Appeal No. UKEAT/0569/12/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 22 May 2013

Before

THE HONOURABLE MR JUSTICE MITTING

MS K BILGAN

MRS A GALLICO

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(1) MR ANDREW TOAL
(2) MR SIMON HUGHES — APPELLANTS

GB OILS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MS KATE ANNAND (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR ANGUS GLOAG (of Counsel) Instructed by: Cummins Solicitors The Bake House Narborough Wood Park Desford Road Leicester LE19 4XT

SUMMARY

STATUTORY DISCIPLINE AND GRIEVANCE PROCEDURES

Whether choice of companion to accompany employee at grievance hearing must be "reasonable" (No). Whether employee refused first choice of companion waives right to be accompanied by him if, he chooses another (No).

(Section 10 **Employment Relations Act 1999**)

THE HONOURABLE MR JUSTICE MITTING

1. Section 10 of the **Employment Relations Act 1999** provides 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)**
>
> **[…]**
>
> **(3) A person is within this subsection if he is—**
>
> **(a) employed by a trade union of 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.**
>
> **[…]"**

Subsections 2(b) and 2(c) provide what the worker's companion may do at a hearing at which he accompanies the worker and sets limits upon it. Subsections 4 and 5 deal with what happens if the worker's representative is not available at the time proposed for the hearing by the employer.

2. Section 11 provides for what is to happen if the employer does not permit the employee to exercise the rights given by section 10:

> **"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(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.

[…]"

3. In this case, the two Claimants raised grievances with the employer. Although the precise sequence of events is not clear from the Reasons of the Employment Tribunal, it is now accepted by Mr Gloag for the employer and common ground, that in each case the employer invited the Claimant to a grievance meeting, at which his grievance was to be aired and following upon which a decision upon it was to be made. After that invitation was received, as well in some instances as before, the Claimant made clear to the employer that he wished to be accompanied by a particular individual, Mr Lean, who was an elected official of Unite, of which both Claimants were members, and was appropriately certified by Unite under section 10(3)(b).

4. In each case, the employer then declined to allow the Claimant to be accompanied by Mr Lean. In consequence, each Claimant sought the assistance of a fellow worker, Mr Hodgkin, who did attend the grievance meetings. When the outcome of them was unsatisfactory from their point of view and they appealed, he was replaced by another elected union official (also certified) at the appeal hearing, a Mr Silkstone.

5. The Employment Tribunal, on facts that were essentially identical to those that we have stated, decided that the employer was not in breach of the statutory obligation under section 10. In the Reasons which they gave, they first considered whether or not the word 'reasonably' in section 10(1)(b) applied to anything other than the request to be accompanied at the hearing. The employers had contended that it applied also to the choice of representative.

6. The Tribunal's decision was set out in paragraph 20 of its decision:

> **"The issue of reasonableness is clearly linked to accompaniment per se and not to the choice of companion. If the reasonableness was tied to the identity of the trade union representative then the statute could have provided for that quite easily."**

7. The Tribunal found that Mr Lean came within subsection 10(3) and noted that subsection 2(a) places a mandatory obligation on the Respondent to allow the worker to be accompanied by one companion chosen by the worker.

8. In relation to the refusal to allow Mr Lean to accompany the Claimants, the Tribunal found as follows in paragraphs 23 and 25 of its Reasons:

> **"23 […] In this case that person was originally Mr Lean and he was rejected by the Respondent. In the Tribunal's view, the Respondents were at that particular time in potential breach of a statutory provision and had a claim been brought at that juncture the Tribunal would have found in favour of the Claimants.**
>
> **25 In this case however the matter does not stop there. Upon Mr Lean being rejected the Claimants chose another companion to accompany them to safeguard them in the grievance meetings. The Claimants therefore waived the potential breach by the Respondent when the grievances concluded with their chosen representative and the fact that it was second choice is immaterial."**

Accordingly, it rejected both Claimants' claims. Both Claimants appeal to this Tribunal.

9. In economical and attractively presented submissions, Ms Annand for the Claimants makes essentially one submission: that the Tribunal's finding that the Claimants waived their right to be accompanied by Mr Lean was not open to the Tribunal as a matter of law.

10. In response, Mr Gloag for the employers submitted that the Tribunal erred in concluding that the word 'reasonably' in section 10(1)(b) qualified only to the request to be accompanied and had nothing to do with the identity of the proposed companion. In so submitting, he relied upon guidance given by the Advisory, Conciliation and Arbitration Service under section 199

of the **Trade Union and Labour Relations (Consolidation) Act 1992** issued in 2009. He submits that, in construing section 10(1)(b), we are entitled to have regard to the guidance given by ACAS and, indeed, to follow it.

11. Before we turn to the submissions of the parties, we make a few preliminary observations about the scheme set out in section 10. To trigger the right, there must first of all be an invitation by the employer to attend a disciplinary or grievance hearing. The mere raising of a grievance by an employee does not suffice to trigger the right. What is required is either a requirement or an invitation to attend a hearing.

12. The employee must request to be accompanied at the hearing. In modern times, good practice on the part of the employers leads responsible employers to remind the employee of that right and invites them to exercise it. The request must, however, be reasonable. Precisely why Parliament put in a qualification requiring that the request be reasonable is not entirely clear to us. The word is there and it does, therefore, serve some purpose. We will address what that is later.

13. Section 10(2)(a) requires the employer to permit the worker to be accompanied at the hearing by a companion, hence the word 'must' in the subsection. This requirement is subject to only one express exception, which is contained in section 15 of the 1999 Act for persons employed by the Security Service, the SIS or GCHQ.

14. The companion is to be chosen by the worker, not by the employer, but the companion must come from within one of the three categories of individuals identified in subsection 3. That is to say, he must be employed by a trade union (in other words a paid official), or an unpaid official who is certified by the union or a fellow worker.

15. Finally, in the event that the chosen companion of the employee is unable to attend a hearing proposed by the employer, subsections 4 and 5 provide expressly what is to happen. A reasonable delay is required, subject to a time limit of five days to permit the companion to attend.

16. We will first take Mr Gloag's 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.

17. Mr Gloag submits that paragraph 36 of the ACAS Code of Practice, to which we have referred, suggests otherwise. Paragraph 36 reads:

> **"To exercise the right to be accompanied a worker must first make a reasonable request. What is reasonable will depend on the circumstances of each individual case. However it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing was available on site."**

18. The Code in which that paragraph appears was issued pursuant to the powers of ACAS under section 199 of the 1992 Act. Subsection 1 provides:

> **"ACAS may issue Codes of Practice containing such practical guidance as it thinks fit for the purpose of promoting the improvement of industrial relations or for purposes connected with trade union learning representatives."**

19. Section 200 provides for what is to happen if the Secretary of State approves a draft Code. He must lay it before Parliament and it is then subject to the negative procedure under section 204. Accordingly, Mr Gloag submits that this Code has received Parliamentary approval and, insofar as there is a lacuna in section 10 of the 1999 Act, has filled it. In our judgment, that submission is not well founded. An ACAS Code is not an available aid to the construction of a statute. Section 199 does not say so nor is it necessarily implicit in section 199 that it should be so. On the contrary, it contravenes a basic constitutional principle that 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.

20. Further, there is, in our view, no lacuna to be filled. Section 10 of the 1999 Act works perfectly well read and understood in accordance with its straightforward language.

21. Further, if the ACAS guidance is to be accepted, it creates problems of its own. By what standard is reasonableness to be judged? Who is to determine that the chosen companion would prejudice the hearing? If it is the employee and his reasonableness which is to be assessed, then there will be little protection for an employer. If it is for the employer, then that goes against the clear words of section 10(2)(a) which gives to the employee the apparently unfettered right to choose, subject only to the companion being within those identified in

subsection 3. If it is for the employer to decide what is reasonable, then by what standard is the employer's decision to be judged should it come to be challenged in the Employment Tribunal?

22. For all of these reasons, we are not of the opinion that paragraph 36 of the ACAS Code is an available aid to construction of a statute which, in our view, is perfectly clear.

23. The next question to be determined is that raised by Ms Annand on the appeal. She has referred us to settled case law on the ability or otherwise of an employee to waive a breach of statutory duty by an employer. In the employment context, the case of **Secretary of State for Employment v Deary** [1984] ICR 413 is in point. The facts do not matter, but the principle was established clearly that neither an express nor an implied agreement by employer and employee to waive a statutory requirement was open to either of them.

24. The statutory prohibition on waiver was then to be found in section 140 of the **Employment Protection (Consolidation) Act 1978.** In the current statutory regime, it is to be found in section 203 of the **Employment Rights Act 1996**, which is applied to rights under sections 10 and 11 by section 14 of the 1999 Act. Section 203(1) of the 1996 Act provides:

> **"Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—**
>
> **(a) to exclude or limit the operation of any provision of this Act [...]"**

25. We see no reason to depart from the reasoning of the Employment Appeal Tribunal in **Deary** under an identically worded predecessor section. If we had been minded to do so, we would have been deterred by a decision of longstanding in another context, **Imperial Chemical Industries Limited v Shatwell** [1965] AC 656 in which Lord Reid observed at page 674(d) to (f):

> **"I entirely agree that an employer who is himself at fault in persistently refusing to comply with a statutory rule could not possibly be allowed to escape liability because the injured workman had agreed to waive the breach. If it is still permissible for a workman to make an express agreement with his employer to work under an unsafe system, perhaps in consideration of a higher wage - a matter on which I need express no opinion - then there would be a difference between breach of a statutory obligation by the employer and breach of his common law obligation to exercise due care: it would be possible to contract out of the latter, but not out of the former type of obligation."**

26. We agree with Ms Annand that the finding of the Tribunal that the Claimants had waived their right to be accompanied by a union official of their choice necessarily involves a tacit agreement by them to waive the employer's breach of its obligation to them to allow Mr Lean to accompany them.

27. Mr Gloag sought to sustain the finding of the Tribunal on two bases: first because they found only that the breach was potential but not actual; and secondly because there are differences between statutory duties and this statutory duty can be waived. As far as the second proposition is concerned, we are unpersuaded that that is so and can see, in light of the two authorities which we have cited, no basis for concluding that one statutory duty can be waived but another cannot be. As far as the first submission is concerned, although the Tribunal expressed itself as referring to a 'potential' breach of a statutory provision, in fact it found that if a claim had been brought at that stage, the Tribunal would have found in favour of the Claimant.

28. On the agreed facts as they now are, this issue does not arise. The employers accept that after the invitation had been issued to both Claimants to attend the grievance and appeal meetings, the employers' refusal to allow Mr Lean to accompany them was either made plain or reiterated; it matters not which. Accordingly, what is conceded on the now agreed facts is an actual breach and not merely a potential breach.

29. For those reasons, we must allow this appeal. In her skeleton argument, Ms Annand proposed that we should allow the appeal and order the employers to pay two weeks' pay, subject to the statutory cap, in respect of both refusals. That is to say the refusal to each Claimant to be accompanied by Mr Lean at both the grievance and appeal meetings. Accordingly, she suggested we should simply order the employers to pay compensation of £1,600 to each Claimant.

30. We refuse to do so. Section 11(3) requires a Tribunal which finds that a complaint under section 10 is well founded to order the employer to pay 'compensation' of an amount not exceeding two weeks' pay. Parliament has chosen the word 'compensation' deliberately. It does not require the employer to pay a minimum sum, as it has done in another context (for example, the obligation to provide written particulars of terms of employment). What it has done is to provide for 'compensation', a different concept. Compensation is not a penalty or a fine. It is recompense for a loss or detriment suffered.

31. When a Tribunal finds that the employer has been in breach of an obligation under section 10, it must go on to assess the loss or detriment suffered by the employee in consequence. If it concludes that the employee has suffered no loss or detriment, then it would not be ordering 'compensation'. If it ordered a substantial sum to be paid, it would be doing something different such as imposing a penalty on the employer.

32. Parliament has, however, provided that when a Tribunal finds a complaint well founded "it shall order the employer to pay compensation". That suggests to us 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 may well feel constrained (and in our view 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.

33. Underlying the issue that we have to determine are questions of fact which, because of the conclusion reached by the Employment Tribunal, it decided it was unnecessary for it to determine. On our understanding of the law, it is necessary for the Tribunal to reach a determination on whether or not either Claimant has suffered any loss or detriment and, if so, to fix an appropriate amount of compensation, subject to the statutory cap for that loss or detriment.

34. For those reasons, this appeal must now be remitted to the Employment Tribunal to determine the amount of compensation to be paid to each Claimant. We see no reason why the Tribunal, already seized of the matter should not have the task of determining the appropriate level of compensation if, in the meantime, it is not agreed between the parties. We so order remission to this Tribunal.