Acas Policy Discussion Papers

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Making more of Alternative Dispute Resolution

The new *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 authors c/o strategy@acas.org.uk

Summary

This first paper in the new *Acas Policy Discussion Papers* series deals with alternative dispute resolution (ADR). It covers a range of processes where both parties retain control over the outcome, but where a neutral third party assists them in defining the issues of difference, finding common ground and, ultimately, reaching a settlement.

ADR has become more prominent as a result of pressure from both policy makers and practitioners, the increasing delays and costs in hearing tribunal cases being a contributory factor. And yet, despite this growing interest, the use of mediation in employment by voluntary and private sector providers remains relatively low, certainly when compared with its application in other areas of public life for, example, commercial mediations and housing disputes. The main focus for using ADR in employment is in SMEs, Acas recently ran a number of pilots for small businesses. But arguably, SMEs do not provide the most fertile ground for ADR, as the relatively low take up in these pilots would seem to confirm. There is a tendency for both parties – particularly in the smaller firms – to wish to terminate, rather than repair, the employment relationship. Instead, it is larger organisations that are more likely to be attracted to the benefits of introducing internal ADR mechanisms.

The practice of using ADR could produce a virtuous circle of employment relations in such organisations. This is best appreciated by considering the alternative – an adversarial tribunal hearing that has very little hope of sustaining the employment relationship. Used at the earliest stage of conflict, ADR emphasises a cooperative and constructive way forward that carries with it the possibility of improving employment relations in the long term.

Introduction

The phrase "alternative dispute resolution" (ADR) refers to a range of voluntary processes involving a neutral third party that brings two sides together to resolve disputes without having to resort to litigation. In most cases, this means the two parties working *together* to find a mutually acceptable agreement. ADR can be described across a continuum and can involve anything from low-level facilitation to high-level intervention – from arranging an informal meeting to discuss the next step to accepting the binding decision of an arbitrator where parties have reached an impasse.

ADR is gaining increasing currency in public life generally. It is used in civil disputes such as family breakdown or neighbourhood disagreements, and increasingly in schools in the form of peer mediation. In the commercial field, ADR forms a key element of construction law, for example. In the employment arena, large numbers of disputes, both collective and individual, are intercepted and resolved by various ADR providers, the most well known being Acas.

ADR and the use of "mediation", in particular, have become key policy objectives for the government. This paper is concerned with the world of employment, a sphere in which the government is promoting ADR at the earliest stage of disagreement before conflict escalates in the workplace. Most specifically, the government is strongly recommending the provision of face-to-face mediation for resolution of individual disputes in smaller organisations.

The thinking behind this new emphasis on ADR is driven in part by the desire to counter the rise in litigious employment relations, and prevent this from becoming a cultural norm. But it is also about reinforcing the government's commitment to the high performance workplace and raising productivity in line with our European and US counterparts through more effective management of the employment relationship within the workplace.

Acas fully supports a move to dealing with employment disputes at the earliest possible stage, with the aim of sustaining the employment relationship. It differs, however, in its view of where the focus should lie. This paper contends that, from a resource point of view, it makes far more sense to give managers mediation and negotiation skills and to encourage self-help rather than direct intervention, particularly in smaller organisations. It questions the rationale behind targeting small firms over larger organisations, pointing out that it is larger organisations, particularly those based in the public sector, that are more ready to embrace ADR, for example, by developing in-house mediation schemes.

This first paper in Acas' new Policy Discussion Paper series reviews the part ADR can play in employment relations and the role of Acas in ADR delivery. It goes on to discuss why ADR has become such a prominent issue, highlighting both government and practitioner motivation, and reviewing what is known of current take up**.** The paper concludes by considering the prospects for ADR and what might be done to realise its potential, in the context of the broader aim of improving employment relations generally.

Coming to terms with ADR

A great deal of confusion surrounds the use of the term "ADR", which means that

very often those involved in the debate seem to be talking past one another. Some commentators have questioned the use of the word "alternative" in ADR, asserting that "appropriate" is a more fitting term to describe the choice that has to be made about what form of intervention is best suited to any given situation. This choice will be influenced by the nature of the dispute and the level of severity and entrenchment that the disagreement has reached.

There is also the criticism that the word "dispute" is too reminiscent of the more adversarial industrial relations of the 1970s and that "difference" or "disagreement" would be more appropriate. Some commentators also contend that the term "resolution" implies a reactive approach to issues and prefer an emphasis on dispute *prevention.*

It is difficult to come by an absolute definition of ADR. Texts on the subject commonly refer to conciliation, mediation, arbitration, early neutral evaluation, expert determination and ombudsmen schemes as being the main constituents of the approach involving third party assistance. Some proponents of ADR argue that arbitration – an adjudicatory method – should not be included in its definition, while others focus on its more preventative aspects and would exclude any form of intervention once a case has been brought, even if that intervention means the case does not reach a full hearing.

Mediation

Mediation deserves a special mention, having become a globally understood term and often used interchangeably with ADR. It is really since the 1980s that "mediation" has gained prominence in the UK, primarily through its development by Mediation UK, the ADR Group and The Centre for Effective Dispute Resolution (CEDR). Mediation is essentially a facilitative process where both parties retain control over the outcome, but where a neutral third party assists them in defining the issues of difference, finding common ground and, ultimately, reaching a settlement. Yet many UK commentators shy away from imposing a rigid definition on the term, or indeed the process of mediation. In this way, they contend, mediation can be moulded to suit different sets of circumstances and the level of intervention can, accordingly, be stepped up or down. In practice, therefore, mediation often includes third party intervention ranging from problem-solving to the more directive process that involves recommending a settlement.

Stages of conflict

ADR can be brought into play along a continuum of disagreement and conflict. The initial, or spark stage, might be just a difference of opinion or a misunderstanding. The next stage is where there is overt conflict in the workplace. An employee may have taken the issue to their line manager who has subsequently failed to take action, and the disagreement has escalated. At this point, if the employee decides to take the problem outside the organisation it is more likely to go down the statutory route. With the next stage being the subsequent breakdown of the employment relationship, the loss of trust may be so significant that individuals may be unwilling to enter any resolution process that does not afford a degree of independence.

At the final, crisis stage, the individual will generally have started formal proceedings by lodging a claim with an employment tribunal. The most likely

form of resolution will be through Acas conciliators who will automatically become involved once an employment tribunal (ET) claim has been lodged. But this is not the end of the road in terms of ADR. Once the tribunal is over, regardless of whether or not the employee has returned to work, there may well be scope for some form of mediation to address the damage to employment relations generally created by the fall-out from the dispute. This may help to mitigate future conflict in similar situations.

The role of Acas

Acas was established in 1974. Its roots go back over a hundred years to when the government set up a conciliation and arbitration function, delivered by the Board of Trade, in 1896. Acas is a public body with statutory responsibilities. Although often primarily associated with high profile disputes of a collective nature, the role of Acas has a much wider remit that encompasses dispute prevention.

Although mediation has emerged as a generic term to describe third party intervention, Acas has traditionally made an important distinction between conciliation, mediation and arbitration that can be understood in terms of people, process and outcomes.

Conciliation

Conciliation, provided by Acas as a free and statutory service, has to be understood in terms of both the collective and individual dimensions. Collective conciliation is offered in disputes between employers and trade unions, or employers and groups of employees with or without formal representation following a breakdown in negotiation on a workplace issue affecting a number of employees. In most instances the parties have usually followed their own internal disputes procedure without reaching a resolution. Intervention by Acas may be the next stage in their formal procedure.

Collective conciliation is voluntary and can be initiated by a request from either side. Around 1,300 such requests are made each year, and conciliation is conducted by internal Acas employees, usually in private meetings and with both sides expecting a high degree of confidentiality.

Individual conciliation is provided as a statutory service following an employee's lodging of an 'ET1' application to the Employment Tribunal Service (ETS) alleging that their statutory employment rights have been infringed. Like collective conciliation, individual conciliation is conducted by Acas employees in private, and they deal with approximately 100,000 individual conciliation cases each year. In 2003/4 just under three-quarters of these were settled or withdrawn without recourse to a tribunal hearing.

Increasingly, conciliation is being conducted in these individual rights cases over the phone instead of face-to-face, one way in which external commentators have differentiated the skills involved in Acas conciliation compared with what is generally accepted as the face-to-face methods of mediation. There is some evidence that, as a result, the role of individual conciliators is not regarded as mediation by potential customers and stakeholders.

Although the bulk of Acas' work has traditionally come into play at the mid to latter stages of a disagreement, the skills of its conciliators – such as building trust, informing, facilitating comments and working closely with the parties to precipitate agreements – could be applied at any stage of ADR.

It may well be that the individual

conciliation service could be enhanced by the adoption, where appropriate, of more proactive mediation techniques. The skills learned by conciliators would enable them to intervene at the earliest stages of conflict as mediators, if the parties involved were amenable.

Collective Mediation

Traditionally, mediation in Acas has been used only in collective disputes within a relatively narrow definition of the term. It 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, such as strikes or lockouts or the law. Mediation in this setting, and traditionally understood in Acas terms, involves making recommendations to attempt to resolve the dispute. Although these are nonbinding as in the case of arbitration, parties are expected to take careful note of the recommendations as a serious basis for resolving the dispute. Because the process inevitably involves some form of value judgement, mediators – like arbitrators – are drawn from Acas' independent panel of experts. But unlike arbitration, which always takes place in joint session, mediation is a more flexible process and often includes at least one private session with both parties. It remains however the least used form of ADR in Acas, with only six collective mediations in 2003/04.

Individual mediation

1.The Acas role in settling potential disputes about individual rights

As well as its statutory duty to try to promote the settlement of actual tribunal claims in a wide range of individual employment rights jurisdictions, Acas also has a duty to intercede in potential claims. Where a tribunal claim could be made, but the parties involved prefer to resolve the matter before it is referred to an employment tribunal, they can approach Acas to seek help in reaching an agreement that is legally binding and precludes the employee pursuing the issue through the judicial process. As with an actual employment tribunal claim where Acas conciliates between the parties to reach a settlement, these agreements are written down on an Acas pro-forma called a COT3 for the parties and Acas to keep as a record of the settlement.

Some years ago, Acas was involved in large numbers of these pre-tribunal application settlements. This was largely because many lawyers advised employers to seek an Acas brokered deal in all dismissals. Employers then began to use this facility more generally to rubber stamp agreements made on the termination of employees' contracts. Often the employer and employee would already have concluded an agreement before approaching Acas, and in some cases employees were informed they would only receive a financial settlement if they were prepared to use this Acas service.

The high volumes of cases from use of the system in this way put a strain on resources and led Acas to review its procedures and, currently, comparatively few ***potential*** tribunal claims are handled by Acas. Since 1993 employment statute has provided for "compromise agreements" to be drawn up between actual and ***potential*** tribunal claimants and their employer which have the same effect as Acas brokered settlements. There are certain conditions attached to these agreements, including guidance for claimants from "accredited" independent advisers, such as qualified lawyers, appropriately authorised trade union representatives, and authorised advice centre workers.

Although it is not possible to track the numbers of these agreements which close off *potential* tribunal claims, there are indicators that the "gap" left by Acas in this practice has been filled by those qualified to effect such settlements. The numbers of these potential tribunal cases dealt with by Acas could increase again if employers make use of the services of Acas and other ADR providers to resolve disputes and disagreements at workplace level. In fact, Acas is already involved in settling large numbers of potential tribunal claims for back pay resulting from the introduction of single status non-discriminatory pay and grading structures in local authorities.

2. SME pilot

A key focus for Acas currently is to offer mediation in individual employment problems before the point where they may have become "actionable" in law. Resolving individual disputes before an employment tribunal claim has been contemplated benefits all concerned, not just in terms of outcome but in the transfer of skills from mediators to the parties involved that can then be put to use in similar situations in the future without recourse to external help.

More recently, Acas has begun to use mediation in its more globally understood definition. Recommendations by the Better Regulation and the Employment Tribunal System Taskforces call for Acas to play a greater role in offering advice and ADR solutions at the earliest stages of conflict. There is particular concern that small firms do not put sufficient effort into resolving problems at an earlier stage by having in place effective dispute resolution procedures. One initiative that flowed from these reports involves pilot projects aimed at organisations with less than 50 employees. In these pilots, Acas provides free face-to-face advice and support in three areas:

- basic information and advice on employers' legal responsibilities through an 'employment law visit';
- third party intervention by way of 'facilitative mediation', to encourage a joint resolution of workplace disputes before Acas statutory duties are triggered; and
- a more pro-active role, or what might be described as 'directive mediation', using external mediators from the Acas panel to hear appeals at the final stage of a disciplinary and grievance procedure. This is regarded as particularly relevant for very small firms where the only staff available to hear an appeal are, more often than not, also involved in the dispute itself.

While employment law visits have been relatively popular, there has been little demand arising from these visits for mediation by small firms. It appears that having been given guidance on the law, small businesses prefer to put things right themselves 'in-house'.

Facilitative mediation is more akin to the Acas function of conciliation in that a third party aims to support the parties in reaching an agreement in a non judgemental capacity.

The third option, of more directive mediation, mirrors what Acas has traditionally offered to resolve collective disputes where a binding process, such as arbitration, would not be acceptable to the parties. For this reason external mediators – from the Acas panel – are used to ensure that Acas protects its impartiality. This too has met with low take up, possibly because the process is seen as too formal for small business concerns. It is also possible that the issues involved were not weighty enough to merit an external process.

3. Training in-house mediators

Acas has recently gained external approval to train individuals and accredit them with a *Certificate in Internal Workplace Mediation* to train and assess in-house mediators. It has already responded to a certain level of demand from organisations who wish to establish an in-house mediation facility, using their own mediators to help resolve differences between managers and individual employees. It has trained, for example, line managers in mediation and conflict resolution skills at the Commission for Racial Equality. It has also run a number of training sessions in other organisations, including a police authority and a local authority, aimed at increasing an understanding of mediation and helping participants to develop mediation skills.

This is a key strategic area to develop in terms of addressing the concerns about the growth of a 'litigation culture'. Acas is investigating the possibility of delivering this type of training on a larger scale in various parts of the public sector. This sector is currently undergoing a huge degree of change as part of the government's modernisation programme, and this makes it likely to be receptive to this type of initiative as a more cost effective method of resolving disagreements in the workplace.

Arbitration

Collective arbitration cases, although more common than collective mediation, are relatively rare, numbering, on average, less than a hundred cases annually, with 63 in 2003/4. Pendulum, or 'final offer' arbitration – where the arbitrator must decide between the final claim of one party as opposed to the final offer of the other – are very few in number, largely reflecting the reluctance of the parties to give total authority on crucial issues to a third party.

Because the role of an arbitrator is to award in favour of one party or the other, use of Acas staff could potentially jeopardise their impartiality in a conciliation role. The Service operates a 'clean pair of hands' approach and arbitrators are independent persons drawn from a panel made up largely of academics and lawyers with expertise in both the arbitration process, employment law and good employment practice. Arbitration always takes place in joint session with all relevant information exchanged beforehand between both sides. It differs from adjudication hearings in that there is an expectation that both sides will cooperate with the arbitrator and that there is no attempt to take the other side by surprise at the hearing by introducing evidence not already disclosed.

More recently, arbitration has also been made available in individual cases. In 2001, in response to the government's aim to further increase use of ADR and reduce the number of tribunal hearings, Acas set up its Arbitration Scheme. This is available in cases involving unfair dismissal and requests for flexible working where the claimants and the employer can jointly agree to opt for binding arbitration where their case is decided upon, as in collective arbitration, by an external arbitrator appointed by Acas. This is intended as an informal, non-legalistic and relatively speedy alternative to having a complaint heard by a tribunal. Take up of this alternative to a tribunal hearing has, however, been low with under 50 cases dealt with to date. Many blame over formalisation of the scheme. Another key factor may be the restriction of the scheme to two jurisdictions, because the vast proportion of tribunal cases are multi-jurisdictional. It is also arguable that, where one party perceives that they have a good legal

case, they will pursue it to a tribunal hearing. As both parties must agree to mediation, this will inevitably cut down the available market.

The growing prominence of ADR

"Access to justice"

Lord Woolf's Civil Justice Review is seen by many as a major turning point in the new impetus for ADR in the UK. Published in 1996, the "Access to justice" report encouraged the wider use of ADR, including recommendations that future litigants and their legal advisors should be required to state whether use of ADR processes had been discussed and, if not, why not? It sent a clear signal out that the potential of ADR for resolving disputes was to be taken seriously by the courts and litigating parties. The Civil Justice Council, established to implement the reforms, agreed that ADR should be one of its main areas of work during its first year of operation. The 1999 Civil Procedure Rules implemented Lord Woolf's recommendations and have since required the courts to play an important role in encouraging the use of mediation.

One of the main reasons for the increased prominence of ADR in employment stems from the concerns first raised in the mid 1990s by the then Conservative government about the delays in hearing tribunal cases due to a dramatic rise in applications. The rise, in part, relates to the increase in individual employment rights, as well as to changes in the economic cycle and labour market participation. With a rise in rights came the increased use of legal representation. Critics felt that tribunals were no longer providing the "easily accessible, informal, speedy and inexpensive" access to employment dispute resolution originally envisaged when they were first set up in the early 1970s.

This concern for a reform to the employment tribunal (ET) system has continued under the current government although in the last couple of years the tide has begun to turn and ET cases are now falling. However, of late, there has been a proliferation of individual employment rights in response to EU legislation, accompanied by a continuing growth in the use of legal experts, and on occasion, QCs. The cost, time and pressure involved in taking a tribunal case, and the negative experience for many users, remain key concerns for policy makers.

It is also worth pointing out the role of employment tribunals in dispute resolution. While the tribunal system has a vital role to play in allowing employees an avenue to hold their employer to account for any abuse of the employment relationship, its role is limited to the consideration of individual cases. Tribunals are not designed to help the employer to get it right in the future or to identify the underlying causes that led to the likely breakdown in the employment relationship.

Current government initiatives

The government is currently developing and implementing policies to address both ADR and the wider dispute resolution agenda. These can be broken down into three defined areas: the tribunal system; statutory workplace procedures; and more emphasis on ADR in employment generally. The Employment Act 2002 introduced changes to the employment tribunal procedures and supports the government's overall commitment "to create a highly productive, modern and successful workplace through fairness and partnership at work … and make it easier to settle disputes in the workplace." This is on the back of a growing body of evidence that

establishes a link between progressive people management practices and increased levels of performance and productivity.

The new disciplinary and grievance procedures, under the 2002 Act, place a statutory obligation on employers and employees to address disagreements in the workplace before seeking recourse through the employment tribunal system. Acas has amended its Code of Practice and good practice guidance to reflect the changes introduced by the new regulations.

In terms of promoting alternative means for dispute resolution in a preventative context, the Better Regulation Task Force and the Employment Tribunal System Taskforce both focused on the need for early dispute resolution and the potential for early forms of mediation as benefiting parties in dispute. In particular, the Better Regulation Taskforce recommended a more proactive role for Acas in addressing problems in the workplace. The report stressed that Acas should not wait for employers to request help, but should work with employers on an ongoing basis to promote better working relations and less adversarial workplaces.

This focus on mediation and early dispute resolution in smaller workplaces has now been reinforced by the government approved DTI strategy on ADR. Acas is seen as the main partner in delivering services in this area.

The practitioner interest

For practitioners, one of the key aims of ADR is to change a culture that assumes that the only route for resolving difficulties and disputes is through confrontational litigation, and to encourage more creative and pro-active solutions to problems in the workplace. Practitioners report that trivial issues often become over complicated and more adversarial because of the way in which they are dealt with. Achieving an early intervention before both sides become entrenched and the problem turns into a dispute would therefore be the best way of sustaining good employment relations on a longer-term basis. This perhaps explains the recent emphasis on ADR entirely free of the court/tribunal system and the use of the term "mediation" to describe the whole range of ADR processes – with specific focus on the earliest stages of workplace differences.

In the past, ADR has mainly consisted of reactive solutions to workplace disagreements, due in part to the way in which the legislative framework for Acas' services developed. The focus now for policy makers is to attempt to mainstream ADR at an earlier stage of conflict, as part of an overarching aim to improve employment relations and enhance organisational performance. There is also the intention to reduce the financial pressure on both employers and the tribunal system.

International interest

The focus on ADR in this country mirrors increasing interest internationally in the employment arena. However, the different regulatory powers, sectoral and geographical coverage, and types of dispute covered (individual or collective) make direct comparison between countries difficult. In some countries, such as New Zealand, mediation is a mandatory element of the statutory process. In Italy and France ADR is built into the legal framework using labour inspectorates to promote mediation in more of a policing role.

In the US, the Federal Mediation and Conciliation Service (FCMS) has a $1.5 million fund to distribute to management labour partnerships with the aim of improving employment relations within organisations. It has also developed Dyad, an adaptive tool to help trade

unions and employers develop internal dispute resolution mechanisms.

Where there is common ground, however, is in the increasing pressure from governments to resolve disputes earlier and challenge a growing culture of litigation. The debate over whether to charge for mediation services is also a generic one. At a recent meeting of international agencies from eight English speaking countries, there was a common realisation that agencies need to find ways into workplaces to deal more directly with disputes almost as they arise.

Acas has traditionally offered advice to other countries that want to adopt a similar ADR service. The South African mediation body and its equivalent in Hungary are examples of this. For several years Acas has supplied experts to accession states in Eastern Europe to explain and offer training in ADR and social dialogue. There continues to be ongoing interest in the British voluntarist approach to ADR and employment relations generally, most recently from China.

Delivery and take up of ADR in employment in the UK

The main deliverers of ADR in employment in Europe and internationally are lawyers. In the UK, on the other hand, intermediaries are generally employment relations experts, trained in the various ADR processes. Those turning to a career in mediation are likely to come from a diverse range of professional backgrounds. Only where employment relations have broken down to such a degree that more directive forms of ADR are required, are the intermediaries likely to be lawyers. Acas is one of the main providers for UK employers wishing to take advantage of ADR, along with organisations in the voluntary and private sectors.

According to the unpublished DTI strategy paper on ADR, the number of employment mediations by voluntary and private sector providers is relatively low. It notes that: "The main private sector provider undertook less than 100 employment mediations last year (compared to 516 commercial mediations by the same organisations and 24,000 mediations in housing disputes by a different organisation)".

If ADR is defined in its broadest sense, as any process that seeks to resolve a conflict not involving coercive action or recourse to the law, then all Acas activity under its banners of conciliation, mediation and arbitration – whether of a collective or individual nature – should be analysed. In 2003/4 Acas provided conciliation in 102,559 disputes going to employment tribunal, 1,271 collective disputes, 69 collective mediation and arbitrations. This is in addition to individual mediations under the SME pilot, and charged for mediation described below, easily making Acas the largest provider of ADR in the UK.

What future for ADR?

There are convincing reasons to promote the wider use of ADR in individual employment disputes. It is both a potentially cheaper and speedier option than tribunal proceedings and is also a less formal and more flexible proposition – particularly in those circumstances where it is possible to predict the likelihood of a potential dispute flaring up into an ET hearing. Used at the earliest stage of conflict, ADR can help improve employment relations in the long term by emphasising a cooperative approach, as opposed to the adversarial nature of a tribunal hearing that has very little hope of sustaining the employment relationship. A key question however, is who should be providing this form of mediation. Is it the role of Acas, a public

employment dispute resolution service? If so what form should mediation take?

Cost

One potential barrier to the large scale use of early ADR is cost. Even if informal dispute mechanisms were provided free of charge and outside the confines of a tribunal application or trades dispute, it is clear that employers would not necessarily use these services. If typical charges – of several hundred or even thousands of pounds – are levied for a half- or one-day mediation there is even less incentive to choose such an option. Pressure on the public purse means there is unlikely to be a free service.

The cost of private sector ADR services varies considerably but can be anything up to £1,500 per day. ADR does not, therefore, come cheap unless provided under Acas's statutory duty and then only in strictly specified circumstances on both an individual and collective level. Organisations can, of course, contact Acas for mediation at an earlier stage, but any intervention on Acas' part would be charged for.

There is therefore no current remit for Acas to provide mediation services to workplaces aside from the mediation pilot, unless on a charged basis. Acas is now providing a limited mediation service on a charged for basis in response to requests for assistance with individual disputes where an ET claim has not been brought, or where Acas mediators are contracted to provide mediation as and when required as part of an organisation's internal processes. The cost situation represents a significant public policy issue for government in its bid to make ADR mainstream in the employment arena.

On a more positive note, anecdotal evidence suggests that those organisations that have already contacted Acas about providing charged for mediation have not indicated that the financial cost is a barrier to going ahead with it. The key issue for these organisations is that the employment relationship is maintained. This does suggest, however, that those organisations that are contacting Acas for mediation to settle a difference in the workplace are those that are more likely to be progressive in their approach to employment relations in the first place.

Mandatory ADR

Not long ago, Lord Woolf voiced regret that ADR has so far not succeeded in changing the strong litigation culture and that one reason was that ADR had not been made compulsory when the Civil Procedure Rules were introduced in 1999. One option for the employment field is that ADR or mediation is incorporated as a statutory process at the grievance handling stage. Even if this was the case, however, merely introducing a requirement that both parties submit to mediation is no guarantee that the dispute will be resolved and could only serve to elongate the process in some situations. It would be somewhat ironic that mediation, designed to be a voluntary and cooperative practice, in this context would be an enforced process where neither party has a choice in its application. For ADR to have optimum impact, it would need to be used at an even earlier stage of a developing disagreement and, preferably, because there is a genuine desire for it and a belief in its potential outcomes.

Collective bargaining

It is important to consider the potential relationship between ADR and collective bargaining, the long established approach to formally managing the employment relationship in this country.

It is not envisaged that any kind of ADR approach would impinge on the role that collective bargaining plays in regulating employment relations in the workplace, the remit of each being quite distinct.

With the same distinction that used to be applied to arguments about disputes of 'right' and disputes of 'interest', ADR is more suitably applied to 'disputes of right'. For example, while ADR could productively be used in disputes over grading, it would not be suitable to resolve issues concerning pay. This means that employing an ADR approach should help with the interpretation of those existing arrangements or procedures and policies that are decided on through the process of collective bargaining.

Management control

Informal dispute mechanisms, when they are effectively employed within an organisation, can play a significant role in repairing the employment relationship in specific situations. This does not automatically mean, however, that one specific instance of mediation will result in more cooperative employment relations throughout the organisation. For this to happen on a universal basis in the employment relationship would require a considerable change in culture and behaviour in British workplaces. Aside from the long tradition of voluntarism in this country, there is also a strong tradition of managerial prerogative. Both would need to be challenged in order to encourage the wider acceptance of a neutral third party. In order to help lever cultural change among employers, the various forms of ADR need to be demystified and its advantages in specific circumstances more widely promoted. Training would undoubtedly play a significant role here and various options could include the development of a training module on a shared-provider basis as well as the provision of written guidance directed at both SMEs and larger organisations. A best practice network or forum could also be established, with a website, where companies that have benefited from an ADR approach could be encouraged to share good practice. There is also the possibility that ADR could be incorporated as part of the Information and Consultation framework within organisations, where it could be viewed as providing the mechanism for achieving more cooperative employment relations and avoiding potential disputes.

Regulating standards and accreditation

Whereas Acas is directly accountable to a governing tripartite Council, there is no equivalent monitoring of ADR service quality in the private sector. There are a wide range of private ADR providers, ranging from lawyers and consultants, to dedicated ADR and mediation organisations such as the ADR Group, CEDR and Mediation UK. That is not to say that these bodies, like Acas, do not engage in a high level of training and professional development for their mediators, or that there is no system of accreditation in place. These standards do not, as yet, extend to a nationally recognised framework of regulation and compliance.

Although many ADR providers provide their own training and qualifications, no formal requirement exists for either in respect of those individuals or bodies offering mediation services. This does raise the issue of regulation and standards, particularly if the use of ADR in the workplace is set to rise.

On a European level, the EU, in its Green Paper "Ymediate No. 2", has mooted the idea of regulating the practice of mediation for resolving disputes among member countries.

This proposal has met with controversy in the UK, particularly within the legal profession. On the domestic front, the Better Regulation Task Force also raised the question of whether a professional standard is needed, and the DTI is researching the need for a national accreditation system for mediators.

Small and medium-sized companies

A key focus of government policy on ADR is directed at smaller firms, which make up around 97 per cent of UK businesses. There is no universally accepted definition of a small firm, although often both turnover and employee size are taken into account. Typically, a small firm is understood as one with less than 50 employees while a medium-size firm would have no more than 250 employees. The number of small firms in the UK has been growing steadily over the past 20 years and, today, there are around one million firms in the country employing between one and 49 people, with the majority of these employing between one and 10.

Supporting SMEs is a strategic priority for Acas – in terms of start up and growth, and helping them recognise the benefits that good employment relations practice makes to business performance. Over half of the 750,000 helpline enquiries that Acas receives each year come from small employers or their employees. Much of the information at **www.acas.org.uk** is targeted at SMEs, and Acas runs good practice training sessions specifically catering for small companies on a range of employment-related issues.

Raising awareness of the benefits of ADR among smaller companies – as well as improving access and take up, particularly in the early stages of a breakdown in employment relations – is a major challenge for all ADR providers. The ongoing regional pilot schemes run by Acas as a result of the Better Regulation Taskforce will test the level of interest and the viability of providing face to face mediation to small firms. Early evidence suggests that take-up has been relatively low, however, an outcome that could partly be attributable to the size of the target firms.

Smaller firms are generally more likely to take a reactive approach to conflict in the workplace compared with larger organisations. Many tend to focus on the problem in hand and do not have the time and/or resources for issues that they consider are peripheral to business operation. This is partly evident in the high proportion of calls to the Acas helpline from small to medium employers. Many small employers do not have ready access to specialist HR advice and have low awareness of both employment law and best practice in employment relations. Research suggests that firms are less likely to have written disciplinary and grievance procedures in place compared to larger organisations. There is little likelihood of small firms training their own internal mediators, or even developing their own people management policies and procedures.

Smaller firms can be a difficult audience to reach and not the most open to using third party intervention. Small businesses, in particular, do not always welcome the involvement of an 'outsider' in the company's affairs. There is also the potential for differences to quickly become personalised in a smaller company that can often be run as a family business. This can result in a complete breakdown in trust between employer and employee that is not easy to reverse. Indeed, neither party may wish to repair the relationship – with or without the help of a third party.

Conclusion: changing the target

Central to the future of ADR policy development is understanding what type of ADR interventions should be geared to what type of organisation. The current thinking assumes that smaller companies are more likely to need tailored mediation because they are disproportionately more likely to end up in tribunals. This is an oversimplification of the real picture.

Data from the *Labour Force Survey* and *Survey of Employment Tribunal Applications (SETA)* does indeed show that, for small firms, the relative risk per individual employee of having a tribunal claim taken against them is greater than for larger organisations. However, this statistic is countered by the fact that a small firm's risk of an ET case is in fact far lower compared to that of a large firm simply because they employ far fewer staff.

Overall, therefore, the number of ET cases against smaller firms is proportionately smaller than for medium and large ones. According to data from SETA 03, 38 per cent of applications to tribunals were from workers in organisations employing over 250 employees, 21 per cent were from workers in organisations with between 50 and 249, and 44 per cent were from workers in smaller organisations.

Recent figures indicate that around 44 per cent of employees work in larger organisations (250+), 12 per cent work in medium sized organisations and 44 per cent work in organisations with fewer than 50 employees. Given that the proportion of employees who are not working in organisations with less than 50 employees is over half of the working population, and given that more than half the tribunal applications are from organisations with more than 50 employees, in theory the provision of tailored mediation should be available to all sizes of organisation.

For small firms, however, face to face mediation may not be the most attractive option. It may be that additional tools and resources will be needed to raise awareness of the least formal stages of the ADR process. These might include management skills training generally but including elements on negotiation, conflict handling and mediation. Support could be given to set up networks of SMEs and to deliver training to groups of firms, thereby making it more affordable. This network of employers could then access retained mediation services as a group.

A key part of Acas' strategy for improving employment relations is how to help employers acquire the skills needed to develop, value and apply procedures that will sustain the employment relationship in situations of conflict. Given the high number of small firms now making up the total proportion of businesses, external intervention in each and every dispute would not only be impossible, it would be uneconomic.

If ADR was introduced at the very early stages it could prevent a disagreement developing into an entrenched dispute with the distance between the two parties increasing at each step of the conflict. It may be the case, however, that medium-size and larger companies provide more fertile ground for the provision of direct ADR services. This already happens in a few exemplary – typically larger – workplaces that, for example, retain their own mediators who can be called in at the very early stages of a conflict between two parties.

There is strong evidence of a potential need in the market for tailored ADR training for larger companies. These

companies would benefit from developing their own competence and awareness of mediation and how and when to apply it. Unfortunately, this form of in-house mediation is not a serious option for small firms with less than 50 employees as it is unlikely that a suitably "independent" pool of in-house mediators could be trained, given the size of the organisation.

Larger companies are more likely to appreciate the benefits of early ADR intervention, both in terms of efficiency and cost compared to the very unattractive tribunal alternative, and in terms of the longer term improvement to employment relations. The practice of using ADR could also produce a virtuous circle of employment relations in such organisations. Some employers, for example, are already adapting the new disciplinary and grievance procedures to include a stage that requires mediation before the grievance progresses any further.

A network of employers could be set up to exchange and promote experience and best practice in ADR for the benefit of a wider audience. It is therefore crucial that large organisations are not left out of the ADR loop when it comes to promoting early intervention in potential disputes, both in terms of individual and collective issues.

When assessing the future use of ADR in an employment context, the overarching aim of effectively maintaining good employment relationships needs to be uppermost, rather than any short-time gains in a reduction in employment tribunal cases. There is currently a strong emphasis on promoting the use of ADR at a very early stage of conflict in the workplace and this approach is to be welcomed. ADR must also continue to be viewed across the whole spectrum of third party intervention if its true value is to be appreciated.

Further reading

Lord Woolf. 1996. *Access to justice*. Civil Justice Review.

Margaret Doyle. 2000. *Advising on ADR: the essential guide to appropriate dispute resolution*. London: Advice Services Alliance.

Paul Newman. 1999. *Alternative Dispute Resolution*. Welwyn Garden City: CLT Professional Publishing.

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