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# REVIEW

## Vive la Différence

Light touch conciliation can continue in the Isle of Man

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# Vive la Différence

## Light touch conciliation can continue in the Isle of Man

*Advocate John Aycock reviews a High Court appeal that maintains a distinct difference between Isle of Man and UK employment law but still leaves one anomaly at large.*

The Isle of Man will continue to be markedly different from the UK when it comes to settling employee claims. That is one of the corollaries of a recent High Court Judgment that makes fascinating reading for employment lawyers and human resource staff.

One of the key issues before the High Court on appeal from the Manx Employment Tribunal involved the function of the Manx Industrial Relations Service ("MIRS") when conciliating settlement agreements between an employer and employee. The court was asked to rule on the extent to which an industrial relations officer should be materially involved in negotiations in order for the settlement to be valid and binding on the employee's statutory rights. This is because employment legislation dictates that an employee's statutory claims can only be properly waived by a conciliated process involving MIRS. In turn, this prevents an unscrupulous employer compromising an employee's claim when the employee may not have received proper advice and assistance.
In a punchy judgment, Deemster Wild declined to assimilate the Manx position with what happened in England in similar circumstances some twenty eight years ago when ACAS (the MIRS equivalent in England) on advice withdrew from signing off agreements already made before the parties had approached the ACAS conciliator. This meant the parties could not achieve full and final settlement if ACAS declined to conciliate and so encouraged the parties to involve ACAS negotiators at an earlier stage. The impasse led to new legislation in England which allowed the parties to make private binding employment settlement agreements (outside the auspices of ACAS) provided certain conditions were satisfied, including that the employee had received legal advice from an independent adviser who met certain criteria (with contributions to legal fees made by the employer). These agreements were known as statutory compromise agreements.
By maintaining the need for MIRS involvement in binding employment settlement agreements, the Isle of Man is however markedly different from the UK and will remain so. In evidence before the court, MIRS accepted that it commonly approves settlement agreements that are effectively already agreed before their involvement. In figures presented to the court MIRS stated that their officers conciliate approximately seven settlement agreements per week. The conciliation role they have involves attempting to promote settlement (this being an MIRS statutory function under section 157 of the Employment Act 2006) in relation to disputes at all stages thus while an employee might remain employed but also after dismissal.

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Deemster Wild distinguished the English position by noting that the reason for introducing statutory compromise agreements in English legislation was that ACAS has refused to rubber stamp pre-agreed settlements. The court pointed out that in the Isle of Man MIRS had not refused to sign off these agreements. Our court did not delve into the reason why ACAS was advised not to act as a rubber stamp. It was noted that in this particular case the first instance tribunal had ruled (amongst other things) the settlement agreement to be void (because MIRS had only been a rubber stamp in this case) but the appeal heard that the tribunal had received no direct oral evidence from MIRS when effecting this decision.

The court looked at what appropriate input from MIRS was required. Deemster Wild said the test is whether MIRS have endeavoured to promote a settlement as that is the statutory function. If MIRS have signed off a settlement (which occurred in this case) then this does not need to be investigated further, save in exceptional circumstances such as allegations of bad faith.

The consequences of this ruling appear to be:

- That the Isle of Man need not change its laws to accommodate statutory compromise agreements the way English legislators did in the 1990s;
- That all employment settlements (whether fait accompli or not) should continue to be conciliated through MIRS in order for the waiver of statutory claims to be effective;
- That MIRS can continue its practice of conciliating with a light touch in appropriate cases.

Deemster Wild pointed out that where both parties are already legally represented and lawyers have negotiated a settlement, it may well be that the MIRS involvement in finalising the settlement is relatively nominal. Had the first instance tribunal's decision stood without being overturned at appeal then such parties would have been faced with involving MIRS at an earlier stage or Manx legislators might in turn have contemplated effecting new law to allow private non-MIRS compromise agreements akin to the UK.

*One Remaining Anomaly*

While it is encouraging that yet further employment law is not being enacted (the 263-page Equality Act 2017 is enough to be going on with) the current situation does leave one ongoing issue. English style compromise agreements mandate the involvement of a "Relevant Independent Adviser" which means a qualified lawyer with a proper indemnity policy who is able to give advice to the employee. The agreement cannot be signed off without a Relevant Independent Adviser certifying that such advice has been given in accordance with English law. I routinely see that UK precedent documents are adapted for use in the Isle of Man by describing the Relevant Independent Adviser as MIRS. This is an uneasy fudge because:

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- The Relevant Independent Adviser concept does not exist in Manx law; and
- The industrial relations officers at MIRS are in any event not Relevant Independent Advisers; they promote conciliation rather than represent a party as such.

The reason employers might adopt this fudge is that they obtain the benefit of the statutory waiver by invoking MIRS but without having to pay or contribute to an employee's legal fees of taking advice from an advocate. I am not suggesting that we make new law in the Isle of Man but perhaps a practical solution would be for MIRS to decline to sign any Relevant Independent Adviser certificate (or to be described as such) thus alerting the employer to the fact that an employee is entitled to legal advice and accordingly it would be reasonable (but not mandatory) to contribute to such legal fees as part of a settlement agreement.
With statistics showing that on average an agreement is conciliated through MIRS every day, it is worth getting these things right, being fair to both parties and ensuring clarity of procedure.

*Advocate John Aycock is head of M&P Legal's Employment Unit and has 27 years' experience of advising on labour law issues in three jurisdictions..*

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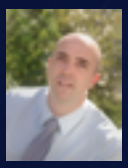

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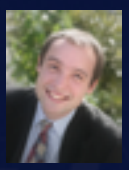

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