## Mediate don't litigate

**Makbool Javaid**
**Partner**
**Head of Employment Law**

makbool.javaid@smab.co.uk

**Ewan Keen**
**Partner**

ewan.keen@smab.co.uk

The argument for the more effective use of mediation in the workplace has been reinforced this month by statistics released by Acas and the Tribunals Service, plus a joint initiative by the TUC and Acas to encourage union officials to turn to mediation to complement their role in helping avoid costly disputes (Page 2).

Mediation involves an independent, impartial person helping two or more individuals, or groups, to reach a solution that's acceptable to everyone. It's a voluntary and confidential form of dispute resolution, which provides an informal and speedy solution to workplace conflict and offers a safe environment for participants to find their own solutions to problems.

The need for workplace mediation is emphasised by the latest detailed analysis of tribunal statistics for 2009/10 (Page 2), which show that the number of claims submitted increased by 56% compared to 2008/09 and that the greatest increases were in claims in relation to working time (297%) and unauthorised deductions (122%). Working time and wage disputes are normally minor in scope and are well suited to resolution through the grievance or mediation process.

The effectiveness of mediation is demonstrated by the Acas statistics for 2009/10 (Page 4). The figures show that 70.8% of the 87,421 claims where Acas were asked to mediate were resolved. Acas also received nearly 10,000 referrals to its pre-claim conciliation service, a third of which resulted in resolution.

SM&B have a team dedicated to mediation services, whether that involves providing mediation for clients in-house, training mediators or running mediation awareness programmes. Contact Makbool or Ewan for further details.

## News in this edition

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**The Ministry of Justice is consulting on six principles for bribery prevention measures to help employers mount a defence under the Bribery Act – Page 3**

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**Acas statistics for 2009/10 show that 70.8% of the 87,421 claims, where Acas were asked to mediate, were resolved – Page 4**

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## Tribunal statistics for 2009/10 published

Following publication of the overall tribunal jurisdiction figures earlier this year, a detailed analysis for 1 April 2009 to 31 March 2010 reveals that claims submitted increased by 56% and the unfair dismissal median award was £4,903.

The Tribunals Service and the Ministry of Justice have published a detailed analysis of the statistics for employment tribunals for the period 1 April 2009 to 31 March 2010. The statistics confirm that the number of claims submitted increased by 56% compared to 2008/09 and that the greatest increases were in claims in relation to working time (297%) and unauthorised deductions (122%).

In terms of representation: (i) lawyers acted as representatives in 161,900 claims; (ii) trade unions represented in 12,500 claims; (iii) claimants/respondents chose to represent themselves in 44,900 claims; and (iv) 'other' representatives, e.g. consultants, friends, acted in 16,700 cases.

The report also includes a detailed analysis of the amount of compensation awarded in various types of claim, including unfair dismissal, together with information on costs awarded by tribunals.

| Matter | Average | Median | Maximum |
|---|---|---|---|
| Unfair Dismissal | £9,120 | £4,903 | £234,549 |
| Costs | £2,288 | £1,000 | £13,947 |

## Acas and the TUC launch new mediation guide

Acas and the TUC launched a new guide for trade union representatives at the TUC conference on the benefits of mediation, and how it can complement their role in helping avoid costly disputes by offering an informal and confidential process to tackle difficult issues.

Acas and the TUC recognise that trade unions play an important role in resolving disputes through informal channels. According to research, 73% of union reps said they had spent time on individual disputes. The new guide seeks to reassure union reps of the benefits of mediation and highlights the type of disputes where it can offer an informal and confidential space to tackle issues. Mediation is particularly useful for bullying and harassment issues and personality clashes that are not always easily dealt with through formal procedures.

The guide points out that mediation is not a replacement for trade union representation, and nor should it undermine the valuable role of trade union representatives. It is, rather, a complementary process. The guide covers: (i) what happens during mediation; (ii) the role of representatives in mediation and how to support members; (iii) how to work with employers to set up mediation arrangements; (iv) how mediation fits with other workplace procedures and agreements; and (v) trade Union reps acting as mediators.

A guide for trade union representatives is available from the Acas mediation page.

## Consultation on appropriate anti-bribery procedures

The Ministry of Justice is consulting on the procedures that commercial organisations should put in place to prevent persons associated with them from carrying out acts of bribery so as to be able to rely on the 'adequate anti-bribery procedures in place' defence to a charge of failing to prevent bribery.

Under the Bribery Act 2010, which comes into force in April 2011, an organisation will be able to rely on the statutory defence to a charge of failing to prevent bribery under S.7, if they have adequate anti-bribery procedures in place. The Ministry is consulting on 'six principles for bribery prevention' to be used as a flexible guide in deciding on the appropriate procedures for an organisation.

The six principles for bribery prevention measures being proposed are: (I) Risk assessment; (ii) Top level commitment; (iii) Due diligence; (iv) Clear, Practical and Accessible Policies and Procedures; (v) Effective implementation; and (vi) Monitoring and review. Consultation closes on 8 November 2010.

## Legal professional privilege does not apply in-house

In Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, the ECJ has dismissed an appeal against an earlier General Court judgment that denied the application of legal professional privilege to communications with in-house lawyers.

Privilege entitles a party to withhold written or oral evidence from production to a third party or a court. In the main this consists of: (i) legal advice privilege (confidential communications between lawyers and their clients made for the dominant purpose of seeking or giving legal advice); and (ii) litigation privilege (confidential communications between lawyers and their clients, or the lawyer or client and a third party, which come into existence for the dominant purpose of being used in connection with actual or pending litigation).

Some private and public sector organisations have in-house legal teams. So, does legal privilege apply, for example, where a line manager seeks legal advice from an in-house lawyer on the dismissal of an employee? The ECJ have confirmed that legal privilege does not apply in such circumstances.

The ECJ held that regardless of the national professional rules and ethical obligations to which in-house lawyers are subject, due to their economic dependence and the close ties with their employers, in-house lawyers do not enjoy a level of professional independence comparable to that of an external lawyer. Therefore legal professional privilege does not cover exchanges within a company or corporate group with in-house lawyers. In the ECJ's view, this does not lower the level of protection of the rights of defence of undertakings as any individual who seeks advice from a lawyer must also accept the restrictions and conditions applicable to the exercise of that profession.

## Acas annual report for 2009/10

Acas has published its annual report and accounts for the year ending 31 March 2010 which shows a steep increase in workload, especially in unfair dismissal cases and that the new pre-claim conciliation service introduced in April 2009 has proved very popular.

Acas has published its annual report for the year ending 31 March 2010, giving a picture of the state of individual and collective dispute resolution in Britain. The number of individual employment claims referred to Acas for conciliation rose by 13% to 87,421 (up from 77,478 in 2008/09) of which 70.8% were resolved. Unfair dismissal was the most common type of claim and featured in 64,878 cases referred to Acas, nearly 10,000 more than last year. The number of collective disputes referred to Acas dropped by 6% to 905.

The new pre-claim conciliation (PCC) service introduced in April 2009 has proved very popular and successful in avoiding the need for proceedings to be issued. Acas received nearly 10,000 PCC referrals, of which the overwhelming majority concerned unfair dismissal, deduction of wages and/or breach of contract. It hopes to see this number doubled in its second year. A third of PCC referrals resulted in resolution, with the most common reason for failure being the employer's unwillingness to engage in the process.

## Obligation to maintain trust and confidence is a mutual one

In McCormack v Hamilton Academical Football Club Ltd, the Court of Session held that the obligation to maintain trust and confidence is a mutual one. Therefore, an employer is under a duty to keep its employees fully informed of any perceived deficiencies in their conduct during the course of their employment.

Mr McCormack (M), the Football Club's Assistant Manager was summarily dismissed. M brought a claim for wrongful dismissal. The club argued that the summary dismissal was justified because: (i) M had been guilty of misconduct on a number of occasions during his short employment; and (ii) taken together, these acts of misconduct amounted to a repudiation of his contract.

The Court of Session held that M had been wrongfully dismissed. There had been no, one, single flagrant breach of contract that was serious enough that it justified instant dismissal. So the issue was whether the cumulative effect of M's misconduct had caused the club to lose trust and confidence in him. Some of the allegations against M were proven, e.g. inappropriate behaviour on the touchline and in the dressing room during a pre-season tournament; but others were not, such as an allegation that M had bullied certain players.

None of the allegations, however, had been taken up formally with M. All that had happened was that the Club chairman had spoken to him informally about his behaviour. Then M was summarily dismissed which came as a 'bolt out of the blue'. The obligation of confidence and trust is a mutual one: the club was under a duty to keep its employees fully informed of any perceived deficiencies in their conduct during the course of their employment. That did not occur here and the circumstances could not possibly warrant summary dismissal.