ACAS consultation

s.10 ERA99 right to be accompanied by a companion of a worker's choice

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Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 29 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

Toal was a case which was pursued and won by Thompsons on behalf of Unite the Union and we are pleased to be able to contribute to this consultation. We believe that is useful to set out the key passages relevant to this consultation as a precursor to their analysis.

The existing wording is:

"To exercise the right to be accompanied a worker must first make a reasonable request. What is reasonable will depend on the circumstances of each individual case. However it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing was available on site."

The EAT's criticisms of this in Toal[1] were:

"We will first take Mr Gloag's first point that the word 'reasonably' in s.10(1)(b) applies both to the choice of representative and to the requirement to be accompanied. Like the tribunal, we reject this submission. We agree with the tribunal that Parliament could easily have provided by express words for requiring the choice of companion to be reasonable, as well as the requirement to be accompanied. The fact that it did not do so, and then in the next subsection obliged an employer to permit the worker to be accompanied by a companion chosen by the worker, is a strong counter indicator to Mr Gloag's contention. It is easy to understand why Parliament would have legislated as it did. This is a right conferred upon the worker. It is possible to conceive of circumstances in which an employer might wish to interfere with the exercise of that right without proper reason in a manner that would put the worker at a disadvantage. Consequently, Parliament has, in our view, legislated for the choice to be that of the worker, subject only to the safeguards set out in subsection (3) as to the identity or the class of person who might be available to be a companion."[2]

[1] Toal & another v GB Oils Ltd [2013] IRLR 696, EAT
[2] Toal supra at paragraph 16 (emphasis added)

and

"… if the ACAS guidance is to be accepted, it creates problems of its own. By what standard is reasonableness to be judged? Who is to determine that the chosen companion would prejudice the hearing? If it is the employee and his reasonableness which is to be assessed, then there will be little protection for an employer. If it is for the employer, then that goes against the clear words of s.10(2)(a) which gives to the employee the apparently unfettered right to choose, subject only to the companion being within those identified in subsection (3). If it is for the employer to decide what is reasonable, then by what standard is the employer's decision to be judged should it come to be challenged in the employment tribunal?"[3]

The suggested revised wording is:

"To exercise the right to be accompanied a worker must first make a reasonable request. What is reasonable will depend on the circumstances of each individual case, although workers are free to choose any fellow worker, trade union representative or official as set out in paragraph 14 (or 35) as a companion. In making their choice, however, workers should bear in mind the practicalities of the arrangements. Thus, it may neither be sensible nor helpful to request accompaniment by a colleague from a geographically remote location when someone suitably qualified is available on site; nor to be accompanied by a colleague whose presence might prejudice the hearing or who might have a conflict of interest. A request to be accompanied does not have to be in writing or within a certain time frame but workers should consider how they make their request so that it is clearly understood and provides enough time for it to be considered by their employer."

Comments on the wording of revised paragraphs 15 and 36

In our view the EAT drew a clear distinction between the request to be accompanied itself, and the choice of companion. The former should be reasonable, but the latter need not be. Indeed, if we understand the EAT correctly, three key elements can be discerned:

1. Since the choice of companion is the worker's absolute statutory right, that choice can be as unreasonable, disruptive and self-defeating as the employee wishes;
2. The employer has no lawful basis for seeking to influence or fetter that choice, other than to insist that the companion fall within the categories contained in s.10(3)[4]; and
3. Neither the employer, nor the Employment Tribunal, may validly criticise that choice for being unreasonable.

We recognise that ACAS may issue Codes of Practice containing such practical guidance as it think fits with the aim of promoting the improvement of industrial relations.[5] We are also mindful that that guidance is admissible as evidence in the Employment Tribunal, and may be taken into account by the tribunal in deciding any issue which they think the guidance is relevant to.[6]

Thompsons recognise that the 3 key elements above sit uneasily with the role and relevance of the statutory Code of Practice. However, and with regret, we feel the proposed draft does not resolve the Toal criticism.

[3] Toal supra at paragraph 21
[4] s.10(3) Employment Relations Act 1999
[5] s.199(1) Trade Union and Labour Relations (Consolidation) Act 1992
[6] s.207 Trade Union and Labour Relations (Consolidation) Act 1992

The guidance contained from the words 'In making their choice' onwards is undoubtedly sensible. However, we feel that the phrase 'free to choose any fellow worker (etc)' does not adequately emphasise the full scope of the three key elements. As such the guidance, when read in a normal and natural way, acts as a limiter and simply recreates the same problem. We believe that this can be resolved by referring to the three key elements. It might become:

"To exercise the right to be accompanied a worker must first make a reasonable request. What is a reasonable request will depend on the circumstances of each individual case. Workers are free to choose any fellow worker, trade union representative or official as set out in paragraph 14 (or 35) as a companion and may alter that choice if they wish. This choice is entirely up to the worker, and employers have no right to influence or limit it. Although that choice is not subject to the statutory requirement of reasonableness, workers should bear in mind the practicalities of the arrangements. Thus, it may neither be sensible nor helpful…"

In our view, this re-wording would reconcile both the Toal criticism, and the aim for it to be a practical industrial guidance. It would also address the other aspect of the Toal decision, namely that a worker can change their chosen companion if they wish and without waiving their ability to change their choice again.

Comments on what "making a reasonable request" might or might not involve

It is sometimes easier to view such a question in reverse. Thus, if we consider when it could legitimately be unreasonable to request a companion no examples spring to mind. As Martin O'Neill MP put it when the bill which became the 1999 Act was being proposed for a second reading,[7]

It is … essential that those who are vulnerable should have the right to be accompanied by a nominated person in hearings. The provision will give those individuals confidence and much-needed assistance.

Mitting J observed in Toal[8]

The employee must request to be accompanied at the hearing. … The request must, however, be reasonable. Precisely why Parliament put in a qualification requiring that the request be reasonable is not entirely clear to us.

In our view reasonableness must relate not to the existence or not of the request, but how that request is conveyed. In this context, and in light of Toal, it could only be relevant to one of two issues:

1. Whether reasonableness, or the lack thereof, is intended to be the touchstone of whether a worker can exercise their right or not; or
2. Whether reasonableness should be used in assessing the level of compensation to be awarded for denying that right.

It makes no sense to provide a worker with a right to protect them from employer abuse, and yet give their employer the ability to deny them that right at a cost of two week's pay at most.[9] This may be self-evident, but when one accepts the freedom given about choice of companion this becomes even more persuasive. Thompsons therefore does not accept that the 'touchstone' approach can be right.

[7] Employment Relations Bill, HC Deb 09 February 1999 vol 325 at Column 157 of Hansard
[8] Toal supra, paragraph 12
[9] s.11(3) Employment Relations Act 1999

We can however see situations where the unreasonable exercise of that right could be reflected in the amount of compensation. There may be circumstances where a worker is fully aware of the right, has time to exercise it, yet does not do so until the disciplinary hearing itself thereby leading to wasted time and money. A tribunal may well consider them less deserving of the maximum compensation than a worker who exercises the right that late due to ignorance, or due to contumelious employer behaviour.

However, in our view this leads to the conclusion that despite no doubt ACAS's best intentions no guidance is in fact required either way: if the touchstone analysis is right then there is no industrial context in which guidance is required; and if the compensation analysis is right then guidance in a Code of Practice would be an unjustifiable fetter upon judicial decision-making.

In any event, the real answer to this conundrum may be in the observation that there is not a single reported decision on this point in the 15 years since the legislation was passed which suggests there is no problem to be addressed by guidance. Thompsons respectfully suggests therefore that this is a matter that does not require ACAS's attention at this time.

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