# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T Macdonald

**Respondent:** B:Friend

**Heard:** via Cloud Video Platform in the North East Region

**On:** 16 February 2024

**Before:** Employment Judge Ayre
Mr M Brewer
Mr Q Shah

**Representation**

**Claimant:** Mr N Sharples, solicitor and Trade Union official
**Respondent:** Ms K Thorpe, consultant

# JUDGMENT

The unanimous judgment of the Tribunal is that the claim for breach of Section 10 of the Employment Relations Act 1999 is well founded. The respondent is ordered to pay the sum of £588.16 to the claimant.

# REASONS

## Background

1. The claimant was employed by the respondent from August 2021 until 20 June 2023 when she was dismissed with immediate effect. Early Conciliation started on 4 August 2023 and ended on 15 September 2023. The claim form was presented on 15 September 2023 and includes a complaint that the claimant was denied the right to be accompanied by a trade union representative at a disciplinary hearing.

## The hearing

2. There was an agreed bundle of documents running to 97 pages.

3. We heard evidence from the claimant and, on behalf of the respondent, from Colette Bunker, Chief Executive

## The issues

4. The issues that fell to be decided at today's hearing were the following:

    1. Was the meeting on 20 June 2023 a disciplinary hearing falling within section 10(1)(a) of the Employment Relations Act 199?

    2. If so, did the claimant reasonably request to be accompanied at the hearing?

    3. Was that request denied?

    4. What compensation should be awarded to the claimant as a result?

5. Ms Thorpe indicated at the start of the hearing that the respondent agreed that two weeks' gross pay for the claimant comes to £558.16. Mr Sharples indicated that the claimant is no longer seeking an uplift in compensation for the respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Mr Sharples acknowledged that claims for breach of section 10 of the Employment Relations Act 1999 do not fall within Schedule A2 of the Trade Union and Labour Relations Consolidation Act 1992.

## Findings of fact

6. We make the following findings of fact on a unanimous basis .

7. The claimant was employed by the respondent as a Project Coordinator from 16 August 2021 until 20 June 2023 when she was dismissed with immediate effect.

8. The respondent is a small, registered charity which arranges befriending between volunteers and vulnerable older people and runs social clubs across South Yorkshire. At the time of the claimant's employment it had eight members of staff.

9. On 12 June 2023 Colette Bunker, the respondent's Chief Executive, was informed by a team leader that one of the respondent's service users, S, had made allegations of bullying against the claimant. The allegations included that the claimant had said mean things to S, shouted at S and upset S.

10. On the morning of 15 June 2023 Ms Bunker contacted the claimant by telephone and asked her to attend a meeting on google meet. During that meeting the claimant was suspended from work and told to turn off her work telephone and computer immediately, which she did. After the meeting Ms Bunker wrote to the claimant by email to her work address in the following terms:

"*Dear Tracey*

*I am writing to confirm your immediate suspension from work on full pay. This is to enable an investigation to be undertaken into a serious complaint by a beneficiary, about your behaviour that could be described as coercive and bullying. It appears that this behaviour has also been noted by other participants of the Wheatley Hills group.*

*Alongside this, it has come to my attention that there may be professional boundary issues relating to your involvement in the befriending relationship between S… and her befriender….*

*I know it is difficult to be suspended but we will do the investigation as quickly as possible….*

*You must not contact any staff, volunteers or older neighbours whilst this investigation is taking place. You must not undertake any work so please switch your laptop and work phone off….*

*Once the investigation has been concluded, I will decide on an appropriate way forward, which may involve disciplinary action. I would stress that this suspension is a precautionary measure and does not prejudice the outcome of any disciplinary hearing, neither should it be regarded as punishment….*"

11. The claimant's evidence was that because she was told to turn off her work computer immediately when she was suspended, she did not see this email until shortly before the meeting on 20 June 2023 when she turned her computer back on. We accept her evidence on this issue.

12. Ms Bunker carried out an investigation. Further concerns about the claimant's behaviour towards S came to light during that investigation. S's complaint of bullying behaviour by the claimant was supported by others.

13. Ms Bunker decided that the matter would not be dealt with through the respondent's disciplinary procedure because the claimant had a relatively short period of service at the time, and Ms Bunker considered that the disciplinary policy does not form part of the claimant's terms and conditions of employment. She made no attempt whatsoever to discuss the allegations about the claimant's behaviour with the claimant, but rather she formed the view that the claimant's employment could not continue and that the claimant would be dismissed.

14. On Monday 19 June 2023 at approximately 12.30 Ms Bunker sent a text message to the claimant in which she wrote: "*Hi Tracey, I've just sent you a meeting invite for 9am tomorrow morning. Could you text back to confirm you've for this please. Thanks, Colette.*"

15. The claimant replied: "*I'm afraid my union hasn't come back to me as yet so the meeting can not go ahead. Thank you. Tracey*". Ms Bunker replied at approximately 3 pm "*It's not a meeting under the disciplinary policy so you don't have a right to have a representative there. The meeting will go ahead tomorrow as planned, see you*

*then*".

16. The claimant then sent a further message to Ms Bunker: "*Can you please send to my personal email a copy of the policy document….I havnt accessed my work phone or computer since you told me to turn them both off on Thursday at 815. My union has said any meeting that could have a impact on my employment, gives me the right to have representation. Thank you. Tracey*". Ms Bunker replied: "*Not sure what policy you're after so I have sent you the employee handbook. The meeting will be between yourself and me, your line manager, at 9am tomorrow. See you then*".

17. The meeting went ahead on the 20 June. It lasted just four minutes. The claimant attended the meeting alone, she felt that she had no choice but to do so, given the text messages she had received from Ms Bunker. She was not sent any documents in advance of the meeting and was not shown the evidence gathered by Ms Bunker during the investigation. In the meeting the claimant declined to answer questions in the absence of her trade union representative. Ms Bunker told the claimant that she was dismissed with immediate effect. She wrote to the claimant confirming her dismissal, and her letter included the following:

"*I am writing to inform you of the outcome of the investigation not the allegations of bullying brought against you at b:friend. As you are aware, you were suspended on Thursday, 15 June, pending this investigation.*

*On Monday, 20 June, we held a Google Meet meeting to discuss the findings of the investigation. During this meeting, I explained that a beneficiary had reported several instances of bullying, and two other individuals corroborated these claims, stating they had witnessed similar behaviour from you. At the meeting, you were given the opportunity to provide your perspective on the allegations. However, you declined to share your side of the story without representation from your union representative.*

*Given the seriousness of the allegations and your unwillingness to participate in the meeting, I regret to inform you that I have decided that the outcome of the investigation is your immediate dismissal from your position at b:friend. Bullying is completely unacceptable behaviour within our organisation, a breach of our safeguarding policy and general professional standards….*

*Your last day of employment, as advised to you, will be recorded as the 20 June. You will receive 1 months pay in lieu of working your notice period….*"

18. The claimant was not offered the right of appeal against the decision to dismiss her. Nonetheless, on 22 June 2023 she wrote to Ms Bunker appealing the decision. She set out a number of grounds of appeal in her letter. One of those grounds was that she had not been "*offered a trade union official or colleague to attend or represent me in the meeting*".

19. Ms Bunker replied to the appeal letter stating that "*The decision to dismiss you was a management decision, and as such, it cannot be appealed. While I understand that this news is disappointing, it is crucial to emphasise that this decision was made after a thorough evaluation and investigation into your conduct. The findings of this*

*revealed that your behaviour went against fundamental company policies and therefore your dismissal was deemed necessary".*

20. At the time of her dismissal the claimant was earning £1,212.67 gross a month. Her gross weekly pay was £279.08.

## The Law

21. Section 10 of the Employment Relations Act 1999 provides that:

"*(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)….*

*(3) A person is within this subsection if he is –*

*(a) employed by a trade union or 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….*"

22. Section 11 of the Employment Relations Act 1999 gives workers the right to bring complaints about breaches of section 10 to the Employment Tribunal. The relevant provisions 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(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….*

*(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)….*

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

23. Section 13(4) of the Employment Relations Act 1999 defines a disciplinary hearing, for the purposes of section 10, as:

"*….a hearing which could result in –*

*(a) the administration of a formal warning to a worker by his employer,*
*(b) the taking of some other action in respect of a worker by his employer, or*
*(c) the confirmation of a warning issued or some other action taken.*"

24. There is no definition of a 'reasonable request' to be accompanied. The ACAS Code of Practice on disciplinary and grievance procedures contains the following relevant provisions:

"***Introduction***

- *Disciplinary situations include misconduct and/or poor performance….*

***Allow the employee to be accompanied at the meeting***

*13. Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:*

- *a formal warning being issued; or*
- *the taking of some other disciplinary action*
- *the confirmation of a warning or some other disciplinary action (appeal hearings) ….*

*15. To exercise the statutory right to be accompanied workers must made 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 timeframe. 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 known in advance the name of the companion were possible and whether they are a fellow worker or trade union official or representative….*"

25. In ***Shone v Oxford and Cherwell Valley College ET Case No 2701364/13*** the Employment Tribunal found that an employee whose request for a postponement of a disciplinary hearing had been refused, and who then 11 minutes before the hearing was due to start, made a request to be accompanied, had in effect asked for a last minute postponement. In those circumstances the request to be accompanied was not unreasonable, and the respondent was not in breach of section 10 of the Employment Relations Act 1999 by going ahead with the disciplinary hearing.

Uplift for unreasonable non-compliance with the ACAS Code

26. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**") gives Employment Tribunals the power to increase or decrease compensation payable to an employee in certain circumstances. It applies to proceedings under any of the jurisdictions listed in Schedule A2 of TULRCA. The jurisdictions listed in Schedule A2 include certain complaints under TULRCA, under the Employment Rights Act 1996, the National Minimum Wage Act 1998, the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994, the Working Time Regulations, the Equality Act and Regulation 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010.

27. Schedule A2 does not list claims under section 11 of the Employment Relations Act 1992.

## Conclusions

28. The following conclusions are reached on a unanimous basis having considered the evidence before us, the relevant legal principles, and the submissions of the parties.

Was the meeting on 20 June 2023 a disciplinary hearing falling within section 10(1)(a) of the Employment Relations Act 1999?

29. Disciplinary hearing is defined in section 13(4) of the Employment Relations Act 1999 as a hearing which could result in the administration of a formal warning or the taking of 'some other action' in respect of a worker by his employer.

30. It is clear from the evidence before us that the meeting on 20 June was designed to result in the dismissal of the claimant. The taking of 'some other action' can in our view include dismissal. Dismissal is in many ways the most serious form of action

that can be taken against a worker by an employer, and it cannot have been the intention of parliament that dismissal would be excluded from the definition set out in section 13(4).

31. Nor can it, in our view, have been the intention of parliament that an employer would be able to circumvent the protections contained in section 10 of the Employment Relations Act 1999 by merely declaring that a process which is designed to address allegations of misconduct is not a disciplinary process. The Tribunal must take a purposive approach to the interpretation of the relevant statutory provisions.

32. The respondent's case, in summary, is that because Ms Bunker decided not to use the disciplinary process and told the claimant the meeting was not a disciplinary one, that the meeting on 20 June was not a disciplinary meeting. We do not accept their submissions on this issue.

33. In deciding whether the meeting on 20 June falls within sections 10 and 13(4) we have to consider the substance of the meeting, not just the name given to it by the respondent. To fail to do so could result in employers being able to deprive workers of their rights under section 10 merely by declaring 'this is not a disciplinary process'.

34. We find that the meeting on 20 June was a disciplinary meeting in all but name. It is clear from the suspension letter, which is typical of a disciplinary suspension letter, and which specifically referred to the possibility of disciplinary action as a potential outcome of the investigation, that the respondent was initially treating the concerns that had come to light as a potential disciplinary matter.

35. What seems to have happened is that when Ms Bunker did the investigation she formed a very strong view on the evidence without even having discussed it with the claimant. She then sought to deliberately circumvent the respondent's disciplinary policy by deciding unilaterally not to apply it because the claimant had less than two years' service. Ms Bunker accepted when giving evidence to the Tribunal that had the claimant had longer service she would have applied the disciplinary policy.

36. The rights conferred by section 10 of the Employment Relations Act 1998 apply from day one of employment. They are not dependent upon any minimum period of service.

37. The ACAS Code of Practice describes disciplinary situations as including misconduct. This clearly was a misconduct issue, as it related to the behaviour of the claimant. It is of concern to the Tribunal that the respondent had a complete disregard for due process in the way that it treated the claimant.

<u>Did the claimant make a reasonable request to be accompanied at the meeting?</u>

38. The Tribunal finds that the claimant did make a reasonable request to be accompanied at the meeting on 20 September. The ACAS Code of Practice suggests that what is reasonable will depend on the circumstances of the case and that a request does not have to be in writing or made at a certain time.

39. The circumstances of this case are that the claimant was given very short notice of the meeting on 20th June. A text message was sent to her less than 21 hours before the meeting was due to go ahead. That message did not tell the claimant what the meeting was about or warn her that she may be dismissed as a result.

40. In that context the claimant's request for the meeting not to go ahead because she had not been able to speak to her trade union is, in our view, a reasonable request to be accompanied at that meeting.

41. The text made clear that the claimant wanted her trade union to be involved in the process, and that she did not want the hearing to go ahead until she could obtain that involvement. Although she didn't use the words 'I want to be accompanied at the meeting' the message in our view makes clear that she die want to be accompanied. Most importantly, that is how the respondent interpreted the message at the time because Ms Bunker's response was that the claimant was not entitled to representation.

42. Although the request was made just the day before the disciplinary hearing, it could not have been made any earlier because the claimant did not know about the hearing until she received Ms Bunker's text at 12.30 on 19 June. She acted promptly having received that text.

43. We therefore find that the claimant did make a reasonable request to be accompanied at the disciplinary hearing which fell within section 10(1)(b) of the Employment Relations Act 1999.

Was the claimant's request denied?

44. It is clear from Ms Bunker's reply to the claimant: "*you don't have a right to have a representative there. The meeting will go ahead tomorrow as planned"* that the claimant's request to be accompanied was denied by Ms Bunker.

45. For the above reasons we find that the respondent breached section 10 of the Employment Relations Act 1999 by failing to allow the claimant to be accompanied at the meeting on 20 June.

What compensation should be awarded to the claimant?

46. Where there has been a breach of section an award of compensation is mandatory. The use of the word 'shall' in section 11 (3) of the Employment Relations Act 1999 ("*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") indicates as such.*

47. It is the unanimous decision of the Tribunal that two weeks' pay is the appropriate award in this case. The respondent rode rough shod over the claimant's right to be accompanied and made no attempt at following a fair procedure when dismissing an employee of approximately 22 months' service. The claimant raised the right to be accompanied not just before the meeting on 20 June, but also again when she sought

to appeal the decision to dismiss her. The respondent continued to ignore her request.

48. In the circumstances an award at the upper end is appropriate. The parties agreed that two weeks' gross pay for the claimant is £588.16. The respondent is therefore ordered to pay that sum to the claimant.

Employment Judge Ayre

Date: 16 February 2024

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