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West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

E-Update 87 – August 2018

Postponing Disciplinaries

When a union representative is unavailable to represent an employee at a scheduled disciplinary hearing, what should the employer do? Under the statutory right to be accompanied the employee can postpone the hearing for up to five working days – but the EAT has now held that complying with that rule does not mean that it will be fair to go ahead with the hearing.

In **Talon Engineering Ltd v Smith**, the employee was suspended in July 2016 and initially invited to a disciplinary hearing on 5th September. She was unable to attend that due to sickness and so the hearing was postponed. Then on 19th September she was invited to a hearing on the 29th. Her chosen trade union representative was not available on that day because he was attending a conference and so the employee put forward a series of alternative dates – the earliest of which was just under two weeks later. The employer was not prepared to agree another postponement and so told Ms Smith that the hearing would go ahead. She refused to attend without her representative being present and so the hearing took place in her absence. She was then dismissed for gross misconduct.

The Tribunal seemed to accept that the fact that her representative was not available meant that Ms Talon could not attend the hearing and held that it was unfair of the employer to go ahead with it in her absence. No reasonable employer, it said, would have refused to postpone the hearing for a short period so that both the employee and her chosen representative would be available.

What the Tribunal did not consider – or even refer to – was the right to be accompanied set out in s.10 of the Employment Relations Act 1999 - that provides that where the employee's chosen representative is not available on the date set by the employer, the hearing can be postponed to a new date put forward by the employee which must be within no more than 5 working days of the original date. The postponement requested by Ms Smith did not meet this requirement, so the employer was not in breach of the right to be accompanied. Could it really be unreasonable for an employer to refuse a postponement when it was simply applying the rule set out in the legislation?

The EAT said it could. It pointed out that the statutory right to be accompanied and the right not to be unfairly dismissed were two separate things. Compliance with the right to be accompanied did not affect whether or not the employer had behaved reasonably. Further, since it was unreasonable for the employer to refuse to postpone the hearing, it followed that the employee was 'not at fault' in failing to attend. The finding of unfair dismissal was upheld.

At one level the EAT's decision is perfectly defensible. The fairness of a dismissal always depends on all the circumstances of the case and so merely complying with the right to be accompanied cannot mean that the employer must automatically be treated as having acted fairly. But surely it is at least a relevant consideration that the requested postponement is for a longer period than provided for in the right to be accompanied? Doesn't the fact that Parliament has set a five-day postponement period at least set some sort of reference point by which the employer's reasonableness can be judged? There may well be cases where a reasonable employer would wait for longer, but the fact that the employer is scrupulously complying with the statutory right to be accompanied must at least be a relevant consideration. The current Acas Code of Practice tells employers to allow a five-day postponement if the representative is not available but gives no hint that an even longer delay might also need to be accommodated. In this case the Tribunal didn't even refer to the right to be accompanied – or the Acas Code - and the EAT's conclusion that there was no need for it to do so, strikes me as going too far.

The other aspect of the case that concerns me is that the Tribunal seemed to think that the unavailability of her chosen representative meant that the employee could not attend the disciplinary hearing - and criticised the employer's decision to proceed in her absence. Going ahead with a hearing that the employee cannot attend is a big step for an employer to take. The central purpose of the disciplinary hearing is to hear the employee's side of the story and so the absence of the employee makes that very difficult. Where the employee is unwell a fair employer will bend over backwards to make suitable arrangements that will either allow the employee to attend or ensure that his or her response to the allegation is fairly heard.

But in this case the employee was not unwell, merely unwilling. Even if it was unfair of the employer to refuse a postponement of the hearing, and even if the employee was therefore disadvantaged due to the absence of her chosen representative, that does not mean that she was entitled to boycott the hearing altogether. There is no consideration in the case of whether or not other representatives were available and there was nothing to suggest that the charges were so complex or involved that only her existing representative would be able to assist her. The EAT's decision that the employee was entitled to refuse to attend the hearing without her chosen representative is likely to encourage other employees to follow suit – making it harder for employers to follow a fair process.

As it happens, my sense is that most employers in local government would have allowed the employee to postpone the hearing in this case. The employee did, after all, offer alternative dates that were just a few days outside the five-day period and it is probably better to accept a small delay rather than give the employee an excuse to claim unfair dismissal. But nevertheless, this is a worrying decision from the EAT which makes it harder to deal with an employee whose chosen representative is unavailable for a scheduled disciplinary meeting. If the five-day postponement in the right to be accompanied is simply irrelevant, then what kind of delay are employers expected to put up with? Neither the Tribunal nor the EAT give any guidance on that issue.

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