Case Number: 2303661/2015

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FOWELL**
MS. A. SADLER
MR. M. WALTON

BETWEEN:

Claimant

MR. M. GNAHOUA

AND

Respondent

ABELLIO LONDON LIMITED

ON: **16 FEBRUARY 2017**

APPEARANCES:

For the Claimant: **MR. J. NECKLES**

For the Respondent: **MR. S. MEYERHOF**

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant was denied his right to be accompanied at a disciplinary hearing on 25 September 2015 contrary to section 10 of the Employment Relations Act 1999 and is awarded compensation of £2.

2. The Claimant did not suffer a detriment for exercising this right to be accompanied and his claim under section 12(2) of the Employment Relations Act 1999 is dismissed.

REASONS

1. The claimant was dismissed from his employment as a bus driver with the respondent at a disciplinary hearing on 31 July 2015. He presented various claims including unfair dismissal and race discrimination but the claims of unfair dismissal and other money claims were dismissed at a preliminary hearing on 2 March 2016 as out of time. Subsequently his discrimination claims were largely dismissed at a further preliminary hearing on 30 June 2016 on the basis that they had no reasonable prospects of success. Deposit orders were made in respect of allegation of direct discrimination and victimisation, which were not then pursued. The only remaining claims for us to determine were alleged breaches of sections 10(2A) and 12(1) of the Employment Relations Act 1999, relating to the claimant's right to be accompanied at his appeal hearing on 25 September 2015.

2. The background facts were set out in the reasons given at the last preliminary hearing before Judge Baron on 30 June 2016, which we gratefully adopt:

> 7. The facts as derived from the documents are as follows. The Claimant was a bus driver employed by the Respondent. It is the responsibility of drivers to undertake an initial walk round check before first taking a bus out. On 3 July 2015 a Mr Yates (whose status is not known) reported to others in the Respondent that, he had not seen the driver undertake the check, and he asked for the CCTV to be checked.
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> 8. The Claimant was suspended and required to attend an investigatory meeting on 17 July 2015. That meeting was held, and the issue discussed. The CCTV record was seen. The discussion then moved on to a different matter said to have been disclosed on the CCTV record, being that the Claimant moved the bus while looking at an iPad. The notes record that the Claimant said that he was reading books, that he only moved the bus forward a few feet, and that there were no passengers on board.
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> 9. The Claimant was required to attend a disciplinary hearing on 30 July 2015, at which hearing he was represented by a union representative, Roy Stone of Unite.
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> 10. The hearing was chaired by Jacinta Foley, Operations Manager. The outcome of the hearing is contained in a letter dated 31 July 2015. The Claimant was found to have been using his iPad while the bus was moving. He was informed that that was gross misconduct, and that he was summarily dismissed.

3. We heard evidence from the claimant and from Mr. Ben Wakerley, the respondent's Operations Director about these matters. A witness statement was also served from Ms. Faley, describing the events leading to the disciplinary hearing, but since these were largely undisputed she

was not called to give evidence. We also had documentary evidence in the form of a substantial bundle from the respondent of about 300 pages, together with a further bundle all of about 20 pages from the claimant.

4. At the outset of the hearing an application was made by the respondent for disclosure by Mr Neckles of another employment tribunal claim which had been referred to by Judge Baron in the course of a preliminary hearing. In the course of that claim an issue had arisen as to whether Mr. Neckles was a duly accredited trade union representative for the purpose of this section 10(3) of the 1999 Act. This had been pursued by the respondent in correspondence on a number of occasions.

5. We declined to grant this application. Mr. Neckles is not a party to this litigation. Nor was it clear exactly what document or documents were requested. Essentially this was a request for information. The respondent did not wish there to be an adjournment and the request was essentially that Mr. Neckles inform the tribunal (and the respondent) what this other case was all about. He volunteered the information that he appeared as a representative in that hearing, had been disinstructed and so did not know the outcome. Since the respondent had not pleaded the case that Mr. Neckles was not an accredited trade union representative, we did not consider that the overriding objective required any further order.

Findings of fact

6. Having heard the evidence from the claimant and Mr. Wakerley we make following findings.

7. Following the disciplinary hearing on 31 July 2015 and the claimant's dismissal he consulted his union Representative Mr. Roy Stone of Unite. He submitted an appeal and informed the company by email on the day of his dismissal that he would be represented by Mr. Mick Storer, also of Unite. He was informed in writing on 6 August that the appeal hearing would take place on 19 August. He wrote again to confirm that Mr. Storer would represent him.

8. Shortly before the disciplinary incident for which he was dismissed, the claimant also joined the PTSC Union. This had a reputation as an organisation more willing to put up a robust defence on behalf of its members. Mr. John Neckles and his brother Francis are leading figures within the PTSC. The claimant therefore decided that he would instead be represented by the PTSC at the forthcoming hearing. A letter was then sent on his behalf on 16 August in trenchant terms, assessing his rights to be accompanied by either John or Francis Neckles. This letter was prepared by Mr. John Neckles who was aware that the company had a policy that neither of them were allowed to represented individuals in disciplinary or grievance hearings.

9. An amended notice of appeal was also filed on the claimant's behalf which emphasised his claim had been treated more harshly than a number of other employees who have not been dismissed in similar circumstances.

10. The company, through its senior HR adviser, Lene Madsen, responded to the claimant by an emailed letter on 17 August, confirming that the company was happy for him to be accompanied by a member of the PTSC union, but that John and Francis Neckles have been banned from taking part in such hearings. The reasons given were that they were guilty of threatening behaviour towards members of staff and of dishonesty.

11. The claimant made no response to that letter and attended the hearing as planned on 19 August. He was accompanied to the site by both John and Francis Neckles, who waited outside. The claimant was told that the hearing would be adjourned and a letter was sent to him that day dealing with his representation. It was less direct than the previous letter and simply said that certain conditions may apply to his choice of representative. The hearing was rearranged for 28 August.

12. He responded to Ms. Madsen by email on 22 August attaching a letter in equally trenchant terms and again drafted by Mr. John Neckles taking issue with the allegations of threatening behaviour and dishonesty. Again, it asserted his statutory right to be accompanied by the companion of his choice. The claimant's concern was that someone from the PTSC represent him. He did not see it as necessary that either Mr Neckles do so, although the letter Mr John Neckles drafted for him insisted that one of two do so.

13. Ms Madsen replied by letter dated 24 August urging the claimant to speak to his chosen representatives about these allegations and reiterating that another representative from the PTSC would be welcome. These exchanges continued until the appeal hearing finally went ahead on 25 September. The company did not contact the PTSC directly about the issue. Throughout this process the claimant retained his faith in the expertise and ability of Mr. John Neckles, who has a law degree and is a frequent representative at employment tribunal hearings. He felt strongly that he ought to have a representative at the hearing. Ultimately he went to the appeal hearing without anyone to accompany him and took little part. He covertly recorded the meeting on his phone and adopted the stance that without a representative he was severely prejudiced and was not going to engage with process.

14. Mr. Wakerley conducted the hearing in a considerate and thorough fashion. As the Operations Director in charge of 2000 staff he was familiar with such hearings and had conducted a number in which drivers

had been dismissed for similar offences. The company had a zero tolerance policy for any driver using an electronic device whilst at the wheel and the "tariff" was dismissal. He went through with the claimant the arguments on both sides, including the claimant's long service since 2004. It will never be known whether the outcome might have been different if the claimant had taken a more active part in the meeting or had shown any contrition, but the outcome was to confirm his dismissal.

15. The reasons for the history of ill feeling between the company and Mr. John and Francis Neckles were described in Mr. Wakerley's witness statement and are largely a matter of record. Mr. Francis Neckles used to be an employee of the company but was dismissed for harassment and intimidation of another member of staff, Mr Mustafa, who was a shop steward for Unite. The incident which led to his dismissal that took place at a disciplinary hearing in which Mr. Mostafa was a witness and Mr. Francis Neckles was accompanying the employee in question. The questions put by Mr. Nichols to Mr. Mostafa were considered to be an attack on his character and to amount to bullying and harassment.

16. Mr. Francis Neckles was dismissed on 20 August 2013. Shortly before this decision was confirmed, and while he was suspended, he went to the company's Walworth depot a number of times to speak to drivers. He was banned from the premises and Mr. Wakerley, who had just joined but was aware of the situation, went to speak to him. He asked him to leave and this request was refused. Mr. Wakerley found his behaviour intimidating and called the police, who eventually came and Mr. Neckles agreed to leave.

17. There were further developments. Mr. Francis Neckles then brought an employment tribunal claim against the company for unfair dismissal in which he was represented by his brother John. Those claims were struck out in their entirety at a preliminary hearing on 16 December 2014 on the basis of vexatious conduct. In addition, Judge Lamb took the very serious step of awarding £10,000 in costs against the two brothers jointly. The vexatious conduct in question involved falsifying the date on which a witness statement was prepared, and the judge made clear that both brothers must have been complicit in this misconduct.

18. The company therefore took the view that they had attempted to obtain substantial compensation from the company using dishonest means, and as a result from that point on neither of them were permitted to represent employees at disciplinary or grievance hearings.

Conclusions

19. The relevant legal provisions in the 1999 Act are 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.
(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.] …

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(2) 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 [detriments] shall apply in relation to contraventions of subsection (1) above as it applies in relation to contraventions of certain sections of that Act.

20. We were referred in particular to the case of **Toal v GB Oils Limited [2013] IRLR 696** which concerned a very similar situation. According to the headnote the facts were as follows:

> Andrew Toal and Simon Hughes, the claimants, raised grievances with their employer, GB Oils Ltd. The employer invited them to attend grievance meetings. The claimants asked to be accompanied by a particular individual, Mr Lean, who was an elected official of Unite the Union. The employer declined to allow Mr Lean to accompany them. In consequence, each claimant sought the assistance of a fellow worker, Mr Hodgkin, who subsequently attended the meetings. The claimants found the outcome of the meetings unsatisfactory and appealed. At the appeal hearings, Mr Hodgkin was replaced by an elected union official, who was not Mr Lean. The claimants brought proceedings, submitting that the employer had breached 5.10 of the Employment Relations Act 1999 by refusing to allow Mr Lean to b accompany them to the meetings.

21. The main difference therefore between that case and the present one is that Mr Toal arranged for an alternative representative. We are not concerned with the question of whether Mr Gnahoua waived his right to representation and so the relevant conclusions were as follows:

> (1) The employer had breached the claimants' right to be accompanied at the grievance hearings by not allowing their chosen union official to accompany them. With regard to the right to be accompanied at disciplinary or grievance hearings under s.10, the choice of companion does not have to be reasonable. Parliament 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.

(2) …

(3) The matter would be remitted to determine whether the claimants had suffered any loss or detriment and the appropriate amount of compensation. Compensation under s.11(3) is not a penalty or a fine. It is recompense for a loss or detriment suffered. The wording "shall order the employer to pay compensation" suggests that the tribunal does not have the right to order that no compensation should be payable. Accordingly, in a case in which it is satisfied that no loss or detriment has been suffered by an employee, the tribunal should feel constrained to make an award of nominal compensation only, either in the traditional sum now replacing 40 shillings - £2 - or in some other small sum of that order.

(4) The ACAS Code was not an available aid to the construction of the statute. It is for Parliament to legislate in words of its choosing for the ends which it seeks to accomplish and for the courts to interpret its legislation, applying established methods of construction.

22. Mr. Meyerhof submitted that this case could be distinguished on the basis that some reasonable limit had to be drawn, and a balance struck. It could not be right that the company was obliged, for example, to host a representative who had been physically intimidating to the decision-maker. The ACAS code of practice drew attention to certain situations in which it would be reasonable for the employer to reject a chosen representative, such as where they were based on long way away and there were many nearer representatives who could deputise. He also submitted that on a strict reading the right only applied to disciplinary and grievance hearings, not to appeal hearings.

23. We were not able to accept these submissions. **Toal** clearly establishes the principle that there is an unfettered right for the employee to choose their companion (see paragraph 21). The Employment Appeal Tribunal specifically considered the ACAS Code but concluded that it could not be an aid to statutory construction, let alone displace the clear terms of the statute. It is also well established that appeal hearings are an integral part of the disciplinary process so that, for example, if an appeal is upheld the legal effect is that no dismissal ever occurred.

24. The potential difficulties in cases such as the present was specifically considered by the Employment Appeal Tribunal in the later and related case of **Roberts v GB Oils Limited (UKEAT/0177/13/DM).** According to the summary:

> "This appeal invited us to reconsider the recent EAT decision in Toal & Hughes v GB Oils Ltd [2013] IRLR 696 that the Employment Tribunal in considering whether there has been a failure to allow an employee to be accompanied by the companion of his choice, where he reasonably requested a companion (s.10 ERA 1999), cannot consider the nature or qualities of the chosen companion as long as he is within s.10(3), and is

> limited to considering whether it was reasonable for the employee to request a companion.
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> 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 not use the compensation, even to nil."

25. It is impossible to distinguish these two binding authorities from the present case. Like all strict rules, there are policy reasons for its imposition which sometimes lead to hard cases. As a general rule it is undesirable for an employer to choose the employee's companion or (what is often very much the same thing) to exercise a veto over his choice. In the present case it is hard to criticise the actions of the respondent, and we make no criticism. They have followed the ACAS Code of Practice and have only sought to interfere in the choice of companion on strong grounds. It is true that Mr. John Neckles has not been accused of or involved in any intimidation himself, but given his involvement in the vexatious conduct it is entirely understandable that the respondent adopted the stance it did, believing there to be an element of discretion in such cases. That is not the case. However, it also appears to us that the case falls squarely within the terms quoted above in **Toal**. We are satisfied that no loss or detriment was suffered by Mr. Gnahoua, and so we award only the nominal compensation of £2 suggested.

26. As to the further claim to have suffered the detriment under section 12 of the Act, the only detriment relied on was having to attend the appeal hearing unaccompanied. This does not add anything to the breach of section 10.

27. The statutory provision at section 12(2) protects an employee from any detriment on the grounds that he has made a reasonable request to be accompanied by a trade union representative. It follows from **Toal** that this has to be construed not as a request for a particular representative but the exercise of the right generally. It protects an employee from reprisals, for example, by a bad employer who wishes to avoid having trade unions involved in the disciplinary process. Some particular detriment or detriments nevertheless has to be identified, over and above the fact that the appellant did not have a companion. It is hard to imagine any case in which the employment relationship comes to an end, as it did in this case, in which such a detriment could be identified. We are reinforced in that view by the terms of section 12(3) which provides that an employee who is dismissed for exercising this right is regarded as automatically unfairly dismissed. These provisions therefore mirror those which protect against detriment or dismissal in whistleblowing cases. In the absence of any specific detriment, over and above the lack of representation, no breach can be identified and so this

claim is dismissed.

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Employment Judge Fowell

Date: **26 February 2017**