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EMPLOYMENT TRIBUNALS

Claimant: **Phyllis Appiah-Kubi**

Respondent: **The Abbeyfield Society**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **22 – 24 September 2021**

Before: **Employment Judge Housego**
Members: **Ms J Forecast**
Mr P Lush

Representation

Claimant: John Neckles of PTSC Union

Respondent: Caroline Jennings, of Counsel, instructed by Anthony Collins LLP, solicitors

JUDGMENT

1. **The claim of race discrimination fails and is dismissed.**

2. **The claim under S10 of the Employment Act 1999 succeeds.**

3. **The other claims are dismissed.**

4. **The Respondent is ordered to pay to the Claimant the sum of £854.**

REASONS

Basis of claim

1. The Claimant was called to a disciplinary hearing. No sanction was imposed. She says that the calling of the hearing by her manager was racially motivated, and the outcome showed that there was no case to answer. She describes herself as black African. The manager about whom she complains is white. She had a union representative, and raised a grievance about this. She says that the person taking the grievance hearing

stopped her representative from presenting her case. She says this unlawfully deprived her of her chosen representative, and was detrimental to her as she regards him very highly. She says that in doing so the Respondent tried to dictate to her which union she should join. The Respondent says that there was good reason to call the hearing, and that the outcome was that a training need had been identified. They say that the representative would not let the Claimant speak, and the person holding the grievance hearing wanted to hear the Claimant set out what her grievance was. They accept that this, and banning that representative from a subsequent hearing was a technical breach of the right to be accompanies, but say that it was justified in the circumstances, and caused her no detriment.

Law

2. Race is a characteristic protected by the Equality Act 2010[1]. The Claimant asserted that her treatment was direct race discrimination[2], and harassment[3], but withdrew the claim for direct discrimination as the same facts cannot be both direct discrimination and harassment.

3. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever was there less favourable treatment tainted by such discrimination. It is for the Claimant to show reason why there might be discrimination, and if she does so then it is for the Respondent to show that it was not. The two steps are not hermetically sealed, and eliding them is not impermissible. The Tribunal has applied the relevant case law[4], and has fully borne in mind, and applied, S136 of the Equality Act 2010. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice. The test for a claim for harassment differs from that for direct discrimination[5].

4. The right to have a trade union representative, the right to complain to an Employment Tribunal, and the right not to be subject to detriment are contained in S10-12 of the Employment Relations Act 1999[6].

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[1] S11 Equality Act 2010

[2] S13 Direct discrimination: (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

[3] S26 Equality At 2010

[4] The law is comprehensively set out in Royal Mail Group Ltd v Efobi [2021] UKSC 33 (23 July 2021)

[5] Set out fully in Bakkali v. Greater Manchester Buses (South) Ltd (t/a Stage Coach Manchester) (HARASSMENT - Religion Or Belief Discrimination) [2018] UKEAT 0176_17_1005

[6] S10-12 Employment Rights Act 1996

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),
(b) is to be permitted to address the hearing (but not to answer questions on behalf of the worker), and
(c) is to be permitted to confer with the worker during the hearing.

(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.

(4) If—

5. The relevant case law on this topic is Toal & Anor v GB Oils Ltd (Statutory Discipline and Grievance Procedures: no sub-topic) [2013] UKEAT 0569_12_2205.

Evidence

6. The Tribunal heard oral evidence from the Claimant. For the Respondent the Tribunal heard oral evidence from:

   6.1. Barbara Jones (who referred the Claimant to a disciplinary hearing);

   6.2. Boulla Gregoriades (who took the disciplinary hearing;

   6.3. Deborah Cutts (who took the first grievance hearing), and from

   6.4. Toni Aynsley (who took the resumed grievance hearing).

7. There was a bundle of documents of over 500 pages and an index to it, and a recording of the first grievance hearing.

(a) a worker has a right under this section to be accompanied at a hearing,
(b) his chosen companion will not be available at the time proposed for the hearing by the employer, and
(c) the worker proposes an alternative time which satisfies subsection (5),
the employer must postpone the hearing to the time proposed by the worker.

(5) An alternative time must—
(a) be reasonable, and
(b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

(6) An employer shall permit a worker to take time off during working hours for the purpose of accompanying another of the employer's workers in accordance with a request under subsection (1)(b).

(7) Sections 168(3) and (4), 169 and 171 to 173 of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992 (time off for carrying out trade union duties) shall apply in relation to subsection (6) above as they apply in relation to section 168(1) of that Act.

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).
(2) […]
(3) (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.[…]"

12 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(2) or (4), or
(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

(2) Section 48 of the M1Employment Rights Act 1996 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(2) or (4), or
(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

(4) Sections 108 and 109 of that Act (qualifying period of employment and upper age limit) shall not apply in relation to subsection (3) above.

(5) Sections 128 to 132 of that Act (interim relief) shall apply in relation to dismissal for the reason specified in subsection (3)(a) or (b) above as they apply in relation to dismissal for a reason specified in section 128(1)(b) of that Act.

(6) In the application of Chapter II of Part X of that Act in relation to subsection (3) above, a reference to an employee shall be taken as a reference to a worker.

Issues

8. The Case Management Order after a telephone hearing of 04 February 2021 contained the following list of issues:

"The issues the Employment Tribunal will be asked to decide at the final hearing are as follows.

Detriment under section 146(1)(ba) and (c) Trade Union and Labour Relations (Consolidation) Act 1992[7]

1 Did the Respondent subject the Claimant to the following alleged detriments

1.1 Preventing the Claimant from receiving the full benefit of Mr Neckles' experience and involvement in during a Grievance meeting held on 18/08/2020 including making use of trade union services under S.10 (2B) Employment Relations Act 1999. It is alleged that Mr Neckles was not given an opportunity to put forward the Claimant's grievance complaint, or sum up the Claimant's case, or respond on the Claimant's behalf to any view expressed during the 18 August 2020 meeting and was not given an opportunity to confer with her;

1.2 Preventing Mr Neckles from representing the Claimant at all from 27 August 2020;

1.3 Preventing the PTSC Union from representing the Claimant from 27 August 2020 to 17 September 2020.

2. Was the Claimant was placed at a substantial disadvantage or suffer significant prejudice in terms of the progress and ultimate determination of her grievance complaint.

3 If so, did the Respondent subject the Claimant to any of the alleged detriments for the sole or main purpose of:

3.1 preventing or deterring her from making use of trade union services at an appropriate time, or penalising her for doing so or

3.2 compelling her to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

4. If the Tribunal finds that the Claimant has suffered any detriment, would it be just and equitable to make any award of compensation to the Claimant with regard to the infringement of the Claimant's rights by the Respondent's act or any losses suffered by the Claimant that are attributable to the Respondent's act?

5. Did the Respondent make an offer to the Claimant per their email dated 27/08/2020 for the sole or main purpose of inducing the Claimant to be or become a member of any trade union or of a particular trade unions or of one of a number of particular trade unions? The email apparently stated that Mr Neckles and the PTSC associates were not permitted to represent the Claimant at the next or future meetings. Apparently, there was a further email on 17 September 2020 from the Respondent seeking to clarify that it was only Mr Neckles, not the PTSC representatives, that were not permitted to attend.

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[7] **146 Detriment on grounds related to union membership or activities**.
(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place] for the sole or main purpose of—
...
(ba)preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or]
(c)compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

Breach of section 10 Employment Relations Act 1999;

6 Did the Claimant make a reasonable request to be accompanied at the grievance hearing on 18 August 2020 and following 27 August 2020?

7 Did the Claimant's Trade Union Official/Representative meet the requirement of s.10 (3) (a) or (b) ERA 1999?

8 Did the Respondent permit the Claimant to be accompanied by her representative, Mr John Neckles, at the grievance hearing on 18 August 2020 and following 27 August 2020?

9 Did the Respondent permit Mr Neckles to address the grievance meeting held on 18 August 2020 in order to do any or all of the following in line with the Claimant's statutory rights under S.10 ERA 1999:

9.1 put the Claimant's case;
9.2 sum up that case;
9.3 respond on the Claimant's behalf to any view expressed at the hearing;
9.4 confer with the Claimant during the hearing.

10 Did the Respondent deny the Claimant her asserted statutory rights of accompaniment pursuant to s. 10 (2A) & (2B) Employment Relations Act 1999 and if yes, on what dates?

11 What is the appropriate remedy under S.11 (3) ERA 1999?

12 Is the Claimant entitled to an uplift in compensation for the alleged breaches referred to above in accordance with S.207A TULRCA 1992?

Detriment under section 12 Employment Relations Act 1999

13 Did the Claimant suffer any detriment on the ground that she exercised or sought to exercise her statutory right to be accompanied under S.10 by her Trade Union through its official Mr John Neckles at her Grievance Hearing held on the 18/08/2020? The detriments alleged are

13.1 The Respondent's decision contained in their email dated the 27/08/2020?

13.2 Deprived (and intended to continue to deprive) the Claimant of benefit accruable from having the services of an experienced representative during a Grievance meeting held on 18/08/2020, and any other Internal grievance or disciplinary hearing / procedures going forward;

13.3 Deprived the Claimant's preferred representative an opportunity to put forward the Claimant's Grievance complaint, or sum up the Claimant's case, or respond on the claimant's behalf to any view expressed during a hearing, or opportunity to confer with the Claimant;

13.4 As a result, the Claimant was placed to a substantial disadvantage or suffered significant prejudice in terms of the progress and ultimate determination of her Grievance complaint.

Racial harassment under section 26 Equality Act 2010.

14 The Claimant maintains that the Respondent subjected her to unwanted conduct by a disciplinary investigations meeting held on 03/06/2020, which determined that there was a case to answer, even though such decision is / was unjustified and overturned at disciplinary that there was no case to answer.

15 Insofar as the acts at paragraph 14 are found to have taken place:

15.1 did the relevant act amount to unwanted conduct?
15.2 was it related to the Claimant's race?
15.3 did it have the purpose or effect of violating Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Claimant?
15.4 was it reasonable in all the circumstances for it to have that effect?"

The hearing

9. The Tribunal listened to a recording of the meeting in question, made by the Claimant or her representative, because the transcript was not wholly agreed. Paragraph 18 of the witness statement of Barbara Jones was redacted as it contained new material which should have been the subject of application to amend the ET3. The Tribunal therefore paid no attention to its contents. All the witnesses affirmed, adopted their witness statements (some with minor amendments) and were cross examined by the representative of the other side. Written submissions were provided at the start of day 3 and Caroline Jennings and John Neckles spoke to them.

10. John Neckles raised two points which the Tribunal did not entertain:

    10.1. That there had been a series of previous attempts by Barbara Jones to have the Claimant disciplined. This was not pleaded, and is not in the list of issues. While touched upon in the Claimant's witness statement, to be considered by the Tribunal full details would have been needed to have been given earlier. It was not a matter which could properly be opened up only in re-examination.

    10.2. That the decision to exclude him had been racially motivated because he is black, as this was not in the list of issues and was not pleaded.

Submissions

11. I made a typed record of proceedings and the written submissions can be read by a higher Court if required. The main thrust of the submissions is below.

12. Caroline Jennings submitted that in referring the Claimant for disciplinary action there was nothing to show any connection with race. The Claimant had not acted as she should in the fire drill. The record she made showed no problem and there was one – one resident had to be fetched from the building by her. The consequences of someone not heeding a real fire alarm could be catastrophic for them. The Respondent needed to know of such an issue, and the Claimant had not told them as she should. Boulla Gregoriades had been open minded and accepted that the Claimant had not understood that this should have been done, partly as the policy referred to "impediments" (physical or mental) to the ability to exit the building unaided. There was no impediment to this resident doing so: she just needed to be told that it was not a test but a fire drill. Therefore, Boulla Gregoriades decided this was not a case of falsifying a record but an innocent mistake which had shown there was a training need. There was nothing to show any connection with race, particularly as the Claimant's two colleagues were black and there had been no problem for them.

13. It was accepted that there was a technical breach of S10 Employment Act 1999 but no detriment resulted so S146(1)(ba) of the Trade Union and Labour Relations (Consolidation) Act 1992 was not breached. There was no breach of S146(c) as although initially the Respondent had barred everyone from the PTSC Union, that was only for a matter of days, and the Claimant had done nothing before Toni Aynsley reversed that decision unprompted. In fact another representative from that union had represented the Claimant at the renewed grievance hearing.

14. John Neckles submitted that the actions of the Respondent had deprived the Claimant of his help, which was far superior to that of any other representative, which he said was plainly a detriment. They had first banned his whole union and suggested unions the Claimant should join instead. They had no reason to do this. The Claimant had a high regard for him, and wanted him to present her grievance. That was her right and she had been denied it. He had behaved entirely professionally, and done no more than the statute entitled him to do. He had been punctilious in making sure Deborah Cutts knew that he would not attempt to answer any questions for the Claimant. He had been polite throughout. He had not attempted to stop the Claimant speaking.

15. The referral to a disciplinary hearing by Barbara Jones was racial harassment. There was no case to answer, as the absence of sanction showed. So there was an ulterior motive, which was a racially motivated attempt to get the Claimant dismissed. There never was any fraud or falsification. There had been no impediment to the resident leaving the building, and the Claimant had not helped her to do so. That was all the Respondent's policy required to be noted. If the policy did not set out everything required that was not the Claimant's fault, yet she had been referred for a disciplinary hearing.

16. Barbara Jones was the person making the allegation and it was not right that she should investigate. This was further evidence of race discrimination.

Facts found

17. Abbeyfield runs supported housing, where people live independently. The Claimant was one of three staff at one of their homes. They were two Housekeepers (of whom the Claimant was one) and a General Assistant. All three are black, two of African heritage, the other Portuguese. The homes are not care homes, and are not staffed full time.

18. On 30 March 2020 there was a fire drill. Nothing untoward was noted at the time. One fire marshal was outside, the Claimant just inside, the building. One resident did not emerge, and another resident told the Claimant this. The Claimant went from the doorway back into the home, to that resident's room, which was unoccupied, then to the communal area where the resident was painting. The Claimant said it was a fire drill: the resident said she thought it was just a test of the fire alarm, and then the resident left to go to the assembly point.

19. In May 2020 a resident made a complaint – the substance is immaterial. In that complaint the resident also said that in the March fire drill the Claimant had not acted properly. Instead of watching and recording what happened she had gone and got one resident. Barbara Jones, who was the Claimant's line manager, was dealing with the complaint. She looked at the fire log, which showed nothing other than a successful fire drill.

20. The Claimant had worked at the home since 2011. Barbara Jones had been her manager (intermittently) for several years. There had been two previous complaints made by residents about the Claimant. In none of the three complaints did Barbara Jones refer the Claimant for disciplinary action. There was no disciplinary sanction on the Claimant at any time in her employment with the Respondent(which continues).

21. On 01 June 2020, at the same time as disposing of the complaint, Barbara Jones asked the Claimant to come to a disciplinary interview about this. The Claimant refused without a representative. Ms Jones said she was not entitled to one at an investigation meeting. The Claimant attended as asked, on 03 June 2020. While John Neckles attempted to show that the Claimant was entitled to a representative at that meeting, he accepted that the Acas Code does not so provide, and the Respondent's policy also provides for representation only at grievance, disciplinary and appeal hearings.

22. Barbara Jones prepared an investigation report, and referred this for disciplinary hearing, for falsifying fire records, breaching safeguarding and health and safety policies. On 08 June 2020 a disciplinary hearing was called, the allegation being gross misconduct, that is falsifying the fire records.

23. That hearing was on 15 June 2020. The outcome letter is very short, and was sent the following day, 16 June 2020. After a brief introduction it stated *"I am pleased to inform you that no formal disciplinary action will be taken against you on this occasion."*

24. Ms Gregoriades explained in her witness statement and oral evidence that she accepted that the Claimant had not done anything wrong intentionally, and that although she had been fully trained her misunderstanding was genuine. The Claimant referred to the policy which sets out that any difficulties in evacuation, either physical or mental, had to be reported so that there could be a personal evacuation plan for that person, and said that this individual had no such difficulty, exiting in good time without difficulty once she was told it was not a test, but a fire drill.

25. This was wrong, as people who do not respond to a fire alarm are every bit as much at risk as those who do respond but have problems in exiting the building. Where there are such people, the Respondent notifies the Fire Brigade (so that if there is a fire they will go and find the person).

26. Because the Claimant thought she was simply ensuring that the fire drill was a success, and not intending to falsify anything there was no sanction. Ms Gregoriades arranged for the Claimant to have more training and recommended that the policy be changed so that no one else could make the same mistake.

27. This was not a matter of *"no case to answer"* but where the allegation put had been answered. While Barbara Jones might have come to that conclusion herself, it was not her role to do so. It was her role to investigate, and refer and for a more senior manager to decide. Matters of fire safety (in a home for the elderly) are plainly of critical importance. It is also plain that a documented decision needed to be made about the situation at the fire drill (a person not responding to a fire alarm), which required it to be reported, and it was not.

28. On 03 July 2020 the Claimant then filed a grievance, through John Neckles. Deborah Cutts dealt with that, by a video link. It was first listed for 10 August 2020, but postponed to 20 August 2020 as John Neckles was not available on 10th.

29. To Deborah Cutts' surprise the Claimant and John Neckles both attended at the home for it. At a time of Covid-19 restrictions this was surprising, and thought to be in breach of government guidance at the time. At the time John Neckles was not someone who would have been permitted to enter the home. Very few people were. While the Respondent makes this point nothing turns on it so far as this claim is concerned.

30. John Neckles spoke for over 10 minutes setting out the legal background to the grievance. Deborah Cutts did not interrupt him. John Neckles then said he was to move on to setting out the substance of the grievance. Barbara Cutts said that she wanted to hear that direct from the Claimant. John Neckles said that she had asked him to articulate it for her. Deborah Cutts did not agree to this. After a short break for Deborah Cutts to take advice from human resources, there was some discussion, and Deborah Cutts maintained her position. John Neckles said that he would therefore not say more, as Deborah Cutts would not permit it. The Claimant read out a statement, prepared by John Neckles, that she would not continue, as she wanted him to speak for her. The meeting therefore ended.

31. It was reported by Deborah Cutts (supported by the note taker) that John Neckles was in effect taking command of the meeting, and stopped the Claimant from speaking, by hand gestures when she looked as if she might. The Claimant's evidence was that she most certainly wanted John Neckles to speak for her. She has the very highest of opinions of his abilities. It was clear that she wanted someone she regarded as articulate and knowledgeable to set out her grievance.

32. John Neckles was said to be intimidating in that meeting. The Claimant or John Neckles recorded it, and with the consent of Counsel for the Respondent, the Tribunal listened to it. While of course the non verbal communication was not visible, John Neckles was calm and courteous in what he said. There is little possibility of physical intimidation by body language in a video call, as Deborah Cutts accepted.

33. The Respondent then wrote to the Claimant to say that she could no longer have John Neckles, or anyone from his union, as her representative. The Claimant says this was because he was perceived as a stereotypical angry black man, and that had a white man done exactly the same he would not

have been banned. That is not in the list of issues, as it was not pleaded in this case. They suggested other unions she might go to. The Respondent does not recognise any union[8].

34. There was then internal discussion. It was decided that Deborah Cutts could not continue to hear the grievance, given that allegation. It was decided that Toni Aynsley would hear it. She is one of four senior human resources people in the Respondent. While she was the line manager of the human resources advisers who had advised Deborah Cutts, she had no personal involvement with the matter. She is a manager and so said that she was of sufficient seniority properly to take the grievance hearing. The Tribunal agrees.

35. Toni Aynsley decided that it was not right to prohibit the use of the whole union (on the basis that they would all be likely to take the same approach). On 17 September 2020 she wrote to the Claimant (288). She took at face value what Deborah Cutts and the notetaker had told her. She said that while she noted that the Claimant did not agree, it was the perception of Deborah Cutts and the notetaker that John Neckles acted in a way that suppressed her attempts to participate in the hearing, and that these two had felt concern for her. She said that she also had a duty of care to Deborah Cutts. She maintained the bar on John Neckles representing the Claimant at the hearing.

Conclusions

Race Discrimination

36. The Tribunal dealt with this first as it is the most important issue.

37. There is nothing in the facts narrated above from which any Tribunal might think an inference could be drawn that the race of the Claimant was of any relevance to Barbara Jones. There was a real issue to be dealt with. This was not “no case to answer” (the use of the phrase by a human resources person in an email of 22 June 2020 (378) is plainly wrong). There was a case to answer, and it was answered. It is unfortunate that the letter saying there was no sanction is very brief and gives no reasons, and it is not right to carry out investigations after the hearing without telling the person affected, as did Boulla Gregoriades. However, these are unimportant, because what was found was to the Claimant’s advantage, and because it is apparent that Boulla Gregoriades approached the matter with an open mind, carefully evaluated what the Claimant said, and having done so found her genuine.

38. There had been no previous referral for disciplinary action although there had been other complaints. If, as the Claimant says, Barbara Jones was out to get her dismissed, there had been no previous indication of it in several years. While the Claimant says there were previous examples of investigations there had never before been a reference to a disciplinary hearing.

[8] John Neckles cross examined asserting that there was at least one recognised union. This stems from the use of the word “recognised” in error by the human resources assistant writing the letter, when intending to refer to an “accredited” union official.

39. The matter of fire safety, effective fire drills (the whole point of which is to make sure there is an effective system, and to deal with any issue) and full reporting in line with proper policies is self-evidently a matter where an issue like the one arising needs to be addressed formally. One can all too easily imagine the consequences for the resident and the Respondent if a fire arose, the alarm was raised and the resident in question took no action. If the burden of proof had shifted to the Respondent, it is certain that it is met.

40. There is also the background fact that all three employed at the home are black. If race was the motivation it is of note that there was no issue for the others. (The Tribunal has noted (and discounted) the hypothetical possibility that Barbara Jones was prejudiced against all three on the basis of race, but more so against the Claimant for other reasons.)

41. It was proper for Barbara Jones to investigate. She was not the accuser, as John Neckles submitted. She learned of an issue, investigated properly, and submitted a report for others to decide. The issue was of sufficient consequence to warrant a disciplinary investigation and report. There was no conflict of interest, as John Neckles asserts.

42. The entire disciplinary process was conducted professionally. There was no delay. The Claimant was not entitled to be represented at the investigation stage. She chose not to be represented at the hearing. Boulla Gregoriades is senior to Barbara Cutts and a proper person to take the hearing. She made a fair decision.

43. The answers to the questions posed in the list of issues (14 and 15) are that the referral was unwanted conduct which was unrelated to the Claimant's race. It did not have the purpose or effect of violating Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Claimant. Any disciplinary process is stressful. There was nothing about this process that was any more than the usual stress for the Claimant. (There is no representation point as the Claimant did not seek to be represented at the disciplinary hearing.) The last issue (15.4) does not arise.

<u>Detriment under section 146(1)(ba) and (c) Trade Union and Labour Relations (Consolidation) Act 1992</u>

44. The Respondent prevented John Neckles from participating in the grievance meetings. He was not allowed to articulate the Claimant's grievance in the first and precluded from attending the second. The Respondent prevented the PTSC union from representing the Claimant from 27 August to 17 September 2020. (Issue 1.)

45. The Claimant was not placed at a significant disadvantage as a result. John Neckles views himself as a doyen of representatives, such that no one, not even his twin brother, can come near the standard of representation he provides. He points to the transcript of the meeting attended by Francis Neckles to contrast with his own approach to matters. He says that the loss of his skills was a substantial disadvantage and was substantial prejudice to the Claimant in the determination of her grievance. (Issue 2)

46. John Neckles' self perception (from the vocabulary and syntax employed in the correspondence it is apparent that he is the author of the emails sent by the Claimant) may or may not be justified, but the Tribunal finds that the outcome of the grievance hearing chaired by Toni Aynsley was entirely appropriate. It is hard to see how the outcome would have been any different, as the Tribunal's findings accord entirely with that outcome, and the Claimant has been represented by John Neckles throughout this case.

47. It was accepted by the Claimant that John Neckles had input into the written submission at the hearing on 17 September 2020 (and the Tribunal finds that in reality he was its author) and so the substance of what he wished to be considered was before Toni Aynsley. The Tribunal found her a fair minded individual, and so the Claimant retained John Neckles' input to the grievance hearing, even if not orally.

48. Nor did she appeal the outcome.

49. Issue 3.1 therefore does not fall to be decided, because there was no detriment.

50. The Respondent did not seek to compel the Claimant to join any particular union. It does not recognise any union. All it did was for a period of 10 days say that the PTSC Union could not represent her, and give her the details of two big unions she might like to choose instead. Then Toni Aynsley, on taking over, rescinded that and worked with Francis Neckles of PTSC Union. (Issue 3.2)

51. There is therefore no compensation applicable, as there was no detriment, and no loss suffered (issue 4).

52. Issue 5 – the ban on the PTSC Union was not, the Tribunal finds, for any reason other than that Deborah Cutts found John Neckles hard to deal with. It was not to try to induce her to join another union. This is inherently unlikely in any event, since there is no union recognised by the Respondent.

<u>Breach of section 10 Employment Relations Act 1999</u>

53. The Claimant made a reasonable request to be accompanied at the grievance hearings of 17 and 27 August 2020 (issue 6).

54. John Neckles met the requirements – the Respondent accepts this (issue 7).

55. The Respondent permitted the Claimant to be accompanied at the meeting on 17 August 2020, but not that on 27 August 2020 (issue 8).

56. The Respondent did not permit John Neckles to address the grievance hearing on 17 August 2020 to put the Claimant's case. Necessarily (as the meeting did not get to that point by reason of that refusal) the Respondent did not permit him to sum up the case or to respond to any view expressed at the hearing. He was permitted to confer with the Claimant (issue 9).

57. The Claimant was, accordingly, denied her rights under S10(2A) (conceded by reason of *Toal*) and S10(2B) of the Employment Relations Act 1999 (issue 10).

58. Issue 11 is compensation. S11(3) limits compensation to two weeks' pay for breaches of S10. The claim form gives the Claimant's pay as £1852 a month, which is £427.38 a week. The maximum award is therefore £854.76.

59. There is a constructional issue. Is a "complaint" the ET1, or is it each occasion there is a breach? If the former, the matter could be circumvented by multiple ET1s being submitted. The Tribunal decides that the mischief addressed by this legislation relates to every meeting. It does not seem likely that Parliament intended to have the same maximum remedy whether there was a single instance or a multiple failure to respect the employee's rights.

60. It is relevant that while Toni Aynsley reviewed matters and revoked the ban on the whole union she maintained the ban on John Neckles. There were, then, two decisions on different days.

61. The Tribunal decided that the maximum possible award applied to each instance, and so the maximum award in this case is £1709.52.

<u>Considerations as to award</u>

62. It is plain that much of the Claimant's witness statement, and her communications were authored by Mr Neckles. Its language and content are such that the Claimant could not have authored it. Much of it is a paean of praise for Mr Neckles, his ability experience and knowledge, and the Claimant would simply not know of all that, or be able to express it in that way. She was, and is highly impressed by him. He has a style which is, in his word, unique. Deborah Cutts found that challenging.

63. The Tribunal has no doubt but that John Neckles was courteous throughout the hearing on 17 August 2020. Deborah Cutts felt he was trying to chair the meeting himself. John Neckles responds entirely professionally to direction from a chair (he demonstrated this in the hearing). He was not intimidating in the hearing with Deborah Cutts. He was, doubtless, somewhat of a challenge for her, but there was no reason from his behaviour why he could not continue. He should have been allowed to set out the Claimant's case, perhaps with a time limit. Then questions asked by Deborah Cutts of the Claimant. John Neckles clearly set out in the hearing that he fully understood that he could not answer questions for the Claimant, and the Tribunal has no doubt but that he would not have done so.

64. John Neckles' approach was legalistic: Deborah Cutts could not deal with that (which is not a criticism). It was entirely right to adjourn and she should either have had human resources support at the resumed hearing, or hand over to Toni Aysnley, as she did. It was not her fault that human resources did not advise correctly.

65. There was no "duty of care" to Deborah Cutts arising from John Neckles' presentation, and if there was, starting again with another chair would deal

with that. It did not require him to be banned.

66. The Respondent said they had concerns about whether the Claimant was in some way being overborne by John Neckles. She has always been absolutely clear that she wants him to represent her. It is not for the Respondent to say that they think it an unwise choice. It is, in any event, her grievance and it is for her to deal with as she thinks fit.

67. The Respondent does not have the right to refuse to accept a Claimant's choice of representative because they feel that he is not acting in her best interests. The Claimant has been consistent in saying that she wanted him.

68. It is relevant that this was not motivated by anti Union sentiment, nor by any desire that the Claimant be deprived of competent representation.

69. The Tribunal noted that other first instance decisions were cited as examples, both involving John and Francis Neckles. The Tribunal found them of no help, basing its judgment on the facts of this case.

70. The Tribunal decided that the 1st meeting went some way, with John Neckles as representative. It was right to adjourn, but the adjournment was because of the refusal to allow John Neckles to do continue to represent – he was allowed to attend, so it is not a case of refusal to allow a representative.

71. This was in reality a failure by human resources to appreciate that there was case law on this somewhat esoteric point, and they got it wrong.

72. The Tribunal noted that for the second hearing the Claimant was allowed the same union, and John Neckles had input into that hearing.

73. So, in both cases this is not a case where the maximum is warranted. The Tribunal decided on one week for each instance, so £854 in total.

74. The Tribunal decided that no uplift was appropriate. This was not an "anti-union" matter. There was no intention to deprive the Claimant of competent representation. Quite the reverse is the case. They made an error, but there is nothing in the facts that should lead to an uplift (issue 12).

Employment Judge Housego

24 September 2021