EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103194/19

Held in Aberdeen on 10 May 2019

Employment Judge: N M Hosie

Petrofac Facilities Management Limited	**Appellant** **Represented by** **Mr B Smith - Advocate**
Derek Christopher Evans	**Respondent** **Represented by** **Mr J Herd - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

(i) the time for presenting the Appeal is extended by one day to 15 March 2019;

(ii) the application for reconsideration is granted and Tribunal's decision to reject the Notice of Appeal is revoked; and

(iii) the Tribunal has jurisdiction to consider the Appeal.

REASONS

Introduction

1. This is an Appeal against a Prohibition Notice ("the Notice"), serial number P309631904, which the respondent served on the appellant on 21 February 2019.

2. The Notice of Appeal was received by the Tribunal on 14 March 2019. However, it was not accepted as Employment Judge Hoey, was of the view that under Rule 105(1) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), it was out of time.

3. The appellant applied to the Tribunal for reconsideration of that decision and the case came before me by way of a Preliminary Hearing to consider the application which was opposed by the respondent.

Rule 105(1)(a)

4. I was required to determine whether the Appeal had been lodged in accordance with Rule 105(1) in Schedule 1 of the Rules which is in the following terms:-

> *"**105 Application of this Schedule to appeals against improvement and prohibition notices***
>
> *(1) A person ("the appellant") may appeal an improvement notice or a prohibition notice by presenting a claim to a tribunal office –*
>
> *(a) before the end of the period of 21 days beginning with the date of the service on the appellant of the notice which is the subject of the appeal; or*
>
> *(b) within such further period as the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for an appeal to be presented within that time".*

Preliminary Hearing

5. It was not necessary for me to hear any evidence at the Preliminary Hearing. I heard submissions on behalf of the parties.

Appellant's Submissions

6. Prior to the Hearing, the respondent's Counsel had submitted a written *"Note of Argument",* which is referred to for its terms.

7. In support of his submissions, Counsel referred to the following cases:-

Keenan v Carmichael 1991 JC 169
Hazlett v McGlennan 1993 SLT 74

8. Counsel referred to s.24 of the Health and Safety at Work Etc Act 1974 which is in the following terms:-

> " **24 Appeal against improvement or prohibition notice**
>
> *"(1) In this section "a notice" means an improvement notice or a prohibition notice.*
>
> *(2) A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an employment tribunal; and on such an appeal the tribunal may either cancel or affirm the notice, if it affirms it, they do so either in its original form or with such modifications as the tribunal may in the circumstances think fit.*
>
> *(3) Where an appeal under this section is brought against a notice within the period allowed under the preceding subsection then –*
>
> *(a) in the case of an improvement notice, the bringing of the appeal shall have the effect of suspending the operation of the notice until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal;*
>
> *(b) in the case of a prohibition Notice, the bringing of the appeal shall have the like effect if, but only if, on the application of the appellant the tribunal so directs (and then only from the giving of the direction)*

(4) *One or more assessors may be appointed for the purposes of any proceedings brought before an employment tribunal under this section".*

9. Counsel referred to Rules 4 and 5 in Schedule 1, which provide: -

*"**4 Time***

(1) Unless otherwise specified by the Tribunal, an act required by these Rules, a practice direction or an order of a Tribunal to be done on or by a particular day may be done at any time before midnight on that day. If there is an issue as to whether the act has been done by that time, the party claiming to have done it shall prove compliance.

(2) If the time specified by these Rules, a practice direction or an order for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day. "Working day" means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971.

(3) Where any act is required to be or may be, done within a certain number of days of or from an event, the date of that event shall not be included in the calculation. (For example, a response shall be presented within 28 days of the date on which the respondent was sent a copy of the claim: if the claim was sent on 1st October the last day for presentation of the response is 29th October).

(4) Where any act is required to be, or may be, done not less than a certain number of days before or after an event, the date of that event shall not be included in the calculation. (For example, if a party wishes to present representations in writing for consideration by a Tribunal at a hearing, they shall be presented not less than 7 days before the hearing: if the hearing is fixed for 8th October, the representations shall be presented no later than 1st October).

(5) Where the Tribunal imposes a time limit for doing any act, the last date for compliance shall, wherever practicable, be expressed as a calendar date.

(6) Where time is specified by reference to the date when a document is sent to a person by the Tribunal, the date when the document was sent shall, unless the contrary is proved, be regarded as the date endorsed on the document as the date of sending or, if there is no such endorsement, the date shown on the letter accompanying the document.

> ***5 Extending or shortening time***
>
> *The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired."*

10. Counsel referred to the Stair Memorial Encyclopaedia of the Laws of Scotland at para 819, under the heading **"COMPUTATION OF TIME".**

11. He submitted that the rejection of the Notice of Appeal by the Tribunal was an error in law. The Appeal was lodged in accordance with Rule 105(1)(a). He referred to the Notice which he accepted was "handed over" on 21 February 2019 and submitted that: *"The Notice was served on 21 February 2019. The Appeal was lodged on 14 March 2019, within 21 days properly computed in accordance with* law".

12. He drew to my attention the following provisions in the "Notes" which were attached to the Notice:-

> *"**Time limit for appeal***
>
> *A notice of appeal must be presented to the Employment Tribunal within 21 days from the date of service on the appellant of the notice, or notices, appealed against, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it is not reasonably practicable for the notice of appeal to be presented within the period of 21 days……*
>
> *The rules for the hearing of an appeal are given in The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013 No 1237)".*

13. He submitted that the "starting point" was s.24 of the 1974 Act, then the Notes and submitted the words "within 21 days **from** the date of service" were significant. Rule 105(1)(a) required to be read in the context of s.24 and the Notes.

14. He submitted that the word "beginning" In Rule 105 (1) (a) is synonymous with "from" and that the Notes *"did not imply that the date of service is to be included".*

15. Counsel further submitted that the Notes attached to the Notice and Rule 4(3) should be understood as setting down, *"general principles or rules".*

16. When Rule 105(1)(a) is considered in that context, it means *"21 clear days",* not including the date of service.

17. He submitted that such a computation was consistent with **Kennan v Carmichael** which, although a criminal appeal, is "*a case of the highest authority"* and is a *"rule of general application".* He referred, in particular, to page 171 of the opinion of the Court of Appeal which was delivered by the Lord Justice-General (Hope).

18. Counsel then went on to refer me to the "Computation of Time" provisions in the Stair Memorial Encyclopaedia at para 819:-

> ***"5 COMPUTATION OF TIME***
>
> ***819. General***
>
> *When calculating the precise extent of a period of time it is necessary to determine, first, the method of computation which is to be employed (which may be naturalis computatio or civilis computatio); second, when the period commences; and, third, when it terminates. The second and third points are closely linked and may conveniently be dealt with together.*
>
> *The law relating to the computation of time has developed in a piecemeal fashion and there are still a number of significant ambiguities. In so far as a general rule can be enunciated it is that a period of time which is to be counted in units of a day or longer is to be calculated by civilis computatio**,** the whole of the first day is to be excluded, and the last day is to be included. Whether the whole of the last day is to be included, or the maxim dies inceptus pro completo habetur is to be applied, will depend on the circumstances, but inclusion of the whole day is to be preferred although the general tenor of the decisions may be to the contrary.*
>
> *Except where the statute has placed the matter beyond doubt, it is essential to look at each time limit independently, and ascertain the computation principles applicable thereto from an examination of the decided cases or by analogy from similar situations. A general statutory provision would be of great assistance. In the context of time limits in criminal procedure, the Court of Appeal has expressed the hope that*

> *"in any reconsolidation of the Scottish legislation on criminal procedure, this matter (the clear definition of time limits, will be attended to, since express provision on the matter should remove all possibility of doubt or misunderstanding on the part of those who, often under considerable pressure, have to operate in practice our system of criminal procedure."*
>
> *Similar sentiments may be expressed in regard to private law and procedure.*
>
> *1 McMillan v H M Advocate 1982 SCCR 309 at 312, 1983 SLT 24 at 26"*

19. Counsel submitted that there was, *"a difficulty using moment to moment, in that the Notice is not timed, it is simply dated. It could be presented at all hours of the day and night. For example, it could be served at 11.30 pm. That would mean that a claimant has only 20 days and half an hour to appeal".*

20. Counsel submitted that the correct approach to the computation was the "*civilis computatio*", on a day to day basis, excluding the first day.

21. In support of his submission that the computation of the 21 day period needs to be calculated in accordance with, "*the general rule of law that excludes the day of service"* he referred to ***Hazlett v McGlennan*** and the following passage from the opinion of the Court at page 75, paras j-k:-

> *"In our opinion counsel for the complainer Hazlett has failed to demonstrate that the general rule in civilis computatio does not apply. We see no reason why the general rule should not be followed in this case. As already observed, the general rule is that fractions of a day are ignored, and that the day from which the period runs is excluded, the period deemed to commence at midnight on that day (para 822 of Vol 22 of the Stair Memorial Encyclopaedia of the Laws of Scotland). In that paragraph reference is made to what Lord Ivory wrote in a note to Erskine's Institute, III viii 96, commenting on a case where a deed was reduced under the law of deathbed: "The ground of decision in the House of Lords is important, as fixing the rule of computation, 'that the terminus a quo, mentioned in the Act is descriptive of a period of time, viz the date or day of the death,*

> *which is indivisible; and 60 days after is descriptive of another and subsequent period, which begins when the first period is completed. The day of making the deed must therefore be excluded".*

22. Counsel submitted that there was also support for his method of computation in ***London Borough of Wandsworth v Covent Garden Market Authority*** [2011] EWHC 1245 which was referred to by the respondent's solicitor. He referred in particular to the following passage from the Judgment of the Queen's Bench:-

> *"3 Wandsworth served the Improvement Notices on CGMA on 14th September 2010. The time for sending the Notices of Appeal to the Employment Tribunal expired on 5th October 2010. The Notices of Appeal were sent on 14th October 2010. They were therefore sent 9 days out of time."*

23. Counsel submitted that what was important in that case was that there are 30 days in September and he submitted that those comments are, *"entirely consistent with the general rule of law"* and his contention that, *"the first day has to be excluded".* This was, *"an actual example and an authoritative statement".*

24. So far as the present case was concerned, therefore, he submitted that, while the Notice of Appeal was submitted *"on the last day",* it was in time.

25. Finally, Counsel said this by way of conclusion:-

> *"The Tribunal having erred in law, and the appeal having been lodged within the prescribed time limit, the appeal should be received and proceed as accords.*
>
> *Esto, the Tribunal upholds the decision of 19 March 2019 (that the appeal was presented out of time, it is in the interests of justice, in all the circumstances, for the Tribunal to exercise the dispensing power in Rule 5, and to allow the appeal to be received".*

Respondent's Submissions

26. The respondent's solicitor lodged documents and copies of cases in support of his submissions, but most of the cases related to the issue of whether or not it had been "reasonably practicable" to present the Notice of Appeal in time and that was not an argument which was advanced on behalf of the appellant.

27. On 1 May, the respondent's solicitor wrote to the Tribunal in support of his submission that the appeal is time barred and should not be allowed to proceed as being out of time. His letter was number 1 in the documents which he submitted. The following are excerpts:-

> *"Accordingly the rule (105(1)) is clear that the 21 days begins with the date of service upon the Appellant. The date of service was 21 February 2019. The appeal was presented on 14 March 2019. Accordingly, the appeal was submitted one day late.*
>
> *2. The rule must be considered alongside the more general rules contained in the Schedule, including the provisions in Rules 4 and 5. These Rules should be applied in a manner which is consistent with Rule 105 when dealing with enforcement notice appeals.*
>
> *3. It follows that any conventions or practices for applying the 21 day notice period in respect of claims not covered by rule 105 are irrelevant because of the explicit terms of the rule.*
>
> *4. The guidance at the back of the Prohibition Notice states that "A Notice of Appeal must be presented to the Employment Tribunal within 21 days from the date of service on the Appellant of the Notice….. "Applying an ordinary meaning to the word "from" is consistent with the 21 day period commencing with service of the Notice upon the Appellant, but irrespective of the guidance note the Appellant requires to satisfy himself that the appeal is presented on time".*

28. The respondent's solicitor submitted that the terms of Rule 105(1) are, *"crystal clear".* The 21 day period, *"begins with the date of the service on the appellant of the Notice*".

29. He drew to my attention that corresponding provisions in Schedule 4 of the previous 2004 Rules had been in different terms:-

> *"**Time limit for bringing appeal***
>
> ***4.** – (1) Subject to paragraph 2, the Notice of Appeal must be sent to the Employment Tribunal office **within** (my emphasis) 21 days from the date of this service on the appellant of the Notice appealed against.*
>
> *(2) A Tribunal may extend the time mentioned above where it is satisfied, on an application made in writing to the Secretary either before or after the expiration of that time, that it is or was not reasonably practicable for an appeal to be brought within that time".*

30. Rule 105(1), he submitted, applies to particular proceedings as set out in the heading. Rule 4 is a general rule whereas Rule 105(1) makes it *"explicit".*

31. The respondent's solicitor also submitted that, *"there is a long standing practice by Tribunals that the 21 days period is one day less".*

32. The Notice in the present case was served around lunch time and that date, he submitted, falls to be included in the calculation of the 21 days. If the claimant's Counsel submitted that that, *"effectively meant 20 days",* that's what the Rule provides.

33. The application is late, and the Tribunal does not therefore have jurisdiction to consider the appeal.

34. The criminal cases referred to by the appellant's Counsel, it was submitted, have no application to the present case, given the explicit terms of the Rule and the same rationale applies to conventions or practices in other areas of the law for computing periods of time. They do not have direct application to the issue.

35. In any event, the respondent's solicitor explained that, his main point was that the Rule is clear and can only have one sensible meaning.

Rule 5

36. So far as the terms of Rule 5 were concerned, he submitted this only means that the Tribunal has power to relieve a party of a failure, but in the present case Rule 105(1) must be applied and if an Appeal is late then the correct approach is to consider whether it was *"reasonably practicable"* to submit the Appeal in time and *"the Judge does not need to fall back on Rule 5 when there is the specific provision in Rule 105(1)(b)".*

Discussion and Decision

37. The terms of Rule 105(1)(a) are in clear, unambiguous terms. They could not be clearer: *"before the end of 21 days* ***beginning with the date of the service*** *(my emphasis) on the appellant".* Giving the normal meaning to these words, clearly the 21 day period includes the date of service. I was satisfied, therefore, that the appeal was submitted out of time, albeit by just one day.

38. I was satisfied that the submissions by the respondent's solicitor in this regard were well-founded.

39. I arrived at that view, having regard to the terms of Rule 4. That is a general rule. The specific rule, under a clear heading, is in Rule 105(1).

40. So far as the authorities referred to by the appellant's Counsel were concerned, the criminal cases which he referred to were just that: criminal cases and they related to time limits which had not been made as clear as they could have been. They were in my view irrelevant.

41. So far as the passages from Stair were concerned, at para 819 the guidance given is on the basis that, *"The law relating to the computation of time has developed in a piecemeal fashion and there are still a number of significant ambiguities*……. *Except where the statute has placed the matter beyond doubt".* The passage then goes on to explain the general rule. In the present case, there is no ambiguity.

Indeed, the previous corresponding Rule was amended so that, in my view, there is no doubt.

42. I arrived at the view, therefore, that the application was out of time.

Rule 5

43. As I recorded above, the appellant's Counsel did not seek to avail himself of the so-called *"escape clause"* in Rule 105(1)(b), by submitting that it had not been *"reasonably practicable"* to present the Appeal in time.

44. However, in the alternative, he sought to rely on Rule 5, in Schedule 1 which is in the following terms:-

> *"**5. Extending or shortening time***
>
> *The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired".*

45. The terms of this Rule are also perfectly clear, and I was not persuaded as the respondent's solicitor invited me to do, that I was constrained by the terms of Rule 105(1)(b).

46. Rule 5 is silent as to the test a Tribunal should apply when considering exercising this discretion.

47. However, a Tribunal must have regard to the "overriding objective", in Schedule 1 Rule 2, to deal with cases "fairly and justly".

48. There is also some guidance, I believe, in the EAT's decision in **Kwik Save Stores Limited v Swain and others** [1997] ICR 49, which set out the correct test for determining what was "just and equitable" under previous versions of the Rules.

49. I had regard, therefore, to the following factors.

The appellant's explanation for the late application

50. While the appellant had instructed its solicitors to frame the Notice of Appeal, the grounds of appeal are, of necessity, technical and I accepted that it would take some time for a solicitor to fully understand the grounds of appeal, take proper instructions and frame the Notice. It was understandable, therefore, that the solicitor would want to use all of the time available to ensure that the appeal was framed properly and that the technical terminology was correct. This would, of necessity, require liaising between solicitor and client over a period.

51. Further, the Notes attached to the Notice serve to confuse matters, as they state that the time limit for presenting an Appeal, is "**within** (my emphasis) 21 days from the date of service", which does not accurately reflect the terms of Rule 105 (1) (a).

The balance of prejudice

52. It is my view that the balance of prejudice clearly favours the appellant who will not be able to challenge the Notice were I to refuse the application and the respondent will not, in my view, be prejudiced by the delay of only one day in presenting the Notice of Appeal. For example, there is no question, of the delay being such that the evidence of any witnesses is likely to be adversely affected.

53. I was satisfied, therefore, that the appellant would suffer greater prejudice than the respondent, were I not to exercise my discretion.

The merits of the appeal

54. It is not possible for me to have a view on this. Suffice to say, that the Notice of Appeal is in fairly detailed terms and would appear, on the face of it, to be

stateable. It would appear to raise issues which can only be properly determined by hearing evidence.

55. I decided, therefore, having regard to these factors and the "overriding objective" in the Rules to, *"deal with cases fairly and Justly",* albeit with some hesitation having regard to the fact that the appellant did not seek to avail itself of the "escape clause" in Rule 105 (1) (b), that this was a case where I should exercise my discretion under Rule 5 and extend the time limit by one day. In my view, it is in the interests of justice to do so.

56. This means that the Tribunal has jurisdiction to hear the Appeal, the Notice of Appeal can be accepted, and can proceed in the normal manner under the Rules.

Employment Judge: **Nicol Hosie**
Date of Judgment: **7 June 2019**
Date copied to parties: **11 June 2019**