Case No: EA-2019-000752-BA
(previously: UKEAT/0214/20/BA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 July 2021

Before :

CLIVE SHELDON QC (DEPUTY JUDGE OF THE HIGH COURT)

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Between :

MISS AM STIOPU	**Appellant**
- and -	
MR G LOUGHRAN	**Respondent**

- -
- -

Ms M Pennycook (Advocate) for the **Appellant**
Respondent debarred from taking part in this appeal

Hearing date: 20 July 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE- APPLICATION/CLAIMS

The employment judge erred in rejecting the claim on the basis that "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 certificate relates" (rule 12(1)(f) of schedule 1 to the **2013 Regulations**), as she failed to consider whether the claimant had "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" (rule 12(2A)).

Rule 12(2A) is a "rescue provision", designed to prevent claims from being rejected for technical failures to use the correct name of the respondent in the early conciliation certificate and the ET1. In every case where rule 12(1)(f) may apply, the employment judge should ask him or herself the question as to whether there is a "minor error" in relation to a name or address and whether it would or would not "be in the interests of justice to reject the claim.

In the instant case, there was material available to the employment tribunal to suggest, or indicate, that a "minor error" could have been made.

CLIVE SHELDON QC DEPUTY JUDGE OF THE HIGH COURT:

1. This is an appeal brought by Miss AM Stiopu ("the claimant") against Gerard Loughran ("the respondent") in which the claimant contends that the employment tribunal erred in law when it rejected her claim for holiday pay and other unpaid monies.

Factual background

2. The Claimant applied for an early conciliation certificate ("the certificate") from ACAS on 4 March 2019. The certificate (numbered R126166/19/85) was issued on 4 April 2019. The certificate identified the claimant as the prospective claimant and Carebrook Limited was identified as the prospective respondent. The address for Carebrook Limited was stated to be 231 Camden High Street, Camden Town, London, Greater London NW1 7BU.

3. On 17th April 2019 an ET1 ("the claim form") was lodged with the London Central Employment Tribunal. The respondent was identified as Gerard Loughran and the address was stated as Pret a Manger, 231 Camden High Street, Camden Town, London, Greater London NW1 7BU. The claimant ticked the box to state that she had obtained a certificate, the number of which was given as R126166/19/85. The details of the claimant's claim were described as being owed holiday pay and other payments. The claimant explained that she had worked with this company for 27 weeks, that during this time she had taken two days of holiday and that, after handing in her notice, she was not paid the remaining holidays. She also refers to the non-payment of a reward of £100 as a result of the company's "refer a friend" scheme. The claimant contends that she fulfilled the conditions of the scheme but was not paid the reward.

4. In box 9.2 of the ET1 ("What compensation or remedy are you seeking?") the Claimant wrote:

> "Carebrook Limited owns [sic] my holidays pay but because of the seven missing payslips that I never get I don't know how many days the company removed from my total holidays. I've only requested three days off for my holidays but it was on 9 and 10 November 2019. In the payslips that I have figures three holiday days paid on 11 January 2019, on 16 November 2018 and another day on 23 November 2018. Together with the holidays as well, Carebrook Limited owns me £100 of refer a friend scheme."

5. On 3 July 2019 the Claimant's claim was rejected by the employment tribunal. A rejection of claim letter was sent to the Claimant in which it was stated:

> "Your claim form has been referred to Employment Judge Wade, who has decided to reject it because the name of the respondent on the claim form is different from the name on the ACAS certificate. I'm therefore returning your claim form to you. I also enclose some explanatory notes called 'Claim rejection: your questions answered'."

The notes set out two questions, "Why has my claim been rejected?" and, "If I think the Tribunal has made a mistake or I have now followed the early conciliation rules, what do I do?" An out-of-time request for reconsideration was made by the claimant on 5 October 2020 following a Rule 3(10) hearing in the Employment Appeal Tribunal ("the EAT"). No response has been provided by the Employment Tribunal.

The appeal

6. The claimant has raised three grounds of appeal: (1) the employment tribunal erred in law by failing to consider any of the factors that it is required to consider pursuant to rule 12(2A) before rejecting a claim pursuant to rule 12(1)(d) or (e), **Employment Tribunals Rules of Procedure** (Schedule 1, **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**) ("the 2013 Regulations"); (2) the employment tribunal erred in failing to give effect to the overriding objective in interpreting and/or exercising the power given to it by rules 12(1)(e) and 2A; (3) in the alternative, if the ET considered the factors set out at grounds (1) and (2) above, it failed to provide its reasons for rejecting the claim in the light of these factors, as required by rule 12(3).

7. Ms Pennycook, acting *pro bono* as advocate on behalf of the claimant has produced a skeleton argument in support of each of these grounds of appeal and she amplified her points in oral argument before me. The respondent was debarred from taking further part in the appeal as he failed to reply to correspondence from the EAT and to an order of the EAT.

Discussion

8. Rule 12(1) of Schedule 1 of the **2013 Regulations** provides that:

> "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 …

> (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."

9. Rule 12(2A) provides that:

> "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."

10. Rule 12(3) provides that:

> "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."

11. Rule 13 sets out the rules relating to reconsideration of the rejection.

Ground 1

12. The claimant contends that the employment tribunal failed to consider any of the factors that it was required to consider pursuant to rule 12(2A) before rejecting her claim. In particular, the claimant argues that the employment tribunal was required to consider whether the error that she made, putting different names of the respondent for the purposes of the certificate and in the ET1, was 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 is contended that the employment judge failed to consider these matters.

13. In the course of her argument Ms Pennycook has referred me to the judgment of Kerr J sitting in the EAT in the case of **Chard v Trowbridge Office Cleaning Services Ltd** UKEAT/0254/16/DM. In that case the claimant had wrongly identified her employer when applying for the early conciliation certificate at a time when she was not legally represented. The certificate named the controlling shareholder of the respondent company rather than the company itself. Her ET1, prepared by her legal representatives, identified the correct name of the employer. The claim form was rejected by the employment judge on the basis that "the respondent named on the claim form is different to that named on the early conciliation certificate". In that case the claimant had requested reconsideration

of a decision to reject her claim on the basis that a minor error had occurred. It was contended that: (1) the person named on the certificate (a Mr Belcher) was the managing director and majority shareholder of the company, with the remaining shares owned by his mother; (2) the majority shareholder conducted the day-to-day running of the business and, for all intents and purposes, operated the business as a sole trader; and (3) he was the person responsible for the claimant's dismissal. It was also argued that it was not in the interests of justice to reject the claim as the claimant had been employed for 27 years and her claim was strong on the merits. The employment judge rejected that argument. The discrepancy of the names did not, in her judgment, "amount to a minor error… such as a misspelling or omitting part of the title of the respondent".

14. In his judgment at paragraphs 68 and 69, Kerr J held that:

> "68. … Minor errors are ones that are likely to be such that it would 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."

15. Having allowed the appeal, Kerr J decided the matter himself with the agreement of the parties pursuant to the EAT's powers under section 35 of the **Employment Tribunals Act 1996**. The learned judge concluded that the error 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."

The learned judge cautioned 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 … could be one of real substance."

It was not in that case, however. The learned judge also concluded that it was in the interests of justice for the claim to proceed.

16. On behalf of the claimant in this appeal, Ms Pennycook relied on the decision in **Chard**. She argued that in this case the employment judge should have considered whether the claimant's error was minor and whether rejection of her claim was in the interests of justice or not. In doing so, Ms Pennycook contended that the employment tribunal should have taken into account various factors (and I quote from her skeleton argument as follows).

> "i. The fact that at box 9.2 the Claimant gave the name of the Respondent as named on the Early Conciliation Certificate. At box 9.2 the Claimant named Carebrook Limited twice, and asserted that it was Carebrook Ltd that owed her the money claimed.
>
> ii. The complexity of the employment situation between Pret a Manger (who interviewed the Claimant and issued her with a contract of employment), Carebrook Ltd (who employed the Claimant) and Mr Gerard Loughran (who was the Claimant's point of contact at Carebrook Ltd, and made regular weekly visits to the Pret a Manger shop);
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> iii. English was not the Claimant's first language;
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> iv. The Claimant was not legally represented;
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> v. The address for Mr Gerard Loughran and Carebrook Ltd was the same;
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> vi. The close relationship between Mr Loughran and the company;
>
> vii Naming a director or shareholder instead of a limited company can amount to minor error, especially when the question is considered in light of the interests of justice and the overriding objective. (At paragraph 62, *Chard v Trowbridge*: "I 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," and at paragraph 64: "I accept that to a lawyer the identity of a company as distinct from a shareholder" (or, as in Miss Stiopou's [sic] case, a Director) "is much more than a matter of form … 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 …").

17. I agree with Ms Pennycock that, in this case, before rejecting the claim on the basis that "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 certificate relates" (Regulation 12(1)(f) of Schedule 1 to the **2013 Regulations**) the employment judge should also have considered whether the claimant had "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" (per Regulation 12(2A)). It appears from the short decision letter that this was not done. If it was done then the employment judge did not explain her reasoning.

18. In my judgment, rule 12(2A) is a "rescue provision" designed to prevent claims from being rejected for technical failures to use the correct name of the respondent (or the claimant) in the early conciliation certificate and the ET1. The wording of rule 12(2A) is that the claim shall be rejected if the judge considers that the claim is of a kind described in subparagraph (f):

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

In my judgment, this language requires the employment judge in every case to ask him or herself the question as to whether there is a "minor error" in relation to a name or address and whether it would or would not "be in the interests of justice to reject the claim". These questions are part and parcel of the overall rule at 12(2A).

19. This can be seen clearly when one compares the language of Rule 12(2A) with Rule 12(2). Rule 12(2) simply provides that:

> "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)."

Rule 12(2) does not contain a rescue provision.

20. Of course, if there was nothing in the materials before the employment judge to suggest or indicate that a minor error has been made, the exercise of consideration will be a short one. It is not for the employment judge to speculate on that matter or as to whether it is otherwise in the interests of justice to reject the claim. In some cases the materials before the employment judge will simply be the certificate and the ET1. In other cases the materials will also include submissions made and evidence provided as part of an application for reconsideration.

21. In the instant case, the materials that were available to the employment judge were those contained within the certificate and the ET1 itself. This included points (1), (4) and (5) of the list set out above: (1) that although the name of the respondent in the certificate, Carebrook Limited, was not named as the respondent in the ET1, it was clear from box 9.2 in ET1 that Carebrook Limited was described as the claimant's employer; (4) the claimant did not appear to be legally represented (she had not filled out any details for her legal representative in the ET1); and (5) the address for Gerard

Loughran (the respondent in the ET1) and Carebrook Limited (the respondent in the certificate) was the same. These matters could constitute minor errors within the meaning of rule 12(2A).

22. In the case of **Giny v SNA Transport Ltd** UKEAT/0317/16/RN (a case cited in **Chard**), Soole J stated at paragraph 38 that he did not accept the submission that "the difference between the names of a natural person and a legal person could never (as a matter of law) be a minor error within the meaning and context of Rule 12(2A)". In **Chard**, Kerr J stated at paragraph 62 that he agreed that Soole J 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".

23. There is nothing in the very brief letter from the employment tribunal to suggest that the employment judge had even considered whether these matters amounted to a minor error. The claim appears to have been rejected simply because rule 12(1)(f) was satisfied, that there was a misalignment between the name and address of the respondent in the certificate and in the ET1. In my judgment, this was an error of law on the part of the employment judge. The employment judge should have considered whether or not the rescue provision applied, and if she had done so then she might have identified a minor error and would then have asked herself whether the interests of justice called for the claim to be allowed to proceed. She does not appear to have done so, and that is an error.

24. During the course of oral argument Ms Pennycook made the point that the claim form should not have been rejected in any event as the claim form did contain the prescribed information. Each respondent's name and address (as required by rule 10(1)(b)) was contained in a prescribed form. This contention did not form part of the grounds of appeal and Ms Pennycook did not ask for permission to amend the grounds to raise it. It does not seem to me, however, that this would have been a good point for Ms Pennycook in any event, as I consider that it is implicit in rule 10 that information about each respondent's name and address should appear at the relevant part of the prescribed form, that is in box 2, where the claimant is asked to fill in the "respondent's details (that is the employer, person or organisation against whom you are making a claim)".

Ground 2

25. In her skeleton argument Ms Pennycook contended that the employment tribunal erred by failing to seek to give effect to the overriding objective in interpreting and/or exercising the power given to it by rules 12(1) and 12(2A). She argues that the employment tribunal failed to ensure that it was dealing with the case in a manner which was proportionate to the complexity and importance of the issues and failed to avoid unnecessary formality and seek flexibility in the proceedings. It is said that the case is short and straightforward relating to unpaid monies. It is proportionate that the case should be dealt with despite the difference in names between the certificate and the ET1. The same address was given and both documents were for the attention of the same individual. Mr Loughran would have received both the certificate and the ET1.

26. It did not seem to me that this ground added anything material to ground 1. In her oral submissions Ms Pennycook agreed. So I do not deal with this ground of appeal separately.

Ground 3

27. It is further contended that if the employment tribunal considered the factors at grounds 1 and 2, it failed to provide its reasons for rejecting the claim in light of these factors. I take at face value that these matters were not considered by the employment judge as they are not mentioned in the short decision letter. In the circumstances there were no further reasons for her to provide. In my judgment, that is the error identified by ground 1 above rather than a reasons challenge. In the circumstances I reject this ground of appeal.

28. During the course of argument Ms Pennycook contended that it was unsatisfactory for the employment judge not to refer in the decision letter to the particular rule which was being relied upon and not to refer to the rescue provision at rule 12(2A). Ms Pennycook says that this would have assisted an unrepresented party when contemplating whether to apply for reconsideration of the decision under rule 13 and what points may need to be covered in such an application. It does not seem to me that this is mandated by the language in rule 12. Rule 12(3) simply requires the notice of rejection to give "the judge's reasons for rejecting the claim". Although the failure to refer to the

particular rule does not amount to an error of law, I do consider that it would be useful, especially for unrepresented parties, to be told about the rescue provision of rule 12(2A) either in the rejection letter itself (if the rejection is made under rule 12(1)(e) or (f)) or in the notes that are sent by the employment tribunal as part of the information about how to apply for reconsideration of a rejection.

Disposal

29. As I have already explained, I allow this appeal on ground 1. The question for me now is what I should do with the appeal. The two judgments of the EAT that I mentioned above, **Giny** and **Chard**, both acknowledge that an error in the identity of the respondent, that is naming an individual rather than the relevant company, could constitute minor errors. Neither case decides that these errors will always amount to minor errors. I agree. Whether or not they do so and whether or not it will be in the interests of justice to reject the claim are both matters for the employment judge. In the instant case the employment judge erred in failing to consider on the basis of the materials before her whether or not the misalignment of the name of the respondent between the certificate and ET1 was a minor error and, if so, whether it was in the interests of justice for the claim to proceed.

30. I consider that the most appropriate course of action disposing of this appeal is to remit the matter to the employment tribunal to consider whether or not the misalignment is a minor error and whether or not it would be in the interests of justice to reject the claim.

31. I do not consider that it would be appropriate for me to consider the matter myself in accordance with the powers set out in section 35 of the **Employment Tribunals Act 1996**. The respondent has been debarred from taking part in the proceedings before the EAT and has not agreed to me making the decision myself (cf. **Chard**). In the absence of such agreement, I should only make the decision myself if there was one obvious answer on the facts. I do not consider that this is such a case. Although it appears from correspondence with the EAT that Mr Loughran is the managing director of Carebrook Limited, the materials that were before the employment judge initially did not contain this information. Furthermore, the materials that were before the employment judge initially and the materials that are before me now do not explain whether there was "an additional substantial

shareholder" in Carebrook Limited other than Mr Loughran (see **Chard** at paragraph 72). I do not know, therefore, whether there is real substance in the misalignment between the names as identified in the certificate and in the ET1.

32. I will direct that the remittal should be to any judge. There is no reason why the matter cannot be dealt with by Employment Judge Wade. However, it seems to me that it is important that the remittal decision is considered as soon as possible given the considerable amount of time that has already lapsed from when the claimant instituted the claim. That will more likely be achieved, it seems to me, if the pool of employment judges who can deal with the matter is widened to any judge.

33. That is my judgment.