.

EMPLOYMENT TRIBUNALS

Claimant: **Mr D. Eiugbadebo**

Respondents: **Abellio London Ltd**

Heard by: **London South** **On: 03 December 2021**

Before: **Employment Judge T R Smith**

Members **Mrs H. Carter**
Mr R. Singh

Representation

Claimant: Mr J Neckles (PTCU union)

Respondent: Mr Meyerhoff (solicitor)

JUDGMENT

The respondent failed to comply with its legal obligation to permit the claimant to be accompanied to a disciplinary hearing by his chosen companion in breach of section 10 of the Employment Relations Act 1996 and the tribunal declares accordingly.

The respondent is ordered to pay the claimant compensation of £2.

Reasons Provided Pursuant to Rule 62(3)

The Evidence.

1.The tribunal had before it a bundle consisting of 108 pages, an amended statement of agreed facts, written submissions from both parties, a statement of Mr F. Neckles, a statement of the claimant, and a bundle of authorities.

The Issues

2.The issues were set out in a case management order and associated judgement dated 18 February 2021 by Employment Judge Sharp.

3.It is not necessary to repeat those issues as the respondent, before the tribunal, expressly admitted a breach of its obligation under section 10 but contended no award should be made in the claimant's favour.

4.It was agreed with the parties that the claimant was now only pursuing a complaint under section 10 and 11 of the Employment Relations Act 1999. There was no complaint being pursued under section 12 of the same act.

The Facts

5.The claimant has been employed by the respondent as a bus driver since 25 June 2018. He remains in their employment

6.The respondent is a bus company operating a fleet of over 700 buses and employing approximately 2500 staff in central, south and west London. It also operates North Surrey.

7.The claimant presented a claim form on 09 April 2020.

8.The claim form was presented on the claimant's behalf by Mr F . Neckles.

9.For reasons that will become clear there are two Mr Neckles, brothers, and for this reason the tribunal will include the initial of their respective given names for the purposes of clarity.

10.The Neckles brothers are senior officials in the PTSC union.

11.In the claimant's claim form numerous complaints were made under various statutory provisions, including under the Equality Act 2010, what are commonly known as the blacklisting regulations and under section 10, 11 and 12 of the Employment Relations Act 1999.

12.Suffice to say, following the hearing before Employment Judge Sharp on 18 February 2021 the only complaint recorded as proceeding was under section 10 and 11 of the Employment Relations Act 1999.

13.In essence the surviving claim relates to the respondent's refusal to allow Mr F . Neckles to accompany the claimant to a disciplinary hearing on 29 January 2020.

14.The purpose of the hearing was to answer allegations of alleged misconduct with regard to two complaints from members of the public.

15.The claimant attended the hearing on 29 January 2020 accompanied by Mr F Neckles. The claimant was informed that his chosen representative was not permitted to enter the respondent's premises and could not represent him.

16.The claimant was informed he could be represented by another member of the PTSC, another union official or by a fellow worker but not by Mr F Neckles or his brother Mr J. Neckles..

17.The hearing was adjourned to allow the claimant to obtain alternative representation. The respondent was not opposed to workers been represented by a trade union, including the PTSC, simply to, two particular members of that union, the Neckles brothers.

18.The hearing was eventually rearranged for 26 February 2020 when the claimant was accompanied by another official of the PTSC union, Ms Reece-Bartlett

19.The outcome of disciplinary hearing was the claimant received a warning, in writing by letter dated 02 March 2020 (108), described as *"informal"*

20.The claimant did not suffer any financial loss as a result of the delay in the rearrangement of the disciplinary hearing.

21.Whilst not the claimant's first choice he was permitted representation at the disciplinary hearing by a member of his chosen union.

22.The reasoning for the respondent's refusal requires careful analysis. It is important to emphasise that this case concerned representation by Mr F Neckles.

23.Mr F Neckles was formerly employed by the respondent until 2013. He was involved in tribunal proceedings between himself and the respondent (case references 2344649/2013 and 2360882/2013.)

24.The claims of Mr F Neckles were struck out by Employment Judge Lamb who found that Mr F. Neckles had fraudulently created a falsified witness statement to further his claim against the respondent.

25.There was also a finding of threats by Mr F Neckles to another employee (see para 16 and 20 of **Ghahoua** below)

26.In that hearing Mr F Neckles was represented by his brother Mr J. Neckles. A costs order was made, ultimately in the sum of £20,000.

27.As a result of the above Mr F. Neckles had been banned from the respondent's premises because the respondent believed he was not to be trusted and had threatened at least one member of the respondent's staff.

The Law

28.The tribunal applied the following legal principles.

29.Section 10 of the Employment Relations Act 1999 provides 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

(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)

Subsection 3 provides as follows: –

(3) A person is within this section if he is-

(a) employed by a trade union of which he is an official within the meaning of section 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 employers workers.

30.Section 11 subsections (1) and (3) provide 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."

31.The tribunal has noted the statutory wording in subparagraph three of *"not exceeding".* It took it to mean the two weeks pay was the maximum it could award. It was therefore able to order, if appropriate, a lesser sum.

32.Two weeks pay is subject to the statutory maximum contained in section 227 (1) of the Employment Rights Act 1996,

33.In addition to the statutory provisions there are two relevant decisions of the Employment Appeal Tribunal which this tribunal took into account in his deliberations.

34.The first was **Toal and anor v GB Oils Ltd 2013 IRLR 696, EAT. Toal** established that although section 10 provides that a worker is only entitled to be accompanied if he or she *'reasonably requests'* it, the reasonableness criterion does not extend to the identity of the companion. So long as the companion meets one of the definitions in S.10(3), the employer must agree to that companion.

35.At paragraph 16 the EAT said: –

"*We will first take Mr Gloag's* [counsel for the respondent] *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."

36.The matter was revisited in **Roberts v GB Oils Ltd 2014 ICR 462, EAT.** The EAT upheld the principle set out in **Toal,** although not without some misgiving, about the potential effect of **Toal** where, for example, the chosen companion had a history of disruptive behaviour. The EAT could envisage circumstances where difficulties would arise if the employer was unable to veto the choice of the workers companion.

37.Despite those misgivings the EAT held that the word *"reasonably"* in s.10 applied to the reasonableness of the request to be accompanied and not to the identity or characteristics of the chosen companion.

38.His Honour Judge Burke QC said, however at paragraph 25: –

Ms Annand [counsel for the claimant] *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.* [this tribunal's emphasis]

39.The tribunal were taken to a number of first instance decisions. The starting point for this tribunal is that it is not bound by any of those decisions.

Reference was made to **Gnahoua -v- Abellio London Ltd 2303661/2015)** and **Batchelor -v- Abellio London Ltd (2301635/2015**).

40.It was common ground that in those decisions it was found the respondent had denied the respective employees the right to be accompanied by either Mr F Neckles or his brother Mr J Neckles. Representation was however permitted by anyone else other than the above-named individuals in accordance with section 10.

41.The tribunal is determined that each respective employee had suffered no detriment and made a nominal award of £2 in each case.

42.It is arguable that **Gnahoua** was a more serious case than that of this claimant as Mr Gnahoua did not arrange alternative representation.

43.The tribunal was also taken to **Hassan -v- Abellio London Ltd 2303655/2015**

In that case the tribunal made an award of £950 in respect of more than one breaches of representation in disciplinary proceedings involving the same employee.

44.The tribunal considered paragraphs 39 to 44 were instructive.

39. We considered our finding at liability stage, paragraph 41, when the question was asked as to why the respondent did not hold a meeting off site. Ms Murphy's evidence to us was that because of the threatening behaviour, members of the respondent's staff, including herself, were not prepared to be put in such a situation. The findings in Gnahoua (paragraph 25) was that Mr John Neckles was not accused of or involved in any intimidation himself but he was involved in vexatious conduct.

40. The ban applied by the respondent was to both Mr Francis and Mr John Neckles. The respondent did not have a safety issue in relation to Mr John Neckles, as he was not accused of or involved in any intimidation but the ban applied to him nevertheless based on the respondent's view of his dishonesty.

41. The ban applied by the respondent was to both Mr Francis and Mr John Neckles. The respondent did not have a safety issue in relation to Mr John Neckles, as he was not accused of or involved in any intimidation but the ban applied to him nevertheless, based on the respondent's view of his dishonesty.

42. We find that <u>if the ban had been applied to Mr Francis Neckles only, this would have caused us to consider a much lower award</u>.[this tribunal's emphasis] *However as it applied to both Mr John and Mr Francis Neckles, we have concerns about the respondent's attitude towards the statutory right to be accompanied in this case and their blanket ban on Mr John Neckles who has not been accused of the same behaviour*

43. ….

44. …..We accept that there was some reason for the making of the ban but this needed more objective and careful consideration than simply applying a blanket ban against the two brothers when their circumstances (based on the findings of earlier tribunals) were not the same. There was no safety risk in relation to Mr John Neckles either on site or off site.

45.Of course, in this case, the chosen representative for the claimant was Mr J. Neckles. This is a significant material factual difference between this case and **Hassan**

46.This tribunal was then referred to the decision in **Oti -v- Abellio London Ltd 2302404/2017 and 2300276/2018.**

47.The tribunal found in **Oti** breach of section 10 and made an award of £250, although it was not clear to this tribunal how that sum was arrived at other than some brief comments in paragraph 87 and 88.

48.The final case the tribunal was taken to was that of **Jimale -v- Abellio London Ltd 2300795/2019.** The tribunal only had the remedy judgement and not the liability judgement. Suffice to say that the claimant's complaint was well-founded but it was not clear to this tribunal whether the requested representative had been Mr F or Mr J. Neckles. An award of £2 was made.

49.The tribunal considered all the above tribunal decisions. None are binding on it. It did not consider there was anything overpoweringly persuasive about them such as to mean that they should be followed.

50.The tribunal therefore approached the case on the basis of both the statute and the two previously referred to judgements of the EAT.

51.The tribunal had sympathy with the respondent. It was not difficult to see why they would wish to bar from their premises a person who another tribunal had found had behaved dishonestly and had also intimidated another employee. The costs order alone gives an indication of how serious the tribunal felt matters were. However the tribunal considered it was bound by **Toal.**

52.The tribunal noted from **Toal** that the purpose of an award is compensation for the breach of the statutory provision and not a penalty or fine.

53.It follows the tribunal must therefore assess the loss suffered by the claimant. As the tribunal already noted the claimant suffered no loss other than a delay in his disciplinary hearing when he was then represented by another member of his chosen union.

54.As was made clear in **Roberts** this tribunal is entitled to take into account in the assessment of an award the particular characteristics of the representative chosen.

55.The tribunal did not accept the respondent's submissions that no award should be made. It reached that conclusion given the wording of section 11 (3) which makes it clear that where the complaint is well founded the tribunal **"***shall***"** make an award

56.The tribunal placed weight on the fact that there was no general refusal by the respondent of representation. It was not acting capriciously. It had a justifiable reason for not permitting Mr F.Neckles on its premises.

57.The tribunal were not attracted to Mr Neckles submission that the test of detriment set out in **Shamoon -v- Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** should apply as that relates to the Equality Act 2010 .This tribunal are not satisfied the same test applies under section 11 of the Employment Relations Act 1999 .Even if it did the tribunal found the claimant suffered no detriment .

58.Nor were the tribunal attracted by the argument that a failure to make substantial award would be a breach of article 11 of the Human Rights Act 1998 (freedom of peaceful assembly) because the tribunal was not satisfied that article 11 was engaged .

59.Even if it was, article 11 is a qualified and not an absolute right. Restrictions may be placed upon freedom of peaceful assembly and association in specified circumstances.. The tribunal considered in respect of Mr F. Neckles the qualification of public safety was engaged and also protection of morals, in the sense that Mr F. Neckles had forged documents for the purpose of tribunal proceedings.

60.If the tribunal were wrong and article 11 was engaged the claimant's rights were already protected by means of the provisions of section 10 and 11 the Employment Relations Act 1998.

61.Standing back and looking at the matter in the round the tribunal concluded the claimant was entitled to a declaration in his favour and £2 was an appropriate sum. It was appropriate because the claimant had suffered no loss, it was appropriate because representation was permitted and it was appropriate because in line with **Roberts** the identity of the representative could be taken into account. The tribunal would add it may well have taken a very different view in the size of the award if the chosen companion had been Mr J. Neckles.

29 December 2021

Sent to the parties on:

11 January 2022