



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 33
XA69/20

Lord Justice Clerk
Lord Menzies
Lord Doherty

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

PETROFAC FACILITIES MANAGEMENT LIMITED

Appellant

against

DEREK CHRISTOPHER EVANS, HM INSPECTOR OF HEALTH & SAFETY

Respondent

Appellant: B Smith QC; Pinsent Masons LLP
Respondent: Webster QC; Morton Fraser LLP

24 June 2021

[1] The issue arising in this appeal is whether the appellant is entitled to rely on the general dispensing power in rule 5 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to excuse late lodging, by one day, of a notice of appeal against a prohibition notice.

The relevant rules

[2] The procedural rules, including time limits, for such appeals are contained in

Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”). The rules of particular pertinence to the present appeal are as follows.

Rule 2:

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with the proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules....”.

Rule 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.”

Rule 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.”

Background

[3] The appeal was out of time, having been presented one day late. The appellant accepted that it could not suggest that it came within the reasonable practicability provision of rule 105, but submitted that it remained open for it to bring itself within the general dispensing power of rule 5. The ET agreed and granted relief. The EAT disagreed, holding that the general dispensing power provided by rule 5 was displaced by a specific dispensing power available in respect of prohibition notices in cases where observance with the time limit was not reasonably practicable.

[4] The appellant's case was presented on the basis of arguments that the EAT failed to apply the plain meaning of rule 5 in the context of the overriding objective of rule 2. Rule 5 was of general application to "any time limit". It was not uncommon for two forms of relief to be available, for example *Semple Cochrane Plc v Hughes* 2001 SLT 1121; *Software Box Ltd v Gannon* [2016] ICR 148 and *Baisley v South Lanarkshire Council* [2017] ICR 365.

[5] The respondent argued that the EAT correctly identified, on the basis of the maxim *specialia derogant generalibus* that the specification of a narrower basis for relief in Rule 105 excluded application of the more general form of relief available under Rule 5, reading the rules as a whole (*Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605). The reliance on *Software Box* and *Baisley* was misplaced, as they dealt with different situations.

Analysis and decision

[6] In our view the error of the EAT lay in failing to recognise that Rules 105 and 5 are designed to address different issues. They do not, as the appellant submitted, provide two different forms of relief, one general and one specific, against failure to comply with provisions of the rules. It is not lightly to be assumed that the rules have been drafted in

such a way as to provide two separate, possibly contradictory, forms of relief. Rather the two rules are directed towards entirely separate issues.

[7] Rule 105 is concerned with the right of appeal, and the time limits therefor. It provides that the time limit for presenting an appeal is either (a) before the end of the period of 21 days beginning with the date of the service of the notice; or (b) where that is not reasonably practicable, such further period as the tribunal considers reasonable. In either situation, there is a right to present an appeal. It is true that the second of these routes to appeal requires the tribunal to make an assessment of what further time allowance would be reasonable, but the grant thereof is not a matter of discretionary relief. If the appellant can bring itself within the terms of rule 105(1)(b), by showing that it was not reasonably practicable to present the appeal within the period provided for in sub paragraph (1)(a), then the time limit which applies is that provided for in sub paragraph (1)(b), as to which it is inconceivable that a period of less than a day would be given. Senior counsel accepted, as he was bound to do, that a tribunal being satisfied that it had not been reasonably practicable to adhere to the time limit specified in the first part of the rule, would be bound to allow the appeal to proceed under the second part so long as it was presented within a further period which the tribunal considered reasonable. In such circumstances the appellant appeals as of right. By contrast, where an appellant requires to resort to rule 5 he asks the tribunal to extend the time limits provided for in rule 105 by exercising the discretionary power conferred by rule 5.

[8] Where, as here, the operative time limit is that provided for in rule 105(1)(a), rule 5 may still operate to provide relief from the failure to meet it, should the equities so dictate.

[9] Senior counsel for the respondent sought to argue that should the court find that the EAT had erred in its interpretation, the ET had erred in concluding that relief should be

granted under rule 5. This was an argument which had not been raised before the EAT or in the grounds of appeal to this court. The only issue which featured in either of these grounds of appeal was the construction issue. Had the respondent wished to pursue the argument that in any event the discretion, had it been available, was wrongly exercised by the ET that should have formed part of the grounds of appeal, on an *esto* basis, before the EAT, and in due course this court. Moreover, it is noticeable that the argument was simply that relief should not have been granted; it was not suggested that the ET had taken account of irrelevant considerations or ignored relevant ones. We do not consider that this is an issue which arises. We will accordingly allow the appeal and remit the case to the ET to proceed as accords.