

Handling a discrimination case

Session 4: alternative dispute resolution

presented by John Sprack for LawWorks October 2023

Grievances (1)

- Consider whether to make use of grievance procedure and if so how
- Timing and co-ordinating with a possible claim
- It may be a way of providing a relatively quick solution to a problem
- It may also be useful in revealing the employer's view of the matter
- But remember that the procedure is in the hands of the employer
- Procedure should be in accordance with the Acas Code (if the grievance is in writing)
- Also with the employer's own previously notified grievance procedure
- For unreasonable breach there is provision of increase/reduction up to 25% in any award

Grievances (2)

- C can be accompanied by a TU rep/work colleague (or anyone else the employer consents to)
- If C goes down this path, they or their companion should record/take notes
- There is also the prospect of an appeal if the decision is unsatisfactory
- Employer may discriminate further in dealing with the grievance eg
 - A. failing to investigate properly
 - B. extreme delay in dealing with the matter (compared with how they normally deal with a grievance)
 - C. failing to make reasonable adjustments for the hearing

For sample grievance letters, and templates see the Citizens' Advice suggestions

<https://medium.com/adviser/writing-a-grievance-letter-about-discrimination-9a075ae2096>

Acas conciliation services

- Leave aside Early Conciliation - an Acas conciliation officer is assigned to all discrimination claims after the ET1 is presented
- They contact usually by telephone - C should insist it is done via their rep
- Their communications are inadmissible before the ET unless by consent
- Their goal is to achieve settlements, and they cannot advise on whether an offer is fair
- Remember that what is said may be passed on to the employer
- Focus on compensation
- You may also deal with the employer direct, but some Acas involvement is necessary if they are to settle via COT 3
- If there is no Acas involvement in a settlement, see s 147 Equality Act 2010

Judicial involvement in ADR

Three distinct methods

- There is recent Presidential Guidance on ADR, to be found here:
- <https://www.judiciary.uk/wp-content/uploads/2013/08/PG-ADR-July-2023-final1.pdf>
- The ET Rules rr 3 and 54 state that the tribunals should encourage the parties to settle by use of ADR
- The ET informs Acas of the claims which it receives and it encourages the parties to make use of its services
- It is also responsible for its own forms of ADR dealt with in the following slides:
 1. judicial mediation
 2. judicial assessment
 3. dispute resolution appointment

Judicial mediation (1)

The guidance

- It is usually offered for claims which will be heard over three days or more
- Hence discrimination in the main (also some whistleblowing, complex unfair dismissal)
- Preferably at an early stage before major expense
- It is consensual - both sides must agree
- Confidential - parties can speak freely and will not be quoted subsequently to third parties/ in a hearing
- Facilitative - EJ will not indicate the merits of the claim unless both sides agree
- Lasts a day usually, most are conducted by phone or online
- EJ who sits for the mediation will not sit at the Full Merits Hearing (FMH)
- Success rate of 65%+ claimed

Judicial mediation (2)

The protocol

- Advantages: parties in control of agreement, can canvas additional solutions
- Less suitable where there are multiple respondents/claimants
- Criteria for offering mediation include whether R's final decision maker on settlement will be present
- Also whether the parties appear willing to compromise from previous dealings
- First time an offer of mediation is made by the ET is usually at the PH for case management
- But it is open to the parties to make a request at any other stage
- During the mediation, the parties will have separate rooms as well as meeting together
- If the parties reach agreement, Acas will be asked to make it legally binding
- If they do not, any previous case management orders will apply, and the mediation EJ will not sit at the FMH
- However, that EJ may be involved in further case management, judicial assessment or dispute resolution

Judicial assessment (1)

The guidance

- Available at any time, often arises at PH for case management
- No particular criteria, but both parties must agree
- It is evaluative
- EJ gives an assessment of the prospects of success and likely remedy
- It is inevitably based on limited information
- It is usually by video or telephone but may be in person
- Proceedings are confidential
- EJ who has given an assessment will not sit on FMH

Judicial assessment (2)

The protocol

- Judicial assessment will only take place if parties agree it will be confidential
- It can be quoted in without prejudice discussions but not with third parties or at FMH
- The request often takes place at PH, EJ decides if suitable and lists for a separate hearing
- The issues need to be clearly defined
- The hearing itself is likely to last 2-3 hours
- EJ will encourage the parties to reach an agreement, without pressure
- EJ will indicate the strengths and weaknesses of the parties' cases
- EJ will not be involved in any procedure involving final determination of the parties' rights

Dispute resolution appointment (1)

The guidance

- Unlike the other ADR methods we have dealt with, this is non-consensual
- It is new, a pilot project in the West Midlands having been successful
- Regions will differ, but likely to be confined to cases of six days or more
- Decision will be taken 4-6 weeks after date for exchange of witness statements
- Parties may make written submissions as to why it is unsuitable
- REJ will decide if it should go ahead
- If it does, 2-3 hours is likely

Dispute resolution appointment (2)

- It will be by video or phone usually, occasionally in person
- Failure to attend without good reason may lead to a costs award
- The process is an evaluative one
- It is confidential
- EJ will evaluate strengths and weaknesses, stating if either party is unrealistic
- EJ will have a bundle containing pleadings and witness statements etc
- If there is no settlement, EJ will not sit on the FMH

ADR pros and cons (1)

Is it right for your case?

- Assuming the conditions for the relevant form of ADR are met, is it the right option?
- Is it right for your case? how will C be at a full ET hearing? is the employer in good faith? are you concerned about whether C will give too much away in ADR?
- Where parties consent, judicial mediation is likely to take place more quickly than FMH
- It can lead to a result which the ET would have no power to award eg reference, apology
- The costs of litigation can be reduced
- The emotional burden of a hearing can be avoided
- There is no publicity - a feature which may suit both sides

ADR pros and cons (2)

Some factors in deciding whether to go for it

- Judicial assessment can be useful if there are unrealistic expectations which stand in the way of negotiating a settlement
- If they are on R's part, it can clear the way for you to achieve a reasonable settlement
- If on C's part, it may free your hand up to negotiate
- Beware of C misunderstanding what the EJ says: : "I can't say how likely the claim is to succeed but if it does an award of £4,000 is likely" = "You are going to win and get £4,000"!?
- The danger lies if your case looks weak on the face of it, but there are factors underlying it which mean C may succeed
- eg The knowledge that C will be a most impressive witness
- eg Your awareness of a killer line in cross-examination of R's witness which you do not want to reveal

ADR pros and cons (3)

- Dispute resolution appointment is a new phenomenon (except in West Midlands)
- It is compulsory to attend, but not to settle
- A dispute resolution appointment may be a blessing eg you wanted mediation but R would not agree
- Given the difficulties in listing 6+ day cases plus several likely PHs, it is worth a try to get the matter sorted
- Even if it does not lead to a settlement, it should play a role in discovering what is disputed, and narrowing the issues

Preparing for judicial ADR

Some guidelines

- Think about what outcomes you wish to achieve
- It may be to achieve maximum compensation: if so, determine your negotiating position, walk away point, steps in getting there
- But non-financial outcomes are also possible
- What are C's feelings and concerns, setting the law aside?
- Who within the employer should apologise?
- If still employed by R what would resolve your situation at work?
- What reasonable adjustments are needed?
- Do you want to arrange regular meetings for your client eg with line manager/HR?
- Or a way to resolve issues in future?
- If C is no longer employed there, do you need an agreed reference? Consider its contents

**Any
Questions?**