EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 20 May 2021

Claimant: Mr Patrick Andrews

Respondent: Abellio London Limited

Before: Employment Judge Fowell

Ms Alison Sansome

Ms Norina O'Hare

Representation:

Claimant: Mr J Neckles, PTSC Union

Respondent: Ms S Cummings instructed by Backhouse Jones Solicitors

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The respondent failed to comply with the duty under section 10(2)(A) Employment Relations Act 1999 to permit the claimant to be accompanied at a disciplinary hearing by a companion of his choice.

2. Compensation for this failure is awarded in the sum of £300.

3. The claimant was not unfairly dismissal.

4. The dismissal was not in breach of contract.

5. There was no unlawful deduction from wages.

6. The claimant was not subjected to a detriment, contrary to section 12(1)(b) Employment Relations Act 1999, on the ground that he exercised or sought to exercise his right to be accompanied.

7. The claimant was not dismissed, contrary to section 12(3) Employment Relations Act 1999, on the ground that he exercised or sought to exercise his right to be accompanied.

8. All other complaints are dismissed on withdrawal by the claimant, including discrimination, harassment, victimisation, unlawful deduction from wages and under the Employment Relations Act (Blacklists) Regulations 2010.

REASONS

Introduction

1. Mr Andrews worked for Abellio as a Bus Driver for about three years until his resignation on 26 October 2017. It followed a drugs test on 12 October 2017. Mr Andrews was unwilling or unable to provide a urine sample and the company viewed this as a deliberate refusal. He was suspended and then invited to an investigation meeting. That led to a disciplinary hearing. On 24 October he asked to be accompanied by his trade union representative, Mr Neckles, who appeared for him at this hearing. The company refused this request on the ground that Mr Neckles was barred from their premises. In response, on 26 October, the day of the hearing, Mr Andrews resigned, asserting that this refusal was a fundamental breach of contract by the company.

2. The complaints presented are therefore as follows:

    a. constructive dismissal under section 95(1)(c) Employment Rights Act 1996;

    b. failure to comply with the duty under section 10(2)(A) Employment Relations Act 1999 to permit the claimant to be accompanied at a disciplinary hearing by a companion of his choice;

    c. being subjected to a detriment, contrary to section 12(1)(b) Employment Relations Act 1999, on the ground that he exercised or sought to exercise his right to be accompanied;

    d. being (constructively) dismissed, contrary to section 12(3) Employment Relations Act 1999, on the ground that he exercised or sought to exercise his right to be accompanied;

    e. wrongful dismissal or breach of contract.

3. As noted above, all other complaints were withdrawn by the claimant before this hearing. The remaining focus was therefore whether Mr Andrews was entitled to resign over the company's refusal to allow him to be accompanied by Mr Neckles. It is one of a number of such cases involving Mr Neckles, the PTSC Union, and

the decision by Abellio to bar him from their premises, and several first instance decisions were cited to us on similar facts.

Procedure and evidence

4. In addressing these complaints we heard evidence from Mr Andrews and briefly from Mr Neckles, and on behalf of the company from Mr Richard Teggart, the manager who oversaw the tests and who decided to suspend Mr Andrews. There was also a bundle of over 500 pages, much of which relating to other cases in which employees had been denied the right to be accompanied.

5. Given the amount of paperwork and the number of complaints, this hearing was originally listed for a two day hearing, but the Tribunal was only available for one day. With this shortened timetable it was only possible to hear evidence and submissions. This reserved judgment therefore follows a day's deliberation on 9 June 2021, when we made the following findings.

Findings of Fact

6. The company operates a large network of buses around the London area, with about 2,500 staff. They have a testing program, with random, unannounced tests, to ensure that none of the drivers is under the influence of drugs or alcohol, and employ an external company to do the testing. The process is set out in their Drugs and Alcohol policy at section 6.4 (Random Unannounced Screening), which says that a urine sample must be provided on request for testing, and that a refusal will normally result in dismissal for gross misconduct. Similarly the Disciplinary Policy lists as gross misconduct "breaches of the drugs and alcohol policy including failing to provide a sample on request".

7. Mr Andrews worked as a driver at their Battersea depot. On 12 October 2017 he was selected, along with other drivers, to provide a sample. The tests were overseen by Mr Teggart, who approached Mr Andrews at about 8.40 that morning to tell him that he been selected. He then escorted Mr Andrews to the testing room to go through the paperwork. He carried out a breath test for alcohol, which was done there and then, and tested negative. The tester then escorted him to the toilet so that he could provide a urine sample, waiting outside the toilet door while he did so.

8. The test requires about 60 ml of urine but Mr Andrews produced only about 10. Mr Teggart asked him to remain in the entrance area and drink plenty of water before having another go in a couple of hours. He came back at about 11.25 to take him for a second test. This time the tester showed Mr Andrews the required level on the jar and Mr Andrews went into the toilet to try again. As before, the tester waited outside, and Mr Andrews emerged with the same amount as before. However, the tester recorded on the form that "I could hear sufficient urine while he was in the toilet" indicating that this was a deliberate failure. Mr Teggart also

took the view that this was a refusal to provide a sample, and suspended him as a result.

9. An investigation hearing was then held with Mr Ade Ademuyi on 17 October 2017. Two days before this meeting Mr Andrews requested in writing that he be accompanied by Mr John Neckles. This was refused by the HR department. The company has a long-standing ban in place against Mr Neckles because, they say, he was guilty of threatening behaviour towards their staff and dishonesty. We were not presented with any evidence about those historical matters and make no findings about them, but the ban was well known and Mr Andrews was certainly aware of it at the time of his request. He is himself a trade union official for the PTSC and had accompanied members to disciplinary meetings in the past.

10. In view of this refusal, and as it was only a fact-finding meeting, Mr Andrews decided to go on his own. At the meeting his explanation for the failed test was that he may have a medical condition which restricted the amount of urine he could produce, but he was unable to say what this condition was and no medical evidence was produced, either then or later. He was presented with the notes from the tester as above, stating that she had been listening behind the toilet door. His response was that this - giving him the evidence at the meeting - did not give him time to generate a defence.

11. The implication is obvious, that he had been caught out. It reinforces the evidence from the test form itself and we see no reason to dispute it. The fact is that Mr Andrews had ample time to rehydrate and provide a sample and there is no medical evidence to explain his failure. We find therefore that this was a deliberate failure on his part, and that he was merely pretending to have made the attempt.

12. Following this meeting Mr Ademuyi decided, reasonably in our view, to proceed to a disciplinary hearing and an invitation was sent. As before, Mr Andrews requested that Mr Neckles accompany him to the hearing. That request was copied to Emma Garrett, HR manager, and she responded the next day with the familiar response that Mr Neckles could not accompany him.

13. There was a further exchange of correspondence and then Mr Andrews submitted his resignation to Ms Garrett on 26 October 2017. The letter, in rather legal language, stated that he had asserted his right to be accompanied, that this had been refused by the company, that this refusal was a detriment and the breach of a fundamental term of the contract, one that had been incorporated expressly and impliedly through established negotiating machinery with the recognised Trade Union (Unite) and so amounted a breach of the relationship of trust of confidence. His resignation was “to take effect forthwith devoid of any notice.”

Conclusions

Constructive Dismissal

14. The test for constructive dismissal derives from the wording of section 95 of the Employment Rights Act 1996:

> (1) For the purposes of this Part an employee is dismissed by [her] employer if (and, subject to subsection (2) … only if) – …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

15. Those circumstances are not specified in the statute but require a fundamental breach of contract. According to the well-known case of **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, referred to in the resignation letter:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.

16. The main case advanced for Mr Andrews was that the right to be accompanied by a companion of his choice was a term of the contract, and indeed a fundamental term.

17. The disciplinary procedure does state that the employee has the right to be accompanied "at all stages of the formal procedure." That includes at the investigation stage. The company say however that it was not a term of the contract at all. According to Mr Andrews' contract of employment at section 20:

> The Disciplinary Procedure does not form part of your contract of employment. It provides guidance to you."

18. There is nothing in the disciplinary policy itself to contradict that statement and so we accept that none of the contents form an express term of the contract of employment.

19. The resignation letter makes the point that this policy had been negotiated and agreed with Unite. Terms of a contract can of course be incorporated by collective agreement, but it does not follow that everything negotiated with a recognised union has contractual force. It remains guidance, which has been approved or agreed with the union, and that remains the case even though the policy has been operated for a long period or time. We were not referred to any authorities to cast doubt on those basic propositions.

20. If we are wrong in that conclusion however, it does not seem to us that this could be regarded as an essential term of the contract, or one going to the root of the contract. It is part of a process for investigating whether Mr Andrews was guilty of gross misconduct, and however important that exercise, it is essentially a question of procedure, something which will arise rarely, and so not an essential term of the contract. Section 1 of the Employment Rights Act 1996 sets out the terms that have to be specified in writing, such as pay and holiday entitlement. There is an obligation under section 3 of that Act to include a note specifying any disciplinary rules applicable to the worker or referring to the provisions of any such document, but that does not make every part of the disciplinary policy an essential term. Such policies will, for example, include terms as to how much notice should be given of a meeting, which could not be regarded as essential. And disciplinary rules are not the same as disciplinary procedures. By contrast, section 13 of the contract of employment specifies the disciplinary rule that employees will have to provide a sample on request for drugs and alcohol testing.

21. This was presented, in the alternative, as a breach of the implied duty of trust and confidence. That *is* a fundamental term and so any breach of it is a fundamental breach of contract. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 such a breach occurs where an employer conducts itself "in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence". But there is nothing to suggest that this important duty was undermined here, let alone breached. As already explained, this was simply not an essential point, or one going to the root of the contract, and so presenting it as a breach of trust and confidence does not add anything. Mr Andrews was in fact seeking reinstatement at this hearing, and explained to us that he wanted to return to help represent other drivers at disciplinary meetings. This strongly suggests that there was no irretrievable breakdown of the working relationship. And regardless of the history of the matter, and the merits of the dispute with Mr Neckles, the company provided reasons for its decision not to allow Mr Neckles to accompany him. It also has to be remembered that Mr Andrews was not denied the right to be accompanied altogether, only the right to be accompanied by a representative of his choice. In all other respects the disciplinary process was perfectly fair.

22. In any event, we have still found that Mr Andrews was in fact guilty of the offence of failing or refusing to provide a sample on request. Mr Neckles argued that the Drugs and Alcohol Policy only made *refusing* to give a sample an offence, alternatively providing a positive sample, but this was in our view a wilful refusal and was covered by the disciplinary policy. In the absence of any medical evidence or serious mitigation, neither of which was forthcoming, the outcome of the disciplinary hearing can only have been dismissal, and a reduction of 100% for contributory fault would have to be made.

Section 12 ERA 1999

23. The next two complaints are of suffering a detriment or dismissal for having sought to exercise this right to be accompanied. Section 12 Employment Relations Act 1999 provides:

> **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) ….
>
> (2) Section 48 of the Employment Rights Act 1996 [the right to complain to an Employment Tribunal] shall apply in relation to contraventions of subsection (1) above as it applies in relation to contraventions of certain sections of that Act.
>
> (3) A worker who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—
>
> (a) exercised or sought to exercise the right under section 10(2A) …

24. Hence, any worker who exercises or seeks to exercise his or her right to be accompanied and is then dismissed or suffers a detriment at work as a result is protected.

25. A dismissal may, in our view, include a constructive dismissal. The wording above makes reference to Part X of the Employment Rights Act 1996, which includes section 95, quoted above. But it is still necessary for Mr Andrews to have resigned "in circumstances in which he [was] entitled to terminate [the contract] without notice by reason of the employer's conduct." That still requires a fundamental breach of contract on the part of the employer, something we have already rejected. Section 12(3) does not therefore add anything in these circumstances to the right not to be constructively, unfairly dismissed. It is not the case that any resignation in response to such a refusal by the employer is automatically regarded as a constructive dismissal, and there is nothing in the statutory language to require that conclusion. It would in fact completely undermine the requirement for a fundamental breach of contract if that were the case, and again, no authorities were cited to us that would lead to a different view.

26. Turning to the detriment claim, the detriment in question is said to be the refusal itself. In the list of issues it is expressed as being prevented from having his chosen companion "and any advantages to him arising from this." The claim form refers as well to Mr Neckles' legal training, advocacy skills and vast experience of employment law.

27. Without doubting Mr Neckles' expertise, this all relates to the decision by the

company to refuse the request. There is no separate or later event, which seems to us an essential requirement, just as in a whistleblowing case there has to be a qualifying disclosure followed by some detrimental treatment. The reference to section 48 of the Employment Rights Act 1996 in section 12 of the 1999 Act means that the same definition of detriment applies, i.e. adverse consequences at work of one sort or another.

28. The first instance decisions cited to us involving Mr Neckles and Abellio all held that some subsequent adverse consequence was required, not simply the refusal. Those comprised **Gnahoua** (2303661/2015), **Hasan** (2303655/2015), **Jimale** (2300795/2019) and **Martinez** (2301532/2018). The first of these was also a decision of Employment Judge Fowell, sitting with two colleagues, and the Tribunal in that case concluded, at paragraph 27:

> "Some particular detriment or detriments nevertheless has to be identified, over and above the fact that the appellant did not have a companion. … 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."

29. Hence, there has to be an exercise of the right to be accompanied or a request to do so, followed by a refusal, followed by dismissal or a detriment. This reasoning was adopted in **Hasan** and **Martinez,** the only cases where the point arose, and we too agree that the denial of the right to be accompanied cannot itself be a qualifying detriment.

30. Mr Neckles referred us to the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)** [2003] UKHL 11, which concerned direct sex discrimination. The House of Lords held that essentially that a relatively minor reprisal can be a detriment, such as removing the right to carry out appraisals, but that does not affect our view that there is still a need for some adverse consequence *after* the refusal.

Breach of contact

31. There is further claim to notice pay, but as already noted Mr Andrews gave notice with immediate effect and so is not entitled to any continuing payment. The company have not dismissed him (actually or constructively) and so is not in breach of contract, and so this complaint too is dismissed.

Breach of Section 10 ERA 1999

32. There remains the central complaint that the company refused Mr Andrews' reasonable request to be accompanied by a companion of his choice. This was not in fact disputed by the company at this hearing. It is not therefore necessary to say very much more about this aspect, but it is as well to set out the rationale adopted in **Gnahoua,** since it includes reference to the two Employment Appeal

Tribunal authorities which do apply:

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 s.10 of the Employment Relations Act 1999 by refusing to allow Mr Lean to 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.
>
> 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. 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."

33. Since then, other Tribunals have become increasingly concerned at the willingness of the respondent to flout section 10, and simply to pay the nominal sum ordered on that occasion. In **Jimale** (Employment Judge Tsamados), in December 2020 the Tribunal concluded with this paragraph:

> 133. There is the ongoing general issue as to the right of accompaniment of the Respondent's employees particularly by John and Francis Neckles. Whilst this is a matter outside our remit, we see this as an unsatisfactory situation for the Respondent's employees who are PTSC Union members and we urge the parties to seek an acceptable solution to this for their sake.

34. What then is the appropriate level of compensation to award now? In January this year, in **Martinez** (Employment Judge Sage), the Tribunal held:

> 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."

35. The award has therefore gone from £2 to £200. Attempting to find the most appropriate level of compensation here, there are a number of competing considerations. Firstly, the events in question in this case took place in 2017, before the above guidance in **Jimale** although the company would have been aware, following the case of Mr Gnahoua, that their continued refusal to allow Mr Neckles to attend was unlawful. At the time of the refusal in Mr Gnahoua's case, the legal position was not so clear, certainly not to the manager's involved in refusing his request. As is clear from the above passage, they thought they had the sanction of the ACAS Code of Practice for the stance they took.

36. On the other hand, this whole situation is essentially contrived. Mr Andrews knew of the ban, and the reasons for it. He opted, either on his own initiative or on advice from Mr Neckles, to resign and claim constructive dismissal. That course of action had the merit of avoiding the stigma of a dismissal for gross misconduct and cast the employer in a bad light.

37. The reality here, we conclude, is that these proceedings, and the previous cases cited, have all come about because of this long-standing feud between the

company on the one hand and Mr Neckles and his brother on the other. They are time consuming for the Tribunals to resolve and expensive for the public. In each case there are or may have been points of substance to resolve, but those matters have been largely displaced by wrangles over the right to be accompanied. Had the company not maintained its ban on Mr Neckles he could have attended the disciplinary hearing, just as he attended this hearing and the other ones mentioned. His role is clearly defined by section 10: he can for example put the worker's case and summarise it, but not answer questions on his behalf. Had he taken on that role the outcome would, we conclude, still have been a dismissal for gross misconduct. Any claim of unfair dismissal would then have been a much more straightforward matter, probably lasting a day, with a considerable saving of time and cost to the company themselves. We note again that the bundle of documents here was about 500 pages, few of which related to the actual disciplinary allegation. In short, patience is wearing thin. We are not able to bind future Tribunals but it may be that in future cases, where the company defend the section 10 claim, as they did here at first, the defence may be struck out, or even regarded as unreasonable conduct of proceedings, with potential costs consequences affecting the whole case. Similar points could also be made about claimant's complaints based on section 12 of the 1999 Act which have now been dismissed by a succession of Tribunals, not on the facts but as being legally without merit.

38. Against that background, we note that a week's pay is £580. The breach was not of the worst sort – Mr Andrews was able to have another companion and so we do not award the maximum or close to it. On the other hand, an award of one week's pay still appears to comfortably exceed any harm done to Mr Andrews. Balancing these considerations as best we can, we conclude that £300 is the appropriate figure.

39. To that extent the claim is upheld.

Employment Judge Fowell

Date 9 June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date 11 June 2021

FOR THE TRIBUNAL OFFICE