EMPLOYMENT TRIBUNALS

Claimant:	**Mr J Chumber**
Respondent:	**Ridge Concrete Limited**
Heard at:	**Birmingham (by CVP video link)**
On:	**6 November 2020 (and in chambers on 16 December 2020)**
Before:	**Employment Judge Flood**
Appearances:	
For the Claimant:	**Mr Kennan (Counsel)**
For the Respondent:	**Mr Blitz (Counsel**

PRELIMINARY HEARING

RESERVED JUDGMENT

The claimant's complaint of unlawful deduction of wages was presented after the expiry of the statutory time limit. That time limit is extended to the date of presentation because it was not reasonably practicable for the claimant to present his claim within that time limit and it was presented within a reasonable time thereafter.

REASONS

Background

1. Employment Judge Meichen directed that there should be a Preliminary Hearing

   "to consider whether the Tribunal has jurisdiction to hear the claim as it appears to be out of time."

2. The matter came before me by CVP on 6 November 2020. The claimant attended to give evidence and had produced a witness statement which was taken in evidence. He was then cross-examined by Mr Blitz. I also had before me the bundle of documents prepared by the claimant and a copy of the 1st claim form and letter of rejection sent on 24 June 2020 and the 2nd claim form. Having heard evidence from the claimant and submissions from Mr Kennan and Mr Blitz, I adjourned the hearing for a reserved decision to be made (as it was not possible to make the decision within the 2 hours listed). The matter came

before me for a reserved decision in chambers on 16 December 2020 (I offer my apologies for the delay in being able to consider this matter until now).

The Issues

3. In determining whether the claimant's complaints unlawful deduction of wages were presented within the time limits set out in **section 23 (2) of the Employment Rights Act 1996 ("ERA")** involved considering *whether it was not reasonably practicable for a complaint to be presented within the primary time limit and if not, whether it was presented within a reasonable time thereafter*; so the issues to be determined are:

    i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made/last date of a series of payments of the wages from which the deduction was made?

    ii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

    iii. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

The relevant facts

4. The claimant was employed by the respondent from 1 July 2018 until 31 January 2020 as a Driver. The respondent says that his last pay day was 4 February 2020. The claimant completed a period of early conciliation between 5 and 24 February 2020. The ACAS early conciliation certificate that was issued on 24 February 2020 identified the prospective respondent as "Ridge Concrete Limited" and identified the address of this prospective respondent as "The Stables, 32 Merridale Road, Chaple Ash, Wolverhampton WV3 9SB".

5. The claimant presented a claim form on 24 April 2020 ("the 1st claim form") bringing a complaint of unlawful deduction of wages. At box 2.1 of this claim form where the respondent's details should be entered the claimant added "Kanwar Shaker Chander Sharma" and at box 3 the address was entered as "The Stables, 32 Merridale Road, Wolverhampton WV3 9SB". At Box 8.2 of the claim form where the claimant is required to enter the background to and details of his claim, the claimant mentions "Ridge Concrete" with reference to his employment.

6. The claim form was referred to Employment Judge Hughes on 24 June 2020 who decided that the claim must be rejected as the name on the claim form was not the same as the name identified on the ACAS early conciliation certificate. A letter was produced and sent to the claimant which informed the claimant that he claim had been rejected because he had

    "not complied with the requirement at rule 10 (1) (c) of the [Employment Tribunal Rules of Procedure 2013 ("ET Rules")], because it does not contain one of the following:

        i. *The same name for the Respondent as on the Early Conciliation Certificate"*

7. The letter of rejection was accompanied by the Tribunal administration's explanatory notes called "Claim Rejection – Early Conciliation: Your Questions Answered".

8. The claimant presented a further claim form on 26 June 2020 ("the 2nd claim form") which was broadly the same as the 1st claim form but at box 2.1 of the 2nd claim form, the respondent was named (correctly) as "Ridge Contract Limited" and at Box 15 where additional information can be provided the claimant had inserted "*I understand that I am making this claim past deadline. I submitted by claim to Tribunal Service 24 April 2020 (Claim number Y82P-3AMW, Case number 1305565/2020), within the time limit. I made a mistake filing a form – I put my former employers name and surname instead of the company's name in the box "Employers name", therefore different from ACAS certificate, which resulted in my claim being rejected (letter dates 24 06 2020, Case number 1305565/2020). The mistake happened in stressful circumstances I am in, I also has Hydro/Pneumothorax operation in Feb 2020 and still use prescription painkillers which unfortunately affected my attention. Due to Covid 19 I was unable to seek Citizens Advice to help me to fill the form, I also could not afford solicitors fees, I would like to ask you to accept my claim."* The 2nd claim form was accepted by the Tribunal.

9. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 8 March 2020 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it. The claimant's employment was terminated on 31 January 2020 (and the last pay date is said to have been 4 February 2020) so early conciliation would need to have been commenced by 30 April 2020 (or 3 May 2020 if going by the last pay date). He commenced early conciliation on 5 February 2020 so did commence early conciliation on time. However the 2nd claim form which was accepted by the Tribunal was presented on 26 June 2020, and would have needed to have been presented on 22 May 2020 so clearly on its face it is just over 1 month out of time.

10. The claimant gave evidence today on the course of events leading up to his decision to issue proceedings. The claimant contacted the respondent by e mail on 1 February 2020 asking for payment of outstanding sums due and confirming that if not paid he intended to contact ACAS to commenced early conciliation (page 1 of the Bundle). The respondent replied on 4 February 2020 (page 2) disputing that it owed the claimant any further amounts. The claimant said he knew that this letter came from Ridge Contract Limited and that the name of Kanwar Shaker Chander Sharma did not appear anywhere on this letter.

11. The claimant contacted ACAS on 5 February 2020 and said in evidence that from that date he knew that Ridge Contract Limited was the organisation against which he should have claimed. He also confirmed that on 24 February 2020 he received the ACAS certificate (page 3) by e mail. He filled in the 1st claim form after this. He confirmed that he correctly entered the ACAS early conciliation number shown on the ACAS certificate when he was completing his claim form. He explained that he saw that box 2.1 of the claim form instructed him to "*Give the name of your employer or the person or organisation you are claiming against*". He also said that he knew his employer as "Kanwar Shaker Chander Sharma" so he looked up the name of "his company" on the Companies House website i.e the respondent and as he saw the same on the first page, he used that information to complete his claim form. He said that he understood from the instruction at box 2.1 that he had provide a name of a "person" and had the question on the claim form been worded differently, he

would have entered the name of the respondent as his employer. The claimant was "not too sure" of the difference between a legal person and a natural person.

12. The claimant had been unwell during this period (although it is noted that he did not mention this in his witness statement). He was in hospital between 14 and 18 February 2020 and was on pain medication upon his discharge from hospital. I did not hear and was not provided with any further evidence on the effects of any medication on the claimant other than what is set out by the claimant in his 2nd claim form.

13. It was some time after when the claimant realised he named the respondent incorrectly and when he was informed that his ET1 was rejected, he sought to amend it and did so. He did not have legal advice at the time of submitting his claim and we accepted that "*working as a lorry driver, I don't normally have to do complicated paperwork and I didn't realise how important it was to get this right*". He admitted he had made an error when completing his form but did not realise this at the time and rectified it as soon as he was notified of this on 24 June 2020 and then submitted the 2nd claim form on 26 June 2020.

The relevant law

14. Section **23 (2) of the of the ERA** states that time can only be extended where the tribunal:

"is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months"

[and was presented to the tribunal*]*

"within such further period as the tribunal considers reasonable"

15. The authorities on this provision are clear that the power to disapply the statutory time limit is very restricted. The statutory test is one of practicability. It is not satisfied just because it was reasonable not to do what could be done as per **Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200.**

16. There has to be some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time as stated by the Court of Appeal in the case of **Walls Meat v Khan 1979 ICR 52:**

"… *The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical … or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."* (Pages 60F-61A).

17. In ***Adams v British Telecommunications Plc [2017] ICR 382***, the position of extending time for an out of time resubmitted claim form that was initially

rejected for misquoting the ACAS Early Conciliation number was addressed. It was confirmed that what is or is not reasonably practicable is a question of fact for the Employment Tribunal. I set out in full paragraphs 18-20 and 31:

"18. The focus is accordingly on the Claimant's state of mind viewed objectively. The Employment Judge did not focus on the second claim and did not simply use the first claim as a guiding light in determining the factual questions she had to determine in relation to the second claim. Had she done so, a number of matters could and would have been considered. First, having lodged the first claim on 16 February 2015 believing it to be complete and correct, the Claimant would have had no reason to lodge the second claim on that date. Secondly, the Claimant cannot have been aware of the mistake she made in transposing the certificate number until after the limitation period expired because had she become aware of it, for example on 16 February when she was in the process of presenting the complaint, she would have corrected it. Moreover, in the period between 16 and 19 February she laboured under the mistaken belief that the first claim had been correctly presented without any defect. Those are the reasons why the second claim was not presented until 19 February, but none of those points appear in the Employment Judge's consideration.

19. The question for the Tribunal, in those circumstances, was not whether the mistake she originally made on 16 February was a reasonable one but whether her mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances. In that regard, it seems to me, it must be assumed that the Claimant's error was genuine and unintentional. Further, as I have already indicated, it must be assumed that she was altogether unaware of the error since had she been aware of it no doubt she would not have made it or it would have been corrected.

20. Moreover, as Mr Sankey submits, the inclusion of an ACAS early conciliation number as a necessary condition of a claim being properly presented is not one that would necessarily be obvious to a Claimant, nor is it immediately obvious that a simple slip in transposing the certificate number onto the form would render the claim form defective in its entirety. I have already referred to the escape route provided by Rule 12(2A) in respect of minor errors in relation to transposing names or addresses of the Claimant and Respondent by reference to the early conciliation certificates, and it is not immediately obvious to me that there is any distinction of substance between errors in relation to the name and address and errors in relation to the certificate numbers themselves. Those are factors that reflect on the degree to which the Claimant was at fault in making the error and then in failing to appreciate that the error had been made. The Employment Judge was entitled to have regard to those factors and if she had been considering the second claim and the facts and circumstances surrounding the second claim there would have been some reference at least to those features.

…….

31. Having considered all of these matters and having accepted that the Claimant was labouring under a misunderstanding about the correctness of her first claim at all times until she presented her second claim, it seems to me that her misunderstanding was genuine and reasonable in the circumstances. That was the impediment to her presenting the second claim on time. Accordingly, I

am persuaded on balance, that it was not reasonably practicable for her to present that second claim in time. She presented the second claim two days late, but she acted promptly and on the same day as she was notified of the defect. In my judgment, she acted within a reasonable period, and, accordingly, time should be and is extended in respect of the unfair dismissal claim."

18. **Rule 10 ET Rules** provides, in para (1), in mandatory terms that an Employment Tribunal

"10.- ... shall reject a claim if-

(a). it is not made on a prescribed form;

(b). it does not contain all of the following information—

(i) each claimant's name;

(ii) each claimant's address;

(iii) each respondent's name;

(iv) each respondent's address [;or...

(c). it does not contain all of the following information-

(i). an early conciliation number;

(ii) confirmation that the claim does not institute any relevant proceedings; or

(iii) confirmation that one of the early conciliation exemptions applies"

And by para (2) that

"*The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.*"

19. **Rule 12 ET Rules** provides,

"*Rejection: substantive defects*

12.—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

(a) one which the Tribunal has no jurisdiction to consider;

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;

[(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.]

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a)[, (b), (c) or (d)] of paragraph (1).

[(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) 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.]

(3) If the 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, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

20. Reconsideration of rejection is contemplated for in Rule 13 of the Rules, and provides the following:

"*13.—(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—*

(a)the decision to reject was wrong; or

(b)the notified defect can be rectified.

…

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

21. There are two (apparently) conflicting authorities on whether an error in the respondent's name was a minor error under rules 12 (2A) **.Chard v Trowbridge Office Cleaning Services UKEAT/0254/16** where the EAT emphasised that what is "minor" is always a question of fact and degree and in this case the error in naming the director of the employer company on the early conciliation certificate instead of the company itself was minor : "An error will often 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" (Kerr J). However in **Giny v SNA Transport UKEAT/0317/16** the EAT upheld the Tribunal's decision to reject a claim in a similar case on the basis that this was not a minor error. It noted that the difference between a natural and a legal person will not always be more than a minor error; each case will depend on its own facts.

Conclusion

22. The claimant has the burden of proof in showing that it was not reasonably practicable for his claim to have been presented in time. Mr Kennan for the respondent firstly submits that the basis upon which the 1st claim was rejected by the Tribunal was incorrect. The claimant was informed that the 1st claim had been rejected on the basis of Rule 10 (1) (c) but this was not valid as the 1st claim did include a valid and correct early conciliation number. The proper

basis for the rejection he submits was under Rule 12 (1) (f) above which deals with rejection by an Employment Judge upon referral if the name of the prospective respondent on the claim form does not match the name of the prospective respondent on the early conciliation form. He referred me to the Chard v Trowbridge case above and in particular paragraphs 63, 64, 67 & 68 of the judgment. He pointed out that a rejection under this Rule is subject to the "escape route" of Rule 12 (2A) and given the findings in Chard, it would not be in the interests of justice to reject the claim. He acknowledges that the claimant did not apply for a reconsideration of the decision of Employment Judge Hughes to reject his claim but instead chose to present the 2nd ET1 which corrected the error. He submitted that the early conciliation rules should not be used as a trap and deprive a claimant of his or her right to pursue an otherwise valid claim. He points out that the claimant has no knowledge of the difference between a natural and legal person nor would it be reasonable for him to do so. He pointed out that the address for the respondent on both claim forms was the same and the person in control of the respondent is the person named on the 1st claim form. He also notes that the same parties had been involved in previous discussions abouts amount owing and the early conciliation. He says that when considering whether to reject a claim, a judge must consider whether the error made was a minor error and whether it would be in the interests of justice to reject it. He submitted that if read in conjunction with the overriding objective at rule 2 of the ET rules, the interests of justice are the primary consideration and this should also be applied when considering whether any error is a "minor error". He pointed out that this particular rule had now been changed with effect from October 2020 to remove the word "minor". If this applied, Mr Kennan submits, the 1st claim would not have been rejected. He therefore submits that this indeed was a minor error and that it is not in the interests of justice for the 1st claim to be rejected. Having not made an application for reconsideration under rule 18 of the ET Rules, he asked me to reconsider the decision to reject of my own initiative and to accept the 1st claim.

23. Alternatively Mr Kennan submits that all the circumstances outlined by the claimant make it clear that it was not reasonably practicable for the claimant to have submitted his claim in time. He referred me to the case of Adams v BT (above) and submits that the claimant genuinely and reasonably believed that he had validly lodged his claim on 24 April 2020 and that this was in time. He was only notified of the error in submission when his claim was rejected by the Tribunal on 24 June 2020 (by which time the date for presentation had passed) and he then immediately submitted the 2nd claim. He points out the claimant acknowledged that he made a mistake but only became aware of this when the claim was rejected. It may be that he should have made an application for reconsideration at this point rather than present the 2nd claim form, but it is clear that he acted promptly once the mistake had been pointed out. He submits that it was not possible (or reasonably practicable) for the claimant to have presented the claim with the correct details until he was aware of the error on 24 June 2020. The claim he says was then presented within a reasonable period thereafter. He invites me therefore to accept the claim.

24. Mr Blitz firstly objected to the basis upon which Mr Kennan was making his submissions because this was not an application for reconsideration and the preliminary hearing for today had not been listed to consider this issue. The preliminary hearing today he says was solely to consider whether the claim had been presented in time and if not whether it was reasonably practicable for it to

have been presented in time. He points out that no application for reconsideration has been made even in the run up to today's hearing and even if this might be outside the applicable time period. He points out that the claimant has been legally represented since 23 October 2020 and no application for reconsideration has been made to date. Therefore he submits that the submissions on whether the original decision to reject the claim was correct and whether it should be reconsidered should not be addressed by me at the preliminary hearing today.

25. Secondly, the respondent submits that there is no basis to show that it was not reasonably practicable for the claimant to have presented his claim on time, or that it was then presented within a reasonable time period. Mr Blitz says it is irrelevant whether the claimant would or could have applied for a reconsideration but I need to consider what was actually in the claimant's mind when he made his claims. He submits that the claimant always knew who his employer was and that this was clear to him from the e mail sent to him from the respondent on 4 February 2020 and when he received his early conciliation certificate from ACAS on 24 February. Mr Blitz contends that the claimant knew he needed to bring his claim against the respondent but as a result of his mistake he failed to do this (despite successfully transposing the correct early conciliation number from the certificate to the claim form) and cannot provide a good reason why this mistake was made. He contends that the very basic medical information provided by the claimant does not support any contention that he was unable to submit a correctly named claim form in time. He submits that the Tribunal's jurisdiction is strictly defined by legislation time limits in these claims are strict for a reason. He therefore invites me to dismiss the claimant's claim.

26. Firstly, I accept the initial submissions of the respondent that I should not as part of this determination consider substantially any application for reconsideration of the original decision to dismiss the 1st claim. This was not what this preliminary hearing was listed to consider and I will confine myself to considering and applying the provisions of section 23 (2) of the of the ERA as set out in the issues above. It is not in the interests of justice for me to reconsider the original decision to reject the claim of my own initiative.

27. On this point, I have considered the helpful submissions of Mr Blitz but on balance I prefer the submissions of Mr Kennan on this particular point and in particular I rely on the conclusions and guidance set out in the case of Adams v BT above which I find has particular relevance to the facts set out above. I accepted what the claimant said that at the time be submitted the 1st claim, he knew his employer as "Kanwar Shaker Chander Sharma" and having looked up the name of "his company", namely the respondent, on the Companies House website and seeing that same name he was familiar with, he used this name to complete his claim form. I also accept that he understood that he should provide a name of a "person" and had the question on the claim form been worded differently, he would have entered the name of the respondent company. He was not aware of the distinction between a legal and natural person and perhaps concluded that there was no significant distinction as to whether his employer was in fact the respondent or Kanwar Shaker Chander Sharma.

28. I conclude that from an objective point of view that having presented the first claim believing it to have been presented correctly, he had no reason to lodge a

further claim against the respondent after this time. I can also conclude from the fact that the claimant did correct his error when he found out about it, that had he been aware that an error had been made, he would have corrected it sooner. Having presented a claim on 24 April 2020 he was reasonably proceeding on the understanding that a claim to the Tribunal had been validly presented without any error or defect. This is the reason why the 2nd claim was not presented sooner. The claimant made a genuine error when he presented his first claim but I do not attribute a high degree of fault to him not appreciating that an error had been made and indeed that a further claim needed to be presented. This failure to appreciate that he had made an error was genuine and reasonable and I find on the facts does meet the test of being some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time. Therefore I conclude that on balance and on these particular facts it was not reasonably practicable for the claimant to have presented the 2nd claim on time. The 2nd claim was presented within two days of being notified by the Tribunal that the 1st claim had been rejected. I conclude that the claim was presented within such further time period as was reasonable.

29. Therefore I conclude that time is extended to the date of presentation of the 2nd claim (26 June 2020) in respect of the claimant's claim for unlawful deduction of wages and this claim will now proceed to hearing.

Employment Judge Flood

17 December 2020