

Written evidence from Acas (the Advisory, Conciliation and Arbitration Service)

Acas (the Advisory, Conciliation and Arbitration Service) is pleased to submit written evidence to your inquiry into court capacity, in addition to the oral evidence given by our Chief Operations Officer, Mr Tony Cooper on 16th March 2021.

As you will know, Acas is a statutory, non-departmental public body with a duty to improve employment relations in Great Britain. In 2019 to 2020, Acas handled approximately 800,000 calls from individuals and employers to our national helpline and our website received 15 million visits from people seeking advice and support. During the year we also provided conciliation in more than 550 collective disputes and trained around 50,000 people on a wide range of workplace-related topics.

Much of Acas' resource, however, is devoted to providing early conciliation before individuals can bring a claim to an employment tribunal. Last year we received nearly 140,000 such early conciliation notifications. Our early conciliation work, is a very successful form of alternative dispute resolution (ADR) currently helping to resolve 69% of all cases without the need for a claim to be registered with the Employment Tribunal. And, of those that do register with the Employment Tribunal Service, Acas resolve 79% of cases ahead of the hearing date. This clearly saves time and cost to the Employment Tribunal Service as well as to businesses and claimants.

We continue to refine and develop our approach to the delivery of our conciliation services to ensure that we maximise our impact as much as possible, thus resolving even higher proportions of cases in the future and further helping to reduce ET backlogs.

We are also working with BEIS on further amendments to the early conciliation regulations, particularly in relation to the handling of cases against multiple respondents, with the aim of reducing the administrative burden associated with handling those cases through the early conciliation process.

As you will appreciate Acas has considerable experience of dealing with employment tribunals and the evidence we offer in this submission will concentrate on this part of the overall court and tribunal service.

The Committee's inquiry into court capacity is considering both the immediate issue of backlogs, especially as affected by the impact of Covid 19 and the longer-term capacity of courts and tribunals to deal with cases post Covid 19. These issues can be viewed from two angles:

1. how cases arrive in the system and are dealt with once there;
2. how the number of cases arriving in the system can be reduced, thus freeing up capacity.

In this response we would like to consider each of these separately as they relate to employment tribunals.

The Employment Tribunal System

Since the Supreme Court decision in July 2017 which led to the removal of employment tribunal fees, both the ETS and consequently Acas, has been under increasing pressure. This pressure has been exacerbated during the pandemic as the ETS has moved to digital hearings and despite additional recruitment within both Acas and ETS, the backlogs are still being felt, particularly in respect of dates being available for employment tribunal hearings.

Acas has identified the following opportunities where, with investment, it will be possible to reduce pressure on the employment tribunal system and help reduce the backlog.

- *Further investment in Acas* - Conciliation is a highly successful ADR process which, as we have already highlighted, removes the majority of potential employment tribunal claims, which dramatically reduces the burden on the employment tribunal service and cost to tax payers and the parties to disputes. Investing further in the conciliation service, is in our view, the quickest and most cost-effective way in which the backlog of cases could be reduced.

Currently Acas conciliators are operating with historically high caseloads, which impacts on our ability to influence and resolve cases. Further investment would allow us to specifically target cases already within the employment tribunals system, with a view to increasing resolution rates and reducing the requirement for judicial time. This investment would be concurrent to the ongoing work to resolve cases through the early conciliation process.

- *A system driven by ADR* – The early conciliation process provides an ADR focus ahead of any claim being lodged to an employment tribunal. We have good evidence of the impact of early conciliation and the benefits that arise from resolution, including reducing the time and costs for employers (and workers) involved in disputes. However, once an employment tribunal claim is made, the drivers for settlement are, in our experience, often related to key dates and milestones in the employment tribunal process being reached or about to be reached. A review of the current arrangements once an employment tribunal has been lodged to ensure that the emphasis remains on resolution outside of the employment tribunal may be beneficial. It is possible that a simple change in the approach to listing cases may save valuable listing time. For example, if the process was changed so that a case was not listed until Acas notified the employment tribunal service that settlement discussions have stalled. This would remove unnecessary costs and administration for cases that are in the process of seeking to find resolution through Acas. This will also have the additional benefit of further promoting conciliation and would ensure court time is not wasted listing cases or using preliminary hearing time when a case is close to settlement. Once notified by Acas of discussions stalling, the Judge could opt to list for an early neutral evaluation, ADR meeting or Judicial Mediation to take a second attempt at resolution ahead of full determination. Acas conciliation would continue to be available right up until the date of the hearing as an alternative to judicial intervention.

A review of the stop the clock arrangements that are in place would also be beneficial. The arrangements continue to cause confusion and lead to time being spent both by Acas and ETS dealing with issues arising from potentially out of time applications. A review of the arrangements and the wider question of limitation periods is worthy of consideration. The aim of a review would be to identify whether improvements can be made which would make the rules easier to understand and reduce the administrative burden that arises from the rules as they currently stand. The stop the clock process is a valuable tool for engaging in the ADR process but can be confusing for parties when they are deciding when their ET claims must be lodged. Clarity about the rules along with a simple calculator for the parties may help those in dispute identify whether they are able to bring their claim and avoid

unnecessary concern for the parties and additional work within both Acas and ETS to deal with cases deemed to be ‘out of time’.

- *A joint Acas / ETS process to handle single jurisdiction fast track cases* – An ADR first approach as set out above, could be further refined, for specific types of cases. For example, for single jurisdiction cases concerning non-payment of wages or other monies, or breach of contract, a short conciliation window could be available and if the case is not resolved the Employment Tribunal Service could fast track the case for an early hearing. This would give the parties to the dispute clarity about the end-to-end journey that they will go through. Consideration could also be given to whether the Judge is able to hear some of these cases via paper submission only.
- *ADR meetings conducted by Acas conciliators as standard for complex multi-jurisdictional cases* – With an increase in resource, Acas could introduce joint ADR meetings as standard for complex cases. This would utilise our extensive experience and knowledge of handling cases as well as drawing on our own mediation experience and experiences from within the civil court mediation processes. Introducing this approach in these cases would have the benefit of reducing the amount of time currently required by Judges for preliminary work, judicial mediation or full hearing. We would envisage that these meetings would be delivered through digital platforms, thereby reducing the time and cost for parties. We would use our experiences of using digital technology to access our customers during the pandemic to develop this approach and ensure that it effectively met user needs.
- *Digital enhancements to the conciliation process* - Acas are currently exploring whether there are additional digital solutions which will support early resolution of cases. Although we are at an early stage of this project, we aim to identify opportunities to find additional solutions that work for the parties and for Acas ensuring our resolution rates are maintained or improved. We anticipate that this will have a further positive impact on those cases awaiting judicial determination at ETS.

Removing redundancy payment claims against insolvent firms from the employment tribunal system - If the number of redundancies rises as expected over the coming months, there is likely to be increased demand on the tribunal system to deal with claims for unpaid redundancy payments. Currently employees seeking unpaid redundancy pay from an insolvent firm are required to first exhaust all alternative avenues – including making a claim through an employment tribunal – before making a claim to the Redundancy Payments Service. One option which would have the potential to reduce the burden on the employment tribunal system would be to remove this requirement, allowing employees to go straight to the Redundancy Payments Service. We are aware that this change would require a change to legislation and consultation with stakeholders.

- *Integration of areas of the ETS IT system with Acas IT* – Developing the case management systems within Acas and ETS to support a streamlined exchange of data and documents between the two organisations without human intervention would be beneficial to the process of resolving disputes as early as possible, and reducing the administrative burden associated

with cases. Achieving this integration has the potential to bring significant costs savings for both Acas and ETS which could be focused on reducing backlogs. More effective sharing of data would also help identify key points within the life cycle of a case where Acas intervention would be particularly beneficial and where ADR focussed discussions are most likely to be successful.

Reducing cases going to employment tribunals

Acas has long held that workplace disputes are best resolved in the workplace. This is good for the parties involved and for the country as a whole as it reduces the burden on the economy. Our insight and research has found that there are some systemic problems when it comes to dealing with conflict at an early stage, including:

- Lack of line management skills to have the confidence to intervene early and have difficult conversations around issues relating for instance to performance or behaviours
- The perception that conflict is an avoidable nuisance that is not taken seriously at senior management level: conversely, a ‘strategic conflict management’ approach is pro-active and picks up signs of unrest at an early stage, assigning clear responsibility for all parties to seek resolution
- An over-reliance on formal procedure, rather than find alternative or more creative ways of resolving problems
- A diminution in the part played by union and employee representatives in channeling employee voice and helping to act as a sounding board for senior managers and workers to address conflict early.

Acas believes that poor management of conflict is costly, and can be detrimental to employment relations, but that equally good management of conflict can be creative, in helping to promote fairer, more inclusive workplaces underpinned by positive climate and culture of trust and openness. Our end-to-end approach to conflict management promotes the importance of identifying and addressing conflict at the earliest stage; and seeking the most impactful solutions. Where early approaches fail to reach a resolution, we believe that turning that into a clear and fair framework for formal resolution inside the workplace is also important. This involves following best practice in discipline, grievance handling, in investigations and suspensions .

We have identified the following areas where, with the right investment, this can be achieved and, by doing so, the number of cases going to employment tribunal can be reduced:

- *Provision of free advice and support targeted at small businesses* – Increasing awareness of employer responsibilities, workers’ rights and the benefits of good practice, are all, in our view, central to helping organisations handle workplace issues well. Targeting this at small businesses with no direct access to HR advice would be particularly beneficial. Improved access to specialist employment relations support will have the benefit of increasing management confidence and capability in handling issues early and effectively. Targeted support of this nature would also help small businesses develop policies and procedures and the core management skills required to manage issues in the workplace and minimise the number of disputes that result in demand for early conciliation and employment tribunal hearings.

- *Increasing access to workplace mediators and the promotion of workplace mediation* – Workplace mediation provides the opportunity to resolve issues within the workplace itself and before the prospect of using formal dispute resolution processes has arisen. Evidence demonstrates that mediation provides an effective channel for parties to reach an amicable and mutually agreed solution without recourse to formal legal proceedings.
- *The identification of disputes and informal resolution through the Acas helpline* - Enhancing the Acas helpline would further support early dispute resolution either by enabling parties to tackle problems themselves or signposting them to further advice and information. This helps avoid submission of an early conciliation notification. Enhancing this service would further increase Acas' impact in addressing and resolving conflict early. The approach could be further enhanced by appropriate use of case work in more complex calls. This additional service would require further investment.
- *Increasing the support available to businesses post-dispute* - Following dispute, Acas could offer employers follow up, in-depth support to build better practices and procedures to reduce future claims. Investing in this support will not only maximise the adoption of best practice but will feed into the wider economy with a more productive workforce. Research on the productivity puzzle shows the link between 'good work' and a more productive workforce. Acas believes that providing additional support in this way will help businesses avoid future disputes and reduce demand on the Employment Tribunal System.

Acas is happy to provide further details on the thinking behind any of these possible areas of focus, if that would be helpful.

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