Belcher was a Director. The misnaming on the Early Conciliation Certificate was not a minor error such as a misspelling or an omitting part of the title of the respondent."**

Such was the reasoning in support of that part of her decision.

27. She went on to deal with the question of whether it was possible for the claim to survive by the obtaining of an extension of time, as it had been brought on 4 January 2016, outside the limitation period. She referred to some of the usual cases: **Palmer & Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119 and **Walls Meat Company Limited v Khan**

[1979] ICR 52. She also referred to **Adams v British Telecommunications plc** [2017] ICR 382, a decision of Simler J (P) which, I am told, became available shortly before the hearing, after written skeletons had been lodged. She referred to the facts of that case and said that she took it into account.

28. She went on to reason that the solicitors had been at fault for the oversight that had occurred. Had they performed their duties as they should have done, the claim could easily have been presented in time, as it would have been possible to obtain a second corrected early conciliation certificate before expiry of the limitation period. She concluded that she was not satisfied that it had not been reasonably practicable for the claim have been presented in time.

29. There are four grounds of appeal remaining following a Preliminary Hearing in this appeal. I propose to address them in a different order to the order in which they appear in the grounds and skeleton arguments. The first ground I will address is ground 2.

30. Ms Romney QC, to whom I am grateful for representing the Claimant pro bono in this appeal, advanced that ground, submitting that it was wrong to reject the claim because the basis of the rejection had been held in **Trustees of the William Jones's Schools Foundation v Parry** [2016] ICR 1140 by Laing J to be *ultra vires* and unauthorised by the enabling legislation.

31. Ms Romney submits that the effect of that decision is to condemn as unlawful the process of rejection of a claim on paper without a hearing, and that the hearing which subsequently took place did not cure the defect. Although she acknowledged that the decision

in **Parry** is the subject of a pending appeal to the Court of Appeal, she said it should be treated as good law and is correctly decided.

32. For the Respondent, Mr Leach who appeared before me and below, submitted in his skeleton argument, among other things, that **Parry** had been wrongly decided and that I ought not to follow it. On instructions at the hearing before me, he withdrew his invitation to me to disregard the decision in **Parry** but he made it clear that he was not thereby conceding the correctness of the decision, merely recognising that for the purposes of today's hearing he was content for the Appeal Tribunal to assume that the reasoning and decision in **Parry** is sound.

33. His argument today was not that it was incorrectly decided, but that it did not impact on the validity of the procedure followed here, because the hearing on 3 May 2016 was an oral hearing at which the Tribunal had the benefit of full argument from both parties and therefore the defect in the written procedure, that was the subject of the decision in **Parry**, did not matter. As he put it in his skeleton argument, the practical effect of the Judgment given following the oral hearing "is that the procedure envisaged in **Parry** was effectively adhered to, albeit unwittingly".

34. In **Parry**, Laing J decided that the procedure whereby compliance with Rule 12(1) of the **Rules of Procedure** is policed by means of a written paper exercise involving the Claimant only, without an oral hearing, was *ultra vires* and not authorised by the relevant provisions in the enabling legislation, the **Employment Tribunals Act 1996**. She envisaged that the procedure in Rule 27 of the **Rules of Procedure** would be an appropriate mechanism for enforcing the requirements in Rule 12(1).

35. Rule 27 provides for consideration of a claim and response on the papers by an Employment Judge, and for a hearing to take place, if necessary, at which the Judge can consider whether the claim or part of it has no reasonable prospect of success and should be, on that account, dismissed. That is the procedure which Mr Leach submits was in effect, albeit unwittingly, followed here.

36. I come to my reasoning and conclusions in relation to the second ground of appeal. I propose to assume that the decision of **Parry** was correct and that the reasoning in it is sound. The reasoning does not strike me as obviously unconvincing and, as a decision of a sister Judge in this Appeal Tribunal, though not strictly binding, it is entitled to the utmost respect. It would be undesirable for me to say more than that, given that an appeal is pending before the Court of Appeal.

37. In my judgment, the second ground of appeal is well-founded and, subject to the other grounds of appeal and the question of materiality, I would ordinarily have been minded to remit the matter back in accordance with the reasoning of Laing L in **Parry** (see paragraphs 43 and 45) to enable a hearing to be convened under Rule 27 (or a procedure analogous to that of Rule 27) to determine the question of compliance with Rule 12(1)(f) and the impact of Rule 12(2A). I do not, with respect, agree with the submission of Mr Leach that the oral hearing on 3 May 2017 before Employment Judge Harper was such that the Rule 27 procedure was effectively adhered to, albeit unwittingly.

38. If a hearing had been convened under Rule 27, or some similar procedure, the Employment Judge at that hearing would have had to decide how to deal with the test set out in Rule 12(2A) of the **Rules of Procedure**, that is to say the issue as to whether the Claimant

made a "minor error in relation to a name or address", and whether it would "not be in the interests of justice to reject the claim". It appears that the reasoning in **Parry** envisages that the Rule 12(2A) issue would be a matter to be considered at such a Rule 27 Hearing.

39. But it is at least possible that at such a hearing the Claimant might find herself unconfined by the straightjacket of Rule 12(2A). She might argue at such a hearing that the interests of justice require the claim to proceed because, if it had proceeded against the wrong party (Mr Belcher) instead of the correct party (the Respondent), the claim would not have been out of time at all and an application under Rule 34 to amend the claim so as to substitute the correct employer for the incorrect one would have easily succeeded.

40. The Respondent, no doubt, would have resisted any such application by pointing to the absence of a valid and timely early conciliation certificate covering the claim against the actual employer (the Respondent) and would have argued that there was a breach of Rule 12(1)(f), and that that breach was not a minor error enabling the claim to be rescued in the interests of justice.

41. I have supposed the hypothetical occurrence of such a hearing under Rule 27 or some analogous procedure, and what it might have involved. It is not necessary for me to decide what would or should have happened at such a hearing, had it occurred. It is sufficient to observe that the exercise might have worn a very different complexion, and I would not wish to speculate on what the outcome would have been. What I do not accept is Mr Leach's proposition that the hearing that occurred was, in practice, materially identical to a Rule 27 Hearing of the type envisaged by Laing J in **Parry**.

42. I turn next to the third ground of appeal. In that ground, Ms Romney argues that even if the exercise is not treated as a nullity, the Judge was wrong to reject the first claim in writing. She did so, Ms Romney submitted, on the basis of the wrong Rule - Rule 10(1)(c) instead of Rule 12(1)(f) - and it was therefore unclear, at the time when the claim was initially rejected in December 2015, what test the Judge had applied.

43. Ms Romney said it was unclear whether the Judge had applied the right test, namely the test under Rule 12(2A), rather than mandatory rejection of the claim if the non-compliance is of requirements in one of Rule 12(1)(a)-(d) (or, I would add, under Rule 10(1)(c) which was the Rule erroneously cited in the letter). Non-compliance with those provisions, she points out, does not trigger the "escape route" for a "minor error". The rejection of the claim is mandatory.

44. Furthermore, Ms Romney submits that on reconsideration of the matter in writing, on 7 January 2016, the Judge failed to appreciate the close links between Mr Belcher and the Respondent to which her attention had been drawn by the solicitor's letter; and failed to state any reason why she maintained that her prior decision had been "correct", despite the points made in that letter about the close links between Mr Belcher and the Respondent.

45. At the same time, Ms Romney went on to submit, it was unsatisfactory for the Judge, having twice rejected or appeared to reject the "minor error" argument, to place it on the agenda for further consideration before herself on a third occasion. Ms Romney submits that all that was procedurally most unsatisfactory.

46. For the Respondent, Mr Leach submitted that any appeal against the rejection in writing of the claim was out of time; no appeal against that Decision had been brought within 42 days

of 22 December 2015. The Claimant had chosen to invite reconsideration at Employment Tribunal level of the Decision, rather than appealing. Moreover, Mr Leach submitted that the error in the numbering of the Rules mentioned in the original notification of 22 December 2015 was not material since it was plain from the terms of that letter that the requirement that had not been complied with was that set out in Rule 12(1)(f).

47. I come to my reasoning and conclusions on the third ground of appeal. Since I am proceeding on the footing that the **Parry** case was correctly decided, it is likely that the initial rejection of the claim on the papers on 22 December 2015 was a nullity. On that basis, this ground of appeal does not matter, save perhaps insofar as it provides context for any of the other grounds of appeal. Nevertheless, I propose to deal with it briefly.

48. I agree with Ms Romney that the terms of the rejection letter of 22 December 2015 were most unsatisfactory. First, the wrong Rule altogether was quoted; Rule 10 instead of Rule 12. Second, the wrong sub-paragraph was quoted, sub-paragraph (c) instead of sub-paragraph (f). Third, where sub-paragraph (c) of Rule 12(1) is in operation, the Court has no function of rescuing the claim by means of the "minor error" escape route. Fourth, the reasons given in the rejection notice of 22 December, such as they were, did not address the question of "minor error" at all. They merely recited the fact of the mismatch between the two names.

49. Turning to the Reconsideration Decision of 7 January 2016, I agree with Ms Romney that it was unsatisfactory that the letter of that date said nothing at all about the issue of "minor error", save that the earlier decision had been "correct" and that the question would be "considered in due course", statements which, to say the least, sat uneasily side by side. The

letter of 7 January did not in any way address the solicitor's arguments about the close links between Mr Belcher and the Respondent.

50. For those reasons, if I had been of the view that the initial written rejection of 22 December 2015 was of any consequence, I would not, if it had been appealed, have allowed it to stand. I do not think that such reasons as were given by the Judge were sufficient to comply with the obligation to give reasons in Rule 12(3).

51. It seems to me that a Claimant driven from the seat of judgment on a relatively technical point, after 27 years of service, should at least receive the courtesy of being told with proper particularity the reasons why that was happening to her. Furthermore, the letter of 7 January 2016 was likely to engender confusion by saying that, on the one hand, the prior decision had been correct but, on the other, that it would be considered at a future hearing.

52. However, if it were the case that the initial decision was not a nullity, I would have to accept Mr Leach's point that there was no appeal against it. He is right that any such appeal is now out of time and that it was overtaken by the request for reconsideration. It therefore follows that ground 3 does not, of itself, take the matter further, and I turn next to ground 4.

53. In that ground, Ms Romney argues that the decision and Written Reasons following the hearing on 3 May 2016, that the error was more than minor, was flawed and was a decision to which the Employment Judge was not entitled to come on the facts before her. She was bound, submitted Ms Romney, to have found that the error was minor, and that the interests of justice required the claim to be allowed to proceed.

54. Ms Romney argued that the Judge had equated a minor error with something like a spelling mistake or typographical error, whereas that was far too narrow a reading of the words "minor error". The Judge, she submitted, had overlooked, again, the point that Mr Belcher and the Respondent Company were very closely linked, and in practice the same operation, albeit legally distinct.

55. Ms Romney took me back to the well-known authorities already mentioned in the context of the solicitor's letter, **Science Warehouse Ltd v Mills** and **Drake International Systems Ltd v Blue Arrow Ltd**. She submitted that the effect of those authorities was that the early consideration provisions should not be allowed to become a trap for the unwary and an engine of deprivation of Claimants' rights to bring claims.

56. The parties also made submissions on the recent decision of Soole J, drawn to their attention by me, in **Giny v SNA Transport Ltd** UKEAT/0317/16. In that case, the facts were similar to the facts here in that the early conciliation certificate had named the owner of the company while the claim had been brought against the company itself. Soole J held that the Tribunal's decision on the papers to the effect that the error was not minor, was unassailable and not perverse.

57. Ms Romney submitted that the positions of the parties in **Giny** had been polarised. The Claimant's position was that the guiding principle was to ascertain whether the name and address given on the early conciliation certificate was such that communication with the correct Respondent by ACAS would succeed or not, and that Employment Tribunals should give short shrift to technical arguments. The Respondent's position was at the other end of the spectrum:

A an error could never be minor where an early conciliation certificate mistakenly named an individual instead of a corporate employer against which a claim is subsequently brought.

B 58. Ms Romney submitted that the Judge had taken a middle course, not accepting either party's position. She submitted that while the reasoning is not very full, the gist of it was no more than that the issue is one for the judgment of the Tribunal, with which the Appeal Tribunal cannot interfere, absent perversity; and what is material for present purposes is the C proposition that a mistake as between a corporate employer and its individual owner could, in some cases, amount to an error that is merely minor.

D 59. For the Respondent, Mr Leach countered those arguments by submitting simply that there was no material difference between the decision of the Tribunal here and that of the Tribunal upheld by Soole J in **Giny**. The Appeal Tribunal could not interfere with the decision E of the Employment Judge that the error had been more than minor, as it could not be said to be perverse.

60. I have considered those rival arguments. I note in passing that the **Parry** case was F apparently not cited to Soole J. He therefore proceeded on the footing that the issue had been dealt with in a procedurally correct manner. It is possible, to put it no higher, that he might have viewed the matter differently if he had been considering the issue through the prism of the G Rule 27 jurisdiction since, in that jurisdiction, a rectifying amendment to the identity of the Respondent could be considered as a reality not merely as a hypothetical construct for the purposes of argument.

H

61. I respectfully agree with Soole J that the "minor error" issue is one of fact and judgment for the Tribunal below; that the words are ordinary English words; and that it is for the Employment Judge to determine the issue so that this Appeal Tribunal can, as Mr Leach correctly submits, only interfere if the decision below is flawed in some way by an error of law or is perverse.

62. I also respectfully agree with Soole J that he was right to reject the Respondent's proposition that an error in the identity of the Respondent, naming an individual rather than the relevant company, could never be minor. For my part, I would place considerable emphasis on the overriding objective when Tribunals have to consider issues of this kind. In this jurisdiction, the overriding objective includes dealing with cases "fairly and justly", but unlike in the **Civil Procedure Rules** ("CPR"), it also includes "avoiding unnecessary formality and seeking flexibility in the proceedings"; see Rule 2(c) of the **Employment Tribunal Rules of Procedure**.

63. The need is to avoid the injustice that can result from undue formality and rigidity (absence of flexibility) in the proceedings. In my judgment, the reference to avoiding formality and seeking flexibility does not just mean avoiding an intimidating formal atmosphere during hearings; it includes the need to avoid elevating form over substance in procedural matters, especially where parties are unrepresented.

64. I accept that to a lawyer the identity of a company as distinct from its controlling shareholder is much more than a matter of form (see, e.g. **Prest v Petrodel Resources Ltd** [2013] 2 AC 415 SC on piercing the corporate veil in matrimonial proceedings). But to a non-lawyer, in a case such as this, the distinction can be attenuated almost to vanishing point: the

address is the same, so there is no problem contacting the Respondent; and the person in control is the same, both of the previous dismissal and of any decision to conciliate or settle. It is true that in the present case the name of the company was not "Allister Belcher Limited", but it is difficult to see why, if it had been, that should make all the difference.

65. In the light of those observations, I turn to consider the Judge's decision. As I have said, her reasoning is set out and set out only in paragraph 21 of her Reasons where she says no more than that Mr Belcher was a "Director" and that the misnaming on the certificate "was not a minor error such as a misspelling or an omitting part of the title of the respondent".

66. She does not mention the point that Mr Belcher is the controlling shareholder of the Respondent, as well as a director of it. A director might have little control and no shareholding in the company. Her reasoning does not, in my judgment, properly address the Claimant's case as set out, first, in the solicitor's letter of 4 January 2016, citing the authorities I have mentioned; and subsequently, in writing by her then counsel, Mr Tibbetts, on the closeness of the links between Mr Belcher and the Respondent.

67. I consider also the wording of Rule 12(2A) in the light of the overriding objective, with which it was presumably intended to operate harmoniously. It has been pointed out that it appears to enact a two stage test. On a literal reading, the first stage is to consider whether the error is minor without regard to the interests of justice. The second stage then arises only if the Judge has already concluded, ignoring the interests of justice, that the error is minor. If, but only if, she has reached that conclusion she must go on to consider whether it would not be in the interests of justice to reject the claim.

68. In my judgment, that literal reading is too purist. It is inconsistent with the overriding objective and risks causing injustice. I prefer to read Rule 12(2A) as indicating that the "interests of justice" part of the Rule is a useful pointer to what sort of errors ought to be considered minor. To put the point another way, minor errors are ones that are likely to be such that it will not be in the interests of justice to reject the claim on the strength of them. The Judge here never got as far as the interests of justice. It appears that was because she did not think that the error was minor.

69. I do not propose to attempt the perilous exercise of an exposition of what errors are and are not minor; it is always a question of fact and degree, but I am satisfied that the decision and reasoning of the Employment Judge were flawed, including on the third and final occasion when she addressed her mind to the issue. Having decided it adversely to the Claimant twice on the papers, and owing, as she did, a duty under Rule 12(3) to give reasons for her decision, she did not adequately address the argument that an error in relation to name (or address) can be minor, even though it is more than just a spelling error or typographical error.

70. She did not address the proposition of Soole J, which Ms Romney impressed upon me, that an error which fails to differentiate between an individual and a company can be a minor one. She appears to have thought that it could not be unless it were a mere spelling or typographical error, or an incomplete form of the company name, but that is not correct in law.

71. I would therefore have remitted the point. However, the parties consented to the course authorised by section 35(1) of the **Employment Tribunals Act 1996**, enabling me to decide it myself, with their agreement.

72. In my judgment, the error here was clearly minor. The factual position pointed in the direction of that conclusion, and there were no factors pointing in the other direction, such as, for example, an additional substantial shareholder in the Respondent over and above Mr Belcher, or a different place of business from the address given on the certificate.

73. In this case, the position would have been no different in substance if the company had been called Allister Belcher Limited. The Respondent knew from the letter of 30 October 2015, from the Claimant's solicitors, that it was against the Respondent that the Claimant intended to proceed, not Mr Belcher personally. There was, therefore, as Ms Romney correctly submitted, no prejudice to the Respondent.

74. I do not say that a mistake as to the identity of a Respondent and a case of confusion between an individual and a company controlled by that individual is necessarily always a minor error; it could be one of real substance. However, in the present case, it seems to me incontestable that the error was minor, and that the interests of justice require that the claim not be rejected. An error will often, in my opinion, be minor if it causes no prejudice to the other side beyond the defeat of what would otherwise be a windfall limitation defence, in a case such as this where, subject to the error, the claim was issued in time and not out of time.

75. Mr Leach accepted that if the ET1 claim form had named Mr Belcher personally, the claim would have been valid, and in time. An application to amend, even outside the limitation period, so as to correct the name of the Respondent to that of the company, could then have been made and, Mr Leach accepted, such applications are commonplace and frequently granted after expiry of the three month limitation period.

A

76. It is, with respect, difficult, in my judgment, to say that naming the wrong Respondent in the ET1 claim form is what should be done to avoid a major error. If the error in this case was major, the solicitor running up against limitation would be better advised to proceed against the wrong Respondent, the one that matches the name in the early conciliation certificate, and then to apply to amend the claim, than to proceed against the right Respondent. Reasoning of that kind can discredit the law in procedural satellite litigation such as this.

C

77. It is also relevant to view the matter in its overall context. Setting against the point that the Claimant was represented from sometime in October 2015, is the point that on the other hand the claim was in every other way - apart from the name on the first early conciliation certificate - properly constituted and not obviously lacking in merit. I agree with Ms Romney that the absence of prejudice to the other side is not altogether irrelevant to whether an error is minor. I conclude that ground 4 of the appeal is well-founded.

E

78. The last ground is ground 1, which for the reasons I have given need not arise, but I propose to deal with it briefly anyway. Ms Romney submitted that in refusing to grant an extension of time, applying the reasonable practicability test, the Employment Judge had misapplied the decision of Simler J (P) in **Adams v British Telecommunications plc** [2017] ICR 382. In **Adams** the issue was whether it had been reasonably practicable to have brought the claim within the primary three month limitation period.

G

79. An extension of time was only needed in the present case if the claim was correctly characterised as having been brought on 4 January 2016, and therefore out of time. If I had been of the view that that was the position, I would not have acceded to Ms Romney's submission that the Employment Judge misapplied the decision in **Adams**. First, she was

aware of the case and what it decided, as is clear from her Decision. Second, the reasoning in paragraphs 25 to 30 of her Reasons shows that she correctly understood it.

80. The ratio of **Adams** is, as Mr Leach correctly submits, that there is no rule of law that where a claim has already been presented once within the time limit, by a litigant in person, albeit defectively, it must follow automatically that it was reasonably practicable to have submitted any second claim in time. It is clear from paragraphs 16 and 17 of the President's judgment that "what is or is not reasonably practicable is a question of fact for the employment tribunal".

81. The Employment Judge clearly understood that, and herself examined the facts. She did not, in my judgment, fall into the error made by the Judge in **Adams** of focussing on the circumstances of the first claim to the exclusion of the circumstances of what was called the "second claim", by which she meant the claim supported by the corrected second early conciliation certificate.

82. The Judge, in effect, distinguished **Adams** by reference to the fact that here the Claimant had been represented from a time well before expiry of the limitation period. She was entitled to place considerable weight on the point that the solicitor had plenty of time to check the wording of the early conciliation certification which he received, or should have received, from his client, and to place weight on the fault of the solicitor in failing to spot the error.

83. I conclude, therefore, that the first ground of appeal is not well founded, and if the appeal had turned on that ground, I would not have allowed it.

84. In the event, however, I have decided in accordance with the reasoning above that the error that was made was not minor, that the interests of justice require that the claim should not be rejected; and it should and will proceed on its merits. The appeal is accordingly allowed.