GRAY'S INN SQUARE

The nuts and bolts of Employment Law during COVID-19: Alternative Dispute Resolution

Alexandra Sidossis
Rosalee Dorfman Mohajer
Amrit Kaur Dhanoa

26 June 2020

Outline

- Impact of COVID-19
- Employment Tribunals and ADR
- Considering the needs of the client
- ADR Methods
  - Negotiation
  - ACAS Early Conciliation
  - Mediation
  - Judicial Mediation
  - Arbitration

Impact of COVID-19

- The Presidents of Employment Tribunals (England and Wales and Scotland) first issued a Joint Direction on 19 March 2020, which was amended on 24 March 2020, and reviewed on 29 April 2020 and 29 May 2020, regarding the listing of Employment Tribunal cases during the COVID-19 pandemic.

- The Joint Direction converted all in-person hearings listed to commence on or before 26 June 2020 to a case management hearing by telephone or other electronic means (exact wording provided on next slide).

- Following the reviews, the Direction remains in force in its current form.

Impact of COVID-19

- The amended direction as at 24 March 2020 remains in force:

> *"In view of the rapidly changing circumstances created by the Covid-19 pandemic, the Presidents of the Employment Tribunals in England & Wales and in Scotland have directed that from Monday 23rd March 2020 all in-person hearings (hearings where the parties are expected to be in attendance at a tribunal hearing centre) listed to commence on or before Friday 26th June 2020, will be converted to a case management hearing by telephone or other electronic means which will take place (unless parties are advised otherwise) on the first day allocated for the hearing. This will provide an opportunity to discuss how best to proceed in the light of the Presidential Guidance dated 18th March 2020, unless in the individual case the President, a Regional Employment Judge or the Vice-President directs otherwise. If the case is set down for more than one day then parties should proceed on the basis that the remainder of the days fixed have been cancelled. For the avoidance of doubt, this direction also applies to any hearing that is already in progress on Monday 23rd March 2020 and, if not already addressed before then, the parties may assume that the hearing on that day is converted to a case management hearing of the kind referred to above. In person hearings listed to commence on or after 29th June 2020 will remain listed, in the meantime, and will be subject to further direction in due course. The parties remain free to make any application to the Tribunal".*

Impact of COVID-19

- **Civil Justice Council Report** – a rapid review on the impact of COVID-19 on the civil justice system was launched on 1 May 2020 and concluded on 15 May 2020. (the report can viewed here: https://www.judiciary.uk/wpcontent/uploads/2020/06/CJC-Rapid-Review-Final Report-f.pdf)

- The survey asked respondents to answer a series of detailed questions about the most recent remote hearing they had participated in between 19 March and 7 May 2020, and their perceptions of the hearing. Once the data had been cleaned and non-civil hearings had been excluded from the sample, it was revealed that data had been captured on 486 remote hearings.

Impact of COVID-19

- The majority of hearings (56%), across a range of practice areas, took place between 24 April and 7 May 2020.

E. Characteristics of hearings reported: When did the hearings described take place?

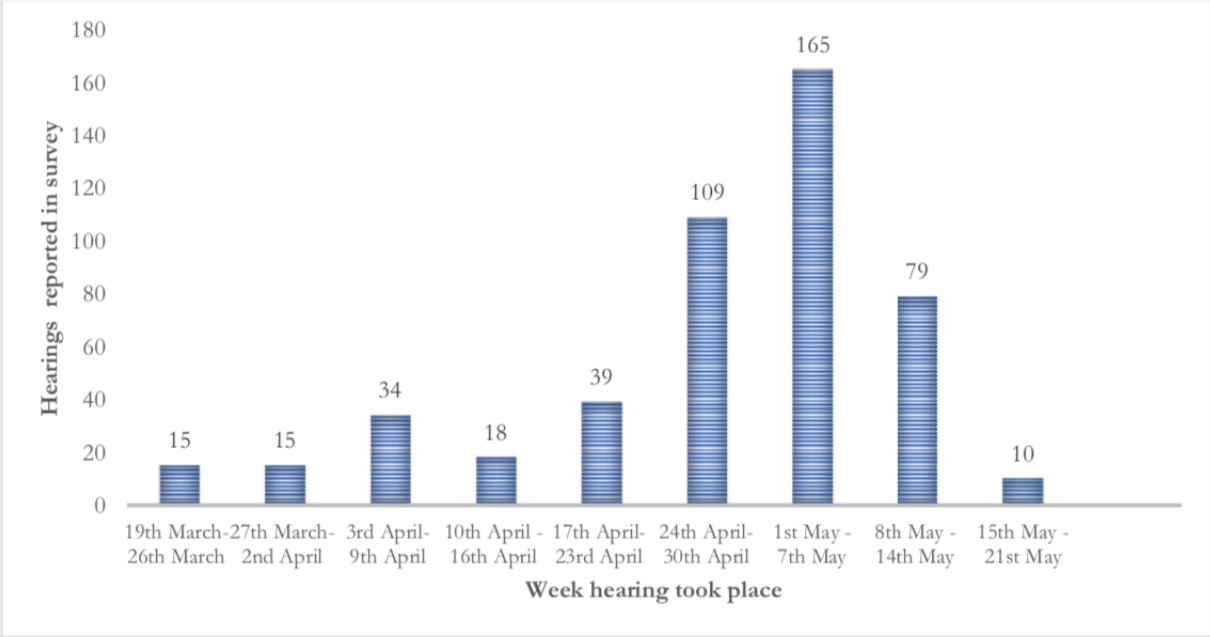

Figure 3: When did the hearings described in this report take place? (n=484)

Source: Civil Justice Council - The Impact of COVID-19 Measures on the Civil Justice System, May 2020

Impact of COVID-19

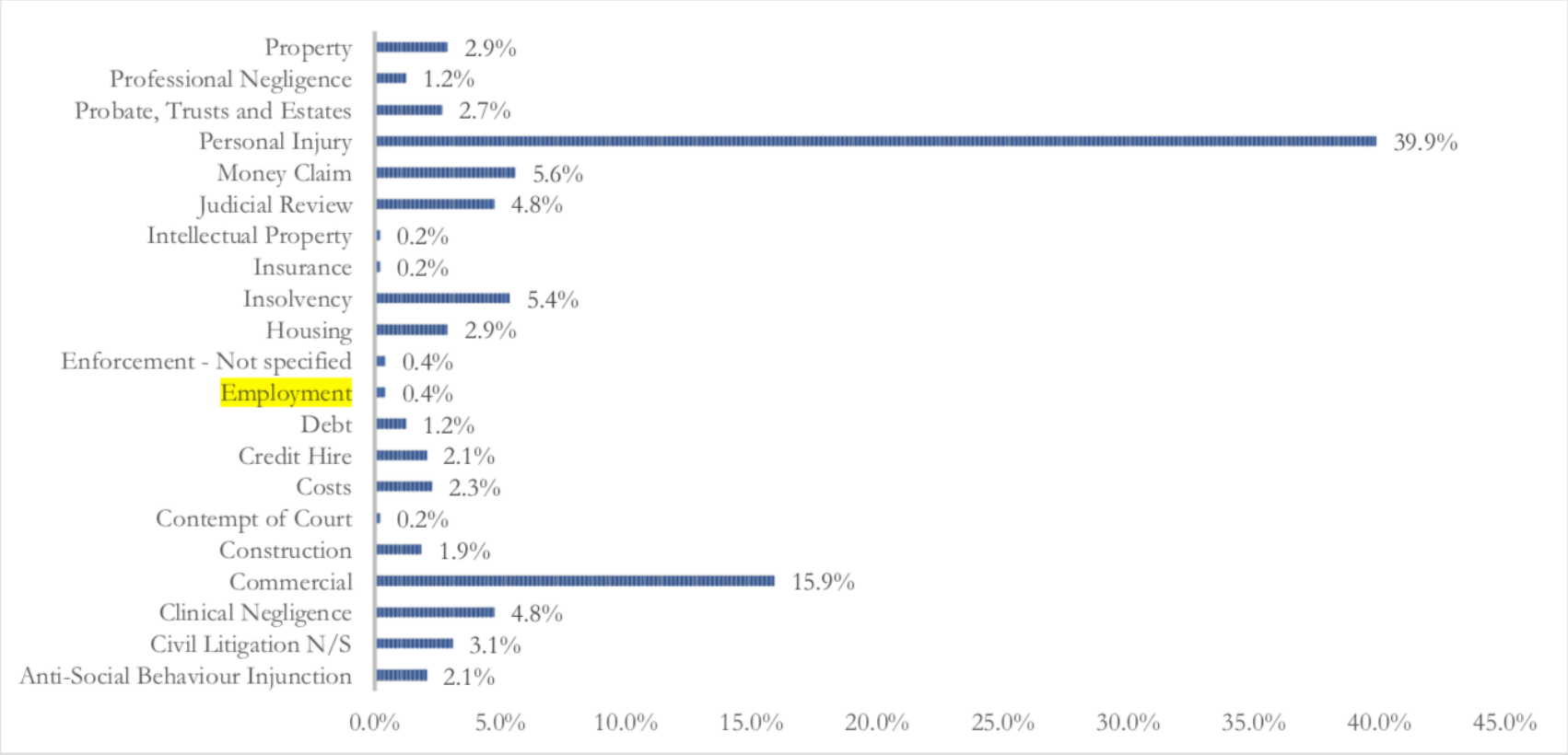

Figure 10: Hearings by area of law

Source: Civil Justice Council - The Impact of COVID-19 Measures on the Civil Justice System, May 2020

Impact of COVID-19

Table 7: Employment Tribunal Workload

Period (week ending)	Single Claims			Multiple Claims (Number of Lead Cases)[4]		
	Receipts	Disposals	Outstanding	Receipts	Disposals	Outstanding
Pre-Covid Baseline	***841***	***718***	***30,687***	***48***	***43***	***4,966***
8 March 2020[5]	873	1,024	NA	47	67	NA
15 March 2020[5]	861	772	NA	37	40	NA
22 March 2020[5]	917	695	NA	39	44	NA
Sunday, 29 March 2020	885	558	31,693	51	29	5,065
5 April 2020[5]	1,020	446	NA	70	26	NA
Sunday, 12 April 2020	883	327	32,922	36	15	5,138
Sunday, 19 April 2020	771	432	33,188	46	18	5,177
Sunday, 26 April 2020	850	541	33,560	40	32	5,203
Sunday, 3 May 2020	890	403	33,994	59	25	5,247
Sunday, 10 May 2020	730	427	34,294	22	28	5,275
Sunday, 17 May 2020	787	504	34,549	43	33	5,312
Sunday, 24 May 2020	877	476	35,078	46	24	5,365

1) The management information presented in this table reflects what is recorded on relevant case-management systems on the date of extraction. The case management systems are continually updated and so the information presented will differ from previously published information.
2) The management information presented is different from the quarterly MOJ official statistics published due to timing and definitional reasons. The official statistics go through a more comprehensive quality assurance and analysis process to ensure quality and coherence.

3) At different stages in the Employment Tribunal process, single claims can be grouped into multiple claims and multiple claims can be split into single claims (when this occurs is dependent on a variety of factors). As such the information presented may vary substantially from previously published information.

4) Employment Tribunal claims can have multiple jurisdictional reasons attached and these can be disposed at different points in the claim lifecycle. The method in which these are grouped and a final claim disposal date is taken differs between the MI and the MOJ official statistics.
5) Some earlier weeks of this data are unavailable due to the limitations of the database.

Source: HMCTS Management Information, 11 June 2020

Employment Tribunals and ADR

- Rule 3 Employment Tribunals Rules of Procedure 2013:

  A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.

- Rule 53(1)(e) Employment Tribunals Rules of Procedure 2013:

  53.—(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—

  (e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).

- The Enterprise and Regulatory Reform Act 2013 introduced various measures aimed at encouraging parties to resolve their workplace disputes outside the tribunal system – e.g. early conciliation.

Considering the needs of the client

- An important consideration at the outset is to ask what the client wants to achieve, in order to determine whether to engage in ADR and what form is most suitable.

  - **Claimant**: it may be important to obtain a letter of reference or apology, or to maintain a good relationship with the employer, these are outcomes that cannot be ordered by a Tribunal but can be achieved via an ADR mechanism.

  - **Respondent**: may be concerned about the publicity of the employment hearing given that ET judgments go onto the online register, the affect of publicity on future ventures and confidentiality may be achieved via an ADR mechanism.

Negotiation

- **What is it?**
  - Negotiations can take place between an employee and employer early on in the dispute or when litigation has commenced between parties' representatives, without the assistance of a third party.
  - Discussions usually proceed on a without prejudice basis, which means that if the negotiations do not succeed in resolving the dispute, the parties' rights are not prejudiced.

- **Why negotiate?**
  - Advantages - Flexible and informal which can save time and costs.

- **When?**
  - The greater the delay in starting negotiations, the less likelihood of success. If your client wants to negotiate, start as early as possible.

- If the parties succeed in reaching agreement, terms are usually recorded in a settlement agreement.

ACAS Early Conciliation

- **What is it?**
  - The Advisory, Conciliation and Arbitration Service (Acas) is an independent, impartial organisation mandated to liaise with both parties to an employment dispute with regard to possible settlement.

  - The mandatory Acas early conciliation (EC) procedure has been in force since 6 May 2014 and must be followed by claimants who present claims in the majority of employment tribunal proceedings. S18(1) Employment Tribunals Act 1996 sets out types of claims covered by early conciliation. There are some circumstances in which the claimant can chose whether or not to make an EC notification.

  - If the EC procedure applies, the Claimant cannot submit their tribunal claim until after an Early Conciliation Certificate is issued by Acas either because the parties do not wish to participate in conciliation or because it has failed to achieve settlement within the prescribed period.

  - Conciliator acts as an intermediary between the parties and conveys settlement proposals.

ACAS Early Conciliation

- **How does it work?**
  - The procedure is set out in the Early Conciliation Rules of Procedure (EC Rules) 2014, contained in the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (SI 2014/254)

1. The claimant makes the initial notification to Acas, which must include the prospective claimant's and respondent's name and address.
2. If the claimant consents to EC, the claim is passed to an Acas conciliation officer, who will then attempt to contact the respondent to see if they consent to conciliation.
3. If both parties agree, the conciliation officer has one month, from the date Acas was originally notified by phone or receiving the form, to promote a settlement. If agreed by the parties, the conciliator can extend the period for 14 days if they consider there is a reasonable prospect of achieving settlement before the expiry of the extended period.
4. If a settlement is reached, Acas will record it on a COT3 form. If not, the conciliator must issue an early conciliation certificate.

ACAS Early Conciliation

- Acas can also provide free conciliation while a claim is ongoing, right up to the start of the hearing if the parties both request it or the Acas officer considers there is a reasonable prospect of settlement.

- **Advantages** of settling a claim through Acas, particularly where one of the parties is unrepresented – simplicity, neutrality, speed, cost, confidentiality, effectiveness
  - It is a free service.
  - 73% of EC notifications received by Acas in 2018 did not progress to a tribunal claim, and of those issued, Acas conciliation resulted in settlement in 51% of cases. (*source: Acas Annual Report and Accounts 2018/19*)

- **Disadvantage** - parties do not have the power to choose an Acas conciliator or to manage the process generally. The Acas officer has no duty to see that the terms of a settlement are fair and must not advise on the merits of the claim (*Clarke and others v Redcar and Cleveland BC; Wilson and others v Stockton-on-Tees BC* [2006] IRLR 324, EAT)

Mediation

- **What is it?**
  - Presence of a neutral third party who manages or facilitates the process through which the parties negotiate a settlement.
  - Mediation may involve the parties pursuing a private mediation or agreeing to proceed with judicial mediation in the employment tribunal.
  - Workplace mediation (an ongoing working relationship between the employer and employee) and employment mediation (working relationship between the employer and employee has broken down or ended by the time mediation takes place).

- **Why mediate?**
  - Advantages **–** voluntary, non-binding, flexible, private and confidential, quick
  - Disadvantage – choice of mediator can be a source of conflict, potential wasted costs, non-binding

- **When is mediation not an appropriate method?**
  - When one party is not committed, tactical use by employers to send a message to employees.

Judicial Mediation

- **What is it?**
  - bringing the parties together for a mediation at a private preliminary hearing before a trained Employment Judge who remains neutral and tries to assist the parties in resolving their disputes, which may include remedies which would not be available at a hearing before an Employment Tribunal (e.g. a reference)
  - at the preliminary hearing stage, an employment judge will identify cases potentially suitable for judicial mediation and ask the parties whether they are interested in this option.
  - Over 65% of cases mediated reach a successful settlement on the day of mediation. Most cases that do not succeed on the day of the mediation are settled before the hearing as a result of the impetus created by the judicial mediation *(source: HMCTS Judicial Mediation: Employment Tribunals Guidance)*
  - Judicial mediation is an alternative to a tribunal hearing but not an alternative to ACAS conciliation.

- **Case management meeting** – takes place, usually by telephone, to consider and make appropriate arrangements for the conduct of the judicial mediation. Includes setting the time of the mediation and agreeing relevant issues. The employment judge will direct if any documents are required (for example, a statement of position and expectations of what is being sought) and make appropriate directions.

Judicial Mediation

- **Advantages** – confidential, private, quicker, neutral

- **Judicial or private mediation?**
  - Restrictions on availability
  - Cost
  - Flexibility
  - Choice of mediator

Arbitration

- **What is it?**
  - process based on agreement between parties to refer a dispute between them to impartial arbitrators for a decision.
  - Arbitration in the UK is governed by the Arbitration Act 1996.
  - Ad hoc or institutional

- **Why arbitrate?**
  - Advantages – privacy and confidentiality, efficiency, party autonomy, flexibility, choice, neutrality, binding, finality and enforcement of awards
  - Disadvantages – cost

- Employers should consider including an arbitration clause in employment contracts and other employment-related agreements. Where there is no such provision, parties should consider the possibility of agreeing to submit disputes to arbitration after they have arisen.

- Acas collective and individual arbitration service

GRAY'S INN SQUARE

Q&A

Putting people
and client service first

4-5 Gray's Inn Square
Gray's Inn London WC1R 5AH
DX No 1029 LDE

clerks@4-5.co.uk
Tel +44 (0)20 7404 5252