Appeal No. UKEAT/0160/17/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 30 January & 5 February 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

ADVISORY CONCILIATION AND ARBITRATION SERVICE (ACAS) APPELLANT

PUBLIC AND COMMERCIAL SERVICES UNION (PCS) RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MR TOM POOLE (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS
For the Respondent	MS REBECCA TUCK (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW

SUMMARY

CENTRAL ARBITRATION COMMITTEE (CAC)

The PCS made complaint to the CAC pursuant to the **Information and Consultation of Employees Regulations 2004** ("ICER") that ACAS, as an employer, had failed to consult with its employees pursuant to a collective agreement. ACAS disputed the jurisdiction of the CAC on the basis that it was not an "undertaking" within the meaning of Regulation 2 of the **ICER** because it was not "carrying out an economic activity, whether or not operating for gain".

The CAC dismissed the challenge to the jurisdiction, holding that all of ACAS' activities satisfied that requirement; alternatively, that a sufficient part of its activities did so.

The EAT dismissed the appeal, upholding the CAC's decision on its alternative basis.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal, pursuant to Regulation 35(6) of the **Information and Consultation of Employees Regulations 2004** ("ICER"), from the decision of the Central Arbitration Committee ("CAC"; Sir Michael Burton, Ms Lesley Mercer, Mr Arthur Lodge; dated 15 May 2017) which held that it had jurisdiction to consider the complaint of the Public and Commercial Services Union ("PCS") against the Advisory Conciliation and Arbitration Service ("ACAS") made pursuant to Regulation 22(1) of the **ICER**. The complaint is of ACAS' alleged failure as employer to consult with its employees pursuant to a negotiated agreement with PCS dated 16 October 2006. A subsequent negotiated agreement between the parties had effect from 1 January 2015 and is in materially the same terms.

2. The **ICER** implement the European Directive 2002/14/EC which established a general framework for informing and consulting employees in the European Community in domestic law. Regulation 22(1) of the **ICER** 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. By Regulation 3, the **ICER** apply to UK based undertakings which employ a requisite number of employees in the UK. An undertaking to which the **ICER** apply is referred to, in relation to its employees, as "the employer". By Regulation 2, "undertaking" means a public or private undertaking carrying out an economic activity, whether or not operating for gain. By Regulation 42 the **ICER** have effect in relation to Crown employment or persons in Crown employment, as they have effect in relation to other employment and other employees.

3. By amendment to its initial response to the complaint, ACAS disputed the jurisdiction of the CAC and the applicability of the **ICER** on the basis that it is not an undertaking within the meaning of Regulation 2.

4. As the CAC decision records, the essential facts are not in dispute. It is also agreed that ACAS is an undertaking within the meaning of the Regulation 2 words "public or private undertaking". That agreement reflects the decision of Langstaff P in **Moyer-Lee v Cofely Workplace Ltd** [2015] ICR 1333 that it means a legal entity capable of being the employer of employees serving it under a contract of employment and does not extend to a mere division or department of that single employer (paragraph 29). Thus, the question is whether ACAS is "carrying out an economic activity, whether or not operating for gain".

5. The essential facts can be taken from the decision. Paragraph 9 sets out extracts from the witness statement of Ms Anne Sharp CBE, the Chief Executive of ACAS. This includes:

> **"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 for 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 [sic]; 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."

6. Paragraph 10 sets out oral evidence given by Ms Sharp, by way of expansion of paragraph 17 of her statement:

"10. … 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."

7. In paragraphs 11 and 12 the CAC Panel considered the following documents. First, ACAS' Annual Report and Accounts 2015/2016 which included the following:

> **"… 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.**
>
> **… 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.**
>
> **… 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."**

8. Secondly, the ACAS Framework Document 2014-17, whose section headed "C*harged Services*" includes:

> **"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."**

9. Thirdly, the 2016 to 2017 Budget Allocation where the "*ongoing work*" in that period is identified:

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

Then under the heading "*Key Spending Areas*":

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

10. Fourthly, a document recording agreement between the Department (BEIS) and ACAS as to "*Key Performance Indicators*" ("KPIs") under three heads: "*Collective Dispute Resolution*", "*Good Practice Services*", and "*Advice Services*". The CAC noted that four of the eight KPIs fell under the heading of "Good Practice Areas" and observed, of the eight items, "*none … apparently are any less key than any others*".

11. Fifthly, an ACAS internal document with a section headed "*Workplace Projects*". This provided for the waiver of fees to customers in appropriate circumstances and set out detailed guidance in that respect.

12. With the acknowledged caveat that the comparative language was not identical, both parties made submissions to the CAC based on decisions of the European Court relating to the **Acquired Rights Directive** 2001/23/EC ("ARD") (and its predecessor 77/187/EC) and hence the domestic **Transfer of Undertakings Regulations**.

13. Counsel for PCS, Ms Rebecca Tuck, pointed in particular to **Mayeur v Association Promotion de l'Information Messine (APIM)** (C-175/99) [2002] 3 CMLR 22. That was a case under the **ARD 1977** which applied "*to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger*" (Article 1). There was no definition of the word "undertaking". However the Court noted the amendment which was to become Article (1)(1)(c) of the **2001 ARD**, namely "*This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain*". The Court held that the activity of the transferor, APIM (a non-profit making association set up by the city of Metz to advertise the opportunities afforded by the city) was economic. Thus:

> **"39. Activity of this kind, consisting in the provision of services, is economic in nature and cannot be regarded as deriving from the exercise of public authority.**
>
> **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. …"**

14. Counsel who appeared below for ACAS pointed to the European Court's decisions in **Henke v Gemeinde Schierke and Verwaltungsgemeinschaft 'Brocken'** [1997] 1 CMLR 373 and **Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca** [2012] 1 CMLR 17.

15. **Henke** concerned the **1997 ARD** and the activities of a German municipality. The Court held that the transfer "*related only to activities involving the exercise of public authority*", and continued "*Even if it is assumed that those activities had aspects of an economic nature, such aspects could only be ancillary*" (paragraph 17).

16. **Scattolon** concerned the transfer of what was described as auxiliary services of school cleaning and maintenance staff from one local authority to another. The transfer predated the **ARD** amendment in 2001. However, the Court defined the term "undertaking" within the meaning of the **1977 ARD** by reference to economic activity. Thus it:

> **"42. … 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 …"**

That statement cited **Mayeur** and other European Court decisions.

17. The judgment continued:

> **"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 …**
>
> **44. Excluded in principle from classification as economic activity are activities which fall within the exercise of public powers … 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 …"

In that case, it was undisputed that the relevant services did not fall within the exercise of public powers (paragraph 46).

18. From these authorities, counsel for PCS and for ACAS placed contrasting emphasis on (1) activities which, however funded, consist in offering goods and services within a given market, and (2) activities which fall within the exercise of public powers.

19. In the former category, counsel for PCS relied on the European Court decision in **Dr Sophie Redmond Stichting v Hendrikus Bartol** [1994] 3 CMLR 265 and the High Court decision in **Porter v Queen's Medical Centre** [1993] IRLR 486, each relating to the **ARD 1997**. **Redmond** concerned a public authority which financed, through subsidies, the activities of a foundation which provided assistance to drug addicts. In upholding the application of the **ARD**, the Court emphasised that the fact that the service was founded by subsidy and "*… provided without remuneration does not exclude that operation from the scope of the directive*" (paragraph 18). In **Porter**, the health authority had a contract with the hospital for the provision of paediatric and neonatal services. Following **Redmond**, the Deputy Judge accepted that the funded supply of these services constituted an undertaking.

20. By contrast, counsel for ACAS relied on two decisions where the performance of regulatory activities by the relevant bodies were held not to constitute economic activity: **Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners** [1999] 1 WLR 701, and **Law Society of England and Wales v Secretary of State for Justice** [2010] EWHC 352. In the latter case, Akenhead J concluded that the Law

Society's central activity within the meaning of Regulation 3(2) was not an economic activity but was primarily regulatory (see paragraph 46). He held that:

> **"69. … regulatory functions can (and should here) 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."**

21. The CAC Panel also took account of (i) the *Cabinet Office Code of Practice on Informing and Consulting Employees in the Civil Service*, (ii) guidance from the DTI in January 2006, and (iii) *Harvey on Industrial Relations and Employment Law*. The Cabinet Office Code of Practice, under the heading "*What is an undertaking?*", in particular noted that "*The main activities of traditional central government departments concern the exercise of public authority (i.e. legislation, administration and policy development)*"; and continued "*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*".

22. The DTI guidance, in particular, noted that an "undertaking":

> **"… 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."**

23. The guidance noted a "*fairly wide interpretation*" in **Dr Sophie Redmond** and in **Porter**; and contrasted the decision in **Henke** where the economic activity was held to be merely ancillary to the main purpose. It stated that 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 the main purpose: "*Each organisation is unique, and so would have to be looked at on a case-by-case basis*".

24. *Harvey*, noting the EAT decision in **Moyer-Lee** which identified the "undertaking" with the legal entity, suggested that "… *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*".

25. The CAC Panel then considered PCS' alternative cases that (1) all the services provided by ACAS constituted an economic activity, or (2) the charged for Good Practice Services constituted "an economic activity" which it carried out.

All services "economic activity"

26. The CAC Panel rejected ACAS' arguments that:

(1) its activities constituted "governmental" activities akin to the regulatory activities considered in the **Chartered Accountants** and **Law Society** decisions;

(2) a division between "governmental" and "economic" activities would be inconsistent with the EAT decision in **Moyer-Lee** that an undertaking means one undivided legal entity;

(3) that the definition of "economic activity" should be equated to "commercial activity" or must involve some "competitive activity".

27. As to "commercial activity", it noted the exclusion in Regulation 2 of a need for a profit motive. The Panel continued:

> **"20. … 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."**

28. As to "competitive activity", the Panel observed that "*A nationalised industry in a monopoly scenario would in the Panels' judgment amount to economic activity*" (paragraph 20). The Panel also considered ACAS' submission based on **Scattolon** (paragraph 44) that all its activities were those which fell within the exercise of public powers, in particular the powers and functions set out in Chapter IV, sections 209 - 214 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("1992 Act"). The Panel stated that activities which fall within the exercise of public powers:

> **"24. … 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 … "*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."**

It concluded that PCS' argument succeeded.

Good Practice Services 'economic activity'

29. The Panel then considered PCS' alternative argument that ACAS carried out an economic activity in respect of the charged - for Good Practice Services. ACAS relied on the omission from the **ICER**, in contrast to the **ARD**, of any reference to "part of an undertaking". Accordingly, and consistently with the decision in **Moyer-Lee**, the undertaking - i.e. the legal entity which is ACAS - must be considered as a whole. The undertaking only fell within **ICER** if, so considered, its activity constituted economic activity. Thus even if part of its activity was an economic activity, ACAS as a whole was not subject to the **ICER**.

30. PCS focused on the indefinite article in Regulation 2, namely "carrying out an economic activity". It was only necessary to establish that the legal entity (ACAS) carried out an

economic activity which was more than *de minimis* or otherwise to be disregarded as ancillary. This accorded with a purposive construction to encourage the provision of information and consultation. On the facts, Good Practice Services were neither ancillary nor *de minimis*.

31. The Panel preferred PCS' argument and concluded that, even if wrong on its primary conclusion, ACAS is:

> **"28. … 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*. …"**

The Appeal

32. ACAS raises five grounds of appeal, namely:

> **"4.1. The CAC failed to properly engage with the question of whether or not Acas' activities (remunerated or otherwise) could be termed "*economic*" within the definition of regulation 2 of the ICE Regulations when they amounted to the exercise of public duties.**
>
> **4.2. The CAC misapplied *Scattolon* and overlooked the ratio of the case at [44], namely, "*Excluded in principle from classification as economic activity are activities which fall within the exercise of public powers*".**
>
> **4.3. By treating Acas' activities as divisible into those which are charged for (economic) and those which are not (non-economic), the CAC has treated Acas as having separate parts in the manner suggested by *Harvey* as being impermissible following *Moyer-Lee*.**
>
> **4.4. The CAC's rationale for deciding that the totality of Acas' activities are to be considered "*economic*", renders meaningless the distinction between economic and non-economic activities in the Directive and the ICE Regulations.**
>
> **4.5. The CAC has overlooked Acas' statutory functions beyond TULR(C)A, for instance under the ETA 1996 and importantly, the role which it has within the ICE Regulations."**

These are interrelated and will be considered together.

ACAS' Submissions

33. Counsel for ACAS, Mr Tom Poole, made the following essential submissions:

First, that the Panel wrongly focused on a distinction between "economic activity" and "governmental activities".

Secondly, that in doing so it took no or no adequate account of the distinction identified in **Scattolon** between economic activity and "activities which fell within the exercise of public powers"; see also the references in **Henke** and **Mayeur** to "exercise of public authority". In consequence the Panel had, on its primary finding, removed any distinction between economic and non-economic activity.

Thirdly, that ACAS' activities, including the charged for services, amounted to a discharge of public duties and powers under the **1992 Act** and the **Employment Tribunals Act 1996**. Thus they fell outside "economic activity". In this respect, Mr Poole particularly emphasised ACAS' (i) core general duty under section 209 of the **1992 Act** "to promote the improvement of industrial relations"; (ii) various powers under the succeeding sections of Part IV Chapter 4 of that Actm and in Chapter III concerning Codes of Practice; (iii) administrative and governance provisions within Part VI of the Act, including the power under section 251A to charge a fee for exercising a function in relation to any person. As to the **ETA 1996**, ACAS has a statutory duty to provide conciliation services in actual and potential ET cases. He referred to the ACAS framework document 2014-17 which further set out these duties and powers.

Fourthly, there was a contradiction between the Panel's statement in respect of "economic activity" that "*it is sufficient if there is a remunerated provision of goods or services to a customer*" (paragraph 20) and its conclusion that all of ACAS' services, including the 90% or so funded by Government grants, constituted "economic activity". The services funded by Government grants could not constitute "economic activity".

Fifthly, that the alternative finding that the charged for services constituted "an economic activity" was in conflict with the decision in **Moyer-Lee**, since it treated ACAS as having separate parts.

Sixthly, that if there was any economic activity, it was merely ancillary to the discharge of ACAS' public duties.

Seventhly, that the Panel's conclusion, on either basis, was in conflict with ACAS' specified conciliation role within the **ICER**: see Regulation 30.

PCS' Submissions

34. In reply Ms Tuck began with two core submissions.

First, that the source of funding cannot determine the question of whether a particular activity is "economic". Thus if a fee were introduced for the telephone advice, it would not alter the nature of the activity.

Secondly, that the fact that a function is set out in a statute does not determine whether or not it is an "economic activity" within Regulation 2. As Regulation 42 further demonstrated, there was no bright line which excluded legal entities whose powers were derived from an Act of Parliament.

35. She drew attention to the various European Court decisions on competition law which **Scattolon** identified in support of the central propositions in its paragraphs 43 and 44. These included **Hofner (Klaus Hofner and Fritz Elser v Macrotron GmbH)** [1991] ECR 1-1979 where a public employment agency providing services free of charge was held to be an undertaking within Articles 85 and 86 of the Treaty. Conversely, in **SAT Fluggesellschaft mbH v European Organization for the Safety of Air Navigation (Eurocontrol)** Case C-

364/92 the activities of the aviation public authority Eurocontrol were held not to be of an economic nature.

36. Ms Tuck submitted that the "exercise of public powers" was concerned with legislation, administration, policy development and regulatory activities. It was ultimately a question for the CAC to determine the facts of each case. In this case the CAC had not overlooked **Scattolon** and the exercise of public powers, and had rightly concluded these had no application in the present case.

Conclusions

37. As a starting point for consideration of the critical words in Regulation 2 *("carrying out an economic activity*"), I agree that the summary of the European Court case law in paragraphs 43 and 44 of **Scattolon** is appropriate. Whilst reflecting an amalgam of decisions on the **ARD** and competition law, the definition of "economic activity" has equal application to the 2002 Directive and thus the **ICER**. That said, the statements in **Scattolon** are, of course, not to be interpreted as a statute, but must be considered in the light of further European Court case law and of the principles relevant to the domestic context.

38. As to the statement that economic activity covers any activity consisting in offering goods or services on a given market, the underpinning decisions of the European Court make clear that this does not require that the payment for such goods or services has to be made by the consumer or end-user. It applies equally where funding is from some other source. The CAC Panel's statement that "*it is sufficient if there is a remunerated provision of goods or services to a customer*" (paragraph 20) is evidently intended to reflect this broad meaning of remuneration. Thus there is no inconsistency with its subsequent reference (paragraph 24) to

90% of ACAS' services being funded by grant. I also agree with the Panel that economic activity may include the supply of goods or services by a monopoly in the given market.

39. As to the exclusion of activities which fall within the exercise of public powers, this must be understood and applied in the context of domestic law. As with most public bodies, ACAS derives its powers and duties from public statutes alone. Too literal a reading of the European Court language of "the exercise of public authority" would conflict with the **ICER** and the underlying directive which expressly make no distinction between a public or private "undertaking"; and likewise Regulation 42 in respect of Crown employment.

40. As Ms Tuck submits, and consistently with the DTI guidance of January 2006, this exclusion in respect of the exercise of public powers/authority has to be considered on a case-by-case basis. Whilst the main activities of traditional central Government departments (see the Cabinet Office guidance) or regulatory activity will be obvious examples within the exclusion, they are not exhaustive.

41. As to the interpretation of "an economic activity", like the Panel I accept PCS' submission that the indefinite article is deliberate and significant; and that it is sufficient to establish that the relevant legal entity carries out an economic activity which is not merely ancillary or *de minimis.*

42. I do not agree that this conclusion is in conflict with the principle in **Moyer-Lee**. The conclusion that the activities of a legal entity include an economic activity does not involve any subdivision of the legal entity into separate entities.

43. I also reject the submission that ACAS' position as conciliator within the **ICER** is an inherent bar to their application to any of its activities. As Ms Tuck submitted, it is no more a bar than it would be to the jurisdiction of the Employment Tribunal in a claim of unfair dismissal.

44. In the light of these principles, I turn first to the CAC Panel's acceptance of PCS' alternative case that the provisions of the charged for Good Practice Services constituted the carrying out of an economic activity. Having regard to the evidence of the nature of the services and the proportion of total income they produced, I have no doubt that the correct conclusion was reached. The services were provided to customers in a given market for such services. They were not *de minimis* or merely ancillary. Whilst inevitably carried out pursuant to ACAS' statutory powers, they were not such as to fall within the exclusion identified in **Scattolon** and other European Court cases.

45. As to the Panel's finding on the primary case that all ACAS' activity constituted economic activity, it is evident that the Panel have the **Scattolon** exclusion expressly in mind. As I read paragraphs 19 and 24 of its decision the Panel concluded that the activities were not within the exclusion for the exercise of public powers since they did not involve the exercise of public authority (e.g. legislation, administration and policy development) or otherwise constitute "governmental activities". Rather, they constituted services carried out in the public interest by a public authority without a profit motive.

46. Furthermore in reaching its conclusion the Panel also placed particular emphasis on the statement at paragraph 42 of **Scattolon** that an undertaking within the meaning of the **1977 ARD** covers "*any economic entity organised on a stable basis, whatever its legal status and*

*method of financing*2. Having thus acknowledged the irrelevance of the method of financing, the Panel concluded that "*both types of services* [i.e. funded and charged for] *involve the carrying on of an economic activity by a public undertaking*" (paragraph 24). In this way, the Panel's focus was more on the economic entity of ACAS than on the activities which it was pursuing.

47. An appeal is of course only on a question of law. However, in my respectful judgment in respect of this finding, the Panel took too narrow an approach to the excluded category of activities "within the exercise of public powers" and focused too much on the entity rather than its activities. The provision of services by a public authority in the public interest and without a profit motive may constitute an economic activity, but not necessarily so. By way of a striking example considered in argument, ACAS' activities include the highly important duties and powers of conciliation under the **ETA 1996**. These arise both before and after the presentation of a complaint to the Employment Tribunal and are provided to ACAS alone. When I raised this particular example with Ms Tuck she was not able to provide any real basis to support the necessary contention that this also constituted the provision of services in a given market. In my judgment, that service cannot be regarded as an economic activity (even one by a monopoly supplier in that respect) but is squarely within the excluded category of services which fall within the exercise of public powers.

48. It is unnecessary for present purposes to consider in further detail each of the services carried out by ACAS. However, I conclude from the cited example that it cannot be said that all ACAS' services constituted economic activity for the purposes of **ICER** Regulation 2. However, for the reasons given in respect of the alternative case, the Regulation is clearly satisfied and accordingly the appeal must be dismissed.