Case Number: IC/54/16
15 May 2017

CENTRAL ARBITRATION COMMITTEE

INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 2004

REGULATION 22: BREACH OF NEGOTIATED AGREEMENT

DECISION OF WHETHER TO ACCEPT THE COMPLAINT

The Parties:

Public and Commercial Services Union (PCS)

and

Advisory, Conciliation and Arbitration Service (Acas)

Introduction

1. Mr Dominic Joy, as "an employees' representative on behalf of PCS Trade Union" (the Union), presented a complaint to the CAC on 11 November 2016 under Regulation 22(1) of the Information and Consultation of Employees Regulations ("ICER") 2004, alleging lack of consultation by Acas (the Employer). The *negotiated agreement* relied upon by the Union was dated 16 October 2006, although there was also such a *negotiated agreement* with effect from 1 January 2015, containing materially the same terms, and for the purposes of this decision it does not matter which of those agreements is relevant, because the Union in its complaint alleges breaches of a number of the materially identical terms of such negotiated agreement, as particularised in its complaint. Regulation 22(1) provides that a complaint may be presented to the CAC by a relevant applicant where a *negotiated agreement* has been

agreed and the applicant considers that the employer has failed to comply with its terms.

2. The CAC gave both parties notice of receipt of the application on 11 November 2016. The Employer submitted a response to the CAC dated 18 November 2016 which was copied to the Union. In accordance with s. 263 of the Trade Union & Labour Relations (Consolidation) Act 1992 ("the Act"), the CAC Chairman established a panel to deal with the case. The Panel consists of himself as Chairman of the Panel and, as members, Ms Lesley Mercer and Mr Arthur Lodge. The Case Manager appointed to support the Panel was Nigel Cookson.

Issues

3. After its initial Response, in which the Employer set out a detailed case denying lack of consultation and failure to comply with the terms of the *negotiated agreement*, the Employer sought permission from the CAC to amend such Response on 8 December 2016, which permission was granted by the CAC on 14 December, disputing the jurisdiction of the CAC and the applicability of the ICER, on the basis that the Employer is not an *undertaking* within Regulation 2.

4. Regulation 2 sets out the following definition:

> "'*Undertaking' means a public or private undertaking carrying out an economic activity, whether or not operating for gain.*"

5. Crown employment is provided for in Regulation 42, which reads as follows:

> "*(1) These Regulations have effect in relation to Crown employment and persons in Crown Employment as they have effect in relation to other employment and other employees.*

(2) In these Regulations 'Crown employment' means employment in an undertaking to which these Regulations apply and which is under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(3) For the purposes of the application of these Regulations in relation to Crown employment in accordance with paragraph (1) –

(a) References to an employee shall be construed as references to a person in Crown employment; and

(b) References to a contract of employment shall be construed as references to the terms of employment of a person in Crown employment."

For the sake of completeness, there is an Explanatory Note:

"*Regulation 42 applies the rights of employees to Crown employees (although the Regulations will only apply if they are employed* [in] *an undertaking within the meaning of the Directive).*"

6. The Employer's case is that it does not *carry out an economic activity* within the definition in Regulation 2. Some 90% of its income is provided by the Government, and only some 10% derives from charges made to 'customers' in respect of services for which it charges; and similarly only approximately 10% of its activity is in respect of services for which charges are made to such customers. Looked at as a whole, and by reference to the overwhelming majority of its work, the Employer is not *carrying out an economic activity*. The Union does not challenge the facts, but contends that on those same facts the Employer is an undertaking carrying out an economic activity

being, within definition Regulation 2, "*a public . . . undertaking . . . not operating for gain*".

7. 4 May 2017 was agreed between the parties as the date for the hearing by the Panel of the disputed issue of jurisdiction, and the Panel heard oral arguments by counsel for the parties, Rebecca Tuck for the Union and David Mitchell for the Employer. It was obviously common ground between counsel that a public undertaking, i.e. a nationalised or government entity, could be an *undertaking* within the definition in Regulation 2 if it was *carrying out an economic activity*. It was also common ground that it was not possible in law to 'sever' the Employer's undertaking and treat the approximate 90% and approximate 10% as two separate undertakings, not only because as a matter of fact the workforce is not so differentiated, but also because of the Employment Appeal Tribunal authority of **Moyer-Lee & Ors v Cofely Work Place Limited** [2015] IRLR 879, in which Langstaff P. held as follows in relation to the ICER (referring to the Regulations as a statute) at paragraph 29:

> "*Accordingly, I have come to the clear view that on the interpretation of the statute, applying domestic canons of construction, it envisages as 'the undertaking' a legal entity capable of being the employer of employees serving it under a contract of employment, and that there is no principled basis for suggesting from within those Regulations that the undertaking should be construed as merely a division or department of that single employer*."

8. In the course of the hearing, Ms Tuck for the Union refined her submissions such that she put the Union's case on two bases:

   (i) Regulation 2 defines an undertaking as one carrying out "*an economic activity*". If, contrary to the Union's contention, it is only that part of the

Employer's activity for which it charges 'customers' that can be characterised as an economic activity, nevertheless that is an economic activity, notwithstanding that it is only approximately 10% of the activity of the Employer, and consequently the Employer is *carrying out an economic activity* and is an *undertaking*.

(ii) Alternatively the Employer is in respect of the totality of its activity *carrying out an economic activity, whether or not operating for gain,* and it is not a ground for distinction that its income is received in part from customers in respect of some 10% of its activity and in part from the Government in respect of approximately 90% of its activity.

Evidence etc

9. The Panel read the submissions of both parties and a number of authorities, to which reference will be made. In addition, a witness statement was presented by Ms Anne Sharp CBE, the Chief Executive of Acas, who also gave evidence on affirmation and was questioned both by Ms Tuck for the Union and by the Panel. Her witness statement included the following paragraphs:

"8. Acas is classified by the Cabinet Office as a Crown Non-Departmental Public Body (NDPB). Its employees are civil servants. Acas was created by the Employment Protection Act 1975 and continues in existence under the Trade Union and Labour Relations (Consolidation) Act 1992.

9. Acas has a general duty in the Trade Union and Labour Relations (Consolidation) Act 1992 to promote the improvement of industrial relations. It fulfils this duty by, amongst other things, providing conciliation in disputes between groups of employees and their employers (collective conciliation);

providing conciliation in disputes between individuals and their employers (individual conciliation); providing general advice and guidance on employment relations; and preparing codes of practice on good employment relations practice. Anyone who wishes to lodge a claim with an Employment Tribunal must notify Acas first so that conciliation can be offered.

10. Acas is funded by grant in aid from its sponsor Department: at the beginning of 2016/17 this was the Department of Business, Innovation and Skills. Machinery of Government changes in the summer of 2016 resulted in the creation of the Department of Business, Energy and Industrial Strategy (BEIS), which now funds Acas. The relationship between Acas and its sponsor Department is set out in its Framework Agreement.

11. The Acas operating year runs from April to the end of March. Funding from BEIS is on the basis of a single year. Each year, usually in the first weeks of April I receive a letter from BEIS informing me what the Acas grant in aid will be for the year which has just begun. Under the terms of the letter, the Department may make in year adjustments to allocations in order to meet reductions in its budgets.

12. I received the allocation letter for 2016/17 on 11 April 2016. This did not cover the entire funding allocation for the year and I received an updated allocation in July, which included the allocation for capital expenditure. The total grant in aid from BEIS for 2016/17 amounted to around £50m, split into different categories of spend, with limited ability to move money between these categories. I have not yet received the allocation letter for 2017/18, but expect around the same grant in aid as in the previous year.

13. Under the terms of the allocation letter Acas, like other BEIS 'Partner Organisations' must:

- *prepare an annual business plan which sets out its contribution to BEIS objectives;*
- *provide specified services;*
- *report monthly to BEIS on expenditure and its financial position;*
- *contribute to central reporting requirements made on BEIS by, for example Cabinet Office and HM Treasury;*
- *report periodically to BEIS on progress against non-financial performance metrics, management information and risks.*

14. Acas is expected to manage the money allocated to it by BEIS so that spending by the end of the year is within 1% of the allocation. Acas is not permitted to carry over any unspent allocation from one year to the next. Each year Acas needs approval from BEIS on the detail of its pay awards, which are also constrained by strict Cabinet Office requirements. Other spending controls also require permission from BEIS, including in relation to recruitment of staff and technology expenditure.

. . .

17. In 2016/17, the last full year of operation, Acas employed the equivalent of 755 fulltime staff (FTEs). Around 175 FTEs work on our telephone helpline for employers and employees; around 305 FTEs provide conciliation in disputes between individuals and their employer; around 30 provide conciliation in disputes between employers and groups of employees represented by trade unions; around 50 provide training and

work on advisory projects in organisations. Others prepare guidance on good practice; manage our external and internal communications channels; maintain and develop our IT systems; deliver other corporate functions, such as finance and HR; and lead and manage the organisation.

18. The vast majority of Acas services are provided free of charge. This includes an on line information service; individual and collective conciliation, guidance; on line training, a telephone helpline; individual and collective conciliation; and advisory work within organisations to either address a potential cause of a collective dispute or develop improved relations following such a dispute.

19. Like other Government bodies, Acas recovers the costs of some of its services through charges to service users. Such charges are made for face to face training, mediation and projects within workplaces which are not associated with collective disputes. As shown in Acas' accounts, in 2015/16 (the last year for which Audited Accounts have been laid before Parliament), these charges covered around £4.5m of costs, less than 10% of Acas' total expenditure in that year, which amounted to around £51m."

10. She gave additional oral evidence, by way of expansion of paragraph 17. Those who work on the telephone helpline do so almost exclusively. The 50 plus 30 are basically carrying on the services for which the 'customer' pays and which are mostly described as Good Practice Services, but she explained that in practice the skills and qualifications of those providing the Good Practice Services will be the same as those providing conciliation in disputes for which charges are not made, so that the 305 FTEs and the 50 plus 30 FTEs will largely be an allocation of the services of the same

employees. The "Others" (approximately 195 FTEs) will be providing services which are not paid for by customers but will be covered by the Government grant.

11. The Panel considered the following in addition:

(i) The Employer's Annual Report and Accounts 2015/16, which recorded at its outset:

"*Acas exists to improve organisational performance and working life in Great Britain through expert and impartial advice and training and through our work to help resolve workplace disputes. Our services are highly valued by those who use them and our wider economic impact is substantial – for every £1 we spend, there is at least £12 benefit to the economy.*"

At page 85 in its "*Segmental Analysis*" the Report records that, out of total expenditure of £51,122,000, £4,224,000 is expended on Good Practice Services, and that the latter results in income of £4,539,000, amounting to a surplus of £315,000 resulting in net expenditure of £46,578,000.

Page 89 states, under the heading "*Income*", that "*the Service charges fees for the provision of training in all major aspects of employment relations, and receives income from the sale of publications relating to the work for the public. Acas strives towards Full Cost Recovery for these charged for services."*

(ii) In the Acas Framework Document 2014-2017 there is a section headed "*Charged Services*" which reads as follows:

"*7.14 The Chief Executive is authorised to optimise the utilisation of Acas' assets by selling services (and, where appropriate, products) to other customers. In addition, and where appropriate, Acas will negotiate, agree and implement charging arrangements in furtherance of Acas' policies.*

7.15 Any commercial activity must be within the bounds of HM Treasury guidance concerning the exploitation of assets and in accordance with usual Government practice.

7.16 Activities should not be pursued if it is likely to introduce excess financial or reputational risk, to undermine Acas' ability to deliver its core commitments or to result in a conflict of interest."

(iii) In the 2016-2017 Budget Allocation contained in a letter dated 12 July 2016 from the Department for Business Innovation & Skills it was provided under the heading "*Business Priorities*" under "*Elements of business plan . . . Content*", as follows:

"***Ongoing work**: it is assumed that Acas will continue to provide the following services during the course of 2016-2017*

- *Collective Conciliation.*
- *Individual Conciliation.*
- *The provision of advice and guidance – via the Acas helpline and Acas website.*
- *Good Practice Services.*

Key Spending Areas

- *Providing efficient and effective conciliation services.*
- *Providing effective advice and guidance, including the Acas Helpline.*
- *Providing charged for (Good Practice) Services.*

There is attached as Appendix I to this Decision what is in fact Annex B to that letter, which records that the Department "*has agreed the following Key Performance Indicators (KPIs) with Acas*", which are then set out. As appears in Annex B there are three sets of KPIs for 2016-2017, consisting of eight individual items, none of which apparently are any less *Key* than any others, each with a *Business Area, Objective, Indicator and Target.* Two of the KPIs are under the heading "*Collective Dispute Resolution*", four are under the heading "*Good Practice Services*" and two under the heading "*Advice services*".

12. Ms Sharp mentioned in the course of her evidence that there was an internal document which might assist in the differentiation between chargeable services and other services, and this was helpfully obtained and provided to the Panel. It is headed up "*Workplace Projects*". There is then a section headed "*The time/cost implications*" dealing with "*where it is appropriate to waive the fee to the customer and provide the service at public expense, to indicate that the fee has been waived in this particular instance (see below the guidelines for such situations)*". There then follows discussion about "*decisions on whether to waive the fee for a Workplace Project*". Considerable detail is provided as to when a decision may be taken to *waive the fee*. This document is attached to this Decision as Appendix II.

Authorities etc referred to

13. As to authorities, there was some dispute as the value of considering of authorities of the European Court addressing the Acquired Rights Directive 2001/23/EC (and hence the Transfer of Undertakings Regulations), as opposed to the Information and Consultation Directive 2002/14/EC ("I and C Directive"), because, as Langstaff P. pointed out in **Moyer-Lee**, they are not identical. The Acquired Rights Directive

applied, by Article 1, to "*any transfer of an undertaking, business or part of an undertaking or business*", and in any event the I and C Directive gave the option to national states to extend information and consultation rights to undertakings or to establishments, and the United Kingdom chose the former (the factor which informed Langstaff P.'s judgment in **Moyer-Lee**). However subject to those necessary considerations, both parties (and indeed commentators, as appears in paragraph 16 below) relied upon decisions of the European Court relating to the Acquired Rights Directive.

14. Ms Tuck relied upon the European Court's judgment in **Mayeur v Association Promotion de l'Information Messine (APIM)** 2000 IRLR 783. The definition of undertaking in Article 1(1)(c) of the Acquired Rights Directive contains almost identical wording to that being considered here in relation to Regulation 2 of ICER:

> "*This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain.*"

Hence Ms Tuck drew the Panel's attention to what the Court says at paragraph 40-41:

> "*40. The transfer of an economic activity such as that carried out by APIM cannot be excluded from the scope of Directive 77/187 solely on the ground that it is carried out for a non-profit-making purpose or in the public interest. The Court has already held that the Directive is applicable to the transfer of an activity providing help to drug addicts carried out by a foundation, a non-profit-making legal person governed by private law (Case C-29/91 Redmond Stichting v Bartol and Others [1992] ECR I-3189), and to the transfer of an activity consisting in the provision of home help for disadvantaged persons, awarded by a public-law body to a legal person governed by private law (joined Cases C-173/96 and C-247/96 Sánchez Hidalgo and Others [1998] ECR I-8237).*
>
> *41. It should be noted that Article 1(1)(c), first sentence, of Directive 77/187, as amended by Directive 98/50, expressly confirms that Directive 77/187 applies to undertakings engaged in economic activities, whether or not they are operating for gain.*"

15. Mr Mitchell helpfully drew the Panel's attention to two authorities:

(i) **Henke v Gemeinde Schierke & Verwaltungsgemeinschaft "Brocken"** [1996] IRLR 701. This was also a case under the Acquired Rights Directive, although it antedated the amendment referred to in paragraph 41 of **Mayeur** which added the Article 1(1)(c) of the Acquired Rights Directive to which reference is made in paragraph 14 above. In those circumstances the consideration for example in paragraph 22 of the Advocate-General's opinion of whether the municipality, whose status as an *undertaking* within the meaning of the Directive was being considered, also carried on economic activities was not so central to the question eventually resolved by paragraph 14 of the European Court's judgment namely:

> "*Consequently, the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities does not constitute a 'transfer of an undertaking' within the meaning of Directive.*"

Insofar as there was consideration of such matters as the provision of day nurseries and car parks the Court's conclusion was (in paragraph 17 of the judgment) that:

> "*17. It appears that, in the circumstances to which the main proceedings relate, the transfer carried out between the municipality and the administrative collectivity related only to activities involving the exercise of public authority. Even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary.*"

(ii) **Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca** [2012] ICR 740 was again a transfer of undertaking case. The European Court held that the Acquired Rights Directive applied to the transfer by one local authority to another of staff providing cleaning and maintenance facilities in schools, distinguishing **Henke**. It does seem, although as is often the case where European Court decisions are not necessarily always clear as reported, in respect of the facts, that the Court was there dealing with a transfer of the maintenance etc. staff only. Nevertheless the words of the European Court's judgment are of some assistance (reference is made to the Acquired Rights Directive 77/187, but that obviously subsumes a reference to Directive 2001/23/EC, which is an amendment of that Directive):

> "*42. The term 'undertaking' within the meaning of Article 1(1) of Directive 77/187 covers any economic entity organised on a stable basis, whatever its legal status and method of financing. Any grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective and which is sufficiently structured and independent will therefore constitute such an entity (Joined Cases C-127/96, C-229/96 and C-74/97 Hernández Vidal and Others [1998] ECR I-8179, paragraphs 26 and 27; Case C-175/99 Mayeur [2000] ECR I-7755, paragraph 32; Abler and Others, paragraph 30; see also, with regard to Article 1(1) of Directive 2001/23, Case C-458/05 Jouini and Others [2007] ECR I-7301, paragraph 31, and Case C-151/09 UGT FSP [2010] ECR I-0000, paragraph 26).*
>
> *43. The term 'economic activity' appearing in the definition given in the above paragraph covers any activity consisting in offering goods or services on a given market (Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, paragraph 19; Case C-82/01 P Aéroports de Paris v Commission [2002] ECR I-9297, paragraph 79; Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraph 108).*
>
> *44. Excluded in principle from classification as economic activity are activities which fall within the exercise of public powers (see, in particular, Case C-49/07 MOTOE [2008] ECR I-4863, paragraph 24 and case-law cited, and, concerning Directive 77/187, Case C-298/94 Henke [1996] ECR I-4989, paragraph 17). By contrast, services which, without falling within the exercise of public powers, are carried*

out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive have been classified as economic activities (see, in that respect, Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 22; Aéroports de Paris v Commission, paragraph 82; Cassa di Risparmio di Firenze and Others, paragraphs 122 and 123)."

16. Apart from authorities, we were referred by Mr Mitchell to other guidance:

(i) The **Cabinet Office Code of Practice on Informing and Consulting Employees in the Civil Service**, which includes under the heading "*What is an undertaking?*" the following:

> *"4. The EC Directive on Information and Consultation and the Implementing Regulations apply exclusively to those organisations which are undertakings. Article 2(a) of the EC Directive defines an undertaking as "a public or private undertaking carrying out an economic activity, whether or not operating for gain". This definition is almost identical to that in the Directive on Transfers of Undertakings transposed in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE).*
>
> *5. The main activities of traditional central government departments concern the exercise of public authority (i.e. legislation, administration and policy development). As there is very little caselaw in this area, it is difficult to be clear on the number of government bodies which would be undertakings, although it is expected that there will be very few, if any. The DTI guidance on the Regulations provides more information on this subject. It is important, however, that legal advice is taken at the earliest opportunity to clarify any doubt over a department's status or that of its agencies and non-departmental*

public bodies to avoid the possibility of a legal challenge of non-compliance with the EC Directive and Implementing Regulations."

(ii) Extracts from **Harvey on Industrial Relations and Employment Law**, which includes the following commentary:

"*142. Departments of central and local government are not, as such, 'undertakings' because they do not carry out an 'economic activity' (ICER reg 2, adopting the words of the I&C Directive (2002/14/EC). Nevertheless, could a government department which engages in commercial activity be regarded, following the cases under the Acquired Rights Directive (2001/23/EC), as operating a (separate) undertaking? The following were held to be undertakings under the Acquired Rights Directive, a state-owned telecommunications activity (Collino v Telecom Italia SpA: C-343/98 [2000] IRLR 788, [2002] ICR 38, ECJ), cleaning and maintenance staff employed by a local authority at a school Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca [*2011*] IRLR 1020, [*2012*]* ICR 740, ECJ) *and home help services provided by workers employed by a local authority (Sanchez Hidalgo v Asociacion de Servicios Aser [*1999*]* IRLR 136, [2002] ICR 73, ECJ*).*

143. Such an approach would be difficult to reconcile with Moyer-Lee v Cofely Work Place Ltd [2015] IRLR 879 [2015] ICR 1333, EAT, which identified the undertaking with the legal entity (in that case, a limited company): if a public authority engages in both governmental and economic activities, the entire authority itself can hardly be

regarded as an economic undertaking, but the part of the activities which is 'economic' is not a legal entity."

(iii) Guidance given by the Department for Trade & Industry in January 2006 on ICER, which includes the following:

"***Undertakings:*** *These are defined in the Directive and the Regulations as "a public or private undertaking carrying out an economic activity, whether or not operating for gain". In terms of companies, DTI believes this means a separately incorporated legal entity (which would have its own shareholders and, in the case of British companies, a unique registration number at Companies House), as distinct from say an organisational entity such as an establishment, division or business unit of a company. It would also include partnerships, co-operatives, mutuals, building societies, friendly societies, associations, trade unions, charities and individuals who are employers – if they carry out an economic activity. It may also include schools, colleges, universities, NHS trusts, and Government bodies (both central and local), again if they carry out an economic activity. Ultimately it is a matter for the courts to decide (in the first instance, the CAC), on a case-by-case basis, whether an organisation is carrying out an economic activity.*

. . .

Further guidance on the meaning of the term "economic activity", including application in the public sector.

- *The Acquired Rights Directive applies to "undertakings or parts of undertakings that carry out an economic activity". It is likely therefore that decisions of the European Court of Justice (ECJ) on the meaning of the term "economic activity" in the context of that Directive would also be relevant in the context of the Information and Consultation Regulations.*

- *The ECJ has given a fairly wide interpretation to the term "economic activity" in the context of the Acquired Rights Directive. For example, it has held that it covers the provision of healthcare services (Porter v Queen's Medical Centre (Nottingham University Hospital) and assistance to drug addicts (Dr Sophie Redmond Stichting v Bartol [1992] IRLR 366). However, the ECJ has also held that organisations whose principal role is to carry out purely administrative functions, or to exercise public authority, are not carrying out an economic activity where it is merely ancillary to the main purpose (Henke [1996] IRLR 701).*

- *Recent decisions suggest that the Henke exception should be construed narrowly, but further case law is required to clarify the situation. The main activities of traditional central government departments concern the exercise of public authority (eg legislation, administration and policy development) although they usually have ancillary economic support functions (such as catering and human resources). Accordingly, these departments*

are thought unlikely to be covered by the information and Consultation Regulations.

- *There may well be difficult cases where a public body both exercises public authority and carries out an economic activity, and it is not clear whether that activity is merely ancillary to its main purpose. Each organisation is unique, and so would have to be looked at on a case-by-case basis. Organisations that are unsure whether they are covered by the Regulations are advised to obtain their own legal advice.*"

17. The Panel drew attention to the case of **Porter**, referred to in this Guidance, (in fact reported at [1993] IRLR 486), and permitted both parties to put in short submissions after the hearing in that regard. **Porter** is an example of a National Health Service Regional Authority being an undertaking, providing services "*not in the nature of a commercial venture*" (Paragraph 31), and Ms Tuck also drew attention to the **Sophie Redmond** case there referred to. Mr Mitchell however pointed out that both **Porter** and **Redmond** antedated the express wording in Article 1(1)(g) of the Acquired Rights Directive now being considered in this case (as, the Panel notes, did **Henke**, on which he relied, and he drew our attention to *Chartered Accountants of England and Wales v Customs & Excise Commissioners* [1999] 1 WLR 701 and *Law Society for England & Wales v Secretary of State for Justice* [2010] IRLR 407, in which the performance of regulatory functions by the relevant bodies were not found to be an economic activity; indeed Akenhead J at paragraph 69 of his *Law Society* judgment concluded that the regulatory functions referred to in both cases should "*be distinguished from economic activity. Regulatory activity designed to protect the*

public by bringing to account practitioners whose service falls below an acceptable standard can be said to be administrative rather than anything else".

Conclusions

18. We turn first to consideration of the Union's second argument namely that Acas is a public undertaking which, by reference to all the services it provides, not limited to the Good Practice Services, is *carrying out an economic activity,* albeit *not operating for gain.*

19. The Employer relies on Harvey's expressed opinion at paragraph 143 set out in paragraph 16(ii) above, which suggests that such an approach would be "*difficult to reconcile with Moyer-Lee*" in that "*the entire authority itself can hardly be regarded as an economic undertaking, but the part of its activities which is 'economic' is not a legal entity*". This appears to the Panel not to assist in a solution. First, it begs the question namely whether indeed it can be said that Acas engages in "*both governmental and economic activities*". The services which Acas provides may be provided by public authority, and in the public interest, but it is difficult to see that they can be described as "*governmental activities*", even to the extent that regulatory activities might be so described in the two cases referred to by Mr Mitchell set out in paragraph 17 above. Secondly, it appears to us to be essential to distinguish between the conclusion, derived from **Moyer-Lee**, that there is a part of Acas' activities which cannot be described as a separate legal entity (this is in any event common ground as set out in paragraph 7 above) and the issue as to whether it can in fact be said that Acas as one legal entity is carrying on activities all or substantially all of which can be described as economic.

20. Mr Mitchell submits that the definition of "*economic activity*" should be equated to "*commercial activity*". But the Panel does not agree. First, the normal reference to commercial activity might impart that the activity is intended to make a profit. That is expressly excluded as part of the definition in Regulation 2. Alternatively, it might be said that commercial activity involves trading in a market place. Notwithstanding the reference in paragraph 43 of **Scattolon**, the Panel does not conclude that for there to be economic activity it must consist in "*offering goods or services on a given market*", which may have been the relevant context in which that wording was used by the European Court by reference to the facts of that case. The Panel concludes that it is sufficient if there is a remunerated provision of goods or services to a customer.

21. Mr Mitchell also submits that economic activity must involve some *competitive activity*. Although it could be said that there are respects in which Acas is involved in such competitive activity, in that there are others, albeit much less experienced and not providing their services in any circumstances for free, who are providing services in respect of conciliation or mediation, that is not in the Panel's judgment necessary. A nationalised industry in a monopoly scenario would in the Panels' judgment amount to economic activity.

22. The Employer submits that Acas has statutory powers and functions derived from ss 209-214 of the Act. However, all the services provided by the Employer, including those charged for, fall within its statutory powers, and it does not seem from the *KPIs*, or indeed the *Ongoing work*, referred to in Annex B and paragraph 11 above that any one of the kinds of service is more significant than any other.

23. There is not a dedicated workforce in respect of the Good Practice Services. In his written submissions Mr Mitchell himself contended that the Employer does not consist of two discrete parts. The waiver of fees in respect of some of their services

appears clearly to depend upon discretion and guidelines as set out in Appendix II to this Decision, and not to constitute a distinction writ in stone between those services charged for and those not.

24. Whether or not **Scattolon** is a decision directly on point (see the discussion in paragraph 13 above), it appears to the Panel to be helpful guidance. In paragraph 44 the Court makes clear that "*excluded in principle from classification as economic activity are activities which fall within the exercise of public powers*", but that would not exclude all services carried out in the public interest (by a public authority) and without a profit motive, and not being, as described in the DTI Guidance (set out in paragraph 16(ii) above) "*the exercise of public authority (e.g. legislation, administration and policy development)"*, which can be classified as economic activity, What appears to the Panel to be particularly clear is the definition in paragraph 42 of **Scattolon** an undertaking as covering "*any economic entity organised on a stable basis, whatever its legal status and method of financing*". The *method of financing*, of remunerating, up to 90% of the services provided by the Employer is by Government grants, while the *method of financing* the balance of the services is by charging customers. In the Panel's judgment both types of services involve the carrying on of an economic activity by a public undertaking.

25. Accordingly, the Union's second argument succeeds. However, we deal for completeness with the Union's first argument, which we shall address on the assumption (contrary to our conclusions) that the Employer's *undertaking* only comprises the carrying out of an economic activity as to approximately 10% of its activities.

26. Ms Tuck submits that the wording of the definition in Regulation 2 is deliberate and determinative, namely (with added underlining) *"a public or private undertaking*

carrying out an economic activity." It could have been provided that the activity being carried out by the undertaking was *wholly or substantially* an economic activity. The omission of the reference to '*part of an undertaking*' in the ICER (as opposed to the Acquired Rights Directive) Ms Tuck submits leads to the conclusion that the whole undertaking is subject to ICER if it carries on an economic undertaking. Mr Mitchell submits the opposite. He submits that the omission of the reference to part of an undertaking requires that whole undertaking must be examined, and justifies considering whether the undertaking as a whole carries out an economic activity, just because there is no provision for severance of a part. If only a part carries out an economic activity, or if the undertaking only as to a part carries out such activity, then the whole undertaking is not to be subjected to the provisions of the ICER as to the totality of its employees.

27. Ms Tuck responds by submitting that the ICER should be construed purposefully in order to encourage the expansion of information and consultation, and that there could if necessary in order to avoid an inappropriate result be the approach of disregarding any economic activity which is *de minimis*, just as in **Henke** the maintenance services were disregarded as *ancillary*. On the facts of this case, the provision of the Good Practice Services cannot be disregarded as *de minimis* and could not, particularly by reference to the *Key Performance Indicators (KPI's)* set out in Appendix I, be regarded as *ancillary*.

28. The Panel is persuaded by the Union that if, contrary to its primary conclusion, the whole undertaking does not constitute the carrying out of an economic activity, the Employer is nevertheless an undertaking because it is carrying on an economic activity when it provides the Good Practice Services, and any other services for which it charges the customer, falling within approximately 10% of its activities and

constituting approximately 10% of its income. The provision of the Good Practice Services and/or such chargeable services is neither *ancillary* nor *de minimis*. It does not seem to us to be a conclusion that would be at all contrary to the purpose of the ICER if the provision by the Employer, remunerated by some £4.5m of charges, of the Good Practice Services is found to be an *economic activity* which the Employer is carrying on, and that as a result of that alone the whole undertaking is subjected to the ICER. However, as the Panel have made clear above, it does not need to rest its decision on that basis.

Decision

29. The Panel resolves the issue of jurisdiction in favour of the Union and the application under s.22 of the Regulations is accordingly accepted.

Panel

Sir Michael Burton (Chairman)
Ms Lesley Mercer
Mr Arthur Lodge

15 May 2017

Appendix I

Annex B: Performance measures and requirements for FY 2016-17

BIS has agreed the following Key Performance Indicators (KPIs) with Acas, as follows:

Acas KPIs 2016-17

Business Area	Objective	Indicator	Target
Collective Dispute Resolution			
Conciliation in collective disputes	Minimize working days lost through industrial action	The promotion of a settlement in disputes in which Acas is involved.	*80%*
Non-statutory alternative dispute resolution	Promote internal resolution of individual disputes at work and to avoid recourse to the employment tribunal system by supplying workplace mediation service	% of mediations that are successful	*90%*
Good Practice services			
Workplace projects	Working with employers and employee representatives to help them to find solutions to workplace problems	% of managers and employee representatives reporting improvement in employment relations following Acas intervention	*70%*
Acas Open Access Training	Training managers and employee representatives	% of delegates reporting a change in policy or practice	*80%*
Acas tailored in-company training[2]	Training managers, employees and employee representatives from the same organization	% of workplaces reporting an improvement in employment relations practice	*70%*
Certificate in Work place mediation	Training individuals to handle workplace disputes	% of successful mediations undertaken by (accredited) mediators trained by Acas.	*80%*

Advice services			
Acas Helpline	Providing a telephone helpline giving information and advice to employers and employees	1) Call quality score 2) Call abandon rate	*1) T 2.5* *2) Target no more than 10% over the year*
Written information and guidance on good practice at work	Providing e-delivered and hard-copy written information on good practice to employers and employees, via Acas website.	a) % of users for whom the guidance helped solve a problem at work[3] b) % of users reporting that the guidance helped to amend or introduce a policy[4].	*a)55%* *b)15%*

9

Appendix II

2.12 Workplace Projects

Where it becomes clear that the organisation requires in-depth work to be undertaken, perhaps by carrying out a diagnostic exercise, planning session or joint problem solving event, then the Adviser should submit a work/project proposal to the organisation detailing

- The objectives of the work
- That the work is subject to joint commissioning (where appropriate)
- The methodology to be used
- The terms of reference
- The parties to be involved - either by name or definition.
- **The time/cost implications**
- Where it is appropriate to waive the fee to the customer and provide the service at public expense, to indicate that the fee has been waived in this particular instance (See below the guidelines for such situations)
- An estimate of any travel and accommodation costs where appropriate
- Details of the Acas adviser who will undertake the work
- That evaluation and possible impact survey will be undertaken

"Why do we have the policy guidance?

1. The guidance in the policies has been developed and refined over a number of years and it is designed to meet several different requirements or objectives. For example, it is essential that we distinguish correctly between charged for and waived fee work. This is necessary not only because we must be careful that we do not offer waived fee work at a cost to the taxpayer in circumstances where an independent and impartial provider such as Acas isn't essential but also because charging for work in circumstances where it is not appropriate could damage the parties perception of our independence and impartiality. In this case there are, therefore, two very different objectives the former is about abiding by Treasury rules and not subsidising our delivery with taxpayers' money in a market where there are private providers and the latter is about maintaining our reputation which is a key foundation of our success and must be protected going forward. Both are equally important. There are other external requirements around full cost recovery and segmental accounting and recording together with internal requirements to distinguish between problem solving advisory work and training so that we can properly assess the complexity of work that staff have undertaken.

Key issues for AD focus - Decisions on whether to waive the fee for a Workplace Project

2. In some circumstances the Adviser may decide that it is appropriate for work to be undertaken at public expense, thus waiving the fee. It would be inappropriate for an Adviser to suggest to customers that situations could be exaggerated in order to attract a decision to waive the fee. Advisers and customers should assume that work will be charged.

3. Guidance has been provided by the Acas BMG concerning the circumstances in which a decision may made for the work to be undertaken at public expense, thus waiving the fee. The circumstances in which a waiver might apply are as follows:

A. Issues which directly flow from a collective dispute whether or not Acas has been involved in conciliation. The work must be directly related to the issue in dispute and the relationship between the parties such that there is little potential for remedy/resolution without intervention/facilitation by a 3rd party. This may apply in unionised or non-unionised environments.

An example might involve the development of a new payments system to replace an earlier disputed one. Work which involves familiarisation, training, embedding or implementation of an agreement arising from the resolution of a collective dispute would not normally justify the waiving of the fee.

B. In cases where an integral part of dispute resolution is an Acas brokered review to take place after a period of operation, for example the implementation of a new shift system agreed as resolution of a dispute. Such a review made attract a decision to waive the fee.

C. The unionised organisation is not in formal dispute but the relationship between the employer and the collective workforce (or large areas of the workforce) is at or near dispute. The active involvement of FTOs and/or lawyers on both sides would be an indicator of such a position as would a significant number of issue based complaints to the Employment Tribunals. A waived fee project in these circumstances might, for example focus on improving working relationships.

D. Circumstances where an employer is seeking to implement changes which go to the heart of the employment contract and which will be resisted by the workforce, for example redundancies.

E. In a non-unionised organisation where Acas has been approached to assist with developing collective structures to deal with issues which are in themselves causing employment relations difficulties or as in C above.

F. Issues surrounding trade union recognition, whether voluntary or imposed and its immediate aftermath.

G. Where the trigger mechanism has been initiated under the Information and Consultation Regulations."

Appendix III

Names of those who attended the hearing on 4 May 2017:

For the Union

Rebecca Tuck	–	Counsel
Iain Birrell	–	Solicitor
Dominic Joy	–	PCS
Chris Peel	–	PCS
Lois Austin	–	PCS
Zita Holbourne	–	PCS

For the Employer

David Mitchell	-	Counsel
Carol Davies	-	Government Legal Department
Anne Sharp CBE	-	Chief Executive, Acas
Lucienne Jones	-	Acas