Appeal No. UKEAT/0177/13/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 October 2013

Before

HIS HONOUR JEFFREY BURKE QC

DR B V FITZGERALD MBE LLD FRSA

MRS L S TINSLEY

MR K ROBERTS — APPELLANT

GB OILS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS K ANNAND (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1H 3LW
For the Respondent	MR M CUMMINS (Solicitor) Cummins Solicitors The Bake House Narborough Wood Park Desford Road Leicester LE19 4XT

SUMMARY

RIGHT TO BE ACCOMPANIED

This appeal invited us to reconsider the recent EAT decision in **Toal & Hughes v GB Oils Ltd** [2013] IRLR 696 that the Employment Tribunal in considering whether where there has been a failure to allow an employee to be accompanied by the companion of his choice, where he reasonably requested a companion (s.10 **ERA 1999**), cannot consider the nature or qualities of the chosen companion as long as he is within s.10(3), and is limited to considering whether it was reasonable for the employee to request a companion.

We expressed some concern about the effect of **Toal**; what if the chosen companion had a history of disruptive behaviour? However, we followed **Toal**, having regard to the acceptance on behalf of the Claimant that if the rejection of the companion was on the facts justified the ET could reduce the compensation, even to nil.

HIS HONOUR JEFFREY BURKE QC

Introduction

1. This is an appeal by the Claimant before the Employment Tribunal against that part of the Employment Tribunal's judgment, which was sent to the parties on 21 December 2012, which rejected his claim against the Respondent, GB Oils Ltd, for compensation under section 11 of the **Employment Relations Act 1999** for breach of his right, set out in section 10 of that Act, to be accompanied at a disciplinary hearing. The Employment Tribunal was presided over by Employment Judge Singleton, who was sitting at North Shields, and had to deal in a much more substantial way with the Claimant's claim that he had been unfairly dismissed for gross misconduct. The judgment of the Tribunal, which found that he had been fairly dismissed for misconduct but he had not been dismissed for trade union reasons, has not been the subject of appeal; what must at the time have appeared to be very much a subsidiary issue for the Tribunal – namely, whether there had been a breach of his rights under section 10 of the 1999 Act – is the subject of this appeal. Today, we have had before us Ms Annand of counsel on behalf of the Claimant and Mr Cummins, the Respondent's solicitor; we are grateful to both of them for their helpful and succinct submissions.

The statutory provisions

2. It is probably most helpful if we set out the relevant statutory provisions at this early stage of our judgment. They are provisions which I suspect, are not regularly considered by the Employment Tribunal, still less the Employment Appeal Tribunal. Section 10 of the 1999 Act, as amended by the **Employment Relations Act 2004**, is headed "Right to be accompanied". I shall set out the relevant parts of the Act for present purposes. Section 10(1)-(5) reads as follows:

"(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2) Where this section applies the employer must permit the worker to be accompanied at the hearing by a single companion who—

(a) is chosen by the worker and is within subsection (3),

(b) is to be permitted to address the hearing (but not to answer questions on behalf of the worker), and

(c) is to be permitted to confer with the worker during the hearing.

(3) A person is within this subsection if he is—

(a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,

(b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or

(c) another of the employer's workers.

(4) If—

(a) a worker has a right under this section to be accompanied at a hearing,

(b) his chosen companion will not be available at the time proposed for the hearing by the employer, and

(c) the worker proposed an alternative time which satisfies subsection (5),

the employer must postpone the hearing to the time proposed by the worker.

(5) An alternative time must—

(a) be reasonable, and

(b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer."

3. Section 11 subsections (1) and (3) are as follows:

"(1) A worker may present a complaint to an employment tribunal that his employer has failed, or threatened to fail, to comply with section 10(2) or (4). […]

(3) Where a tribunal finds that a complaint under this section is well-founded it shall order the employer to pay compensation to the worker of an amount not exceeding two weeks' pay."

4. Section 14 provides:

"Sections 10 to 13 of this Act shall be treated as provisions of Part V of the Employment Rights Act 1996 for the purposes of—

(a) section 203(1), (2)(c) and (f), (3) and (4) of that Act (restrictions on contracting out), and

(b) section 18(1)(d) of the Employment Tribunals Act 1996 conciliation."

5. Finally, in this section we should refer to section 203(1) of the **Employment Rights Act 1996**, which provides:

> **"Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—**
>
> **(a) to exclude or limit the provision of any operation of this Act, or**
>
> **(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal."**

6. Other statutory provisions, relating to the status of an ACAS Code, we shall come to later.

The facts

7. The Claimant was employed by the Respondent as a tanker driver at their depot in Jarrow; he was also a senior shop steward. The Respondent is a distributor to customers of different types of oils. In July 2011, as a result of reports from customers, the Respondent found that deliveries to customers of white diesel oil, or "derv", had been contaminated by gasoil, or "red diesel". Investigation led them to believe that the driver responsible for the contamination was the Claimant. A disciplinary process was followed, at the end of which the Claimant was dismissed for misconduct. As we have said, the Employment Tribunal, having considered the facts in great detail, concluded that the dismissal fell within the band of reasonable responses and was not unfair.

8. The disciplinary hearing was originally to take place on 15 August 2011. The Claimant sought to exercise his right under section 10 of the 1999 Act to be accompanied at that hearing

and nominated for the purpose a Mr Lean. Mr Lean was not an employee of the Respondent or a full-time officer of the Claimant's union, Unite. He was what is known as a lay official. He was regional chair of the south-eastern region of Unite and branch secretary of a Unite branch of which many of the Respondent's employees were members; we infer that that did not include the Claimant, for Mr Lean was based in the south-east of England and the Claimant was based in the north-east. The Tribunal, at paragraph 2.8, set out what happened in respect of that request in these terms:

> **"There was a dispute ongoing between the respondent and Mr Lean, the detail of that dispute not being known to the Tribunal, however, the respondent had made it clear to the claimant that Mr Lean would not be permitted to accompany him, Mr Lean being banned from meetings and from any of the respondent's sites. The claimant accepted this and arranged to be accompanied by Matthew Draper, a more senior trade union representative than Mr Lean. The claimant told the Tribunal that he was happy for Mr Draper to accompany him and that he had been his choice and the Tribunal found that in this respect there was no breach on the part of the respondent of section 10 Employment Relations Act 1999 as had been alleged by the claimant. Furthermore, the Tribunal noted that neither the claimant nor Unite raised any issue or grievance with the respondent at the time with regard to the stance that the respondent had taken in not permitting Mr Lean to attend."**

9. The disciplinary hearing, which had to be postponed as a result of the events we have described, took place on 20 September 2011 (it is agreed that the date of 20 December in the judgment was a typographical error). Mr Draper accompanied the Claimant; the hearing concluded with the Claimant's dismissal. He appealed against the decision to dismiss him, and the Respondent, in accordance with their policy, appointed a Mr Craven to hear the appeal, he being the next manager up the line from the manager who had conducted the disciplinary hearing. At paragraph 2.12 the Tribunal described what happened as to the Claimant's section 10 right at that stage in these terms:

> **"Despite knowing from the disciplinary hearing that Mr Lean would not be permitted to accompany him to the appeal hearing the claimant asked for Mr Lean to do so. When he was told that this would not be permitted the respondent agreed to postpone the hearing and allow the claimant to obtain further representation. Mr Draper was willing to attend and the claimant was happy with this and therefore the respondent suggested a second hearing date of 31 October 2011. This was set out in a letter to the claimant dated 13 October 2011. Mr Draper was not available on 31 October and he asked for the hearing to be held on 3 November, a day when Mr Draper and the claimant knew that Mr Craven was not available. It was explained to Mr Draper that due to other commitments Mr Craven was**

> **available to hear the claimant's appeal at any time during the week commencing 24 October. Thereafter Mr Craven would not be available until possibly the end of January due to commitments elsewhere. It was suggested to the claimant that if Mr Draper was not available someone else may be available to accompany the claimant, the respondent suggesting various names of senior representatives of the union. The respondent suggested names of alternative representatives on 14 October and by 21 October had not heard back from Mr Draper or the claimant as to what was happening. The claimant told the Tribunal that he wanted Mr Lean or Mr Draper to represent him and he did not ask any senior steward from GB Oils to represent him as he thought they might be sacked for doing so. After what can only be described as a protracted period of e-mail correspondent [sic] between the parties the respondent indicated that the appeal haring was to go ahead on 31 October. Mr Craven and an HR assistant travelled to the venue where the hearing was scheduled to take place, however, the claimant did not attend. The respondent then discovered that owing to a cancellation Mr Craven was now available on 9 November 2011 and rescheduled the meeting to take place in the same location at 12 noon on that day. Once again the claimant did not attend."**

The details of the changes of date described in that excerpt do not affect the outcome of this appeal.

10. The Tribunal set out their conclusions on the section 10 claim at paragraph 4.6. They said:

> **"With regard to the claimant's claim that he was prevented from being accompanied during the disciplinary process by a companion of his choice the Tribunal were not persuaded that this was the case. The claimant told the Tribunal that whilst Mr Lean was his first choice he understood why the respondent objected to Mr Lean accompanying him and he was happy to be accompanied by Mr Draper who was another companion of his choice. In this respect the Tribunal noted that neither the claimant, Mr Draper nor the union raised any complaint or grievance about Mr Lean not being permitted to accompany the claimant which is what the Tribunal would have expected had he felt that he had been denied his rights."**

They went on to deal with the appeal hearing, but nothing which they said there adds to the effect of their decision generally, which was that in declining the Claimant's choice of Mr Lean, so that he was accompanied by Mr Draper at the disciplinary hearing and would or could have been accompanied by Mr Draper at the appeal hearing, the employers had not been in breach of the section 10 right.

The previous EAT decision

11. There is, so far as is known to the parties or to us, only one appellate decision upon the construction and application of section 10(1) of the 1999 Act. That decision is **Toal & Hughes v GB Oils Ltd** [2013] IRLR 696, a judgment of the Appeal Tribunal presided over by Mitting J and delivered, some five months ago on 22 May of this year. The name reveals that the employer was the same employer as in the present case. The appellants were represented by Ms Annand, as is the Appellant today. The respondent was represented by counsel, instructed by Mr Cummins, and the person whom the claimants in that case had sought unsuccessfully to have as their companion was Mr Lean. Both claimants had raised grievances; each asked to be accompanied by Mr Lean, and in each case the respondent declined to accept Mr Lean as their companion and they were accompanied by someone else. The Employment Tribunal rejected the respondent's argument that, on the correct construction of section 10(1), the words "reasonably requests" included considerations of the identity or qualities of the chosen companion and held that those words qualified only the reasonableness of the employees' request; but it upheld the respondent's argument that by choosing other companions to accompany them the claimants in that case had waived any breach of the section 10 right.

12. The Employment Appeal Tribunal considered both points and, having done so, allowed the claimants' appeal. As to the effect of the word "reasonably" in section 10(1)(b), the EAT at paragraph 16 concluded as follows:

> **"We will first take Mr Gloag's first point that the word 'reasonably' in section 10(1)(b) applies both to the choice of representative and to the requirement to be accompanied. Like the Tribunal, we reject this submission. We agree with the Tribunal that Parliament could easily have provided by express words for requiring the choice of companion to be reasonable, as well as the requirement to be accompanied. The fact that it did not do so, and then in the next subsection obliged an employer to permit the worker to be accompanied by a companion chosen by the worker, is a strong counter indicator to Mr Gloag's contention. It is easy to understand why Parliament would have legislated as it did. This is a right conferred upon the worker. It is possible to conceive of circumstances in which an employer might wish to interfere with the exercise of that right without proper reason in a manner that would put the worker at a disadvantage. Consequently, Parliament has, in our view, legislated for the choice**

to be that of the worker, subject only to the safeguards set out in subsection (3) as to the identity or the class of person who might be available to be a companion."

13. The EAT recognised that the relevant ACAS Code of Practice said, at paragraph 36, that reasonableness had to be considered in the context of the individual case and included issues about the chosen companion; but, at paragraph 19, the EAT held that the Code could not be used as an aid to the correct construction of statute and that section 10 of the Act worked perfectly well when read and understood in accordance with its straightforward language. At paragraph 21 the EAT drew attention to a number of practical problems that could arise if the respondent's broader construction of the words "reasonably requests" were adopted and if, as a result, the Employment Tribunal had to decide whether the selection made by an employee was reasonable.

14. On the waiver issue, the EAT, at paragraphs 23-26, concluded that section 203(1) of the 1996 Act had the effect that a claimant could not waive his right to be accompanied by a union official of his choice or contract that right away. Accordingly, the claimants' appeal was allowed, and their claims were remitted to the Employment Tribunal to assess compensation up to the maximum two weeks' wages stipulated by the statutory provisions.

15. We should add that the EAT's decision in that case was made well after the Employment Tribunal's decision in the present case was made and after the present Notice of Appeal was presented. Whether the Employment Tribunal in the present case knew of the Employment Tribunal's decision in **Toal** is not clear; it is not mentioned in the Tribunal decision in the present case, and it is perhaps unlikely that they would not have mentioned it had they known about it.

Submissions

16. Ms Annand put the Claimant's appeal forward on three grounds. They were:

(1) As the EAT held in **Toal**, section 14 of the 1999 Act and section 203 of the 1996 Act combined to have the effect that, in so far as the Employment Tribunal decided in favour of the Respondent on the basis that by choosing a replacement for Mr Lean and not doing so under protest the Claimant waived the right given to him by section 10 of the 1999 Act, the Employment Tribunal were in error.

(2) Waiver of a statutory right is also not permitted by the common law in addition to any prohibition arising from the statutory provisions to which we have just referred.

(3) In so far as the Tribunal decided that the Claimant's request to have Mr Lean as his companion was not a reasonable request, that too was an error of law, for the reasons set out in **Toal**. The word "reasonably" in section 10 must be construed as applying to the reasonableness of the request and not to the identity or characteristics of the person whom pursuant to the right to request the employee chooses.

17. Mr Cummins did not seek to argue against either limb of Ms Annand's submissions or against the conclusions reached by the EAT in **Toal** on the waiver issue. With commendable frankness, he agreed that a statutory right provided by section 10 could not be waived, whichever of the two routes by which that end was achieved according to Ms Annand's submissions applied. His argument was that, on a proper interpretation of section 10, the issue of waiver did not arise. Although we had suggested to him a possible argument that, on the facts, the Claimant might be said to have withdrawn his request to be accompanied by Mr Lean and substituted for it a request to be accompanied by Mr Draper, Mr Cummins did not pursue

that suggestion. We suspect that that may have been because that point had not been taken before the Tribunal and, as Ms Annand pointed out, would or at least could have involved a finding of fact which the Tribunal was not asked to make and did not make.

18. Whether the Tribunal decided to reject the Claimant's claim under section 11 for breach of his section 10 right on the basis of waiver is not clear from the way in which they expressed themselves. It seems to us, from what they said in the two passages we have set out in this judgment, that they did have such an approach in mind. If so, in our judgment, they were in error. We respectfully adopt the reasons for that conclusion set out in paragraphs 23-26 of the EAT's Judgment in **Toal** and do not seek, particularly in the light of Mr Cummins' concession, to confuse what is there set out with clarity by adding to it.

19. Mr Cummins' central point, however, was that the EAT in **Toal** was wrong to construe the words of section 10(1)(b) as narrowly as it did and that the Employment Tribunal in this case were right to have approached their decision on the basis that, in considering whether the request to be accompanied was reasonable, the Tribunal were entitled to, and indeed had to, look at all the relevant circumstances, including the identity and characteristics of the chosen companion. He accepted that the issue was one of statutory construction. Applying ordinary language, he submitted, the words should be construed in the way we have set out. It was not sensible, he said, that the statutory intention should be taken to have been one pursuant to which, if an employer has a genuine, deeply held and objectively justified objection to the companion chosen by an employee, he has nevertheless to accept that companion as the employee's companion at a grievance or disciplinary hearing despite the objection and has to permit that companion to act on the employee's behalf as set out in subsection (2)(b) of section 10.

20. There was much discussion during the argument of different fact situations which might be examples pointing in either direction; they are not difficult to imagine. As a paradigm one might take a case in which the companion chosen by a claimant under section 10 had on a number of earlier occasions disrupted grievance or disciplinary hearings either verbally or physically, and even had done so or appeared to have done so deliberately. We were told – although the Tribunal were not – what the nature of the objection to Mr Lean was. We say no more about that than that it might provide another example of the practical difficulties to which a narrow construction of the words "reasonably requests" can lead.

21. Mr Cummins supported his argument by two references to the judgment in **Toal**. He pointed out that at paragraph 12 the EAT had said that it was the request that had to be reasonable and had asked itself why, if that was the correct extent of the effect of the word "reasonably" in section 10(1)(b), what the purpose was of its being there. The EAT said that they would address that question later, but, said Mr Cummins, they did not do so; and that may be correct. Secondly, section 207(2) of the **Trade Union and Labour Relations (Consolidation) Act 1992**, provides:

> **"In any proceedings before a tribunal […] any Code of Practice issued under this chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the Tribunal […] to be relevant to any question arising in the proceedings shall be taken into account in determining that question."**

We should not, he submitted, accept what was said in **Toal** about the legitimacy of an attempt to inform statutory construction by reference to the ACAS Code. The relevant paragraph of the ACAS Code, paragraph 15, in so far as it is relevant, plainly pointed towards a broader construction of the relevant words than that which found favour in the EAT in **Toal**.

Mr Cummins submitted that on the issue of construction the words of section 207(2) meant that what was set out in the Code had to be taken into account and could not be set on one side.

22. Ms Annand submitted that section 10(1) and (2)(a) read together had the effect, that once there had been a reasonable request to be accompanied at a disciplinary or grievance hearing the employer had no alternative if a breach of the section 10 right was to be avoided but to allow the request and to permit the worker to be accepted by the companion of his choice. She drew attention to the word "must" in section 10(2)(a). Parliament had intended, she submitted, to give to the employee who reasonably desired a companion and thus requested a companion from the employer to have the companion of his choice, the choice must be that of the employee, and the employer had no right to veto or interfere with that choice, as long as that choice was of a person that fell within one of the classes set out in subsection (3), as Mr Lean admittedly did. In effect, her submission supported the conclusion reached by the EAT in the last sentence of paragraph 16 of the Judgment in **Toal**, which we can usefully repeat. It was in these terms:

> **"Consequently, Parliament has, in our view, legislated for the choice to be that of the worker, subject only to the safeguards set out in subsection (3) as to the identity or the class of person who might be available to be a companion."**

23. Ms Annand submits that the harsh effects which might be thought to arise in extreme cases from that construction should not deflect us from regarding that construction as correct. In cases where the breach was technical, for example where the employer had a justified objection to the employee's choice or perhaps where the employee had obtained alternative representation that was of equal or higher quality, that would or could be reflected by the Employment Tribunal when the Tribunal came to assess compensation. If there was no

prejudice, she submitted, it would be open to the Tribunal to make a nil award, and, in a case in which there was no prejudice, it would be unlikely that such a case would be pursued.

24. As to in what area the word "reasonably" in section 10(1)(b) operated, on the narrow construction, she submitted that it could be unreasonable for an employee to require a companion if the hearing in respect of which he made that request was related to a minor or trivial grievance. She conceded, however, that that could hardly arise in the context of a disciplinary hearing. As to the ACAS Code, she relied on what was said in **Toal**.

Conclusion

25. We are prepared to be open enough to say that one of the members of today's division of the EAT has had considerable difficulty in becoming satisfactorily assured that the construction adopted in **Toal** holds the balance fairly in an industrial context. However, we have concluded not that we wish to disagree with our colleagues who decided **Toal** – for, if we felt it right to do so, we would do so – but that the conclusion the EAT reached in that case, on the proper construction of section 10, was right and right for the reasons the EAT gave. Ms Annand has persuaded us that the safeguard for an employer against wanton selection of a companion is that set out in subsection (3) and in appropriate consideration of compensation. It is not a situation in which no protection for the employer exists at all. Subject to that safeguard, the choice is that of the employee once he has made a reasonable request. Although paragraph 15 of the ACAS Code points in the opposite direction and, in our view, pursuant to section 207 of the 1992 Act, has to be given some weight, it does not have sufficient force to cause us to move away from what appears on the statutory words to be a clear conclusion as to the proper construction of the relevant words.

26. Accordingly, for those reasons, the appeal must be allowed. It is common ground that the claim must now be remitted to the Employment Tribunal for them to assess compensation. No doubt both sides will give consideration to Ms Annand's submissions and what we have said about them as to what it may be relevant for the Tribunal to consider when or if they are asked to decide what appropriate compensation up to the two-week limit may be.

Costs

27. We do not take the view that this is a case in which we should award costs. We take the view that there is only one previous decision on the issue of the construction of section 10 of the 1999 Act. We are not and were not bound by that decision, although of course we would give it considerable weight. When we read the papers in this case, we are not afraid to say that our initial thoughts were that the decision in **Toal** might well have been one with which we would disagree; and we take the view that there were reasonable grounds for the Respondent to consider that they could succeed in persuading us to a different view than that which was expressed in **Toal**. They have not done so; and in the end we are thoroughly persuaded that our colleagues' decision was correct; but we do not believe that the contrary was unarguable or that it was improper, vexatious, misconceived or unreasonable for the Respondent to resist this appeal once the decision in **Toal** had emerged in May of this year. Accordingly, our conclusion is that this is not a case that falls within rule 34A(1) of the Employment Appeal Tribunal Rules, and we decline to make an order for costs.