# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Mohamuud Jimale

**Respondent:** Abellio London Ltd

**Heard at:** London South (by CVP) **On:** 1 June 2021

**Before:** Employment Judge Tsamados
Miss E Rousou
Mr G Mann

**Representation**
Claimant: Mr J Neckles, Trade Union representative
Respondent: Ms R Jones, of Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

# JUDGMENT ON REMEDY

The **unanimous** Judgment of the Employment Tribunal is as follows:

Following our Reserved Judgment on Liability dated 20 January 2021, the Claimant is awarded compensation in the sum of £2 in respect of the breach of section 10 of the Employment Relations Act 1998.

# REASONS

These reasons are provided at the request of the Claimant's representative.

## Background

1. In our Reserved Judgment on Liability dated 20 January 2021, following a hearing from 2 to 4 December 2020, we found that the respondent was in breach of section 10 of the Employment Relations Act 1998 in respect of the

denial of the claimant of his right of accompaniment to a disciplinary hearing held on 12 November 2018.

2. Unfortunately, we had insufficient time in which to reach a decision on the final day of our hearing and so we reserved Judgment. In our Reserved Judgment on Liability, we invited the parties to resolve the matter between themselves to avoid the need for a remedy hearing or to let the Tribunal know by 26 March 2021 if one was required.

3. A remedy hearing was subsequently listed for today. At this hearing we heard submissions both in writing and amplified orally by each of the representatives. We do not propose to set those submissions out in writing in this Judgment but have taken them fully into account and refer to them where necessary.

4. It is fair to say that in summary, Ms Jones urged us to make an award of nil or £2 compensation and Mr John Neckles, whilst making attempts to reopen matters that had already been determined in our Reserved Judgment on Liability, urged us to award the maximum under the legislation.

5. We would highlight by way of context that there is some history between the respondent and Mr John and Francis Neckles of the PTSC union, which is set out in detail in our Reserved Judgment on Liability.

## Relevant Law

6. Employment Relations Act 1998:

*"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.*

*(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 [etc.] …*

*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 207B (extension of time limits to facilitate conciliation before institution of proceedings) of the Employment Rights Act 1996 applies 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 [section] 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) …"*

## Conclusions

7. In our Reserved Judgment on Liability, we found that section 10(2)(a) and (b) of the Employment Relations Act 1998 had been breached. Our task today was to determine what remedy to award under section 11(3).

8. Both parties agreed that the claimant was paid in excess of the statutory cap on a week's pay applicable at the relevant time, of £475 per week gross. The maximum we are able to award is up to two weeks' pay capped at the statutory amount of a week's pay for each week.

9. We were referred to Toal & Hughes v GB Oils Ltd UKEAT/0569/12 [2013] IRLR 696 in which the Employment Appeal Tribunal (EAT) gave guidance as to awarding compensation.

10. At paragraph 30 of the Judgment, the EAT stated that compensation for breach of the Employment Relations Act is not a penalty or a fine, but recompense for a loss or detriment suffered by the claimant.

11. At paragraph 31, the EAT further stated that we must assess the loss or detriment suffered in consequence, which in the case before us is the breach of section 10.

12. At paragraph 32, the EAT also stated that if we find a complaint well founded, we have to order the respondent employer to pay compensation and so whilst we do not have the right to award nil compensation, we may well feel constrained as to the amount to award, which could be a nominal amount of compensation.

13. We were also referred to Roberts v GB Oils Ltd UKEAT/0177/13 [2014] ICR 462, which followed Toal but with some reservation as expressed within the summary headnote and at paragraph 25 of the Judgment:

*"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."*

*"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 (Counsel for Mr Toal) 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."*

14. Having considered Roberts, we do not find that the circumstances envisaged as to the award of nil compensation apply in the matter before us.

15. Both parties referred us to a number of first instance decisions of the Employment Tribunals in past cases heard at the London South Region and involving the respondent against various claimants represented by Mr John Neckles. We considered these Judgments, but reminded ourselves that, of course, first instance decisions are of persuasive authority only and are not precedents that we are bound to follow.

16. We considered those Employment Tribunal decisions as we set out below:

    a. Gnahoua v Abellio London Ltd UKET 2303661/2015 which was heard on 16 February 2017. We were provided with a copy of the Judgment and Reasons sent to the parties on 28 February 2017. We had already referred to the decision in this case at paragraphs 72 and 73 of our Reserved Judgment on Liability. In essence, Mr Gnahoua requested the right of accompaniment by Mr John or Francis Neckles at an appeal hearing, the respondent denied his request, efforts were made to rearrange the hearing date and he was encouraged to attend with someone else. Ms Jones referred us to paragraph 25 of the Judgment at paragraph 7. a. of her written submissions. The Tribunal awarded compensation in the sum of £2. We considered this case and found that it was the closest in circumstances to the matter before us;

    b. Batchelor v Abellio London Ltd UKET 14th July 2017. We were not provided with a copy of the Judgment or the reasons for the decision. Ms Jones said in submissions that the claimant in that case was denied the right of accompaniment by Mr Francis Neckles and the Tribunal awarded compensation of £2. Without more, it was not possible to rely on this decision;

    c. Hasan v Abellio London Ltd UKET 2303655/2015 which was heard on 11 October 2017. We were provided with the Judgment on Remedy sent to the parties on 24 October 2017. We had referred to the decision in this case at paragraph 74 of our Reserved Judgment on Liability. In essence, Mr Hasan requested the right of accompaniment by Mr Francis Neckles at two hearings, the respondent denied these requests, efforts were made to rearrange the dates and he was encouraged to attend with someone else. The Tribunal awarded the claimant compensation of one week's pay for each of two breaches but on specific facts applying to that case at that time;

d. Oti v Abellio London Ltd UKET 2302403/2017 & 2300276/2018 which was heard on 7-11 November 2020. We were provided with a copy of the Judgment and Reasons dated 30 December 2020. In essence, Mr Oti was successful under section 10 of the Employment Relations Act having requested the right of accompaniment by Mr John Neckles, efforts were made to rearrange the meeting and he was encouraged to attend with someone else. The Tribunal awarded compensation in the sum of £250. Having considered the Judgment and Reasons we are unclear as to how this figure was arrived at beyond the analysis set out at paragraphs 87 and 88. Unfortunately, these paragraphs do not identify how that figure was calculated. We were also referred to the analysis of the Judgment set out by Ms Jones at paragraph 8 of her written submissions;

e. Martinez v Abellio London Ltd UKET 2301532/2018 which was heard on 5 January 2021. We were provided with a copy of the Reasons which was sent to the parties on 22 January 2021. We note from the reasons that the claimant made three requests for representation by Mr John Neckles at a grievance hearing all of which were refused. We also note that the Tribunal made clear findings of detriment suffered by the claimant as a result of the denial and that whilst compensation in the sum of £200 was awarded, there is no indication as to how this was calculated.

17. Having considered all of these Employment Tribunal decisions we find that there is nothing overpoweringly persuasive about them such as to warrant following them.

18. Turning then to consider compensation in the matter before us. As we have identified compensation is intended to recompense for a loss or detriment suffered.

19. The claimant was denied the right of accompaniment by Mr John or Francis Neckles at the disciplinary hearing on 12 November 2018.

20. The respondent does not deny refusing the right of accompaniment by the Neckles brothers and relies on the basis set out in its letters to the claimant at the time (as we have referred to in our Reserved Judgment on Liability). This in turn is based on findings made in several previous Employment Tribunal cases which are a matter of public record and we cannot go behind them. Further, as far as we are aware they have not been overturned on appeal. On the face of it the respondent has justification for its position.

21. We accept that the Employment Relations Act 1998 exists for a reason, namely, to allow a worker to choose a companion to accompaniment him/her to a disciplinary or grievance hearing from the allowed categories.

22. Whilst the previous Employment Tribunal decisions refer to the lack of review of the respondent's position, we heard no evidence on those matters or as to whether there were conditions that could be imposed which would allow a relaxation of the ban on representation by the Neckles brothers.

23. As we have found in our Reserved Judgment on Liability, the Respondent did offer the claimant the right to have the disciplinary hearing rescheduled, to allow him to arrange for alternative representation by PTSC and suggested that he could submit written submissions or contact its HR department. The claimant did not take any of those steps.

24. As we also found in our Reserved Judgment on Liability, the hearing was then rescheduled for 19 November 2018. The claimant attended, but did not renew his request to be accompanied, he simply resigned on the basis that his preferred representative was not allowed on the premises.

25. We refer to paragraphs 115 to 119 of our Reserved Judgment on Liability. We found that the claimant suffered no detriment under section 12 of the Employment Relations Act 1998, in as far as the only detriment (if we call it that) that he did suffer was the denial of attendance of his chosen companion at the 12 November 2018 meeting. He was not refused the right of accompaniment outright, he was offered alternatives and at the rescheduled meeting on 19 November 2018 he simply resigned.

26. In the circumstances we find that the claimant has suffered no quantified detriment or loss. We do not believe that this is a case where it would be appropriate to award no compensation but given the justification that the respondent had in refusing to allow accompaniment by the Neckles brothers, we believe it is appropriate to make an award of nominal compensation only, in the sum of £2. We would repeat the words of Toal in which the EAT stated that Parliament has chosen the word compensation deliberately and it is not intended to be a penalty or a fine. It is recompense for a loss or detriment suffered. That is the extent of our powers.

27. Mr Neckles referred us to the test of detriment within Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, HL. In Shamoon, the House of Lords considered the position as to what amounts to detrimental treatment for the purposes of a complaint of unlawful discrimination under the legislation in force prior to the Equality Act 2010. A detriment was held to be an act which a reasonable employee might feel places them at a disadvantage with regard to the circumstances in which they work. It is not necessary to demonstrate some physical or economic consequence.

28. However, we felt that this test did not apply within the context of a complaint under the Employment Relations Act 1998 and the resultant case law. In any event we had already reached our findings and conclusions as to loss/detriment within our Reserved Judgment on Liability (as referred to above)

29. Mr Neckles referred us to Article 11 of the Human Rights Act, 1998 at paragraph 1 of his written submissions. In essence, the Human Rights Act incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic law.

30. Article 11 ECHR sets out the right to freedom of assembly and association as follows:

> *"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
>
> *2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."*

31. We were not convinced that Article 11 was engaged in the circumstances of this case. But in the event that it was, we find that those rights or those analogous to them are preserved within sections 10 and 11 of the Employment Relations Act 1998.

32. We would repeat our concerns as set out in paragraph 133 of our Reserved Judgment on Liability. The interests of the employee/worker are at the heart of our case and indeed of all other PTSC members. They are not being served by either party in the continued attempts to seek representation by the Neckles brothers and the ban on such representation imposed by the respondent. We would encourage the parties to seek some form of mediation, perhaps via ACAS, to seek an acceptable compromise, so as to benefit those workers/employees seeking to exercise the right of accompaniment by PTSC.

33. Mr Neckles again raised the matter of the application of the ACAS uplift in compensation. As we have already stated at paragraph 111 of our Reserved Judgment on Liability, the ACAS uplift does not apply in cases of this nature.

Employment Judge Tsamados
Dated: 15 September 2021