ELA ARBITRATION AND ADR GROUP

The Acas Arbitration Scheme for the resolution of unfair dismissal disputes (the Scheme)

Is there any appetite for seeking to revive/invigorate Acas arbitrations?

Since its introduction in May 2001, the Scheme has never been widely used and, apart from a brief spike in 2011 (as a result of a number of claims brought following settlement of a high profile industrial dispute), usage has been falling in recent years. Between May 2001 and 2006, 55 cases were referred to ACAS. Between 2006 and 2010, a mere 8 cases were referred. Perhaps surprisingly, given that Acas arbitrations are 'free', even the introduction of tribunal fees in 2013 did not change the position. On the contrary, no claims were referred to Acas between 2013 and 2015.

Although Acas are not averse to reviving / reinvigorating the Scheme (indeed, Acas saw the introduction of Tribunal fees in 2013 as an opportunity to do so and provided refresher training to members of its panel of Independent Arbitrators in anticipation of a revival), there seems to be little appetite within BIS and, perhaps more surprisingly, within trade unions.

Following discussions between Acas and BIS last year, it became clear that BIS was, at best 'agnostic' in its approach to the Scheme, and would need to be persuaded by some public or otherwise influential groundswell of support to revive/ reinvigorate the Scheme in order for it to intervene and assist. Acas officers have, informally, raised this issue with trade union FTO contacts in the Midlands and the North, but without success – meeting a surprisingly high level of ignorance about the Scheme and what might be described as a 'litigation mindset' culture for dealing with members' claims.

What kind of claims are apt for that form of arbitration?

Introduced on 21 May 2001 and designed initially to operate only in England and Wales, the Scheme was extended to cover Scotland on 6 April 2004.

The Scheme only covers **unfair dismissal claims** and is expressly not intended for cases involving "jurisdictional or complex legal issues" or ones which raise points of EU law. It is ideally suited for claims which are (i) quite straightforward / simple, but (ii) are sensitive involving issues which both parties might well prefer not to air in the public arena of an Employment Tribunal.

If the claim involves alleged breaches of employment rights other than unfair dismissal, unless the parties are happy either for there to be two hearings (with the unfair dismissal claim determined by arbitration under the Scheme, and the other claims or claims dealt with by the employment tribunals) or to settle the other claims, the only way forward is for the parties to have all the claims dealt with by the employment tribunals.

Although the Scheme will cover cases of alleged constructive dismissal, it will only do so where the parties agree that the events which took place amounted to a dismissal. The Scheme does not cover claims for breach of contract.

Although unfair dismissal cases involving issues of EU law can be heard under the Scheme[1], the parties to such disputes are, "strongly recommended" by Acas to have them heard in an employment tribunal.

[1] Where a case is heard under the Scheme and which does involve questions of EU law, the arbitration can still proceed. However, whereas in a case which does not involve points of EU law, the arbitrator simply applies the provisions of the Scheme (taking into account general principles of fairness and good practice in the work place rather than strict law or legal precedent), in a case in which the dismissal was unfair by reason of the operation of EU law, the arbitrator must apply the provisions of the relevant statutes and case law.

The scope of the Scheme is, therefore, extremely limited.

What issues stand in the way of Acas arbitrations gaining momentum?

Issues potentially standing in the way of Acas arbitrations gaining momentum include:

1. The scope of the Scheme is too narrow. It only covers unfair dismissal claims and so is of no use to someone with other heads of claim they might want to bring alongside (or to an employer who wants all possible claims to be covered off). Acas have put this informally to BIS but, as noted earlier, although open minded, there is no real enthusiasm (or time and energy) to do anything about it at the moment. Unless BIS is persuaded by a groundswell of support and take-up of claims under the Scheme, it will not be prepared use precious legislative time to amend the Scheme. The classic "Catch 22" problem though, is that if the Scheme isn't amended and broadened to cover other forms of claim, there probably never will be any increased take-up.

2. The Scheme is entirely voluntary and is only available once a claim / dispute has arisen.

3. Entry to the Scheme is only via an arbitration agreement reached with the assistance of an Acas conciliator or in the form of a Settlement Agreement. There is a strong case for suggesting, therefore, that, if the parties in an unfair dismissal case are 'close' enough to be able to negotiate and sign a COT3 / Settlement Agreement, most would settle the case altogether, rather than simply agree to arbitrate.

4. No one promotes the Scheme. Most would be litigants don't; lawyers don't; trade union officials don't; and even Acas officers don't promote it. One can speculate as to the reasons, but a litigation mindset and lack of awareness, will be up near the top of any list.

5. The remedies on offer are broadly similar to those obtainable from an Employment Tribunal under provisions largely lifted from the Employment Rights Act 1996, and yet the process for reaching a decision is, arguably not as robust as in an employment tribunal, with hearings not intended to last more than half a day (or thereabouts), no cross examination of witnesses, and with the arbitrator to 'take account of general principles of fairness and good practice in the work place' rather than strict law or legal precedent (EU law aside). In addition, there are very limited grounds for challenging an arbitrator's award, not made any easier by the fact that the arbitrator only needs to give 'the main considerations' for his / her decision, rather than detailed reasons.

6. When tribunal fees were first introduced on 29 July 2013, Acas did wonder whether interest in the Scheme might increase as a result. It didn't and that is hardly surprising; after all, why would an employer agree to arbitrate a claim that the employee might well be deterred by the tribunal fee regime from bringing in the Employment Tribunal? (Now, of course, tribunal fees have been abolished).

Low and high value claims: Is arbitration only for high value claims, or could a system work for low value claims?

There is no reason why an arbitration scheme, indeed, the Acas Arbitration Scheme, could not work for low value claims. Free of charge, the Acas Scheme ought to be perfect for low value (but sensitive) claims.

The arbitrator can request Acas to appoint a legal advisor to advise on EU law. The advisor's role is to advise the arbitrator and the arbitrator simply has to take the advisor's opinion / advice into account. Alternatively, the scheme also allows parties to apply to the High Court or Central London County Court for a determination on a point of EU law (and/or the Human Rights Act) as a preliminary point of law.

Where a point of EU law has been considered by the arbitrator, a party may appeal to the High Court of Central London County Court on a question of law arising out of an arbitrator's award.

If so, what would that look like and what would be the selling points to the parties?

In order to make the Scheme (or an alternative, parallel scheme) attractive for resolving 'low value' disputes, important features would be:

1. A much broader remit. Even if it were still considered by the Government to be inappropriate for the Scheme to cover all potential types of claim, the Scheme should, at least, be extended to cover all straightforward claims, of the kind often tagged on to unfair dismissal claims (for example, unpaid wages, unpaid holiday pay, and breach of contract - up to, say, £25,000, as in the Employment Tribunals). The Scheme would also be extremely well suited for straightforward claims (such as unpaid wages and unpaid holiday pay) in ongoing employment situations, where the adversarial and public Employment Tribunal system is, often, very poorly suited.

2. To increase the number of employment lawyers on the Acas panel of Independent arbitrators.

3. To allow the parties to agree to arbitrate potential disputes in advance of them arising. Suitable protection for employees could be provided by requiring such arbitration clauses to be contained in (i) collectively bargained agreements, or (ii) agreements where Acas or a "relevant independent adviser" has advised the employee on the consequences of submitting a dispute to arbitration.

4. To provide Acas with more resources / funding to promote and run the Scheme.

5. To extend the Scheme beyond the control of Acas / take it outside Acas altogether, although, if so, that would beg the question of how it would be funded (given that the cost of arbitraton under the Scheme is met by Acas and free to the parties)?

6. Could an ELA backed scheme (possibly as part of a suite of measures ELA might sponsor as part of a campaign to promote ADR) work? This would have bespoke (if truncated) procedural rules rather than the current procedural anarchy. Further ELA could, hopefully, encourage participation by some of those who were either established arbitrators of employment disputes or wished to use this as a way of getting some experience. Funding again could be an issue here though; ELA can't be expected to fund these arbitrations without strict controls and limits, so one would then be either expecting arbitrators to do it pro bono or for a low flat fee - either way this is likely severely to restrict take-up and any payment could end up killing the scheme.

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