Appeal Nos.
UKEATS/0044/19/SS
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EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 10th March 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MR DC EVANS (HM INSPECTOR OF HEALTH & SAFETY)	APPELLANT
PETROFAC FACILITIES MANAGEMENT LIMITED	RESPONDENT

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MR DC EVANS (HM INSPECTOR OF HEALTH & SAFETY)	RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant (Respondent to the Cross Appeal)	Mr Andrew Webster (One of Her Majesty's Counsel) Instructed by Morton Fraser LLP Quartermile Two 2 Lister Square EDINBURGH EH2 9GL
For the Respondent	Mr Barry Smith (of Counsel) Instructed by: Pinsent Masons LLP 13 Queens Road ABERDEEN AB15 47L

SUMMARY

JURISDICTIONAL POINTS

EXTENSION OF TIME: REASONABLY PRACTICABLE

The Respondents lodged a Notice of Appeal against a Prohibition Notice under the Health and Safety at Work Act 1974. Rule 105(1)(a) of the Tribunal Rules 2013 gave the Respondents 21 days to appeal. Rule 105(1)(b) gave the Employment Tribunal a discretion to excuse lateness provided it was not reasonably practicable to lodge the Notice of Appeal on time. The Respondents accepted that it would have been reasonably practicable to lodge it on time but contended that the Employment Judge had general dispensing powers under Rule 5. They argued that having regard to Rule 5 the Employment Judge was entitled to allow the appeal though late having regard to factors that lay outside Rule 105(1)(b). The Employment Judge accepted he had discretion under Rule 5.

Held that the dispensing power available was that provided under Rule 105 (1)(b) and that Rule 105 was a self-contained rule setting a time limit for appeals against Prohibition Notices and providing a discretion for non-compliance on a more restricted basis than that provided in the body of the Rules. In these circumstances the Employment Judge had no jurisdiction under Rule 5 to relieve the Respondents of non-compliance with the statutory time limit. As regards the cross appeal, the Employment Judge had been correct to hold that on a proper construction of Rule 105(1)(a) the 21 days for appeal included the day when the Prohibition Notice was issued.

THE HONOURABLE LORD SUMMERS

Introduction

1. In this case, I heard an appeal and cross-appeal. For convenience, I shall refer to HM Inspector of Health and Safety as the "Appellant" and Petrofac Facilities Management Ltd as the "Respondents". The Appellant appeals a decision of the Employment Judge to permit a Notice of Appeal to be received out of time. The Employment Judge exercised his dispensing power under Rule 5 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** and permitted the appeal to proceed. The Appellant appeals this decision. In the cross appeal, the Respondents argue that the Employment Judge's decision that the appeal was out of time was incorrect and that there was no need to exercise the dispensing power under Rule 5. I deal with both these appeals hereunder.

The Facts and Circumstances

2. The Appellant is Derek Evans, one of Her Majesty's Inspectors of Health and Safety. He has power under the **Health and Safety at Work Act 1974** Section 22 to issue a Prohibition Notice if it is thought that there is a serious risk of personal injury as a result of an activity to which the 1974 Act applies. He issued a Notice on 21 February 2019 to the Respondents. In this situation, the Respondents were bound to desist from the prohibited activity. The Respondents decided to challenge the Prohibition Notice and contacted their lawyers with a view to appealing the decision.

3. Section 24 of the **Health and Safety at Work Act 1974** provides -

> **"(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 and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit."**

4. The period prescribed is found in Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** Rule 105 -

> **"105. (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."**

5. The Respondents' lawyers thought that the last day for appeal was 14 March 2019 and lodged the claim in the form of a Notice of Appeal on that date. Rule 105(1)(b) requires the Notice of Appeal to be lodged "before the end of the period of 21 days beginning with the date of the service on the appellant of the notice" (paragraph 105(b)).

The First Legal Issue – computation of time

6. The Employment Judge began by considering whether the words "beginning with" included the day of service of the Notice of Appeal. He considered the wording of Rule 105(1)(a) and concluded that they did. In this situation, the Employment Judge held that the appeal was out of time (Judgement paragraphs 37-42).

7. The Respondents have cross-appealed this aspect of his decision. They argued before me that Rule 105(1)(a) required to be read in the light of Rule 4(3) and that the words "beginning with the date of the service" did not include the date of service. I do not accept this argument. It is however more convenient to explain why I consider it is unsound after rehearsing the arguments about the dispensing power.

The Second Legal Issue – the dispensing power

8. At the Employment Tribunal, the Respondents did not seek to rely on the dispensing power in Rule 105(1)(b). It permits the Employment Tribunal to relieve the Appellants of their failure to appeal within the prescribed time –

> **"…where it is satisfied that it was not reasonably practicable for an appeal to be presented within that time"**

9. The Respondents conceded that they could have lodged their appeal on 13 March 2019. They accepted that it would have been reasonably practicable to lodge an appeal before the deadline. The Appellants argued that the Employment Judge was nevertheless entitled to take into account factors other than reasonable practicability. They argued Rule 5 was available to the Appellants.

10. Rule 5 reads -

> **"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."**

11. The Employment Judge accepted that Rule 5 was engaged and after weighing up a variety of factors (rehearsed below) permitted the appeal to proceed. The Appellant does not accept that Rule 5 is engaged. He submits that Rule 105(1)(b) is the only ground for relief from the terms of Rule 105(1)(a).

Discussion

12. Rule 5 and Rule 105(1)(b) have the same broad purpose but differ in several respects. Rule 5 does not prescribe the factors the Employment Tribunal may take into account. It is a general discretion. See paragraphs 47-48 of Judgement. By contrast, Rule 105(1)(b) refers to a single factor, reasonable practicability. Rule 5 applies to "any time limit". It covers deadlines fixed by the Employment Tribunal as well as time limits in the rules. By contrast, Rule 105(1)(b) is designed to provide relief where there has been a failure to comply with the time limit for lodging a claim set by Rule 105(1)(a).

13. The Appellants argued that the specific discretion of Rule 105(1)(b) was subject to the overriding discretion of Rule 5. This argument was accepted by the Employment Judge (paragraph 45). That being so, the Employment Judge considered that he was entitled to take into account factors other than reasonable practicability having regard to the general obligation in Rule 2 to deal with cases fairly and justly (see e.g. **Baisley v South Lanarkshire Council** [2017] 365 at 378).

14. If the Employment Judge's approach is correct, it means that the rules that govern appeals against Prohibition Notices are subject to two dispensing provisions. One that permits relief where it was not reasonably practicable to lodge a Notice of Appeal and another that permits relief on any ground. But if Parliament had intended there to be relief on any ground under Rule 5, there would have been no need to limit relief to the ground of reasonable practicability under 105(1)(b). The greater includes the lesser. If the Respondents are correct, Rule 105(1)(b) is otiose. See also appeals under the **Energy Act 2013** (Rule 105A(1)(b)).

15. The Appellant cited the maxim *generalia specialibus non derogant,* general provisions do not derogate from special provisions (Traynor's Latin Maxims 4th ed. p 235). He might equally have cited the reverse proposition *specialia derogant generalibus*, special provisions derogate from general provisions. He argued that when a matter falls under a specific provision, then it must be governed by that provision and not by the general provision. The Appellant

argued that the broad provision (Rule 5) was followed by a narrower provision (Rule 105(1)(b), and in that situation the latter should be understood as an exception to the former. I am satisfied that he is correct. Although the maxim expresses a convention of speech that is ancient in origin, it is a convention that is still recognised today (see Bennion on Statutory Interpretation 7th ed. p 517 section 21.4). In **Effort Shipping Co Ltd v Linden Management SA, The Giannis NK** ([1998] 1 All ER 495 at 513) Lord Cooke of Thorndon described the principle as "simple common sense and ordinary usage". The context of the two competing rules supports the Appellant's argument. I accept that a later provision should be regarded as overriding an earlier provision where the later provision is expressed in specific terms. Of course, this principle of interpretation is not an inflexible one and may yield to the words of the statute and the circumstances of the case. But where, as here, there is no statutory guidance as to how the two rules relate to one another, the general principle of interpretation identified above should apply.

16. Rule 5 appears in the Introduction to the Rules (Rules 1-7). Rule 105 appears in the Miscellaneous section at the end of the Rules. The Miscellaneous section contains a set of specific provisions conferring a specialist jurisdiction. If Rule 5 is applicable to appeals under s.24 of the **Health and Safety at Work Act 1974** then Rule 105(1)(b) has no purpose because it is swallowed up by Rule 5. If Rule 105(1)(b) only applies to appeals against Prohibition Notices, the reverse is not true. Rule 5 retains its general purpose. It continues to apply to applications under Employment Law legislation, which is the overarching purpose of the Rules. In these circumstances I consider that I should interpret Rule 105(1)(b) as an exception to the general rule in Rule 5.

17. The Respondents referred me to **Software Box Ltd v Gannon** [2016] ICR 148. I do not consider that this case is helpful. It does not involve the rules discussed above nor does it involve the issues of statutory construction that arise in this case. Likewise, **Baisley v South Lanarkshire Council** (above) although it contains a helpful discussion of Rule 5 and the factors that guide the operation of the dispensing power, does not discuss Rule 105 and the principles of statutory construction govern its relationship with Rule 5. I do not think this case affects the issue before me.

Factors Relevant to Discretion

18. Although I have held that Rule 5 has no application to this sort of case, it is appropriate to say a few words about the factors relied on by the Employment Judge. In paragraph 50, he adverts to a number of factors that showed why in his opinion the lawyer who drafted the Notice of Appeal would have had difficulty lodging the Notice of Appeal on time. He notes that he would have had to take instructions, absorb the technical issues raised by the Prohibition Notice and then draft the Notice. But these considerations in my opinion go to the practicability of lodging the Notice on time. Since the Respondents accepted it was reasonably practicable to lodge the Notice of Appeal on time, I do not consider they are relevant to Rule 5.

19. The Employment Judge indicated that because of the variety of matters to be dealt with, "It was understandable…that the solicitor would want to use all the time available to ensure that the appeal was framed properly….". There are two points that require to be made in this connection. First, it should be noted that there is a *non sequitur* in the Employment Judge's reasoning. In light of his finding that the 21 days permitted under Rule 105(1)(a) had expired the lawyer could not have used "all the time available". He must have used more than the time available. Second, while I accept that "understanding" is always desirable, caution should be exercised where it is used to relieve a lawyer of a legal error. I acknowledge that the best of lawyers makes mistakes. But the dispensing power is not really designed to save lawyers from miscalculations. It may be however that this was the sort of exceptional case where (had it been available) Rule 5 could have been exercised. As the Employment Judge observes (paragraph 51 Judgement), the notes to the Health and Safety Executive's Prohibition Notice were inaccurate. They state that:

> **"a notice of appeal must be presented to the Employment Tribunal <u>within 21 days from the date of service</u> 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."**

20. The Respondents pointed out that Schedule 4 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** had previously governed such appeals. Rule 4 provided -

> **"4 (1) Subject to paragraph (2), the notice of appeal must be sent to the Employment Tribunal Office within 21 days from the date of the 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."**

21. The notes to the Prohibition Notice are a combination of Rule 4(1) from the old Rules and Rule 105(1)(b) from the new Rules. They are misleading because Rule 105(1)(a) is worded

differently from the old Rule 4(1). The Respondents submitted that the notes had led their lawyer into error.

22. I do not consider I have to decide whether the dispensing power under Rule 5 should extend to this sort of error. I have held that the only ground of relief available under the Rules is "reasonable practicability" and given that this ground of relief is not available to the Respondents, I do not consider that the Employment Judge was entitled to have regard to the error in law nor the circumstances in which it came to be made. Thus while I accept that the words "within 21 days from the date of service" usually mean that the period begins on the day after service and do not include the day of service (**Pacitti Jones v O'Brien** 2006 SC 616 at p 620 paragraph 14; cf. Rule 4(3) of the **2013 Rules**) and while I also accept that the words in the notes misled the Respondents' lawyer, I do not consider this is a factor relevant to the discretion under Rule 105(1)(b).

23. I should observe that the notes to the Prohibition Notice go on to say, "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)". Had the lawyer consulted the Regulations as opposed to relying on the notes he would have appreciated that the notes were erroneous.

24. The Respondents also complained that the effect of the interpretation I prefer was to stop the appeal in its tracks and deprive the Respondents of an opportunity to be heard on the merits. I was informed that Prohibition Notices can be taken into account in sentencing in much the same way as prior convictions should the Respondents be convicted of a criminal offence. I accept that such notices cause damage to reputation. I am not persuaded however that these matters are relevant to the present appeal.

The Cross Appeal

25. The cross appeal brings me back to the point I described as the "first legal issue" (above). In my judgement, the factors that govern my approach to the appeal provide useful guidance in the cross appeal. In the cross appeal, the Respondents sought to argue that Rule 4(3) explained how time should be computed under Rule 105(1)(a). Rule 4(3) provides -

> **"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.)"**

26. As noted above however the wording of Rule 105(1)(a) does not mirror the wording of Rule 4(3). The wording in Rule 105(1)(a) has an established meaning. In **Guven v Secretary of State for the Home Department** 2010 SC 555 Lord Reed stated -

> **"…where the period within which an act has to be done is expressed to be a period beginning with a specified day, that is to be taken as demonstrating an intention that the specified day must be included in the period. …. As Sheriff Simpson remarked in *M, Appellant* (p 115): 'Wagner's Ring Cycle begins with *Das Rheingold* , not Die Walküre . A round of golf begins with the drive from the first tee, not the second hole.'"**

27. It follows from my reasoning above that Rule 105(1)(a) does not require to be interpreted so as to conform with Rule 4(3). It has its own wording. That wording has an established meaning. I consider I should leave that meaning undisturbed. Rule 4(3) belongs to a set of general provisions and has no bearing the specific provisions of Rule 105(1)(b). It follows therefore that the Employment Judge was correct in concluding that –

> **"The terms of Rule 105(1)(a) are in clear, unambiguous terms… giving the normal meaning to these words, clearly the 21 day period includes the date of service… (paragraph 37)**
> **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 Rule 105(1). (paragraph 39)"**

Conclusion

28. I conclude therefore that the Notice of Appeal lodged on 14 March 2019 against the Prohibition Notice serial number P309631904 and dated 21 February 2019 was out of time. I will accordingly allow the appeal by the Appellants and refuse the cross appeal by the Respondents