



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Martinez

**Respondent:** Abellio London Limited

**Heard at:** London South Croydon by CVP

**On:** 5 January 2021

**Before:** Employment Judge Sage

## Representation

Claimant: Mr J Neckles Solicitor

Respondent: Ms Walkerdine Solicitor

# REASONS

*Reasons requested by the Claimant.*

1. Although this case was listed to deal with the issue of liability only, it was agreed that both liability and remedy could be dealt with today.
2. This is a case bought by the Claimant, who is employed by the Respondent company as a driver operator. In the particulars of claim it stated that the Claimant had made three requests to be accompanied to a scheduled grievance hearing and her choice of representative was refused. The Claimant made three requests to be represented at the grievance hearing by Mr John Neckles of the PTSC Union, all were refused by the Respondent.
3. It was not disputed by the Respondent that they denied the Claimant the right to be accompanied by her chosen representative, however they state that the decision to maintain the ban on Mr John Neckles attending the Respondent's premises was justified and reasonable in all the circumstances.
4. In justifying their reason to refuse access to their premises the Respondents rely on the previous case of Mr F Neckles v Abellio London Limited which was a case heard in 2015 by Employment Judge Lamb (case number 2360882/2013 and 2344649/2013) "the Neckles case". In this case adverse comments were made about Mr John Neckles. The Respondent stated that the findings of this case questioned the honesty and integrity of this

representative. Although there was an accusation against Mr Francis Neckles of intimidation, it was confirmed that there was no such allegation against Mr John Neckles and the Respondent still maintained that neither Mr John nor Mr Francis Neckles are allowed on their premises or to represent employees at the hearing, on or off the premises.

### **Agreed Facts**

5. The facts of the case before me were undisputed and no witness evidence was called. The dispute related to the Claimant's right to representation at a grievance hearing (and a disciplinary hearing), the grievance was seen at pages 52-3 of the bundle and made accusations of less favourable treatment, harassment and discrimination. She had also been asked to attend a disciplinary hearing. The first request was made to be accompanied on the 8 April then on 10th of April 2018. The Claimant specifically named Mr Neckles as her chosen representative in both requests. Those requests were refused by Mr Tinsley of HR on the 10 April 2018 (page 58-9) and 11 April 2018 (page 64 of the bundle). Both letters referred to the Neckles case and the 'serious and adverse findings' of the Employment Tribunal and the fact that Mr John Neckles was 'complicit in the dishonesty findings'.
6. The Claimant then wrote to the Respondent on the 11 April 2018 stating that while she did not accept any interference or denial of her statutory rights to be accompanied she 'decided to choose an alternative representative, being George Kostakopoulos to accompany her to the grievance only" (paragraph 23 of the agreed facts). The Claimant continued to assert her right to be represented by Mr John Neckles at a disciplinary hearing (see page 66-7 of the bundle).
7. The Claimant subsequently attended the grievance hearing on the 13th of April and was represented by a different representative, Ms Francis of the PTSC. No issues were raised by the Claimant at this meeting of her choice of representative. The grievance was concluded and the outcome was seen in the bundle. The outcome of the grievance was irrelevant to the issues in this case. The disciplinary hearing did not proceed and the charges were dropped.

### **Closing Submissions**

#### **The Claimant's submissions.**

8. There were three requests to assert rights to be accompanied to a grievance hearing on the 8th 10th and 11th of April and those rights were denied on the 10th and 11th of April . It is important to note that the person she reasonably requested to attend was Mr John Neckles. Any issue in relation to Francis Neckles is irrelevant in this case. It is important to note that the ban is justified on the basis that I had threatened some of the staff and to adverse findings made against me in the above case made by Employment Judge Lamb which led to the strike out of the decision in 2015. The Respondents have relied on this case and on the findings made in that decision.

9. What is noteworthy are the three other employment Tribunal claims and they are the cases of Bachelor v Abellio 2301635/2015 (pages 92-112), Gnahoua v Abellio London Limited 2303661/2015 (pages 82-91), Hasan v Abellio London Limited case number 2303655/2015 (pages 113-119 of the bundle) where the Tribunal affirmed the finding in the Genau case that found I did not intimidate staff and there was no impediment to me attending the premises or representing staff on or off site. It said that there was no basis for barring me and the decision should not stand. In this case they found against the Respondent. The Hasan decision promulgated in October 2017 shows that there are three decision of the Tribunal where the actions of the Respondent have been found to be unlawful. The Hasan decision exonerated me and is binding on the Respondent, they are therefore estopped from trying to overturn the Tribunal's findings. The Respondent is happy to rely on the decision made by Employment Judge Lamb but choose not to apply the decisions that exonerate me. It was reasonable for the Claimant to request myself to represent her interests at the grievance hearing.
10. I also refer to the two cases against GB Oils. In Toal v GB Oils Limited [2013] IRLR 696 the reasonableness of the companion is subject only to the safeguard under section 10(3) which Parliament has legislated for. As long as I meet the requirement for the criteria, which I do, the only reason the Respondent denied me the right to accompany the Claimant was due to threatening behaviour, but the subsequent case found that to be illegal.
11. The Respondent has suggested an alternative representative, however this is a failure of section 11. There was a breach of this section and they are now seeking to rely on justification. We contend that the reason the Respondent seeks to rely on this is because they are estopped, in the light of the decision in Hasan.
12. I know that Tribunals are not bound by each others decisions, the parties are different but the facts have been determined. The Respondent has not appealed them. They know their acts are unlawful and they are in breach of the mandatory requirements of the law. The law is in Section 10 of the Employment Relations Act 1999 and the restrictions are in Section 10(3). We therefore contend that the decision to bar was reckless and deliberate and insofar as the motive, we contend that the Respondent sees the Neckles relationship as compared to the one they have with Unite. They are concerned that we are taking away members from Unite, that is why they have embarked upon this bar. The expense they have put to in this case has been insignificant. The Respondent is emboldened in their actions in breach of the law.
13. The Claimant asked for the maximum award which should be 2 weeks pay based on the weekly pay of £475 per week and subject to an uplift of 25% which is 1187.50. He stated that the Respondent made a reckless decision knowing it was unlawful. It was obviously taken on advice. Mr Neckles asked for an uplift as the Respondent was clearly in breach of the statutory code and an uplift would in his view "focus their minds of their legal obligations – there is a legal obligation to comply but they have flagrantly breached the rules".

**The Respondent's submissions.**

14. The Respondent relied upon their written submissions which in outline were as follows: that the Claimant submitted a grievance on the 8 April 2018 stating that she wished to be represented by Mr John Neckles; in reply she was informed on the 10 April 2018 that both Mr John and Francis Neckles had been "*banned from representing members at the Respondent's premises for reasons relating to threatening behaviour toward's the Respondent's staff, as well as by reason of their dishonesty demonstrated in the serious and adverse findings made in the Neckles v Abellio London Limited case*". The Respondent actively encouraged the Claimant to seek assistance from another representative. Mr John Neckles then contacted the Respondent on the 10 April 2018 'on instruction from the Claimant' requesting to be represented by him. It was suggested by the Respondent that Mr Neckles was preparing correspondence for the Claimant.
15. The Respondent at paragraph 10 of their submission suggested that Mr. John Neckles was 'endeavouring to use the Claimant as a means to continue to further his and Mr Francis Neckles' own quarrel with the Respondent and was in effect 'laying the groundwork' for a potential claim by the Claimant against the Respondent. The Respondent also referred to the case of Batchelor as being another example of this.
16. The Claimant was represented by Ms Francis at the grievance hearing by her chosen companion which fell within subsection 10(3), the Respondent therefore submits that they permitted the Claimant to be accompanied by her chosen representative.
17. The Respondent accepted that they did not allow the Claimant to be represented by her chosen representative due to the reasons stated above, she was given every opportunity to be accompanied by an alternative representative.
18. The Respondent also submitted that the Claimant in this case suffered no loss or detriment and attended the grievance hearing with an alternative representative. It was stated that if a breach of section 10 was found, the Tribunal should follow the decisions of Batchelor v Abellio London Limited case number 2301635/2015 and Ghanhoua v Abellio London Limited case 23033661/2015 where the court found that there was no detriment and the Tribunal awarded the nominal sum of £2.
19. The Respondent also referred to the case of Neckles v Abellio London Limited cases 2360882/2013 and 2344649/2013 and the comments made therein which are described as damning. This case led to an award of costs against Mr Francis Neckles. The Respondent stated that the reference in paragraph 24 of their submissions to the costs awarded due to the conduct of Mr Francis Neckles was "relevant only to the extent of providing context to the perpetual quarrel against the Respondent".
20. In conclusion the Respondent stated that their ban against Mr Neckles was justified and reasonable. They stated that they allowed all employees to be

represented in accordance with section 10. They claimed that there was no loss or detriment suffered by the Claimant.

21. In paragraph 26 of the Respondent's submissions they referred to the criticism made in some cases about the conduct of Mr John Neckles. It described this claim as "seemingly engineered by the Neckles brothers, as opposed to genuine concerns from Claimants who have raised the issue in their own words and language". The Respondent therefore asked that if the Tribunal was minded to agree with this view, they are invited to conclude and regard "these actions as an abuse of process".

### **Case Law**

**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**

**Toal v G B Oils Limited [2013] IRLR 696**

**Roberts v GB Oils Limited UKEAT/0177/13/DM**

### **The Law**

Section 10 Employment Relations Act 1999

(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.

(2C) Subsection (2B) does not require the employer to permit the worker's companion to—

- (a) answer questions on behalf of the worker;
- (b) address the hearing if the worker indicates at it that he does not wish his companion to do so; or
- (c) use the powers conferred by that subsection in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.]

(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 proposes 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.

(6) An employer shall permit a worker to take time off during working hours for the purpose of accompanying another of the employer's workers in accordance with a request under subsection (1)(b).

(7) [Sections 168\(3\) and \(4\)](#), [169](#) and [171](#) to [173](#) of the Trade Union and Labour Relations (Consolidation) Act 1992 (time off for carrying out trade union duties) shall apply in relation to subsection (6) above as they apply in relation to section 168(1) of that Act.

## 11 Complaint to employment Tribunal

(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(2A), (2B)] or (4).

(2) A Tribunal shall not consider a complaint under this section in relation to a failure or threat unless the complaint is presented—

- (a) before the end of the period of three months beginning with the date of the failure or threat, or
- (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) *Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) of the [Employment Rights Act 1996](#) apply for the purposes of subsection (2)(a).*

(2B) Subsections (2) and (2A) are to be treated as provisions of the [Employment Rights Act 1996](#) for the purposes of *sections 207A and 207B* of that Act.

(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) Chapter II of [Part XIV](#) of the Employment Rights Act 1996 (calculation of a week's pay) shall apply for the purposes of subsection (3); and in applying that Chapter the calculation date shall be taken to be—

- (a) in the case of a claim which is made in the course of a claim for unfair dismissal, the date on which the employer's notice of dismissal was given or, if there was no notice, the effective date of termination, and
- (b) in any other case, the date on which the relevant hearing took place (or was to have taken place).

(5) The limit in [section 227\(1\)](#) of the Employment Rights Act 1996 (maximum amount of week's pay) shall apply for the purposes of subsection (3) above.

(6) ...

## **12 Detriment and dismissal**

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he—

- (a) exercised or sought to exercise the right under section [10(2A), (2B)] or (4), or
- (b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

(2) [Section 48](#) of the Employment Rights Act 1996 shall apply in relation to contraventions of subsection (1) above as it applies in relation to contraventions of certain sections of that Act.

### **The ACAS Code of Practice on Disciplinary and Grievance Procedures**

36.

The statutory right is to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker. Employers must agree to a worker's request to be accompanied by any companion from one of these categories. Workers may also alter their choice of companion if they wish. As a matter of good practice, in making their choice workers should bear in mind the practicalities of the arrangements. For instance, a worker may choose to be accompanied by a companion who is suitable, willing and available on site rather than someone from a geographically remote location.

37.

To exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. A request to be accompanied does not have to be in writing or within a certain time frame. However, a worker should provide enough time for the employer to deal with the companion's attendance at the meeting. Workers should also consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative.

## **Decision**

22. This is a case where there is no disagreement as to the facts. Although it is noted that a number of allegations were made in closing submissions about this case being engineered or being used to harass the Respondent, this was not a matter that was put to the Claimant. There was no evidence to suggest that this case was engineered or pursued for an ulterior motive or was not genuinely pursued by the Claimant.

23. It was not disputed that the Claimant made three specific requests to be accompanied by her chosen representative and in response to those requests she was denied the right to be accompanied by Mr John Neckles. The Respondent admitted that they denied the Claimant her right to be accompanied because in their view they had been reasonable to ban him from the premises and from representing any of their employees in disciplinary or grievance hearings, on or off the premises. The Respondent relied on the unfavourable comments made by Employment Judge Lamb in the above mentioned decision. Although it was noted in correspondence with the Claimant the Respondent referred to threatening behaviour it was confirmed by the Respondent that there was no such allegation against Mr John Neckles.
24. Although it was the Respondent's view that Mr Neckles had what was described as a 'perpetual quarrel' against them, it was also true that the Respondent had decided to ban Mr John Neckles without limit in time and for all purposes. Although the Respondent may have formed a view that the litigation presented by the trade union was in pursuance of their 'quarrel' with the Respondent, this has been a view that they have held for a number of years. It is the Respondent who decided to ban Mr Neckles from the premises for all purposes. This decision has never been reviewed or revisited. At best the complaints against Mr John Neckles related to that one specific case, there was no other evidence that suggested that he was a danger or a threat to others that justified banning him from entering any premises or from representing any of his members' interests.
25. What was apparent in this case is there was almost no discussion of the Claimant's case. The focus appeared to be entirely on the relationship between Mr John Neckles and the Respondent as was apparent from the Respondent's closing submissions. What is in issue in this matter is the Claimant's right to be accompanied by a representative of her choice, this she sought to exercise and was refused by the Respondent as a result of their continuing ban.
26. The right under section 10 of the Employment Relations Act is the right to be accompanied where the person is invited to a disciplinary or grievance hearing. In this case it was not disputed that the Claimant made three specific requests to be accompanied by her chosen representative, the Respondent refused those requests on two occasions.
27. The statute at Section 2A of the Employment Relations Act 1999 is clear that the Respondent must permit the worker to be accompanied at a grievance hearing by a person who is chosen by them. This is a right of the worker to have a free choice to identify those that they trust from a recognised trade union. The Claimant identified a specifically named trade union representative and this request was refused on two occasions. The statute is quite clear that this is a right of the worker and the statute states that the employer must permit them to be accompanied. The reference to a reasonable request is to the nature of the request as confirmed in the above cases not to the identity of the person to accompany the worker. If the Respondent were to be the final arbiter on an appropriate representative, it would undermine the independence of representation within the workplace



and would potentially leave employees and workers vulnerable to unscrupulous employers.

28. I have been taken to the case of *Toal v GB Oils [2013] IRLR 696* which confirmed that the meaning of the word 'reasonable' contained under section 10 (1)(b) only relates to the nature of the request made by the worker. It confirmed that once the worker has made a reasonable request, the employer must accept the companion chosen by the worker subject only to the safeguards set down in section 10(3). There was no evidence to suggest that those statutory safeguards were breached. It was also confirmed that the choice of representative is only restricted by this section as to the class of representative and not in relation to their identity. The Respondent was therefore obliged to accede to the request made to be accompanied as that request was reasonable. It was also confirmed in this case that the right to be represented by a chosen representative cannot be waived. This case was also authority for the proposition that the ACAS Code of Practice could not be an aid to construction when considering the definition of reasonableness in the statute, especially where the words used are clear.
29. The latter case of *Roberts v G B Oils Limited [2014] ICR 462* voiced a concern about the ruling in the *Toal* case in cases where the companion was unreasonably chosen and they specifically referred to cases where the representative had a history of disruptive behaviour in the execution of his duties as representative. It was confirmed that the safeguards available to the employer is for the Tribunal to reflect this in the amount of compensation awarded, where appropriate. However it was confirmed that they were content to follow *Toal* with the Tribunal being justified to reduce the compensation, "even to nil" where the facts justified it.
30. Although it was mooted in the case of *Roberts v GB Oils Limited [2014] ICR 462* that it may be reasonable not to allow a representative with a history of disruptive behaviour to represent a worker, there was no evidence in this case that Mr John Neckles had a history of disruptive behaviour when acting as a representative. The only evidence against Mr John Neckles was the ruling in the Neckles case, but that was not an adverse finding made against him when acting as a union representative.
31. I have to decide whether the Claimant in this case was denied the right to be represented by her chosen representative and on the facts I conclude that she was, on two specific occasions. It was irrelevant that the Respondent allowed their employees to be represented by other representatives, the statute clearly states that a worker is entitled to be represented by someone of their choice. There was no evidence to suggest that the Claimant in this case requested this particular person for anything other than genuine reasons. Although it has been suggested that this case was in some way engineered, no evidence has been put forward that supports this allegation. I therefore conclude that this was a request made by a member of a trade union to be represented by her chosen representative and that request was refused. There has therefore been a breach of section 10.

32. I conclude further that the Respondent has interfered with the Claimant's right to be represented by her chosen representative. I considered the mischief that the statute was designed to prevent, which was to ensure that workers had access to independent union representation and being able to access timely assistance and representation where their rights or their future employment may be at risk. I conclude that the Claimant was denied the right to be represented by her chosen representative for a period of days during which time she was unable to take advice on the preparation and representation of her case to the grievance hearing.
33. I considered whether the Claimant had been subjected to a detriment and I conclude that this was a detriment. I considered the guidance in the case of *Shamoon* which appears in the headnote which states "*the test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought to suffice*". I accept that over a period of days from the 8th of April to the 11th of April she was denied the right to be accompanied by her chosen representative and therefore that delay meant that she was unable to prepare for her grievance hearing and this would have been to her disadvantage. I also took into account that as this was the Claimant's grievance, any delay in discussing or moving forward the grievance would have been something that may have caused concern to the Claimant and therefore would have amounted to a detriment.
34. I then went on to consider the issue of remedy in this case. I was referred to a number of cases by the Respondent and encouraged to follow the approach of several of my colleagues in London South including Employment Judge Hall Smith and Employment Judge Fowell, who both awarded the Claimant a nominal sum. I was also encouraged to look at paragraph 32 of the *Toal* case which stated that if there is no loss or detriment the sum awarded can be nominal. However I have concluded that the Claimant suffered a detriment as referred to above. However the detriment was minor and only led to a slight delay in seeking support and assistance from her trade union.
35. The Claimant asked for the maximum compensation of two weeks pay however on the facts this is a case where there was a breach but the detriment suffered was brief and she suffered no losses. Taking into account all the facts of the case, I award to the Claimant the sum of £200.
36. I have been asked by the Claimant to award an uplift in compensation due to the failure to comply with the ACAS code of practice. Although Mr Neckles referred to the Respondent as committing what he described as a 'flagrant breach of section 10' this is certainly true where he is identified as the named representative. However the Respondent's conduct towards other representatives from his trade union was entirely reasonable.
37. The ACAS Code of practice at paragraph 36 states that "workers may alter their choice of companion if they wish" and the agreed facts reflected that the Claimant indicated that she had decided to change her choice of representative for the grievance hearing. There was no evidence to suggest

that this change of representative was made after applying undue pressure. It was also noted that at the grievance hearing the Claimant was represented by a different representative from the union and the Respondent made no objections to this change. This evidence reflected that there was not a flagrant breach of section 10 or a breach of paragraph 36 of the Code of Practice. The Claimant's second and third choice of representative was accepted by the Respondent and she was adequately represented by her trade union in the grievance hearing. It is for this reason that an uplift is not appropriate on the facts of this case.

38. It is regrettable and unfortunate that the dispute between the Respondent and Mr John Neckles continues and is reflected in the various cases that have been referred to above. Although the Respondent maintained that it was reasonable for them to continue to ban both Neckles brothers from their premises and from representing any of their employees, this has resulted in numerous cases before the Tribunal. It is noted that there have been a wide range of awards made but in most cases there is a finding that the Respondent had breached the Claimant's section 10 rights. Every time there is a breach there is likely to be another claim presented to the Tribunal. The matter is in the hands of the Respondent and with Mr Neckles. I endorse the comments made by Employment Judge Elliott in the case of Hassan at page 120 of the bundle at paragraph 42 where concern was noted about the Respondent's attitude towards the statutory right to be accompanied in that particular case and the blanket ban applied to Mr John Neckles. The Respondent is encouraged to revisit it's ban or at least to reconsider the extent of their restrictions placed on Mr John Neckles when he is seeking to represent his members.

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Employment Judge **Sage**

Date: 22 January 2021