Unfair dismissal: Refusal to postpone disciplinary hearing when chosen companion unavailable

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In *Talon Engineering Ltd v Smith*, the Employment Appeal Tribunal (EAT) held that an employer's refusal to postpone a disciplinary hearing for two weeks to allow the employee's union official to accompany her made her dismissal unfair.

Talon Engineering Ltd, a medium-sized family business, initiated disciplinary action against Mrs Smith, a long-serving employee, over allegations that she had made inappropriate comments about a number of unnamed colleagues in emails to a business contact in another company. These included allegedly describing one unnamed colleague as a "knob". It was also alleged that Mrs Smith deleted some of these emails to cover her tracks.

Mrs Smith was suspended on 29 July 2016 and attended an investigatory meeting on 9 August. On 26 August, she was invited to a disciplinary hearing to take place on 5 September, which was postponed because Mrs Smith was ill and then on annual leave.

On 19 September, Mrs Smith was invited to a rescheduled disciplinary hearing to take place on 29 September. Mrs Smith's chosen companion, a regional official from Unite, was unavailable to represent her during the week beginning 29 September. The official's first available dates were 10, 13 or 18 October.

The employer stated that it would not postpone the rescheduled disciplinary hearing, on the basis that:

- a further delay would put strain on both Mrs Smith and the staff covering her work while she was on suspension; and
- it was entitled to reject the postponement request because the union official could not attend within five days of the date set.

However, Mrs Smith explained that she was not prepared to attend in the absence of her chosen companion. The employer proceeded with the disciplinary hearing in her absence and decided to dismiss her, on the grounds that:

- the email comments had the potential to bring the company into serious disrepute;

- the comments amounted to a breach of the company's bullying and harassment policy; and
- Mrs Smith had attempted to conceal the contents of some of the emails.

The employer upheld this decision on appeal and Mrs Smith claimed unfair dismissal in an employment tribunal.

The employment tribunal held that the failure to postpone the disciplinary hearing to enable the trade union representative to accompany Mrs Smith made the dismissal unfair. The tribunal went on to reduce Mrs Smith's basic and compensatory awards by 15% for contributory fault and made a further *Polkey* reduction of 15% to her compensatory award.

In making these reductions, the tribunal accepted that the emails included "highly critical remarks" about colleagues, but pointed out that Mrs Smith did not breach the company's bullying and harassment policy, as the comments were not made to the individuals concerned. The tribunal also criticised the employer for an insufficient investigation into the allegation that Mrs Smith had deleted some of these emails to cover her tracks.

The EAT rejected the employer's appeal. The EAT stressed that the circumstances of this case involve two distinct statutory provisions. On the one hand, s.10 of the Employment Relations Act 1999 provides for the right to be accompanied by a companion who meets the statutory definition. On the other hand, tribunals assess whether or not a claimant has been unfairly dismissed by reference to s.98(4) of the Employment Rights Act 1996.

The EAT held that the employment tribunal was entitled to:

- conclude that it was unreasonable for the employer to refuse to postpone the hearing for a short period of time after Mrs Smith returned from annual leave; and
- make no reference to s.10 of the Employment Relations Act 1999, so as not to make the mistake of conflating two quite different statutory provisions.

According to the EAT, once the tribunal decided that the employer had acted unreasonably in not postponing the hearing, it followed that Mrs Smith was not at fault for failing to attend the hearing. It would be unreasonable to require her to do so when the hearing had been unfairly proceeding in the absence of her chosen companion. This was a fundamental procedural defect that the employer did not cure at the appeal stage.

In upholding the employment tribunal decision, the EAT also rejected the assertions that the tribunal:

- substituted its views of the dismissal's fairness for those of a reasonable employer;
- erred in its approach to reducing compensation for contributory fault and under the *Polkey* principle; and
- was wrong to conclude that the email comments were not a breach of the employer's bullying and harassment policy.

Overall, the EAT approved the employment tribunal's decision that it was a "gross overreaction" to dismiss Mrs Smith for the emails, given her long and unblemished service and the short further postponement to the disciplinary hearing that was needed.

Implications for employers

Under the right to be accompanied, where a worker's chosen companion is unavailable for a scheduled disciplinary hearing, the worker can propose an alternative time that is both reasonable and within five working days of the original hearing. The employer must postpone the hearing to that alternative date and time, unless it is reasonable to reject the proposal.

To reduce the risk of unfair dismissal, employers may wish to reschedule a disciplinary hearing if the employee has compelling reasons for asking for a postponement. In this case, a combination of the employee's long service, her absences, the relative shortness of the delay and unavailability of her companion combined to make the dismissal unfair.

Holding a disciplinary hearing in an employee's absence should be a last resort. It may be an option if the employee has persistently failed to attend scheduled hearings for no good reason.