**ACAS Consultation: on the revision of paragraphs 15 and 36 of the Code of Practice on Disciplinary and Grievance Procedures**

This is the response of the Employment Committee of the Birmingham Law Society.

* It appears ACAS have balanced these amended paragraphs well by pointing out the freedom to choose but also suggesting the limitations on that freedom which employees should consider when making their choice.
* The encouragement to workers to consider practicalities, and the effect of an unreasonable choice, is welcomed and may assist in reducing potential abuse of the effect of the decision in **Toal**. Consideration might also be given to a reminder that a determination of what is fair or unfair in the context of a dismissal (i.e. a decision under s.98(4) ERA 1996) may take account of the (un)reasonableness of the worker’s selection/(un)reasonableness of an employer’s refusal in respect of a particular selection.
* What is meant by “making a *reasonable* request” is unclear. It is noted that in **Toal** (at paragraph 12) it was found that this qualification was included by Parliament to “serve some purpose” and whilst the EAT suggested that the nature of that purpose would be addressed later in the decision, it did not obviously go on to do so. It seems that there are two possible meanings: (i) it may be that the request to be accompanied *per se* might, in some circumstances, be found to be unreasonable, such that the right does not arise. However, this is likely to be a rare scenario; or (ii) the manner/timing of the request might be unreasonable (as opposed to the choice of companion). An example might include a situation such as a late request, for example at a hearing that had been adjourned on several other occasions for other reasons. This is perhaps already covered by the proposed re-wording.
* It is difficult to foresee examples of unreasonableness in the request that does not have the potential to conflict with the decision in **Toal**, i.e. with the worker’s right to select the companion. Accordingly, the guidance should perhaps include a specific encouragement to employers to accommodate a worker’s selection wherever possible.

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