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Acas Policy Discussion Papers

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The alchemy of dispute resolution – the role of collective conciliation

The *Acas Policy Discussion Papers* series is designed to stimulate discussion and debate about key employment relations issues.

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We welcome your comments and opinions. These should be sent to the author c/o strategy@acas.org.uk

Introduction

Collective conciliation has been part of the industrial relations landscape for over 100 years. Its application in settling disputes between groups of employees and employers has changed and evolved over that time, as has the incidence of its use. More recently, a complex set of factors including the growth in the statutory individual employment rights framework, the nature of trade unions, and the dwindling experience of HR and employee representatives – the key players in collective conciliation – have all played a role in influencing the extent to which collective conciliation remains a firm fixture of workplace collective relations.

The recent unofficial action at the Lindsey oil refinery that sparked sympathy protests across the country highlighted just how fragile collective employment relations can be when the economy is in crisis. And it brings to the fore the very important role of collective conciliation, even in areas of illegal action*, in dealing swiftly with the potential economic damage that industrial disputes can give rise to. And yet, collective conciliation is not simply a tool to deal with conflict when relations have reached this level of deadlock, it is most effective and indeed most common when relations are difficult but have not yet broken down entirely.

This paper addresses how collective conciliation has changed and why, and asks:

- What is collective conciliation and what part does it play in collective bargaining?
- Is there a relationship between collective conciliation and the level and nature of industrial unrest?
- What are the barriers to collective conciliation – particularly in the public sector?
- Are Acas conciliators really alchemists when it comes to proactively transforming employment relations?
- Against the backdrop of economic recession, what is the future of collective conciliation?

*Acas does not normally become involved in unofficial action

What is collective conciliation?

Collective conciliation is a specific term used to refer to talks aimed at resolving disputes between representative groups (most typically trade unions) and employers – or, less frequently today, groups of employers – facilitated by an independent third party. Its origins date back to the Conciliation Act 1896 and it was at the core of Acas' creation as an independent body in 1974. Crucially, the establishment of Acas and its statutory responsibility for collective conciliation removed the state's arbitration and conciliation functions from ministerial control. There is therefore a long established history of Acas offering free conciliation in collective disputes.

Other forms of alternative dispute resolution (ADR) approaches offered by Acas include:

- **Arbitration** – where an impartial third party is asked to make a decision on a dispute – unlike conciliation where the parties are encouraged to reach their own decision. As is the case with conciliation, arbitration is voluntary so both parties must agree to go to arbitration. They should also agree in advance that they will abide by the arbitrator's decision. Arbitration can be used in collective employment related disputes, typically if conciliation has failed to resolve it, and involves Acas appointing an independent arbitrator from its panel of arbitrators. The arbitrator will hear both sides of the case and make an impartial and independent decision. The decision is morally, but not legally, binding.
- **Collective mediation** – which has the potential to be used where conciliation has failed and the parties are unwilling to move to binding arbitration but remain committed to resolving the issues without recourse to coercive action. Mediation in this setting, and traditionally understood in Acas' terms, involves making recommendations to attempt to resolve the dispute. Prior to the mediation, the parties give an undertaking to seriously consider the recommendations in good faith.

In line with the long tradition of voluntarism in British employment relations, of which collective conciliation is very much a product, there are only very limited instances where UK law can compel unwilling parties to cooperate with third parties in an attempt to resolve industrial disputes, or legally compel the parties to abide by the agreements reached though conciliation[1]. This is a very different framework to that which exists in many other countries.

This media's preoccupation with collective conciliation is no doubt due to the high profile nature and impact of some industrial disputes – for example, when the petrol tanker drivers have taken strike action this had serious repercussions across the country. Despite less than five per cent of its resource being devoted to this element of Acas' work, collective conciliation is probably still seen by the public as the reason for Acas' existence and its other work often overlooked. Large-scale industrial disputes still command huge publicity which in some cases has also served to boost Acas' credibility and profile. The confidentiality that characterises these talks and the low profile that Acas keeps for its part in the process – most disputes do not even mention Acas' involvement – means there is a certain mystique around collective conciliation. This secrecy means that historically it has been difficult to gain a first hand insight into this area of Acas work. This paper aims to shed some more light on the world of collective conciliation.

The link with collective bargaining

"For most of the 20th century the regulation of the employment relationship by means of collective bargaining between employers and unions (and, where absent, by employers acting unilaterally) was far more important than legal regulation through acts of Parliament." (Dickens and Neal, 2006[2])

Collective conciliation has to be seen in the context of collective bargaining – the means of regulating and controlling the inevitable conflict between the competing interests of capital and labour. It involves management and trade union representatives negotiating over working conditions – such as wages, job security and working hours – for the workforce. In the UK

this tradition has been characterised by a voluntarist approach with the emphasis on collective bargaining outcomes which are not legally enforceable, unlike in the US, for example. Only where these mechanisms were lacking due to labour being hard to organise and service (for example, in sectors such as farming and hotel and catering) has there been statutory intervention through the creation of wages councils and so on. Historically, the process would have been characterised by a pluralist approach, where the organisation is perceived as being made up of strong and legitimate groups – management and trade unions – with their own goals and interests. But more recently, partnership and unitarism have been the preferred, more modern method of employment relations. In this approach, both sides strive for a mutual understanding and mutual gains because of their shared interests.

Collective conciliation is not a substitute for management and trade unions negotiating between themselves but provides the oil to grease the wheels of the collective bargaining machinery when it breaks down. Hence the statutory emphasis on the parties making full use of their own internal procedures before deferring to an external third party: it is far preferable that workplaces are able to regulate their own employment relationship without recourse to an outsider.

The climate within which collective bargaining operates, and therefore that which also affects collective conciliation, has changed over the past few decades and the various changes of government. It is also interesting to note how Britain differs from the rest of Europe in terms of collective bargaining arrangements. The Workplace Employment Relations Survey (WERS) 2004[3] found that, in Britain, in workplaces with 10 or more employees, 34% of employees belonged to unions with 40% covered by collective bargaining. (There are significant differences by sector: in the private sector 22% are union members and 26% are covered by collective bargaining; in the public sector 64% are union members and 82% are covered by collective bargaining). Contrast this context with Germany where figures for around the same period showed that 29% of all employees belonged to unions but 92% were covered by collective agreements and, even more starkly, with France where only 9% belonged to unions but 95% were covered by collective bargaining. This is primarily because, in these countries, collective bargaining occurs at sectoral or regional levels and, by law, the agreement is applied to all firms whether or not they recognise unions.

The WERS series also shows that the proportion of workplaces setting pay through collective bargaining has been in decline since the mid-1980s. The decline continues in the WERS 2004 survey with the percentage of workplaces engaging in any collective bargaining over pay falling from 30% in 1998 to 22% in 2004. The survey also shows that "the decline was largely confined to the private sector where the incidence of collective bargaining fell from 17% to 11%". This compares to the 1970s when around 80% of employees in the private sector were covered by collective bargaining and for over half of them the principal level was multi-employer (industry level) bargaining.

The role of collective conciliation

State-sponsored collective conciliation has a long history as a flexible means of intervention in industrial relations disputes. Acas' collective conciliation work derives from a number of statutory references, the most recent one being the Trade Union and Labour Relations (Consolidation) Act TULRCA 1992 which restated Acas' power to conciliate in trade disputes. The definition of a trade dispute includes:

- disputes between workers and employer and not just between trade unions and employer; and
- disputes between workers and workers.

s210 of TULRCA states:

"where a trade dispute exists or is apprehended Acas may, at the request of one or more parties to the dispute or otherwise, offer the parties to the dispute its assistance with a view to bringing about a settlement."

It is important to note the "may" as opposed to "shall" in the above definition; collective conciliation is a power rather than a duty on Acas' part.

The legal definition of a dispute with regard to Acas conciliation is wider than that which relates to industrial action. This means that Acas can act where a dispute is impending; it is free to act in practice in virtually all cases, but there is no compulsion to act. Of course, in the interests of good employment relations, Acas is keen to intervene wherever the intervention of an experienced, neutral third party could help to resolve a workplace dispute.

In line with the voluntarist approach there is no compulsion on the parties to come to conciliation. As Goodman[4] says, collective conciliation is a voluntary supplement to the parties' established negotiating procedure: "the latter have always been regarded as primary and it is a fundamental element of policy (and indeed incorporated into statute) that their authority should be upheld." Goodman's point is a crucial one, as conciliation is normally considered appropriate only when these procedures have been exhausted or when the parties agree that other overriding considerations require it. This premise is rooted in s210(3) of TULRCA. Consequently, Acas will generally not seek to intervene substantively until the parties have exhausted all internal steps.

Assisted bargaining

Notwithstanding the importance that the statute, and Acas, places on the parties' ability to resolve their own differences through established procedures, there are occasions where Acas does get involved in some capacity much earlier; for example in an 'assisted bargaining' role. This is because Acas is not confined to dealing with formal, collective disputes but can provide a different sort of assistance to handle collective employment relations issues and prevent a dispute arising. Assisted bargaining involves outcomes remaining in the hands of the local parties with the role of Acas being to facilitate the parties in arriving at mutually acceptable solutions. This is not the same as collective conciliation because collective conciliation can happen only where there is a trade dispute.

This type of intervention typically happens where there is a history of disputes. For example, following several years of disputes and instances of multiple conciliations in the same pay round at a major retail group, it was suggested that the Acas conciliator chair a meeting before negotiations had even started. At this informal meeting between several senior HR directors and the two trade union full-time officers, the company presented the financial situation and would then hear the union's aspirations and topical bargaining issues from their national conference. The aim was to achieve a more realistic union claim and a more reasonable company response. The parties also agreed that Acas would facilitate the first round of negotiations in an advisory capacity. The outcome was the submission of a lower claim; following some conciliation-type work on the part of Acas between the two parties, a revised offer was agreed and put to ballot. It was accepted by a reasonable majority and this model became the format for future negotiations. There have been no pay disputes or the need for Acas' traditional conciliation services since.

Who uses collective conciliation and why?

Collective conciliation is used by organisations across the spectrum of British industry. The 2007/08 Acas annual report[5] provides an overview of the type of issues where Acas has conciliated over the year. As has been the case for many years, pay and associated terms and conditions provided the most common reason for the dispute.

The 896 collective conciliations can be broken down as follows:

General pay	24.6%
Other pay	23.2%
Recognition	17.7%
Changes in working practices	8.3%
Other trade union	7.6%
Redundancy	5.9%
Discipline and dismissal	4.6%
Others	8.1%

The Acas Research and Evaluation Unit has recently published an evaluation of its conciliation service[6]. The evaluation report, drawing on independent research by Ipsos Mori of the service over the 2006/7 period, looks

at the type of organisations that use Acas collective conciliation, and their reasons for doing so.

For example, it finds that:

- almost a third of collective conciliation cases in 2006 occurred in SMEs, although 39% were in very large organisations with more than 1,000 members of staff;
- both public and private sector organisations use Acas collective conciliation. Taking into account the number of disputes in each sector, Acas is more likely to be involved in private sector disputes rather than public sector ones; and
- in a large majority (68%) of cases, at least one side believed that there was a risk of industrial action if the dispute was not resolved, at the time Acas became involved.

The desire to reach an agreement was the main reason given by both sides for bringing a third party into their disputes. Parties chose to involve Acas either because of previous experience of collective conciliation or other services, because Acas is written into their dispute procedures, or because they saw Acas as independent and impartial.

Pattern of industrial unrest and recourse to collective conciliation

There is a strong relationship between collective conciliation and the level and nature of industrial unrest, but it is not a straightforward one. Has collective bargaining in this country undergone a sea change – whereby disputes are diminishing in general – and is this reflected in the falling demand for Acas assistance?

A superficial glance at the statistics would seem to indicate that this is true. Strikes are commonly known as one 'institutional expression' of discontent among the workforce, with the extent of the action being influenced by the strength of trade union organisation. It is informative, therefore, to compare the level of stoppages with the requests for collective conciliation. The average number of days lost per year in the late 1970s and early 1980s stood at around seven million working days in official records[7]. Contrast this with the latter half of the 1990s and early years of the twenty-first century, when days lost to officially-recorded stoppages stood at around 0.5 million a year.

When Acas was first established, requests for conciliation averaged over 3,000 annually for three consecutive years from 1976. Forty years later, the 2007/08 Acas annual report showed that this level had dropped to less than a third – that is, less than 1,000 a year. In the intervening years, from the 1980s onwards, there has been a decline in strike activity and the number of stoppages. It is not surprising, on one level, that the demand for independent third party intervention to help resolve collective disputes has therefore diminished.

But the figures also demand a more in-depth analysis if the relationship between collective unrest and the role of conciliation is to be fully understood: while the link between the two is obviously strong, it is not a purely reactive one. According to Lowry[4] writing in 1990 (quoted in Goodman), there have been a number of reasons for the decline in the conciliation workload, including:

- Conservative governments post 1979 who "…commended the virtues of employers standing on their own two feet"
- changes in the economic and political climate causing employers to "think twice" before becoming involved with an agency created by a Labour government
- reluctance on the part of some employers to use Acas because of its role in the 1975-1980 statutory trade union recognition process… "there were undoubtedly some employers who denied themselves the use of the service because of its suspected bias"
- the change in the balance of bargaining power (due *inter alia* to declining union membership and recession) led employers who in other circumstances might have used Acas conciliation deciding not to; and
- a fall in the number of strikes.

Goodman himself also cites the following "dramatic changes" having an impact on the demand for Acas' collective dispute-resolution work, including:

- the continuous reduction in trade union membership and density
- the reduced coverage of trade union recognition and of collective bargaining
- the decline of industry employers' associations and multi-employer collective bargaining
- the introduction of fundamental restrictive changes in collective labour law, particularly affecting strikes and other forms of industrial action
- the rise in individual statutory employment rights and their enforcement through employment tribunals; and
- significant changes in organisational management – the rise of human resource management (HRM) and neo-unitarism, downsizing, flexible labour forces, de-layering, team building and so on.

Not just a numbers game

A more indepth look at the issues behind the statistics on requests for conciliation provides greater insight into the reasons for the lower demand for Acas' intervention. Looking at the last 15 years, and analysing conciliation case work by subject matter, the number of pay disputes has remained relatively stable, falling about 7% below the 1990s average. Recognition cases, following the initial aftermath of the introduction of statutory recognition, are slightly above the average of the 1990s.

The two main sources of collective conciliation case work that have fallen considerably since the end of the 1990s are redundancy and dismissal and discipline requests. It is hard to pin-point with absolute certainty why this has been the case, but one explanation is that employees and trade unions have recourse to legal remedies in these types of cases, particularly the latter. Furthermore, the incidence of redundancy among British workers has not been high during this period – a trend that is already changing with the current economic situation and ongoing announcements of lay-offs.

Despite its collective conciliation work continuing to attract a disproportionate amount of media attention compared to other activities, the balance of Acas' work has undoubtedly shifted over the four decades of its existence. It is also important to note that collective conciliation has only ever been used in a minority of collective bargaining situations: most of the time, the parties resolve their own disputes without a third party's help. On this note, Lowry concludes that, provided it takes place in "an improved climate of industrial relations", a decline in the collective conciliation workload of Acas from its early peak "is a healthy symptom[4]."

Importantly, Goodman notes the "inherent danger of mis-interpeting or exaggerating the significance of numbers", and regarding "rates of utilisation" as the only indicator of value. "Simple volume statistics reveal nothing of the circumstances, difficulty or importance of specific disputes", he says.

The public sector puzzle

"The interface between Acas and different parts of the public sector and different disputes within it is fascinating but often tantalisingly inaccessible", says Goodman. This is indeed an interesting and key area for Acas to consider in the context of its collective conciliation role. Goodman refers to the "public sector reluctance" to involve Acas. This reluctance may stem from the view that Acas staff are "only civil servants" and that conciliation itself signals a readiness to compromise that may not always be appropriate. Of course, the subject of dispute may not be suitable for conciliation. A lack of experience in using the service on the part of the public sector might also be a factor. Evidence shows that those who use the service value it, use it again and recommend it to others.

This reduced take up of the service by the public sector is worthy of further examination, not least because it is here that collective bargaining is by far the more dominant feature compared to the private sector. The

2004 WERS found that 14 per cent of private sector workplaces have collective bargaining, compared to 83 per cent of public sector workplaces. When it comes to pay determination, the comparative figures are 11 per cent and 77 per cent respectively.

With the decline in the manufacturing sector (which accounted for almost two-fifths of all workplaces experiencing industrial action in 1980), public sector workplaces, in contrast, have become both more numerous and more prone to industrial action in the intervening years (Dix et al, 2008). By 1984, the public sector accounted for over two-thirds of industrial action – a dominance that is retained to the present day. One in seven public sector workplaces experienced industrial action in the year preceding the 2004 WERS, for example. This pattern prompted Dickerson and Stewart (in Dix et al, 2008[7]) to investigate the possible reasons as to why the public sector appeared "strike prone"; they concluded that the lack of product market competition was an important factor, along with the higher rates of unionisation and the larger average size of establishments. Disputes in this sector now dominate the statistics to a greater degree than ever before. Those parts of the public sector that are characterised by national bargaining also often have a high profile – the Department for Work and Pensions, coastguards and recent pay disputes among prison officers, to name but a few examples.

Dix et al attribute the notable rise in industrial action in the public sector between 1998 and 2004 to the reactions of public sector trade unions and their members to government-inspired attempts to impose limits on the pay increases of particular public sector groups, or to the change programmes that have been implemented across the sector.

In addition, the employment relations climate in the public sector differs to that of the private sector in some crucial ways. For example, increasing numbers of public servants are now covered by review bodies, amounting to around half of the total public sector workforce. The proportion of people covered is set to increase further at a time when concerns are emerging about credibility over their independent role. Furthermore, the review bodies themselves cover two quite different groups of workers – those who have full access to all of the tools of collective bargaining (including the right to strike) and those, like the police, who do not. 2007 and 2008 have seen a continuation of this trend and outbursts of industrial unrest across large sections of the public sector. In the next two years or so, public sector pay may well be the focus of further outbreaks of industrial action on a very broad front as the government continues in its unwavering application of its tight control of public sector pay.

Acas does have a long tradition of providing collective conciliation in many different parts of the public sector – going far back in time, in the railways and London Underground. More recently, it has been significantly involved in dealing with issues in colleges and universities, local government, the NHS and the fire brigade, for example. It has undoubtedly been a challenge to gain greater involvement in conciliating in departmental disputes within the civil service – probably because, although independent of Government, Acas is still a part of the civil service. It could be argued, however, that this should serve as an even stronger argument for making use of taxpayer funded services.

Individual versus collective expressions of discontent

It might be assumed that the sharp increase in employment tribunal claims over the past decade represents a replacement for levels of collective action. Whereas previously workers expressed their discontent and demands collectively, dissatisfied employees are increasingly choosing to withdraw their labour individually resulting in a higher incidence of absenteeism and labour turnover. An assumption that the rise in tribunal cases more generally is a new manifestation of the same conflict previously expressed collectively may be over simplistic. Dix et al argue:

> "Except in rare cases such as a walk out in support of sacked colleagues collective action has typically been prompted by concerns about pay levels, other general terms and conditions, and redundancies. In contrast, ET claims have typically been concerned

with underpayment (rather than levels) of wages, unfair selection for dismissal or discriminatory behaviour[7]."

They also point to the fact that tribunal cases are not generally taken in the context of a continuing employment relationship.

However, the researchers also accept that this pattern may be about to change. There has been a notable rise in recent years of multiple claims ie several employees bring the same case against the same employer, often with the same representative. Between 2001 and 2005 single claims fell and have since fluctuated whereas there has been an increase in multiple claims. The volume of multiple claims has been largely influenced by a growing number of equal pay cases taken by women against local authorities, a trend that is now appearing in the NHS. As a consequence, last year equal pay outnumbered unfair dismissal as the main jurisdiction conciliated for in applications to the Employment Tribunal Service (Acas annual report 2007/08). But trade union reps are increasingly taking multiple claims under other jurisdictions.

In focus groups of collective conciliators, held in July 2008, the participants noted the increase in unions using multiple applications on not only equal pay, but wages, holiday, and working time, where previously such issues would have been dealt with collectively. Some commentators argue this trend is a reflection of the individualisation of employment rights, others point to a strategic decision on the part of the unions. The view of Acas conciliators is that there is a combination of factors.

Anecdotally, Acas conciliators and trade unionists say that there is greater tendency for trade union officials to pass ET claims to solicitors because of the sheer volume and complexity of individual cases. But there has also been a growing awareness by trade unions that the submission of multiple claims may be a valid bargaining tool.

One crucial difference between collective and individual action is that collective action is far more likely to preserve the employment relationship. Whereas in many multiple cases those involved are still employed in the organisation, in the vast majority of individual cases the person has already left. In their analysis of WERS 2004 Dix et al, found that unionised workplaces have more collective disputes and grievances but lower levels of employment tribunal claims. This evidence, say the authors, supports the idea that workplace representation encourages the internal resolution of disputes[7]. If dissatisfaction is overt then employers have a far better chance of dealing with it early on.

Complaints to employment tribunals may not be an expression of the same type of conflict but there seems little doubt that the juridification of the employment relationship has shaped the way that individuals and trade unions choose to express workforce discontent.

Barriers facing collective conciliation

There have always been risks for the parties associated with collective conciliation as discussed earlier on in this paper. One major criticism has been that conciliation is merely a short term stop gap. All of these concerns are connected with the fundamental process involved. But more recently additional barriers have appeared.

The trade union view that conciliation via Acas is seen as a failure seems to have become more overt in recent years and pressure put on full-time officers to use conciliation only as a very last resort. The knock on effect is that parties are coming to Acas much later in the life of a dispute when positions are entrenched, and strike action has been threatened. Although recourse to Acas conciliation is only intended once internal procedures have been exhausted the view is that parties previously approached Acas earlier, often because Acas was written into procedures.

According to conciliators it is rare for parties to even be aware of stages in dispute procedures nowadays. In one case where Acas conciliated the company had forgotten that it had a procedural agreement with the union for a no strike deal linked to compulsory arbitration.

Lack of mandate

One problem in any collective conciliation is that one or other of the parties may not have the proper mandate to negotiate effectively. This is exacerbated within the public sector where management negotiators do not hold the purse strings.

Globalisation, increased outsourcing, tighter budgetary control by central government and trade union balloting rules mean that centralised decision making is more common. On the one hand this affects management freedom to negotiate at a local level, but it also impacts on the ability of the trade union to bring an issue to the table in the first place.

> "Full-time officials (FTOs) have to go back to membership a lot more now. Five years ago the FTO would have dealt with the whole thing themselves. Now they have to go back to the membership, then to head office, who look through every word of the agreement. There is a much more national approach on the part of the trade unions."

(Collective conciliators' focus group, July 2008)

Lack of experience

The most notable change identified by conciliators as a barrier to effective conciliation has been the fall in experience of the parties involved, both in terms of their ability to negotiate effectively and a lack of awareness of the collective conciliation process itself.

In some sectors and businesses such as the rail industry, BA and the Royal Mail collective conciliation is built into their dispute resolution procedures, and parties know the form and what to expect. But elsewhere those with experience of collective industrial relations are gradually disappearing.

Many of the trade unionists active since the 60s and 70s are leaving at the same time. The newer full-time officials, especially those who have come up through the organiser route, often lack the experience they would have gleaned had they worked their way up as workplace representatives. Younger HR directors and managers have had less opportunity to experience collective industrial relations, and have rarely had any practical training.

> "The result is that people are looking to us as collective conciliators to walk them through the process. So a collective conciliator has to be a good negotiating strategist. A lot of what we do now is about educating the parties."

> "There was a big push when the new recognition legislation came in 10 years ago and there was a cluster of cases, but it's all gone quiet since then. And so when we deal with recognition we have to go back to basics and explain all about how to run ballots etc. We spend a lot of time explaining and answering questions; many negotiators that we deal with are young and so do not have that legacy or experience of dealing with unions collectively".

(Collective conciliators' focus group, July 2008)

Conciliators also reported a growing tendency for management to use consultants. Some have little or no experience of negotiation and may lack a more intricate knowledge of issues involved or the work environment. As a result, they can at times make matters worse by inflaming existing tensions.

Complexity

Although conciliators have been dealing with lower numbers of collective conciliations the general consensus is that those they do deal with are more complex and take longer to resolve. One recent development is the complexity created by the use of subcontractors and outsourcing. This was evident in disputes such as those involving Gate Gourmet, the Grangemouth oil refinery and the Shell tanker drivers. In each case the sole customer – previously the owner of the business – was not a party to the dispute in the usual meaning of the term but was certainly a ghost at the bargaining table. So in the case of Gate Gourmet, BA had outsourced the catering side of the business and then bought back these services from Gate Gourmet.

The complex legal issues in relation to commercial contracts and penalty clauses mean the room for manoeuvre can be very small. The real pain is felt by the original owner and yet they are not involved in the conciliation, and to achieve movement in the dispute there often needs to be movement in the contract held by the customer.

In the case of the Lindsey oil refinery dispute the Italian subcontractor IREM, which brought in their own mainly Italian workforce, under the EU Posted Workers Directive, was at once at the centre of the dispute but yet played only a minor part in negotiations to resolve it. A longer and more complex subcontracting chain meant that neither was the relevant information readily available nor were key decision makers necessarily present at the bargaining table.

The more straightforward pay deals of previous years are also becoming less common with negotiations on pay now more likely to involve changes to work organisation or such matters as annualised hours. The lack of one authoritative inflation figure can be a problem with one side using the RPI and the other the CPI. With current economic instability the ability of either side to reach an agreement that they feel guarantees the needs of business and of members will be increasingly challenging.

Measuring success

What conciliation allows the parties to do is to get back round the table where talks have broken down, speed up the process of negotiation, and in many cases avoid strike action. Someone once described diplomacy as the art of building ladders for people to climb down gracefully. And this is perhaps at the heart of what makes collective conciliation such an effective process.

In his article on collective conciliation and arbitration under Acas, Goodman identifies two key measures of success:

- ensuring that the parties are aware of Acas services and use them where appropriate;
- Acas' services are largely effective in achieving a settlement (including referral to arbitration or the withdrawal of claims) or progress towards one (including movement back to direct talks or referral to mediation or a working group) – the definition used by Acas to record successful outcomes.

Goodman[4] notes:

> "Plainly this process involves a degree of subjectivity and self reporting, and the stark terms 'success' and 'failure' may on occasion perhaps exaggerate the clarity of the outcomes. For example, some small disputes may fade away, not being sufficiently significant to be pressed to a conclusion, or perhaps having served a purpose as part of some wider developments. Sometimes Acas conciliators move in and out of disputes at different times."

Making an impact

Research into the economic impact of Acas identified that the collective conciliation service alone provides benefits worth £159 million a year to the national economy[8]. It costs £1.6 million a year to run the service, meaning that for every £1 spent on Acas collective conciliation, it generates benefits to the UK economy worth £99. This establishes collective conciliation as the most cost effective of the range of services provided by Acas.

The evaluation of Acas conciliation in collective employment disputes in 2007[6] surveyed users of the service on their experience. Almost nine in 10 (89%) of employee representatives and 82% of managers were either satisfied, very satisfied or extremely satisfied with the collective conciliation service they received from Acas. The vast majority (87%) of customers said they would be likely to use or recommend the service. According to customers, Acas settled or made progress towards a settlement in 90% of cases. The study identified the following impacts from using the conciliation service:

- it sped up the resolution of the dispute (72% of employee representatives and 66% of managers)

- it brought the two sides closer together (66% of employee representatives and 57% of managers and
- it helped avoid strike action (66% of employee representatives and 52% of managers).

It seems that the collective conciliation service provided by Acas has stood the test of time.

From catalyst to creative force

Led by a Chief Conciliator, Acas collective conciliators are based in offices across England, Wales and Scotland, and conciliate in both local disputes and those with a national perspective.

These conciliators tend to be experienced staff, with an average of eight years' experience of conducting collective conciliation. At March 2007 almost a third of collective conciliators had more than 10 years' experience with just five per cent having less than one years' experience. Around one in ten work purely on collective conciliation cases but it is more common for conciliators to have a varied role in Acas, working with organisations to improve employment relations, training organisations or individuals on employment relations issues, managing staff or involved in business development. The greater diversity in their role reflects not only lower levels of demand for collective conciliation, but also the change in organisational emphasis from one that supports the operation and expansion of procedures designed to regulate negative behaviour to a broader approach to employment relations and greater emphasis on encouraging positive behaviour.

Goodman suggested that over the years the Acas conciliation style has evolved from being a catalyst in its early years to a more proactive emphasis. And the latest survey of collective conciliation confirms this approach as the strongest indicator for successful outcome and customer satisfaction. The report itself recommends further research into conciliator behaviour and why customers perceive conciliators as being 'proactive'.

A key focus of the independent evaluation of Acas collective conciliation was to determine the conciliator behaviours and techniques that led to successful conciliation outcomes, as well as to customer satisfaction.

Interestingly, conciliator behaviour was far more likely to influence a successful outcome than the characteristics of the dispute (type of case, employment relations environment, levels of hostility, whether there was a threat of industrial action etc). Typically, this behaviour involves:

- being proactive in seeking agreement
- being, available when needed outside meetings and beyond normal working hours
- establishing rules and boundaries of the conciliation

Acceptability and reputation are essential when it comes to opening doors, but conciliators need to be skilled and effective to bring about positive outcomes.

Certainly in the focus groups of collective conciliators there was universal agreement on the need for collective conciliation to be proactive. By proactivity, conciliators were referring to making judgement about what is appropriate in the circumstances. This can mean challenging the parties, coming up with ideas and thinking of solutions that the parties have not considered.

There is always the risk accompanying greater proactivity that the parties will be tied to an Acas solution and not their own, but herein lies the importance of the conciliator's experience and expertise. An effective conciliator will offer 'solution and challenge' and not simply a challenge to get a response. They will offer a range of options rather than just one. Such an approach offers the parties something new to think about and it may be easier for a conciliator to do this than for one of the parties where it might be perceived as a sign of failure, as in 'why didn't you think of this before?' All this requires the conciliator to judge the moods of the parties and their willingness to consider other options. This can vary over the course of the

conciliation, so timing as well as the development of trust are crucial.

The conciliator's role as catalyst cannot be ignored however, and is rarely as limited as is sometimes implied. In some situations it may simply not be possible to be proactive. Some procedural agreements in the public sector, for example, tie people into a single room and do not allow adjournments, a restriction which conciliators find very frustrating since it inhibits the process.

Proactivity by conciliators is not restricted to their behaviour in the conciliation itself. It is also an important driver of demand for conciliation services. Goodman noted that between 1975 and 1993 only 4% of collectives were initiated by Acas, but in the period 1994-98 the figure jumped to 14%. Since then levels have fluctuated between 9% and 17%. Acas' involvement in trade union networks and training courses and HR managers groups and CIPD courses, are also recognised as key factors in the number of cases brought to Acas, as is the practice of 'running alongside'. This refers to cases where Acas is made aware of a dispute via its own networks or the media, and contacts the parties to be briefed without yet formally becoming involved. This can then lead to a request for conciliation at a later stage.

In recent years there has been a dip in this type of collaboration with trade union and management groups. Although there is now renewed input into trade union courses, there remains a gap in terms of support and training for the HR community on collective negotiation and conciliation.

A deepening recession

As the recession deepens calls to the Acas helpline on redundancy have overtaken unfair dismissal as the main call topic rising from 19.4% in May 2008 to 34.7% in January 2009. Across the country Acas is continuing to receive dramatic rises in declared redundancies.

Acas experience from the previous recession was that there were more disputes but lower levels of stoppages.

As Peter Harwood, Acas Chief Conciliator, explains:

> "Interestingly, what we saw then was trade union officials recommending acceptance of pay offers but members voting in pay ballots not to accept. We have already seen that happening in a few disputes recently. When people are generally unhappy about their financial situation and are given the opportunity to express that dissatisfaction in some way by putting a cross on a ballot paper, then they will do so. This means that there will probably be a slight increase in disputes. That is what occurred then. We are already handling about 10% more disputes than last year. However that does not necessarily mean there will be more stoppages."

> "In the last recession, that same economic hardship meant that when it came to a strike action ballot or actually taking strike action and losing pay then people were more hesitant. There was no increase in actual stoppages in the last recession. In fact the number of stoppages as reported by the Office of National Statistics nearly halved. Again recently we have seen some industrial action ballots deliver 'no' votes or slim majorities below 60%."

There has also been a real shift in attitude from unions, according to Brendan Barber of the TUC: "Put simply union members want unions to work with employers to solve problems wherever possible, not rush into confrontation[9]."

A reduction in stoppages does not mean that collective conflict will wither away, however. And with unemployment rising, an increased threat of redundancy and organisational restructuring, the need for collective structures and mechanisms will become all the more necessary.

Moreover, we are now seeing the emergence of a new trend in unofficial action including participation by non unionised workers. It raises the question of what Acas' involvement should be in future in these types of disputes. There is a need to balance the potential benefits of intervention where there is likely to be a serious impact on the economy, against the dangers of condoning illegal action.

The future of collective conciliation

> "In a recession you need collective institutions and collective discussion, and from time to time organisations will need help in resolving those discussions if they result in conflict. The danger facing organisations is not so much a return to the bad old days but pockets of workplace insurgency."

(John Philpott, Chief economist, CIPD[9])

Unionised and non-unionised workplaces alike have a duty to consult with the workforce where they make 20 or more workers redundant in a 90 day period. But they also need to inform and consult with their employees on an ongoing basis to reassure them in uncertain times; to maintain engagement and trust; and, to work together to find collective solutions to situations they may well have never faced before.

The current uncertainty makes it all the more difficult for managers and trade union officials to predict the course of a dispute. This can lead to tactical errors which cause parties to end up in positions which they did not foresee but which they feel they still have to defend. The fact that many HR Managers and trade union officials may also be handling situations which they have not faced before has the potential to exacerbate these positions.

And what of those employees in non-unionised workplaces who have taken on the job of representing colleagues in what can be complex and stressful consultation process over redundancies? They may have no experience of collective action, and what is more HR may have little or no experience of dealing with a dispute at a collective level.

During the last recession Acas worked with employers to help manage consultation on redundancy, to successfully find alternative solutions to lay offs, and to provide advice and support on maintaining employee engagement in difficult circumstances. And some of the fall out from the recession will undoubtedly involve Acas in its collective conciliation role. Acas is currently working with a range of partner organisations across the country in a strategic and practical capacity in so called 'rapid response groups', to provide advice and support to employers.

The real secret to achieving settlements and avoiding conflict situations, says Harwood, Acas Chief Conciliator, is "no surprises". If companies are facing difficulties then the sooner the realities are communicated and employees and their representatives are involved in helping to find ways to mitigate problems the better. This means treating people openly and honestly. This can then lead to something else we saw in the better companies in the last recession – a spirit in adversity which saw employers, trade unions and employees working together to get through the hard times to better times ahead."

Acas remains a source of assistance for resolving disputes but there is a need for its collective conciliation role to be better known and understood, particularly in industry sectors that do not have a tradition of using conciliation but also amongst younger members of the workforce.

It will be the younger generation of HR and trade union reps that are most likely to find themselves out of their depth in current disputes. It may be too late for some of them to take up much needed training opportunities in negotiation skills, redundancy handling or the conciliation process, as they deal with those situations by baptism of fire. But awareness of Acas conciliation services, and training and support for those not yet facing conflict in their workplaces may well provide support in the most difficult of times. Now is the time to seek advice and training that will help prevent or at least minimise disputes in the future.

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