ELA ARBITRATION AND ADR GROUP

COSTS ISSUES IN ARBITRATION

Costs: What are the costs issues involved in arbitrating employment disputes? In the context of the kind of employment disputes that would go to arbitration, are the costs of the arbitrator, and who bears them, a material consideration? Do we think there are any lesser costs implication in arbitrating than litigating?

We have looked at two aspects of costs:

- the quantum of costs incurred by the parties to proceedings in court, employment tribunal and arbitration; and
- how liability for costs is allocated by the court or arbitral tribunal, including which costs are recoverable by the successful party.

On the latter, we have focused on the allocation of costs in High Court proceedings and arbitration because the Employment Tribunal remains an essentially costs-neutral jurisdiction, with each party generally bearing their own costs. This will have pros and cons, depending on the merits of the party's position and their ability to bear the risk of being ordered to pay the other side's costs.

Quantum of costs

In all three methods of dispute resolution, the parties have to incur their own legal costs of preparing and presenting the case. These costs typically include solicitors, counsel, expert witness fees, the charges of translators and transcribers, travel, accommodation, photocopying and other incidental expenses.

High Court

In order to issue a claim with a claim value of over £200,000, the court fee is fixed at £10,000 or 5% of the claim value with interest if the claim is between £10,000 and £200,000. There is also a fee of £255 to issue an interlocutory application. Apart from these fees, the parties do not have to pay separately for use of the court, the time of the judge or court staff.

Employment Tribunal

Many of the awards in the Employment Tribunal are subject to limits. The basic award is based on a formula that takes account of age, length of service and the amount of a week's pay (subject to a statutory cap). The maximum compensatory award is the lower of 52 weeks' pay or a figure which changes annually in line with inflation on 6 April each year. The current figure is £78,692 and from 6 April 2017, this will be increased to £80,541. For cases involving breach of contract claims, claimants are limited to recovering a maximum award of £25,000, which pushes claimants to issue civil claims in the county court or high court for sums in excess of that cap. Unless the claimant has claims for which the maximum cap does not apply such as discrimination or dismissals that are automatically unfair for whistleblowing or health and safety reasons, the statutory limits will mean that litigation in the Employment Tribunal will not be a viable route for high value cases.

Arbitration

The costs of an arbitration include the fees and expense of the arbitrator or tribunal, fees payable to the arbitral institution, and the costs of the venue. Additional costs also arise where the parties

require three arbitrators rather than a single arbitrator. In addition to paying the costs, parties will also need to arrange and agree the practical arrangements and organisation for any hearing.

The additional costs involved in an arbitration can therefore be a material consideration (particularly for claimants). The fees for arbitrations can vary depending on the sums in dispute or the complexity of the matter. These costs can be acceptable to parties in certain cases when weighed against the benefits of the arbitral process and the importance to the parties of resolving the matter quickly, in a private forum with the process overseen by specialist arbitrators chosen by the parties. It is also relevant to note that the arbitral award will not be released until the tribunal's fees have been paid.

One common method of calculating fees of the arbitrator or tribunal is according to the time spent (e.g. LCIA arbitrations). Another common method is for the arbitrator to charge a percentage of the amount in dispute and this may be subject to an increase depending on the complexity of the matter (e.g. ICC arbitrations). Therefore, the institution chosen will have an impact on the costs.

The "seat" of the arbitration may also be relevant to costs. If the arbitral clause is contained in a domestic English contract, then England is likely to be the seat of arbitration. However, in an international context, it is appropriate to consider the differences between the costs laws of different countries. In practice, however, the seat of arbitration is not usually chosen with specific regard to costs; factors such as overall support of the arbitration process, the availability of interim measures such as injunctive relief, the disclosure regime and various other factors tend to play a more active role in decisions about the "seat".

Examples of arbitration fees

LCIA

The LCIA's fees are not set by reference to the claim value.

a. LCIA - £1,750 registration fee
b. Registrar / Deputy Registrar £250 per hour
c. Counsel £225 per hour
d. Case administrators £175 per hour
e. Casework accounting functions £150 per hour
f. A sum equivalent to 5% of the fees of the Tribunal. The Tribunal's fees will be calculated by reference to work done by its members in connection with the arbitration and will be charged at rates appropriate to the particular circumstances of the case, including its complexity and the special qualifications of the arbitrators. The Tribunal shall agree in writing upon fee rates conforming to the Schedule prior to its appointment by the LCIA Court.
g. Expenses incurred by all of the above people

As an indication, the LCIA website says that a mean LCIA arbitration costs $198,000 (approx. £160,000) and a median amount of $98,000 per arbitration (approx. £80,000).

ICC

The ICC charge a percentage of the amount in dispute and this may be subject to an increase depending on the complexity of the matter. The ICC has a cost calculator to help anticipate the costs involved. This sets out an estimate based on a minimum, average and maximum spend per arbitrator (presumably a sliding scale based on experience of each arbitrator). On an indicative basis, £1million in an average ICC dispute (according to the calculator) with one arbitrator will cost approximately £60,000. With three arbitrators, this amount is increased to around £140,000.

Liability for costs in arbitration and litigation

As noted above, in the employment tribunal, absent unreasonable conduct etc., each party generally bears their own costs. By contrast, in both the High Court and arbitration, costs are usually allocated by an order of court or tribunal, with the default position being that the loser pays his own and the other side's costs.

Arbitration

In terms of potential costs awards in arbitration seated in England, the tribunal has a wide discretion. The tribunal has flexibility both as to how to approach liability for costs and the quantum of any costs award. This can lead to some quite considerable costs awards being made against unsuccessful parties. That said, the tribunal will (unless the parties otherwise agree) follow the approach of the courts in England and Wales, which is moderated by the overriding objective of dealing with cases at proportionate cost. See the Chartered Institute of Arbitrators: Guideline for Arbitrators Making Orders Relating to the costs of the Arbitration[1].

The provisions of the 1996 Act which relate to costs (sections 59 to 65) are not mandatory. Therefore, the parties' agreement or the rules of the chosen arbitral institution will govern the award of costs. There are, for example, different rules applicable for the LCIA and the ICC.

For example, Article 28.4 of the LCIA Rules 2014 states that the tribunal shall make its decisions on costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration. However, the tribunal may approach things differently and take into account the parties' conduct. Any order for costs will usually be made with reasons in the award containing such order.

The 1996 Act provides a mechanism (which we understand has been little used in practice to date) under section 65(1) that allows the tribunal, unless the parties agree otherwise, to cap the recoverable costs of the proceedings or any part of the proceedings to a specified amount. If used more frequently, for example as the culture of costs management in litigation gains momentum, this mechanism could prove to be valuable as an aid to reducing the parties' expenditure and avoiding disproportionate expense.

The Departmental Advisory Committee on Arbitration (DAC) Report on Arbitration Bill 1996 (which is used as an aid in construing the Act) emphasised that this clause,

> *"…will have the added virtue of discouraging those who wish to use their financial muscle to intimidate their opponents into giving up through fear that by going on they might be subject to a costs order which they could not sustain."*

This may be a substantial consideration for parties with concerns as to their recoverable costs when deciding to use arbitration rather than the County or High Court.

If a cap on costs is imposed, a party does of course remain free to spend as much as it wishes on the arbitration although it will not be able to recover costs in excess of the cap from the other side if it is successful in the case. Such a cap can be applied either to the costs of the entire arbitration or to a

[1] http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/drafting-arbitral-awards-part-iii-costs-8-june-2016.pdf

category of costs, such as legal fees. Similarly, the cap can be applied to the case as a whole or to a particular phase such as disclosure. This serves to limit the liability of the losing party. It would also be of great value to a party who is an individual and would tend to be in a weaker financial position than a corporate party as the extent of their costs exposure in the event that the tribunal results in a loss is reduced. This is also likely to benefit the weaker party by increasing their chances of securing after the event insurance cover (at an affordable premium) against the risk of an adverse costs award.

Allocation of costs – which party bears them

Generally speaking, in arbitrations in England, the winner will be awarded its costs. However, unless the parties agree the quantum of costs, only recoverable costs following an assessment process by the tribunal are awarded. The tribunal has an overall discretion as to how to deal with liability for costs. Where the parties have decided to arbitrate in accordance with arbitral rules, such as the LCIA or ICC Rules, where those rules provide guidance on the allocation of costs, these will effectively form the basis of the parties' costs agreement.

The impact of what costs are recoverable

High Court

In terms of the costs involved in High Court litigation, this is an area in which there has been a significant cultural shift following Lord Justice Jackson's reforms to civil litigation in April 2013. The courts are now tasked with managing the future costs to be incurred by the parties so as to further the overriding objective of dealing with cases justly and at proportionate cost.

The cost management procedures apply for all multi-track claims for less than £10 million (excluding interest and costs) in all courts, unless the court orders otherwise. It should be remembered that costs management applies to costs which may be recoverable from the other side after detailed assessment. The parties are at liberty to decide to invest more than they could reasonably expect to recover in the litigation and more than is deemed proportionate in the budget. They cannot, however, expect to recover unbudgeted costs from the other party. The significance of the costs budget in High Court litigation was recently underscored by Mrs Justice Carr in, *Merrix -v- Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB), wherein she held,

> *"… where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party's last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted.*

The overriding objective (CPR 1.1) states that the court is enabled to deal with cases justly and "at proportionate cost". This means that proportionality will be considered during a case, through case and costs management, and also at the end of the case, when costs are assessed. The definition of proportionality is in CPR 44.3:

Costs will be proportionate if they bear a reasonable relationship to:

a) The sums in issue in the proceedings;

b) The value of any non-monetary relief in issue in the proceedings;

c) The complexity of the litigation;

d) Any additional work generated by the conduct of the paying party; and

e) Any wider factors involved in the proceedings, such as reputation or public importance.

Lord Justice Jackson provided guidance on proportionality in his final report:

> "*…I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR Rule 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction*."

Anecdotal evidence suggests that there is a lack of judicial consistency at CMCs in relation to costs issues. The uncertainty about how a court will approach proportionality means that the ability of a party to recover a significant amount of its costs in the litigation is hard to anticipate. Arbitration may offer more certainty when it comes to cost recovery. That said, the law relating to costs recovery at the High Court is developing in a direction that is introducing more significance to the costs budget, which in turn may promote the desired predictability regarding costs in the High Court.

The possible introduction of fixed recoverable costs to High Court claims is also a relevant consideration. In November 2016, the government announced an intention to extend fixed costs across civil litigation. Lord Justice Jackson is currently leading a review of fixed recoverable costs.

The objective of the review is to make the costs of going to court more certain, transparent and proportionate for litigants: *"Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action."* Lord Justice Jackson is due to report his findings in July 2017. The review is considering the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply. It is understood that Lord Justice Jackson is exploring the introduction of fixed recoverable costs in cases valued at up to £250,000 although it could be applied to cases of a value up to £500,000.

If Lord Justice Jackson's proposals go ahead, bringing a dispute before the High Court may provide the parties with more certainty as to their potential exposure to the winning party's legal costs. This possible limit on what costs are recoverable by a successful party may make litigation more attractive to a claimant in contrast to arbitration.

The assessment of costs incurred in arbitration will however, generally be the same as in litigation, as pursuant to s.63(5) of the 1996 Act unless the tribunal or the court determines otherwise, costs will be awarded on a standard basis.