



XpertHR Weekly Podcast

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- Sarah Anderson: Hello and welcome to XpertHR Weekly with me, Sarah Anderson. A worker's statutory right to be accompanied by a trade union official or fellow worker at a formal disciplinary or grievance hearing might seem quite straightforward, but it can be confusing for employers. They may be unsure whether or not a meeting is in fact a disciplinary, or grievance hearing, and whether or not the right to be accompanied has been engaged.
- They may wonder if they can object to an employee's choice of companion. This last issue, on the choice of companion, cropped up in two recent cases. To discuss the right to be accompanied and these cases that deal with it, I'm joined by principal employment law editor, Stephen Simpson. Hi Stephen.
- Stephen Simpson: Hi Sarah.
- Sarah Anderson: So Stephen, tell us where the law on this right to be accompanied is set out. [0:00:48.2]
- Stephen Simpson: So a worker's right to be accompanied by a trade union official or fellow worker at disciplinary hearings, and also grievance hearings, is in s.10 of the Employment Rights Act 1999, and of course it's also in the Acas code of practice on discipline and grievance, which employers must follow in disciplinary procedures.
- Sarah Anderson: So the right to be accompanied applies to both disciplinary and grievance hearings, but we'll concentrate on disciplinary hearings today. How is a disciplinary hearing defined? [0:01:11.8]
- Stephen Simpson: So it's defined in the Acas code as a disciplinary meeting that could result in firstly, a formal warning being issued and secondly, the taking of any other disciplinary action. So, obviously, dismissal but also, for example, demotion, and thirdly, of course, the confirmation of a warning or some other disciplinary sanction, which basically means appeal hearings.
- Sarah Anderson: So are there disciplinary meetings to which the right doesn't apply? [0:01:32.8]
- Stephen Simpson: Yes. The main one is investigatory meetings. There's no statutory right to be accompanied at investigations.
- Sarah Anderson: But some employers may choose to offer that right at investigations? [0:01:41.8]

Stephen Simpson: Yes. There's no reason why an employer can't offer that right in a contract of employment. As we'll see in one of the cases we're going to look at, it may actually be an advantage for all concerned, including the investigators, particularly where the job is of a highly technical nature.

Sarah Anderson: Okay, so going back to disciplinary hearings, who can act as a companion for an employee? [0:01:58.7]

Stephen Simpson: So as I've just said, companions are limited to trade union officials and fellow workers, so technically employers are entitled to refuse requests if the chosen companion falls outside this definition, unless there are some special circumstances, such as when reasonable adjustments need to be made for a disabled person.

Sarah Anderson: Okay, so we've discussed the basic law and the right to be accompanied. Now tell us about the recent developments in this area. [0:02:20.2]

Stephen Simpson: So I'd highlight three that we could talk about today. So firstly, the Acas code was amended in March 2015 to take account of changing case law. Secondly, we've just reported a very interesting tribunal case on an employer vetoing the choice of companion. That case is called *Eleftheriou and Arriva North London*. And then thirdly, there was a High Court case in August 2015, *Stevens and University of Birmingham* on the choice of companion at investigatory meetings.

Sarah Anderson: Okay, so taking your points in the same order, why was the Acas code changed? [0:02:49.4]

Stephen Simpson: So accepted wisdom used to be that employers had some leeway to refuse the employee's choice of companion. In other words, the choice of companion had to be reasonable, even if the companion met the statutory definition of being a union official or fellow employee.

Sarah Anderson: So what was that assumption based on? [0:03:03.5]

Stephen Simpson: So it was actually suggested in para.15 of the old version of the Acas code, which says that to exercise the statutory right to be accompanied, workers must make a reasonable request. What is reasonable would depend on the circumstances of each individual case. And then, here comes the controversial bit, however it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing. So it was very clear that employers could turn down employees' choices in some cases.

Sarah Anderson: Okay, so tell us about the case that challenged the assumption that an employee's choice of companion had to be reasonable, in addition to satisfying the statutory definition. [0:03:38.0]

Stephen Simpson: So way back in July 2013, the EAT in *Toal and GB Oils* found that as long as the companion meets the statutory definition, there's no requirement for the identity of the employee's companion to be reasonable.

Sarah Anderson: But there is still a reasonableness requirement, is there not? [0:03:51.9]

Stephen Simpson: Yes. So under the legislation, the employee still has to reasonably request to be accompanied at the hearing.

Sarah Anderson: Do we have any guidance as to what that means? [0:03:59.5]

Stephen Simpson: So, unfortunately, the statute is silent on that. There's no explanation in the Employment Relations Act on when a request might not be reasonable. We do know that it relates more to the way in which the request is made, for example say an employee requests to be accompanied a few minutes before the disciplinary hearing is due to start by someone they know is unavailable, which I think does sometimes happen as a delaying tactic by employees.

Sarah Anderson: Okay, and the Acas code was amended to take account of the case of *Toal*, wasn't it? [0:04:25.5]

Stephen Simpson: Yes, the Acas code now simply states that employers must agree to a worker's request to be accompanied by any companion from one of these categories, ie a union rep or fellow worker.

Sarah Anderson: Okay. Moving on to the recent cases you mentioned earlier in this area, tell us about the first case. [0:04:42.0]

Stephen Simpson: So the first case is *Eleftheriou and Arriva North London*, in which a bus driver was invited to a disciplinary hearing. The invitation included a section for him to sign and return to confirm attendance with a space left for the choice of companion.

Sarah Anderson: And did he fill in the form? [0:04:55.4]

Stephen Simpson: No, in fact he simply turned up at the hearing with a Mr McConville, an accredited trade union representative for the RMT.

Sarah Anderson: Did the employer allow Mr Eleftheriou to be accompanied by Mr McConville at the hearing? [0:05:06.3]

Stephen Simpson: No. So managers had actually been instructed not to allow Mr McConville to accompany any of its employees at any disciplinary or grievance hearings. He allegedly behaved unreasonably during hearings, for example it was said that he had talked over others.

Sarah Anderson: So the disciplinary hearing took place without Mr McConville, Mr Eleftheriou's chosen companion? [0:05:23.9]

Stephen Simpson: Exactly, and so actually did his appeal hearing and really, to cut a long story short, Mr Eleftheriou was issued with two cautions which were upheld on appeal, all without the benefit of Mr McConville's assistance at the hearings.

Sarah Anderson: Now, did anyone else request to be accompanied by a Mr McConville? [0:05:39.3]

Stephen Simpson: Yes. Essentially the same thing happened to another bus driver, Mr Bowani, who was also refused his request to be accompanied by the same individual and he was actually dismissed in the end.

Sarah Anderson: And Mr Eleftheriou and Mr Bowani went onto bring claims together against the employer? [0:05:52.7]

Stephen Simpson: Yes, so they both brought claims that their right to be accompanied had been breached.

Sarah Anderson: What did the employer give as its reasons for the ban on Mr McConville's attendance at the hearings? [0:06:01.3]

Stephen Simpson: So the employer said that it had vetoed Mr McConville's attendance at hearings because he had caused trouble before. It said that he had a tendency to speak over others and would not allow others to talk. It also said that he had at times said insulting and inappropriate things to managers. That was according to the employer's version of events, anyway.

Sarah Anderson: What was Mr McConville's evidence at the tribunal hearing in response to these allegations? [0:06:21.7]

Stephen Simpson: So it turned out that he had been diagnosed with Autistic Spectrum Disorder, symptoms of which include finding it difficult to stop talking.

Sarah Anderson: And did the tribunal find this to be a sufficient reason to ban him from the hearings? [0:06:33.6]

Stephen Simpson: The tribunal found, no, and upheld both claimants' claims under the right to be accompanied. In essence, it said that once the employer knew that Mr McConville satisfied the statutory definition for companion, it had no right to veto their choice.

Sarah Anderson: And tell us about the other significant case that's here on the right to be accompanied. [0:06:49.0]

Stephen Simpson: So the other we should talk about really is *Stevens and the University of Birmingham*, in which a clinical academic was suspended from his research activities after irregularities and an internal investigation was undertaken.

Sarah Anderson: What did the investigation involve in this case? [0:07:03.0]

Stephen Simpson: So there was to be an initial investigatory meeting and under the disciplinary procedure he was allowed to be accompanied at investigatory meetings by an employee of the university or a trade union representative. So the contract actually went beyond what the statutory minimum requires.

Sarah Anderson: Now who was Professor Stevens's choice of companion at this investigatory meeting? [0:07:20.6]

Stephen Simpson: So he's not actually a member of a trade union but is a member of the Medical Protection Society (MPS), which is a medical defence association. He wanted to be accompanied by Dr Palmer, a member of the MPS. So in effect, Professor Stevens wanted a companion who didn't come under the terms of the disciplinary procedure.

Sarah Anderson: So someone who was neither a trade union official, nor a fellow worker. [0:07:42.0]

Stephen Simpson: Yes, but he did have a degree in medical law and ethics but no professional legal qualifications, and he was an expert in clinical trials. So you can see why Professor Stevens wanted him there specifically.

Sarah Anderson: Well was there any reason why Professor Stevens couldn't use a colleague? [0:07:56.4]

Stephen Simpson: Well his colleagues were all potential witnesses in the investigation and he didn't work in the office much, so that essentially meant that he wasn't close enough to any colleagues to be able to be comfortable with asking them.

Sarah Anderson: Now how did the employer respond to Professor Stevens's request. Did it allow Dr Palmer to accompany him at the meeting? [0:08:13.1]

Stephen Simpson: No. It refused, citing a reluctance to depart from its disciplinary procedure for fear of upsetting its approved trade union. The university didn't want to create a precedent for fear of opening the floodgates to similar requests.

Sarah Anderson: Okay, so we know that Professor Stevens went on to bring a claim against his employer. What sort of claim did he bring? [0:08:29.8]

Stephen Simpson: So he brought a breach of contract claim in the High Court, including a claim that the employer had breached the implied term of trust and confidence.

Sarah Anderson: And what did the High Court decide? [0:08:37.7]

Stephen Simpson: So it decided that the employer's refusal was patently unfair and damaged the relationship of trust and confidence between the employer and the employee.

Sarah Anderson: Now why did the High Court decide that, Stephen? [0:08:47.7]

Stephen Simpson: So it really said that all the cards were stacked against Professor Stevens because firstly, the university enlisted the support of an external HR consultant for the hearing. Secondly there were no colleagues he could ask and thirdly, he couldn't find anyone else with the necessary clinical know-how. And then fourthly, the High Court stressed also that if the allegations were upheld, that would have effectively ended his career.

Sarah Anderson: So in this case, the need to stick to the rules didn't outweigh Professor Stevens's rights? [0:09:12.6]

Stephen Simpson: Exactly. The university's justification for its stance was not sufficient to allow it to treat Professor Stevens so unfairly.

Sarah Anderson: What key lessons can employers take away from these cases? [0:09:21.5]

Stephen Simpson: So what I'd say, the way the law has been going, is that employers will need a very, very, very good reason to turn down an employee's choice of companion. For example, there would have to be some doubt as to a union rep's credentials, or their choice of a fellow worker informed to the employer at short notice would have to disrupt

the business. And then the other thing I'd say about the Stevens case is that, although it's very fact-specific, employers should be flexible with the employee where possible, for example go beyond the law where a failure to do so might lead to a breach of trust and confidence.

Sarah Anderson: Thank you very much for taking us through these interesting cases, Stephen.

Stephen Simpson: Thanks, Sarah.

Sarah Anderson: We have lots of resources on the right to be accompanied, including the cases we have discussed today and a how to guide dealing with a worker's statutory right to be accompanied at disciplinary and grievance hearings. That wraps up our look at the statutory right to be accompanied for this week and brings us to the end of this week's XpertHR Weekly. We are back again next week but until then, it's goodbye from us.