

IN THE INFORMATION TRIBUNAL

BETWEEN:

**THE MINISTRY OF JUSTICE
(THE SCOTLAND OFFICE)**

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**RULING ON APPELLANT'S APPLICATION FOR NOTICE OF APPEAL TO
BE ALLOWED OUT OF TIME**

1. The Respondent's decision notice dated 17 March 2008 was served on the Appellant on 18 March 2008. The notice provided information at paragraph 53 as to an appeal to the Information Tribunal including the time limit for appealing.
2. The provisions in relation to a valid appeal are set out in the Information Tribunal (Enforcement Appeals) Rules 2005:

Rule 4

(1) An appeal must be brought by a written notice of appeal served on the Tribunal.

(2) The notice of appeal shall –

(a) identify the disputed decision and the date on which the notice relating to the disputed decision was served on or given to the appellant; and

(b) state –

(i) the name and address of the appellant

(ii) the grounds of the appeal

.....

(v) where applicable the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under rule 5(2) below; and

(c) be signed by or on behalf of the appellant.

Rule 5

(1) Subject to paragraph (2) below, a notice of appeal must be served on the Tribunal within 28 days of the date on which the notice relating to the disputed decision was served on or given to the appellant.

(2) The Tribunal may accept a notice of appeal served after the expiry of the period permitted by paragraph (1) above if it is of the opinion that, by reason of special circumstances, it is just and right to do so.

(3) A notice of appeal shall if sent by post in accordance with rule 31(2) below, be treated as having been served on the date on which it is received for dispatch by the Post Office.

3. Under rule 5(1) the Appellant was required to serve a notice of appeal on the Tribunal within 28 days of 18 March 2008, namely 14 April 2008. [The Appellant served the grounds of appeal only late in the afternoon of 15 April. This was an incomplete notice of appeal and did not comply with rule 4. [However the accompanying email did apply for the notice to be considered in time.....]. A notice of appeal form dated 16 April 2008 containing the remainder of the information required by rule 4 was served on the Tribunal on [18] April. Paragraph 7 of the notice which provides an appellant with the opportunity to make an out of time application was left blank. [Was there an accompanying email explaining why the NOA was out of time?]
4. The appeal is being handled by the Treasury Solicitor (TSol) on behalf of the Appellant. On 1 May the Tribunal invited TSol to provide the special circumstances as to why the Tribunal should exercise its powers under rule 5(2) to accept the appeal as in time.
5. TSol responded by email on the same day that

“ As I have previously explained to the Tribunal, our client's Notice of Appeal was submitted one day late as a result of a miscalculation of the deadline. In addition, counsel for the Scotland Office was unexpectedly unavailable in the days immediately preceding the deadline. We had expected to have draft grounds for circulation to our client on Friday, 11 April but in the event they were not received until shortly before noon on 15 April, the date on which they were sent to the Tribunal.

Once again, I should be grateful if you could place this email before the chairman so that he may consider the notice of appeal out of time under rule 5(2), with my sincere apologies.”

6. On 6 May the Tribunal gave TSol another opportunity to expand on the special circumstances they were putting forward on behalf of the Appellant. The Tribunal clerk dealing with the case responded to TSol's email of 1 May as follows:

“I have put your email before the Chairman. He is still of the view that you have not provided sufficient detail of any special circumstances. Please explain why the drafting of the notice of appeal was left to the last minute, why counsel was unexpectedly unavailable, why another counsel could not have been used and any other circumstances you wish him to take into account. Also our calculation is that the notice was 4 days out of time. Please explain how you complied with rule 4 by 15 April 2008.”

7. TSol responded on 8 May as follows:

“Our Grounds of Appeal in this matter were finalised and lodged on 15 April, which we calculated to be the deadline for notifying an appeal. Under Rule 5(1), a notice of appeal must be served on the Tribunal within 28 days of the date on which the notice relating to the disputed decision was served on or given to the appellant. The disputed ICO Decision Notice was dated 17 March 2008 and received by my client on 18 March 2008 (I attach a copy of the Notice and covering letter, which is dated as received on 18/3). By our calculations, this gives a deadline of 15 April for lodging an appeal.

Our Notice of Appeal was omitted from our initial email to the Tribunal in error and was forwarded to the Tribunal on 18 April, together with a copy of the original information request (I have previously explained this in an email to Preet).

We received instructions in this matter on 2 April. Counsel was instructed to prepare Grounds of Appeal on 3 April. Counsel indicated that he would forward draft Grounds on 11 April, which would have enabled us to lodge the document on 14 April. However, counsel was unexpectedly called away on urgent business and was unable to begin drafting until the evening of 14 April. By this stage, it was too late to instruct new counsel with experience in Information Tribunal matters. In the event, we did not have a draft for approval until shortly before noon on 15 April. The document was finalised and lodged that afternoon. In the circumstances, therefore, it was not possible for us to lodge Grounds of Appeal before 15 April.”

Consideration and Conclusion

8. I find a valid notice of appeal complying with rule 4 was not served on the Tribunal until 18 April 2008, 4 days after the expiry of the permitted period. Are there special circumstances under rule 5(2) allowing it to be accepted after that date?

9. TSol are a very experienced legal department who regularly represent public authorities before the Information Tribunal. They should be more than familiar with our rules and time limits for appeals. In this case they offer on behalf of the Appellant as special circumstances for the Tribunal's consideration of an out of time application that although they were instructed in plenty of time by the Appellant and they in turn instructed counsel to prepare grounds of appeal in plenty of time that counsel, in effect, let them down, hence the out of time appeal.
10. Once TSol receive the grounds of appeal these are served on the Tribunal a day late but without complying with all the other requirements of rule 4. This takes another 3 days. So counsel's performance is not the only reason for the late appeal.
11. I find that these circumstances are not special. When TSol realised that counsel was unable to meet the deadline there was no reason why another counsel should not have been instructed. I am aware that TSol use a number of different counsel who are familiar with FOI jurisdiction. There is no evidence that TSol even sought to instruct another counsel. TSol's own lawyers should be very familiar with the jurisdiction considering the number of public authorities they represent before the Tribunal and there appears to have been no attempt to draft the grounds themselves on behalf of the Appellant. TSol could always have applied to vary the grounds at a later stage if necessary after obtaining counsel's opinion.
12. Moreover I find that no special circumstances have been offered for the failure to submit a proper notice of appeal until another 3 days after the grounds of appeal were served on the Tribunal.
13. I am therefore of the opinion that there are no special circumstances where it would be just and right to accept the Appellant's notice of appeal as in time.

Signed

John Angel
Chairman

Date