EMPLOYMENT TRIBUNALS

Claimant: **Mr O Mir**

Respondent: **BW Legal Services Limited**

HELD AT: **Leeds** **ON: 23 January 2019**

BEFORE: **Employment Judge Davies**
Mr W Roberts
Mr I Taylor

REPRESENTATION:
Claimant: **Mr Rehman (trade union representative)**
Respondent: **Mr Willoughby (counsel)**

JUDGMENT having been sent to the parties on 24 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and Issues

1. This was a claim under s 10 and 11 Employment Relations Act 1999 brought by the Claimant, Mr Mir, against his former employer BW Legal Services Limited. Although in his claim form he referred to a claim of unfair dismissal, his representative Mr Rehman confirmed at the outset of the hearing that that claim was not pursued because the claimant did not have two years' qualifying service. The Claimant has been represented by his trade union representative, Mr Rehman, and the Respondent by Mr Willoughby of counsel. We heard evidence from the Claimant and, for the Respondent, we heard evidence from Mr Bhadur Sur. We were provided with a very short file of documents which we considered.

2. The issues to be determined were:

   2.1 On 10 August 2018 was the Claimant required to attend a disciplinary hearing?
   2.2 If so, did he reasonably request to be accompanied by a companion, namely his trade union representative?
   2.3 If so, did the Respondent fail to comply with that request?

Findings of fact

3. The Tribunal made the following findings of fact. The Respondent, BW Legal Services Ltd, is a debt recovery law firm. The Claimant started work as a collections advisor on 23 July 2018. There are about 100 collection advisors or agents and 10 supervisors, all managed by the collections team manager, Mr Sur. The Claimant had a six-month probation period, during which his contract said that his performance would be monitored. He was entitled to one week's notice.

4. The Claimant's employment started off with a training period and he was still being trained at the time of the events that gave rise to his dismissal a couple of weeks later, on 10 August 2018. The Tribunal was told that there had been some concerns about his conduct between 23 July and 10 August 2018 but we did not hear detailed evidence about that and we do not make any findings about it.

5. On 10 August 2018 the Claimant was called to a meeting with no notice and no information about what was to be discussed. He went to the meeting room, where he found Mr Sur along with Ms Andrews, an HR administrator. He asked what the meeting was about and Mr Sur told him it was about his dismissal. There was a brief discussion. On all accounts it lasted no more than a couple of minutes. During the course of it Mr Sur told the Claimant that this was about him writing a homophobic note and leaving it on a colleague's desk. The Claimant said that he had not done that. Mr Sur told him that he had been told that he did. Mr Sur also told the Claimant that he had behaved unacceptably with respect to his use of his phone in the department. The Claimant said that he wanted this in writing. He was told his pay entitlements and he was told that he had no right of appeal. He was then told to collect his belongings and was escorted from the building.

6. On 13 August 2018 a letter was written to the Claimant confirming that he had been dismissed and setting out his pay and annual leave entitlements.

7. The central dispute on the evidence before the Tribunal was whether, during the course of that meeting, the Claimant told Mr Sur that he wanted his trade union representative present. For the reasons that follow, the Tribunal accepted the Claimant's evidence that he did:
    7.1 It is right that although the ET1 claim form says that the Claimant requested his trade union representative to *be present*, his witness statement says something slightly different. His witness statement says that he said he wanted to *speak to* his trade union representative. Mr Willoughby quite properly questioned the Claimant about that in cross-examination. The Claimant's answers in oral evidence were clear and prompt. He said that when he asked what the meeting was about he was told it was about his dismissal. He therefore said, "Hold on a second, I want my union representative here." The Tribunal found that evidence credible and convincing. It seemed to us that this was more a case of an experienced litigant not appreciating the necessity of being precise in a witness statement about the exact words used, rather than giving evidence that was untruthful or inaccurate.
    7.2 The Tribunal also took into account the Claimant's evidence that he had recent experience of attending a capability hearing for a previous employer where he had his trade union representative present. That seemed to the Tribunal to make it somewhat more likely that when he went into a room and was told he

was about to be dismissed, the thought of asking for his trade union representative to be there might have occurred to him.

7.3 The Respondent relied on handwritten notes of the meeting on 10 August 2018 made by Ms Andrews. She did not give evidence to the Tribunal. We were led to believe that she no longer works for the Respondent and may be suffering from ill health. Those notes were not shown to the Claimant at the time. He only saw them for the first time when they were disclosed in the course of these proceedings. The notes do not refer to a request to be accompanied by a trade union representative.

7.4 On Mr Sur's evidence the notes are inaccurate in a number of ways. For example, they record that during the course of the meeting Mr Sur told the Claimant that he had carried out an investigation. Mr Sur's evidence to us was that he did not carry out an investigation and that Ms Andrews must have misunderstood what was said. That suggests that the notes said something inaccurate. Mr Sur also gave evidence that during the meeting the Claimant asked what pay he was entitled to. That was not in the notes. So, there was at least one thing that the Respondent's witness says was said at the meeting and yet was not recorded in the notes. In all those circumstances the Tribunal did not find the notes particularly persuasive. We did not attach particular weight to the fact that there was no mention in the notes of a request by the Claimant to be accompanied by his trade union representative.

7.5 The Tribunal did not find Mr Sur's evidence generally to be entirely convincing. For example, in his witness statement he said that the homophobic comment that the Claimant had written in a note and left on a colleague's desk said, "I'm gay." The notes of the meeting record that he said at that time that the note said, "you're gay." When he was asked about that Mr Sur pointed out that these events happened last August. The implication was clearly that his recollection may not be perfect five months later. Mr Sur also said at one stage that he had reviewed the handwritten notes straight after the meeting. He was asked why, if that were the case, he had not spotted the inaccuracies in the notes. In particular, he was asked why he had not noticed that Ms Andrews had recorded that he had told the Claimant that he had carried out an investigation, when he had done no such thing and said no such thing. At that stage he said that he only reviewed the notes to check that the Claimant had been told about his pay and annual leave entitlements. The Tribunal did not find that evidence convincing.

8. The Tribunal therefore preferred the Claimant's version of events. We find that he did say to Mr Sur at the outset, "Hold on a minute I want my union representative here," and that Mr Sur refused him. It may well be, as Mr Rehman submitted, that fundamentally Mr Sur wanted the Claimant gone that day and he wanted this to be dealt with there and then.

9. There was no dispute that Mr Sur had made his decision to dismiss the Claimant before he called him into a meeting. The Claimant accepted that when he went into the meeting he was told that the decision had already been made. He accepted that he knew that it did not make any difference what he said during the course of the meeting. Mr Sur accepted that this was a dismissal because of conduct.

Legal principles

10. The right to be accompanied at a disciplinary hearing is contained in s 10 Employment Relations Act 1999, which provides as follows:

> **10 Right to be accompanied**
> (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.
>
> (2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who –
> (a) is chosen by the worker; and
> (b) is within subsection (3).
> (2B) The employer must permit the worker's companion to –
> (a) address the hearing in order to do any or all of the following –
> (i) put the worker's case;
> (ii) sum up that case;
> (iii) respond on the worker's behalf to any view expressed at the hearing;
> (b) confer with the worker during the hearing.
> …

11. A definition of "disciplinary hearing" is provided in s 13. It says that a disciplinary hearing is a hearing which could result in: the administration of a formal warning to a worker by his employer, the taking of some other action in respect of a worker by his employer, or the confirmation of a warning issued or some other action taken.

12. Mr Willoughby drew the Tribunal's attention to a decision of the Employment Appeal Tribunal ("EAT") called *Heathmill Multimedia ASP Ltd v Jones* [2003] IRLR 856. In that case two employees had been called to a meeting and told that they were being dismissed for redundancy. The Employment Tribunal had made a finding that the reason for dismissal was redundancy and that it was not therefore appropriate to follow a disciplinary route. The EAT accepted the argument that a "disciplinary" hearing must be concerned with the taking of disciplinary action and that s 10 therefore did not apply because this was a case of redundancy. However, the EAT also said something that relates to the question of what is meant by a "hearing" in s 10, as follows:

> It is submitted that where the purpose of the meeting is simply to inform an employee that by reason of redundancy he is to be dismissed, that is not a hearing, still less is it a disciplinary hearing and it cannot properly be said to be a hearing which could result in the taking of some action in respect of a worker by his employer. It is said that the words [the taking of some other action] must be construed as the taking of some other disciplinary action in respect of a worker by his employer. It seems to me that those arguments are well founded.

13. The proposition accepted by the EAT went beyond the point that this could not be a *disciplinary* hearing because it related to redundancy. The EAT also accepted the submission that this was not a *hearing* in any event and that appears to have been because it was simply a meeting to inform the employees that they were being dismissed. That may not be the binding part of the EAT's judgment, but it is at least persuasive as far as this Tribunal is concerned.

14. In another case, *London Underground Ltd v Ferenc-Batchelor* [2003] ICR 656, the EAT was looking at the opposite end of the process. It was concerned with whether informal, investigatory type meetings during which employees were given some kind of counselling or informal warning, were disciplinary hearings. The EAT held that the right to representation arises where there is a hearing. It went on at paragraph

> Therefore there is required to be some event where an employee is called upon to meet an allegation where he would without representation be vulnerable and at a disadvantage.

15. The EAT went on to hold that whether there was a hearing depends on the findings of fact by the Employment Tribunal, which can look at both the form and the substance of what took place, the process of decision-making and the possible consequences that might follow by way of action or sanction. Further, the EAT held that if a hearing has taken place, the next question is whether it is the sort of hearing at which there could be one of the consequences set out in s 13. That makes it clear that there are separate questions: (1) is it a hearing; and (2 if so, is it a disciplinary hearing?

16. The Tribunal was not able to identify any authority that was precisely like this case. However, the word "hearing" itself suggests that this is an occasion on which someone is to be heard and both decisions of the EAT referred to above point to such an approach. The Tribunal therefore directed itself that a disciplinary hearing for the purposes of s 10 and s 13 is something more than a "meeting" and is an event where an employee is called on to meet an allegation and might be assisted by the presence of a companion able to carry out the functions referred to in s 10(2B).

Application of the legal principles

17. The Tribunal starts by saying this. The Respondent's treatment of the Claimant was unacceptable. The Claimant did not have two years' service so he did not have the right to complain of ordinary unfair dismissal. Therefore, he was dismissed for what plainly was a conduct reason with no process of any kind being followed. The ACAS Code of Practice on Disciplinary and Grievance Procedures applies from day one of an employee's employment. As we understand it, the Respondent is a law firm with 100 or more employees and it is deliberately choosing not to comply with the ACAS Code of Practice. However, that is not the question we have to decide. The question we have to start with is whether when it terminated the Claimant's employment it required him to attend a disciplinary hearing.

18. The Tribunal had no hesitation in finding that this was a disciplinary matter. The Respondent cannot avoid what is clearly a dismissal because of alleged misconduct by seeking to characterise what happened as the exercise of its right to terminate a probationary period. As Mr Sur accepted, he was plainly terminating an employee's employment and he was doing it because of alleged conduct. That engages the disciplinary arena.

19. However, as explained above, in order for the s 10 right to be engaged, there must be a "hearing." On our findings of fact, the Tribunal came to the view that there was no hearing. That is because this was not an occasion on which the Claimant was called upon to answer a question or allegation. On our findings, a decision had been taken before the meeting that the Claimant's employment was to be brought to an

end. He was not called on to answer any question or to respond to the allegations. He was simply told that he was being dismissed because of them. Mr Sur had already made his mind up.

20. This seemed to the Tribunal to be more analogous to cases in which employees receive letters or even phone calls out of the blue terminating their employment. When that happens, there is no question of the right to be accompanied by a trade union representative arising. The employee is told without warning and without due process that his or her employment is ending. While that is unfair, it does not trigger the right to be accompanied. Likewise, the Tribunal found that what took place on 10 August 2018 did not trigger that right. It was not enough that the Claimant's dismissal took place face to face in a meeting. He was not called on to answer any allegation and this was not an occasion on which he could have been assisted by a trade union representative in the ways set out in s 10. It may seem wrong that if an employer chooses to disregard good employment practice and the ACAS code, so that no hearing is conducted, they avoid having to allow the employee to exercise his or her right to be accompanied. But it seemed to the Tribunal that in those circumstances the Claimant was not being required to attend a hearing within the meaning of s 10 and s 13, as clarified in the case law. Therefore, the right to be accompanied did not arise.

21. If the Tribunal had found that there was a disciplinary hearing, then the Claimant would have succeeded in his claim. As set out above, the Tribunal found that he did make a request to be accompanied and that it was refused. We would have found the request to be entirely reasonable in circumstances where the Claimant had been called into a meeting without warning and told he was to be dismissed.

Employment Judge Davies
6 February 2019