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ACAS consultation on the revision of paragraphs 15 and 36 of the ACAS Code of Practice on Disciplinary and Grievance Procedures

Response from the Employment Lawyers Association

7 January 2014

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The Employment Lawyers Association ("ELA") is a non-political group of lawyers working in the field of employment law. Our membership includes those who represent claimants and respondents in courts and employment tribunals. ELA does not comment on the political merits of proposed legislation, rather making observations from a purely legal standpoint. ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

The Legislative and Policy Committee of the ELA set up a sub-committee under the chairmanship of Paul Statham of Pattinson Brewer Solicitors to consider and comment on the ACAS consultation on the revision of paragraphs 15 and 36 of the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code"). Its report is set out below. A full list of the members of the subcommittee is annexed to the report.

1. The recent decision of *Toal and Anor v GB Oils* UKEAT/0569/12/LA and *Roberts v GB Oils Ltd* UKEAT/0177/13/DM found that the word "reasonably" in section 10(1)(b) of the Employment Relations Act 1999 ("ERA 1999") applied to the employee's request to be accompanied and not to the identity of the chosen companion. According to this judgment the employer has no right to turn down a chosen companion on the basis that the choice of the companion is unreasonable. However, in order to obtain any compensation for the breach of the right which is other than nominal (and which is limited to a maximum of two weeks' pay by Section 11(3) ERA 1999), the employee will have to show a detriment – which will not always be easy, particularly where the hearing has gone ahead with a satisfactory replacement as a companion.

2. Mr Justice Mitting in *Toal* did not have to consider sections 207 and 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992") which requires an Employment Tribunal to take into account any relevant ACAS Code of Practice. This is because Schedule A2 TULRCA 1992 does not list a Section 10 ERA 1999 claim as being subject to Section 207A so the Tribunal was not obliged to consider the interaction. Section 207A permits a tribunal to increase the compensation awarded for such claims where there has been an unreasonable failure by the employer to comply with a Code of Practice (which would include the ACAS Code).

3. Mr Justice Mitting in *Toal* rejects the respondent's submissions about the significance of the current ACAS Code to the issue of whether a respondent could reject an employee's chosen companion. He stated that an ACAS Code "is not an available aid to the construction of a statute…" The Court must construe the language of the statute but ELA think that he could have acknowledged the existence of Section 207 TULRCA 1992. This states that the ACAS Code is "admissible in evidence, and any provision of the Code which appears to the tribunal…to be relevant to any question arising in the proceedings shall be taken into account in determining that question". If the facts in *Toal* were different and it was a disciplinary rather than a grievance hearing that led to a dismissal and a tribunal claim for unfair dismissal, the provisions of the ACAS Code would have been relevant in determining procedural fairness and an unreasonable failure to comply with the ACAS Code could result in an uplift in compensation of up to 25% pursuant to Section 207A TULRCA 1992.

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4. In another very recent decision which involved the same employer and the same rejected companion, *Roberts v GB Oils Ltd* UKEAT/0177/13/DM, the EAT recognised the relevance of the ACAS Code but nevertheless followed the earlier decision of *Toal* in terms of the statutory construction of Section 10 ERA 1999, despite reservations as to its effect. The EAT did observe, however, that an employer might have a "justified objection" to a particular individual and that there was a safeguard for an employer against a worker's "wanton selection of a companion as set

out in Section 11(3) ERA 1999", as an employment tribunal could in such a situation reduce compensation to the worker to nil.

5. The ruling in *Toal* is confined to the meaning of a "reasonable request" to be accompanied pursuant to section 10 of the ERA 1999. It did not touch on the issue of the procedural fairness of a dismissal and therefore it is suggested that the position in that respect remains unaltered. As such, it would not necessarily be procedurally unfair for an employer to refuse a chosen companion and may not of itself be expected to trigger a finding of unfair dismissal (depending on the circumstances). For example, it might not be unfair to refuse a request for a particular individual where the presence of that individual might prejudice the hearing or involve a conflict of interest or where another no less capable or suitable representative was secured to represent a claimant. Likewise the breach of any ACAS Code requirement for a free choice of companion might be reasonable in such circumstances and therefore avoid uplift to any award under Section 207A TULRCA 1992.

6. Some members of the sub-committee considered that amendment to the ACAS Code should not expose employers to the risk that a refusal to allow a particular companion could render a dismissal procedurally unfair in circumstances when the dismissal would not currently be unfair for this reason (for example, where the refusal was justified on grounds of conflict of interest). These members considered that, if it is not made clear in the ACAS Code that the new definition of reasonable request only relates to the ERA 1999 rights, tribunals might wrongly conclude that the reference to a free choice of companion in the ACAS Code now forms part of the requirements of a fair procedure, given the obligation for tribunals to take the ACAS Code into account under Section 207 TULRCA 1992. They also felt that there was a risk that tribunals might also wrongly conclude that denying a free choice of a companion could not be a reasonable breach of the Code in any circumstances; a failure to make these points clear could mislead workers in their understanding of the consequences of making a particular request and give rise to uncertainty for employers. However, other members of the sub-committee felt the redraft of paragraphs 15 and 36 struck

the right balance to bring the ACAS Code in line with the decision in *Toal* (and *Roberts*) and further clarification was unnecessary. They considered that tribunals were unlikely to feel their decision about what was a fair procedure was fettered by the redrafted ACAS Code.

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7. The sub-committee did think the redrafted paragraphs 15 and 36 should be amended in the following ways:-

a. The wording on what might make a request unreasonable could be tightened and clarified to state that should the employee subsequently bring a dismissal claim referring to the employer's refusal, it would not necessarily make the dismissal unfair nor lead to an uplift in any compensation awarded. It would be for the tribunal to decide that the failure rendered the dismissal unfair and/or was an unreasonable breach of the ACAS Code.

b. It might be useful to specify that the examples that are provided for the matters that an employee should bear in mind when selecting a companion is a non-exhaustive list. The ACAS Code might also suggest that a worker consider whether a companion with a history of disruptive behavior would best serve the interests of the worker (as per the facts of *Toal* and *Roberts).*

c. The revised wording for Paragraphs 15 and 36 of the ACAS Code could also consider including a recommendation that, when employees make requests, they should consider to whom they are made and that it may be relevant to whether a request is reasonable if the worker ignores an employer's policy or procedures specifying the manner and to whom a request should be made without good reason.

d. The ACAS Code could usefully explain whether the level of sanction or seriousness of grievance is relevant to whether a request to have a companion is reasonable.

e. The ACAS Code could also set out whether a worker can effectively agree to withdraw his/her request to have a particular companion, if the worker is satisfied that the employer is justified in objecting to the companion and a proposed alternative is acceptable to the worker. This was suggested by the EAT in *Roberts* as a possible argument but was not pursued in that case on the facts.

The members of the sub-committee were:-

Paul Statham Pattinson & Brewer
Robert Davies Dundas & Wilson LLP
Felicia Epstein Pattinson & Brewer
Anna Henderson Herbert Smith Freehills LLP.

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