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Employment alternative dispute resolution

10 July 2023 Sarah Hooton

The President of the Employment Tribunals (England and Wales) has issued Presidential Guidance on the use of alternative dispute resolution (ADR) in employment claims.

The Guidance sets out the four types of ADR available that employment tribunals can encourage parties to make use of:

1. Conciliation though Acas;
2. Judicial mediation;
3. Judicial assessment; and
4. Dispute resolution appointment.

The first three of these are likely to be familiar to those who have used the tribunal system but the Guidance gives a helpful summary of the approach taken in each of these, as well as highlighting the differences between them. All three of these processes are "consensual" – both parties have to agree for these forms of ADR to take place.

The fourth is somewhat different and is much newer. Dispute resolution appointments have been trialled in the Midlands West region since 2020 and the Guidance now confirms the intention to roll these out nationally. They are a non-consensual form of ADR, generally reserved for the more complex claims and those with longer hearing slots (six days or more). The non-consensual aspect means that the Tribunal can order one, even if neither party wishes to attend ADR. If the Tribunal believes that a dispute resolution appointment is appropriate, then the parties are expected to attend – and a failure to attend without good reason could amount to "unreasonable conduct" for costs purposes. This does not, however, mean that settlement is obligatory – there is no mandatory outcome that follows from a dispute resolution appointment (or any of the other forms of ADR).

There may well be cases where the parties believe there is simply no benefit to a dispute resolution appointment and that its listing would therefore increase costs for both the parties and the Tribunal unnecessarily – for example, a claimant may believe that the true value of their claim lies in success at Tribunal (often referred to as "clearing their name"); a public sector respondent who is caught by the restrictions on special severance payments (noting that there are different definitions as to what is or is not a special severance payment for different parts of the public sector), may not have the necessary authorisation to allow for settlement to take place. The additional information set out in the Protocol for dispute resolution appointments (appendix 3 to the Guidance) does allow for the parties to make submissions to the Tribunal as to why the appointment should not take place – the key issue will be whether it is or is not in the interests of the overriding objective (as set out in point 12 of the Guidance). The parties would therefore be able to make their case as to why any dispute resolution appointment should not proceed. However, the Guidance does point out that there may be wider benefits to a dispute resolution appointment – such as assisting the parties to gain a clearer understanding of the case, or to clarify or narrow the issues in dispute; a lack of interest in settlement may therefore not be determinative of whether the appointment should proceed.

The Guidance stresses the costs – both financial and emotional – associated with claims. With pressures continuing to increase on employment tribunal resources, the Guidance makes it clear that a focus of the tribunals can and should be on encouraging the parties to resolve their cases by agreement. Resolution of the issues in a claim by a tribunal should therefore be as a last resort where such agreement cannot be reached.

Read the guidance →

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