



LABOUR RELATIONS AGENCY CONSULTATION

**on the revision of paragraphs
103 and 104
of the
LRA Code of Practice on
Disciplinary and Grievance
Procedures**

Introduction

1. In May 2013, the Employment Appeal Tribunal's ruling in the case of Toal and anor v GB Oils (which concerned the refusal of GB Oils to allow Mr Toal and a colleague to be accompanied at a grievance hearing by a companion of their choice) suggested that Acas' Code of Practice on disciplinary and grievance procedures did not accurately reflect the law on the statutory right of accompaniment.
2. In Northern Ireland, Article 12 of the Employment Relations (Northern Ireland) Order 1999 states that workers have a right to be accompanied at a disciplinary or grievance hearing where they are invited to such a hearing and make a reasonable request. What constitutes a reasonable request is not defined in the Order but, in its Code of Practice on Disciplinary and Grievance Procedures, the Agency states that it would not normally be reasonable for a worker to insist on being accompanied by a companion who would have to come from a remote geographical location if someone suitable and willing was available on site, or whose presence would prejudice the hearing.
3. In the EAT's ruling in Toal, however, it was stated that if a worker has been invited to a disciplinary or grievance hearing then, provided they have made a reasonable request to be accompanied at the hearing, they have the right to choose whoever they like as a companion - so long as the companion is from one of the categories set out in Section 10 of the Employment Relations Act 1999 (Article 12 of the Employment Relations (Northern Ireland) Order 1999), i.e. a fellow worker, a person employed by a trade union or a trade union representative who has been certified in writing by the union as having experience of, or having been trained in, acting as a worker's companion at disciplinary and grievance hearings.
4. Given this ruling, the Agency recognises that the current wording in its Code suggests an erroneous interpretation of the law and has therefore decided to amend the Code to take account of the EAT's ruling.

The Labour Relations Agency Code and the right of accompaniment

5. The right of workers to be accompanied at disciplinary and grievance hearings is dealt with in Section 3 of the Code of Practice. Guidance on making a reasonable request to be accompanied and the choice of companion is covered in paragraphs 103 and 104. The current wording is as follows:

"103 Whether a request for a companion is reasonable will depend on the circumstances of the individual case and, ultimately, it is a matter for the courts and tribunals to decide. However, when workers are choosing a companion, they should bear in mind that it would not be reasonable to insist on being accompanied by a colleague whose presence would prejudice the hearing or who might have a conflict of interest. It would not be reasonable for a worker to ask to be accompanied by a colleague from a geographically remote location

when someone suitably qualified was available on site. The request to be accompanied does not have to be in writing.

104. *The companion may be:*

- *a trade union official who is employed by a trade union; or*
- *a lay trade union official, as long as he/she has been reasonably certified in writing by his/her union as having experience of, or having received training in, acting as a worker's companion at disciplinary or grievance hearings. Certification may take the form of a card or letter;*
- *a fellow worker (i.e. another of the employer's workers)".*

Proposed amendment

6. Having considered the EAT judgement carefully the Agency is proposing to amend the wording of paragraphs 103 and 104 to read as follows:

"103 Whether a request for a companion is reasonable will depend on the circumstances of the individual case and, ultimately, it is a matter for the courts and tribunals to decide. Workers should consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative (see 104 below). A request to be accompanied does not have to be in writing or within a certain time frame but a worker should provide enough time for the employer to accommodate the companion's attendance at the meeting.

104. The chosen companion may be:

- a trade union official who is employed by a trade union; or
- a lay trade union official, as long as he/she has been reasonably certified in writing by his/her union as having experience of, or having received training in, acting as a worker's companion at disciplinary or grievance hearings. Certification may take the form of a card or letter;
- a fellow worker (i.e. another of the employer's workers).

Employers must agree to a worker's request to be accompanied by any companion from one of these categories. Workers may also alter their choice of companion if they wish. As a matter of good practice, in making their choice workers should bear in mind the practicalities of the arrangements, for example choosing to be accompanied by a companion who is suitable, willing and available on site rather than someone from a geographically remote location".

7. This revised wording makes clear that workers have a right to choose whoever they like as a companion, so long as they come from one of the defined categories of companion. However, it retains the good practice point that workers should have some

regard to the effect that their choice of companion will have on the disciplinary or grievance process itself. The Agency feels that this is an important point to make both to encourage workers to consider their choice of companion and who might best be suited to support them at the hearing, and to discourage requests for accompaniment that may disrupt the process and may not actually be in the worker's own best interests.

8. Comments are invited on the wording of revised paragraphs 103 and 104 and also on what "making a reasonable request" might or might not involve. To set the new paragraphs in context a copy of the complete Section 3 of the Code of Practice with the revised paragraphs included is attached.
9. The Agency considered whether it should take this opportunity to revise other aspects of the Code. However, it felt that it would not be appropriate to undertake a major revision of the Code at this time, primarily because the Code was subject to a major revision only a few years ago and further substantive change now would be disruptive to the wider business community. A substantive revision of the Code would also take more time to achieve and it was felt important to amend the Code to take account of the EAT decision as soon as possible.
10. Although comments are not being sought on the Discipline and Grievance Code as a whole at this point in time, the Agency will continue to keep the Code under review and will consider a more substantive revision if there seems to be a demand for it.

How to Respond

11. Comments on the revised paragraphs 103 and 104 can be sent by post or email to;

Tommy Wright,
Employment Relations Manager,
Labour Relations Agency
2-16 Gordon Street, Belfast BT1 2LG
Email to tommy.wright@lra.org.uk

The closing date for responses is **14 March 2014**.

12. The Agency recognises that this is a shorter period for consultation than is normal with Codes of Practice. However, given the importance of amending the Code to reflect the EAT decision as soon as possible and the fact that comments are only being sought on changes to two paragraphs within the Code the Agency Board feels that the short timescale is justified.
13. When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

Confidentiality and Data Protection

14. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want information, including personal data that you provide, to be treated as confidential, please be aware that under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
15. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Agency.
16. The Agency will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Section 3

A worker's statutory right to be accompanied

At a glance

The right to be accompanied

- All workers¹ have the right to be accompanied at a disciplinary or grievance hearing (paragraph 97).
- Workers must make a reasonable request to the employer if they want to be accompanied (paragraph 97).
- Disciplinary hearings, for these purposes, include meetings where formal warnings or the confirmation of a warning or some other actions might be taken against the worker. Appeal hearings are also covered (paragraphs 98-100).
- Grievance hearings for the purpose of the right of accompaniment are defined as meetings where an employer deals with a worker's complaint about a duty owed to them by the employer (paragraphs 101-102).

The companion

- The companion can be a union official or a fellow worker (paragraph 104).
- Nobody has to accept an invitation to act as a companion (paragraph 107).
- Fellow workers who are acting as companions can take paid time off to prepare for and to attend a hearing (paragraph 109).

Applying the right

- Agree a suitable date for a meeting with the worker and the companion (paragraph 110).
- The worker should tell the employer who the chosen companion is (paragraph 112).
- The companion can have a say at the hearing but cannot answer questions for the worker (paragraphs 113-114).
- Workers should not be disadvantaged for exercising their right or acting as a companion (paragraph 116).

Guidance

What is the right to be accompanied?

97. Workers have a statutory right to be accompanied by a fellow worker or trade union official where they are required or invited by their employer to attend certain disciplinary or grievance hearings. They must make a reasonable request to their employer to be accompanied. Further guidance on what a reasonable request is and who can accompany a worker appears at paragraphs 103-109.

What is a disciplinary hearing?

98. For the purposes of this right, disciplinary hearings are defined as meetings that could result in:
- a formal warning being issued to a worker, such as a warning that will be placed on the worker's record;
 - the taking of some other action, such as suspension without pay, demotion or dismissal; or
 - the confirmation of a warning issued or some other action taken, such as an appeal hearing.
99. The statutory right of employees to be accompanied also applies to any disciplinary meetings held as part of the statutory dismissal and disciplinary procedures. This includes any meetings held after an employee has left employment.
100. Informal discussions or counselling sessions do not attract the right to be accompanied unless they could result in formal warnings or other disciplinary actions. Meetings to investigate an issue are not disciplinary hearings. If it becomes clear during the course of such a meeting that disciplinary action is called for, the meeting should be ended and a formal hearing arranged at which the worker will have the right to be accompanied.

What is a grievance hearing?

101. Employees have the right to be accompanied to a grievance hearing. For the purposes of this right, a grievance hearing is a meeting at which an employer deals with a complaint about a legal duty owed by him/her to a worker, whether the duty arises from statute or common law, for example, contractual commitments.

102. For instance, a request for a pay rise is unlikely to fall within the definition, unless a right to an increase is specifically provided for in the contract or the request raises a statutory issue about equal pay. Equally, most employers will be under no legal duty to provide their workers with car parking facilities, and a grievance about such facilities would carry no right to be accompanied at a hearing by a companion. However, if a worker was disabled and, because of his/her disability, needed parking facilities in order to attend work, he/she probably would be entitled to a companion at a grievance hearing. An issue might arise as to whether the employer was meeting his/her obligations under the Disability Discrimination Act 1995.

What is a reasonable request?

103. Whether a request for a companion is reasonable will depend on the circumstances of the individual case and, ultimately, it is a matter for the courts and tribunals to decide. Workers should consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative (see 104 below). A request to be accompanied does not have to be in writing or within a certain time frame but a worker should provide enough time for the employer to accommodate the companion's attendance at the meeting.

The companion

104. The chosen companion may be:

- a trade union official who is employed by a trade union; or
- a lay trade union official, as long as he/she has been reasonably certified in writing by his/her union as having experience of, or having received training in, acting as a worker's companion at disciplinary or grievance hearings. Certification may take the form of a card or letter;
- a fellow worker (i.e. another of the employer's workers).

Employers must agree to a worker's request to be accompanied by any companion from one of these categories. Workers may also alter their choice of companion if they wish. As a matter of good practice, in making their choice workers should bear in mind the practicalities of the arrangements, for example choosing to be accompanied by a companion who is suitable, willing and available on site rather than someone from a geographically remote location.

105. Some workers may, however, have additional contractual rights to be accompanied by persons other than those listed above, for instance a partner, spouse or legal representative. If workers are disabled, employers should consider whether it might be reasonable to allow them to be accompanied because of their disability. Some workers may experience personal difficulties in raising and pursuing certain grievances because of, for example, their sexual orientation and may request to be accompanied by a companion from an organisation which has a special interest in assisting and supporting such workers. Employers should be sensitive to such workers' needs in all of these circumstances.
106. Workers may choose an official from any trade union to accompany them at a disciplinary or grievance hearing, regardless of whether the union is recognised or not. However, where a union is recognised in a workplace, it is good practice for workers to ask an official from that union to accompany them.
107. Trade union officials or fellow workers do not have to accept a request to accompany a worker, and they should not be pressurised to do so.
108. Trade unions should ensure that their officials are trained in the role of acting as a worker's companion. Even when a trade union official has experience of acting in the role, there may still be a need for periodic refresher training.
109. A worker who has agreed to accompany a colleague employed by the same employer to a hearing is entitled to take a reasonable amount of paid time off to fulfil that responsibility. It is also good practice for employers to agree reasonable time off to allow for the companion to familiarise him/herself with the case and confer with the worker before and after the hearing. A lay trade union official is permitted to take a reasonable amount of paid time off to accompany a worker at a hearing, as long as the worker is employed by the same employer. In cases where a lay official agrees to accompany a worker employed by another employer, both time off and payment for this are matters for agreement between that lay official and his/her employer.

Applying the right

110. Where possible, the employer should allow a companion to have a say in the date and time of a hearing. If the companion cannot attend on a proposed date, the worker can suggest an alternative time and date so long as it is reasonable and it is not more than five working days after the original date.

111. In the same way that employers should cater for a worker's disability at a disciplinary or grievance hearing, they should also provide for a companion's disability, for example, providing for wheelchair access if necessary.
112. Before the hearing takes place, the worker should tell the employer whom they have chosen as a companion. In certain circumstances (for instance when the companion is an official of a non-recognised trade union) it can be helpful for the companion and employer to make contact before the hearing.
113. The companion should be allowed to address the hearing in order to:
- put the worker's case;
 - sum up the worker's case;
 - respond on the worker's behalf to any view expressed at the hearing.
114. The companion can also confer with the worker during the hearing. It is good practice to allow the companion to participate as fully as possible in the hearing, including being given the opportunity to raise points about any information provided by witnesses. The companion has no right to answer questions on the worker's behalf or to address the hearing if the worker does not wish it. Additionally, a companion must not act in a manner which would prevent either an employer from explaining his/her case or any other person at the hearing from making his/her contribution to it.
115. Workers whose employers fail to comply with a reasonable request to be accompanied may present a complaint to a tribunal. Workers may also complain to a tribunal if employers fail to re-arrange a hearing to a reasonable date proposed by the worker when a companion cannot attend on the date originally proposed. The tribunal may order compensation of up to two weeks' pay.
116. Employers should be careful not to disadvantage workers for using their right to be accompanied or for being companions, as this is against the law and could lead to a claim to a tribunal.