

Research Paper

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Mediation at work: of success, failure and fragility

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Abstract

Using data from a survey of organisations with experience of workplace mediation, this paper explores how employer attitudes to mediation vary according to the outcome of the most recent case. Most respondents reported either full or partial resolution in their most recent mediation and views across the sample were typically favourable. However, the minority reporting no resolution in their last mediation expressed views that were significantly less positive among a range of attitudinal and other variables. That the outcome of a single mediation can influence perceptions of its wider value suggests an additional facet of Feuille and Kolb's concept of 'fragility'. It is also an important finding in a policy environment in which workplace mediation is being promoted, emphasising the importance for organisations of evaluating their mediation provision and of publicising the results.

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1. Introduction

There is now a developing corpus of evidence that examines the use of mediation – that is, of a neutral third party to resolve conflict between two or more parties – in the context of individual workplace disputes. In the United States for example, the US Postal Service's Resolve Employment Disputes, Reach Equitable Solutions Swiftly (REDRESS) scheme in particular has been the focus of considerable research effort, both qualitative and quantitative (see for instance the 2001 special issue of the *Hofstra Labor and Employment Law Journal* devoted to the scheme and Bingham, 2004 and the references therein). A number of other schemes have also been examined as case studies (for example deLeon, 1994; Hébert, 1999; Wood and Leon, 2006), while survey evidence concerning the experiences of those using alternative dispute resolution (ADR), including (workplace) mediation also exists (McDermott, 1995; Varma and Stallworth, 2001; Lipsky and Seeber, 1998; McDermott and Obar, 2004). The UK evidence in contrast, is more limited. This is perhaps not surprising given that mediation's use in the employment context in the UK is a more recent development, albeit one whose profile has been raised by the Gibbons Review (Gibbons, 2007), and the subsequent 2008 Employment Act and revised Advisory, Conciliation and Arbitration Service (Acas) *Code of Practice on Disciplinary and Grievance Procedures*¹.

Two recent pieces of survey evidence however, contribute significantly to understanding (the use of) workplace mediation in the UK setting. The first is an Omnibus Poll of 500 small and medium-sized enterprises (SMEs) undertaken by Acas (Johnston, 2008), while the second is an on-line survey of 766 employers undertaken by the Chartered Institute of Personnel and Development (CIPD) in conjunction with Acas (Chartered Institute of Personnel and Development, 2008). Secondary analysis of the SME data reveals significant differences to a series of attitudinal statements between those with and without experience of using mediation to resolve workplace disputes, even allowing for the possibility that experience and attitudes may be jointly determined (Latreille *et al.*, 2010). In particular, respondents from organisations with experience of mediation in this context were significantly more likely to state that mediation was a good tool for resolving workplace conflict and that it improved line managers' ability to manage conflict, while being less likely to view mediation as expensive and suited only to larger organisations². Although not significantly different, they were also slightly less likely to agree that mediation was a last resort. More surprising however, is that the average agreement score for those with experience was lower (albeit again not significantly so), when asked if mediation produced 'win-win' solutions that leave both parties satisfied'.

This last result might suggest that while mediation is generally viewed positively among organisations who have tried it ('familiarity breeds affection', to paraphrase Lipsky and Seeber, 1998: 156), experiences may not be universally positive with a corresponding impact on attitudes. Unfortunately the small number of organisations with experience of mediation in the SME Poll precludes

¹ The *Guidance* accompanying the *Code* in particular emphasises the role of mediation and exhorts organisations to use this and other informal means of resolving workplace conflict.

² Some caution is required for the last of these, where endogeneity is found to be present and the impact of experience absent when this is properly accounted for (using a semi-ordered bivariate probit – see Latreille *et al.* 2010 for details).

further examination of this issue. However, the CIPD survey provides greater opportunity for analysis since it contains a sample of organisations of larger than average size drawn from largely CIPD members, many of whom have experience of workplace mediation. The present paper looks in detail at this data source. Key is the availability of information on the outcome of the most recent mediation, and in particular whether the issues it was designed to address were fully resolved, partly resolved or not resolved, thereby facilitating an assessment of the extent to which attitudes to workplace mediation are experientially determined.

Crucially, and to anticipate the results which follow, it transpires that the outcome of the most recent experience is associated with significant differences across a range of attitudinal and other variables, suggesting that success or failure in (a single) mediation can influence perceptions of its value more generally. It is argued that this constitutes a further dimension in which mediation (or more accurately, its perception) might be said to exhibit 'fragility' (Feuille and Kolb, 1994). Feuille and Kolb originally conceived of fragility as relating primarily and *inter alia* to the fact that, excepting in its fully evaluative mode³, mediation does not guarantee resolution and may in fact depend for its efficacy on the pressure arising from (reversion to) more formal processes in the event of impasse (see Feuille and Kolb, 1994: 251–253 for an extended discussion)⁴. They also note that more creative solutions may be difficult to achieve where disputes concern single issues such as grievances where potential for trading issues is absent and that mediated settlements may also be more difficult to enforce subsequently (although the extent of voluntary compliance might be argued to be greater given parties create and 'own' the solutions under mediation⁵).

The additional element of fragility identified here has potentially significant policy implications, since such fragility seems more likely where an organisation is less committed to its use in principle but perhaps prompted to do so for reasons of crisis or (especially) compliance (to use Lynch's 2001 taxonomy)⁶. The pressure to consider mediation arising from recent reforms in the UK thus carries a potential risk, although it should be emphasised at the outset that the CIPD data reveal unequivocally that when measuring 'success' in terms of resolution of the issues, the vast majority of organisations view their most recent experience positively, resulting in either partial (29.8 per cent) or full resolution (58.5 per cent). However, almost 1 in 10 (9 per cent) of those with experience of mediation reported it as having 'failed', at least to the extent it did not resolve the underlying issues. Given its association with subsequent attitudes to mediation, multivariate modelling of outcome in the most recent mediation is also undertaken; while necessarily exploratory in nature, this is the first occasion such analysis has been undertaken in the UK setting.

³ For a critique of evaluative mediation, see Kovach and Love (1996).

⁴ This may explain the preference among some of those in the Acas SME mediation scheme pilot for some form of investigation rather than facilitative mediation (Seargeant, 2005).

⁵ The longer term durability of settlements in the employment setting remains a subject on which there seems scant evidence.

⁶ The other drivers, used in the context of so-called 'integrated conflict management systems' (see *inter alia* Lynch, 2001) are cost, competition and culture.

The remainder of the paper is structured as follows. Section 2 briefly describes the data set, followed in Section 3 by a discussion and interpretation of the results. Finally, Section 4 concludes.

2. The data

As noted above, the data used for analysis are taken from the CIPD survey on employers' use of mediation (Chartered Institute of Personnel and Development, 2008). The survey was purposive in nature, being targeted at CIPD members and others likely to have experience of mediation in their organisation, and was conducted online. The questionnaire contains a series of questions "exploring how organisations use mediation, what they see as the benefits, factors influencing its use and the attitudes of employers and employees" (Chartered Institute of Personnel and Development, 2008: 16). In total 766 responses were received, of whom 327 indicated their organisation had experience of using mediation to resolve workplace conflicts. These 'experienced' respondents are the subject of the analysis reported here, where the focus is on the organisation's most recent experience of mediation. Reflecting its targeting, some 98 per cent of sample respondents are CIPD members. This is clearly not a representative sample, but crucially and uniquely, does yield "an informed response" (Chartered Institute of Personnel and Development, 2008: 16) and hence insights from those with experience of its use.

As to the extent of use, an average of 3.42 cases were referred to mediation in sample organisations during the previous 12 months, this figure being slightly higher among those where the most recent case was 'Completely resolved' (3.52) compared with those where it was 'Partly resolved' (3.47)⁷ and 'Not at all resolved' (2.77). Cumulative experience is of course, likely to be greater, so that while for some organisations their previous mediation experience was their only one to date, for many at least, it would not have been.

While the number of organisations reporting that their most recent mediation failed to resolve the issues at all is modest (30), and this should be borne in mind in interpreting the results, both sub-group and overall sample sizes are typically large enough to undertake formal testing and thus to draw statistically meaningful inferences. On occasion however, doing so requires the merging of response categories so as to avoid problems associated with small predicted cell counts; these are noted as appropriate.

3. Results

The first set of results explores the extent and circumstances in which respondents felt mediation would be effective/appropriate. Table 1 details the results. The top panel reports the methods participants considered most effective in resolving individual workplace conflict, with three choices being permitted from a prompted list. The first pair of columns of figures reports the proportion and number citing the option in each row among their three permitted selections, while the next three pairs of columns present the corresponding figures

⁷ This figure excludes one outlier reporting an implausible 999 cases during the previous year.

separately according to whether, in the respondent's opinion, the issues in the most recent case in the organisation were 'Completely resolved', 'Partly resolved' or 'Not at all resolved'. These figures are followed in the penultimate column by a Pearson Chi-square p-value when testing for differences among the three experience groups in the proportions reporting/not citing a particular option (i.e. treating each option as a cross-tabulation). The final column in the table in each case then identifies those (pairwise) comparisons among the experience sub-groups which are significant in terms of the frequency with which each option is mentioned.

As can be seen from the results in the upper panel of Table 1, only modest variations are apparent concerning the methods considered to be most effective in resolving individual workplace conflict between those whose organisation's last mediation ended in complete, partial or no resolution. One exception is that those whose previous mediation experience ended in full resolution are more likely to consider informal discussion effective in addressing workplace conflict than those where partial resolution resulted. Even so, this method is the most commonly reported by all three sub-groups, with more than 90 per cent saying it is effective (99 per cent among those whose last experience saw the issues completely resolved). A high percentage of respondents also consider mediation specifically to be among the most effective conflict resolution methods (perhaps not surprisingly given the sample). Importantly, the percentage citing this as an effective measure is lower for those whose last mediation at the organisation concluded without resolution of the issues (albeit differences among the sub-groups are only significant at the 10 per cent level in this case).

In contrast, strongly significant differences are evident in terms of respondents' views of how frequently mediation might be suitable when workplace problems arise. As revealed in the middle panel of Table 1, the percentage considering it suitable for 'most cases' declines from slightly in excess of 30 per cent of those whose most recent mediation experience led to complete resolution, to just 7 per cent for those where the outcome was no resolution. Conversely, the percentage considering mediation as likely to be suitable in only a minority of cases is correspondingly higher at 37 per cent for the 'Not resolved' group and significantly so compared with the other two groups (both around 14-15 per cent).

In terms of the issues for which mediation is suitable, the data reveal (as discussed in the CIPD report) relationship breakdown as the issue for which respondents most commonly agreed mediation was appropriate (86.8 per cent), followed by bullying or harassment (75.3 per cent). Few variations according to the resolution of the most recent mediation are evident, excepting on the issue of pay, where those whose last case was completely successful in resolving the issues appear more likely to report agreement than those where it was only partly successful (36.8 per cent compared with 22.4 per cent). The rationale for this is unclear, although it may reflect a blurring of the conceptual boundaries between mediation of individual and collective issues among at least some of the respondents. In the collective context of course, pay is an important tension point and one where there is a long-standing tradition of third party intervention, most notably by Acas (Mumford, 1996; Goodman, 2000), albeit more commonly undertaken using arbitration or conciliation processes.

Table 1: Mediation suitability by outcome of most recent mediation

	All		Extent to which most recent mediation resolved issues						p-value ^a	Pairwise
	%	N	Completely resolved (A)		Partly resolved (B)		Not at all resolved (C)			
			%	n	%	n	%	n		
<i>Most effective methods for resolving individual workplace conflict (up to 3 choices):</i>										
Informal discussion between those affected	94.0	298	99.0	96	91.1	173	96.7	29	0.023	A>B
Grievance procedures	64.4	204	69.1	67	61.1	116	70.0	21	0.323	
Mediation	77.9	247	76.3	74	81.1	154	63.3	19	0.084	
Compromise agreement	21.8	69	19.6	19	21.6	41	30.0	9	0.480	
Submission of an Employment Tribunal claim	1.9	6	2.1	2	2.1	4	0.0	0	n/a	
Acas conciliation/COT3	5.7	18	7.2	7	5.8	11	0.0	0	0.326	
<i>Suitability of mediation when workplace problems arise:</i>										
Most cases	21.5	68	30.9	30	19.0	36	6.7	2	0.002	A>C
Some cases	61.7	195	53.6	52	66.7	126	56.7	17		A<C, B<C
Only a minority of cases	16.8	53	15.5	15	14.3	27	36.7	11		
<i>Perceived suitability of mediation for dealing with^c:</i>										
Discrimination on grounds of sex	44.8	134	45.7	43	45.2	80	39.3	11	0.823	
Discrimination on grounds of race	45.0	135	45.7	43	44.9	80	42.9	12	0.964	
Other forms of discrimination	48.5	145	50.0	47	48.9	87	40.7	11	0.689	
Dismissal	25.6	75	28.0	26	24.3	42	25.9	7	0.806	
Bullying or harassment	75.2	232	74.7	71	76.6	141	69.0	20	0.665	
Pay	27.2	81	36.8	35	22.4	39	24.1	7	0.037	A>B
Conditions of employment	35.9	106	43.0	40	31.8	55	37.9	11	0.186	
Discipline	31.1	93	33.3	31	31.2	55	24.1	7	0.666	
Relationship breakdown	86.8	270	86.5	83	87.6	163	82.8	24	0.765	

^a p-value relates to Pearson χ^2 .

^b Significant pairwise comparisons (5% level) with Bonferroni correction for multiple comparisons.

^c Count and % of those reporting mediation 'Very suitable' or 'Fairly suitable', collapsed from 5-point Likert scale (reference category (not reported) is merging of 'Neither suitable nor unsuitable', 'Fairly unsuitable' and 'Very unsuitable').

Table 2: Attitudes to mediation by outcome of most recent mediation

	All		Extent to which most recent mediation resolved issues						p-value ^a	Pairwise ^b
	%	N	Completely resolved (A)		Partly resolved (B)		Not at all resolved (C)			
			%	n	%	n	%	n		
<i>Benefits of using mediation as a means of resolving workplace issues (multiple responses permitted):</i>										
To retain valuable employees	62.8	199	64.9	63	64.2	122	46.7	14	0.158	
To reduce sick absence	32.8	104	36.1	35	31.1	59	33.3	10	0.690	
To develop culture of managing & developing people	54.3	172	51.5	50	57.9	110	40.0	12	0.153	
To improve relationships between employees	83.3	264	86.6	84	84.7	161	63.3	19	0.008	A>C, B>C
To avoid costs in defending ET claims	47.9	152	60.8	59	40.0	76	56.7	17	0.002	A>B
To maintain confidentiality	18.9	60	24.7	24	16.8	32	13.3	4	0.193	
To reduce/eliminate stress of more formal processes	70.7	224	74.2	72	69.5	132	66.7	19	0.620	
To reduce the number of formal grievances raised	57.7	183	56.7	55	60.5	115	43.3	13	0.202	
Other	5.0	16	5.2	5	5.3	10	3.3	1	n/a	
<i>Agreement with statements that^c:</i>										
Mediation improves line managers' ability to manage conflict	65.8	208	73.2	71	65.6	124	44.8	13	0.018	A>C
There is a clear business case for mediation to resolve workplace issues	80.1	254	84.5	82	80.4	152	63.3	19	0.038	A>C
More widespread use of mediation will reduce volume of ET claims	60.1	190	66.0	64	58.5	110	50.0	15	0.244	
Internal mediation has positive impact on workplace culture	73.0	230	72.2	70	77.5	145	50.0	15	0.008	B>C
Some employees see mediation as denying them access to justice	25.6	81	19.6	19	25.5	48	46.7	14	0.012	A>C, B>C
Some line managers see mediation as interfering with their authority	36.9	115	29.9	29	40.2	74	40.0	12	0.231	

Mediation produces 'win-win' solutions leaving both parties satisfied	57.1	180	66.0	64	57.8	108	26.7	8	0.001	A>C, B>C
Shows commitment to individual dignity & respect for employees	79.4	250	79.4	77	84.0	157	53.3	16	0.001	A>C, B>C
Mediation improves parties' understanding of each other's position	85.6	267	89.6	86	89.2	165	53.3	16	<0.001	A>C, B>C

^a p-value relates to Pearson χ^2 .

^b Significant pairwise comparisons (5% level) with Bonferroni correction for multiple comparisons.

^c Those responding 'Strongly agree' or 'Tend to agree', collapsed from 5-point Likert scale (reference category (not reported) is merging of 'Neither agree nor disagree', 'Tend to disagree' and 'Strongly disagree').

Table 2 next considers the perceived benefits of mediation and then a series of statements exploring respondents' attitudes to mediation. In the survey, respondents were presented with a list of potential benefits and asked to indicate all those which applied in their experience. In respect of the former, improvements in relationships between employees was the most frequently reported benefit (83.3 per cent)⁸, followed by reducing the stress associated with more using formal processes (70.7 per cent), developing an organisational culture that focuses on managing and developing people (67.2 per cent), retaining valuable employees (62.8 per cent) and reducing the number of formal grievances raised (57.7 per cent). A significant minority also cited avoidance of Employment Tribunal (ET) costs (47.9 per cent) and reductions in sickness absence (32.8 per cent).

As previously, some interesting variations exist according to the outcome of the most recent mediation. In particular, while more than 3 in 5 of those for whom the previous mediation failed to resolve the issues considered improving employee relationships a benefit, this figure is significantly lower (63.3 per cent) than for those where mediation partly or fully resolved the issues (86.6 per cent and 84.7 per cent respectively). A further significant difference is also evident in the extent to which respondents felt mediation helped avoid the costs associated with defending ET claims. The 2007 CIPD report *Managing Conflict at Work* highlights a negative association between organisations that train any employees in mediation skills and number of ET claims in the previous year (Chartered Institute of Personnel and Development, 2007: 15–17)⁹. The effect of mediation in these areas, and in particular ETs is often perceived as a (if not 'the') major motivating factor for introducing mediation¹⁰, although in practice a range of factors is likely to be at work (again, see Lynch, 2001) and as the above indicate, it is only the fifth most commonly identified benefit in the data used here. Interestingly, reducing sickness absence ranks seventh most popular, despite evidence from the Acas case studies (Latreille, 2010) and more anecdotal conversations with HR practitioners suggesting such benefits may not be insignificant: often long-standing disputes that enter mediation involve at least one of the parties having protracted or frequent periods of absence as a consequence of the (stress of the) problems occasioned by the conflict.

The most consistently significant set of differences however, are those in the lower panel of Table 2. These data report the combined percentage strongly agreeing or tending to agree with each of the statements (the omitted category in each of the cross tabulations being those expressing disagreement or neutral views). At the aggregate level, views among these experienced respondents towards mediation at the workplace are positive. Thus, 85.6 per cent agreed that

⁸ Preserving good relationships ranks fourth on the (different) list in Lipsky and Seeber (1998) in the wider commercial mediation context, being reported by 59 per cent of respondents.

⁹ Its 2004 predecessor identified a similarly signed correlation between mediation training and volumes of disciplinary and grievance cases (p. 9).

¹⁰ In the US context, Balc (2002) points to the rapid growth in employment discrimination filings and the costs and time these entail as driving use of ADR there. Conbere (2001: 30) argues that "When many people think of ADR in employment... they think only of reducing the risks and costs associated with litigation", while Lewis (2000: 32) even goes so far as to articulate that "Their *purpose* is to resolve disputes quickly and efficiently, thereby reducing the costs of litigation" (emphasis added).

mediation improves parties' understanding of the other side's position, 80.1 per cent that there is a clear business case for the use of mediation to resolve workplace issues and 79.4 per cent that it demonstrates commitment to recognising individual dignity and showing respect for employees. At the other end of the scale, only a quarter (25.6 per cent) agreed that some employees saw mediation as denying them access to justice and just over a third (35.6 per cent) that some managers saw it as interfering with their authority. Again it is noteworthy that fewer respondents agreed that mediation would reduce the volume of ET claims than agreed that, for example, mediation delivered both 'softer' outcomes such as positive effects on workplace culture, mutual understanding, dignity and respect, as well as the 'harder' outcomes such as managerial capacity to address disputes and the existence of a clear business case¹¹.

Breaking down responses by outcome of the most recent mediation, some striking differences in attitudes emerge. For example, whereas almost 85 per cent of those where the last mediation fully resolved the issues perceived there to be a clear business case for mediation, the corresponding figure for those where the most recent mediation did not do so is just 63.3 per cent. Similarly, almost three quarters (73.2 per cent) of those reporting complete resolution agreed that mediation improves managers' ability to manage conflict, compared with just 44.8 per cent of those where no resolution resulted. The latter group are also significantly less likely than both those where the previous mediation resulted in full or partial resolution to agree that mediation produces 'win-win' solutions, that it shows commitment to employees' dignity and to respecting employees, and also that it enhances the mutual understanding of the disputants. Conversely, they are significantly more likely to agree that some employees see mediation as denying them access to justice (46.7 per cent compared with 25.5 per cent for those whose previous experience resulted in partial resolution of the issues and just 19.6 per cent of those with full resolution). This is an issue to which we return shortly in the context of the discussion in Table 3.

Broadly speaking therefore, the results in the lower panel of Table 2 demonstrate quite clearly that the outcome of the most recent mediation experience is strongly related to attitudes to mediation¹². Positive attitudes are more typically evidenced by those where the outcome was full resolution of the issues, followed by those where the issues were partly resolved, and finally those where no resolution occurred. Even where the proportions agreeing with a particular statement are not significantly different, this pattern often remains. Nor is this finding sensitive to the decision to focus on the proportions agreeing with the statements:

¹¹ The last of these, and in particular the high proportion reporting the presence of a clear business case is especially interesting, since one of the features of the Acas/CIPD case studies of workplace mediation schemes was that, with one exception, organisations with formal schemes typically did not undertake formal cost-benefit or similar analyses of their offerings. While some evidence does exist (see for example <http://www.cipd.co.uk/shapingthefuture/mdtnbtcs.htm>), the absence of rigorous, transparent and consistently based evaluations constitutes a major shortcoming in the evidence base.

¹² Merging of categories in the table is necessary here for the Pearson test.

comparing means (strictly mean ranks) using a Kruskal-Wallis H test¹³ confirms the presence of sub-group differences with p-values that actually exceed those reported in Table 2 in each case.

Turning to Table 3, this examines managerial support for mediation, the factors perceived by respondents as impeding greater use and the extent of change in use over the previous 3 years. Considering first managerial support for mediation in the top panel, as the notes to the table indicate, sample sizes require the collapsing of some of the categories (specifically 'Line managers support the use of mediation in principle but can be reluctant to agree in practice', 'Line managers have a neutral stance about the use of mediation' and 'Line managers are hostile to the use of mediation') to facilitate analysis. However, as is clear, a familiar pattern emerges: *unequivocal* support by line managers ('Line managers support the use of mediation in the organisation') for the use of mediation is more likely in those organisations whose most recent mediation resulted in full resolution of the issues (51.7 per cent) than where partial or no solution resulted (30.8 per cent and just 15.0 per cent respectively). The differences between the first outcome group and the other two are each statistically significant; managerial support for mediation is lower on average in those organisations where recent experience was less successful. In fact, while not reported in Table 3, the data reveal a higher percentage of respondents indicating *qualified* managerial support (i.e. support *in principle* but a reluctance to agree *in practice*) among the 'Partly resolved' sub-group compared with either of the other two groups of respondents. Strikingly, one in seven (13 per cent) of those reporting no resolution felt managers were actually hostile to mediation, compared with just 1.9 per cent of those where it led to partial resolution and none at all where it was said to have completely resolved the issues.

Managerial resistance to mediation may of course be a significant impediment to its effective introduction, implementation and operation, and the middle panel of Table 3 explores a set of prompted factors that respondents indicated inhibited greater use of mediation in their organisation. Although only weakly significant ($p=0.079$), it is worth noting first that those whose most recent mediation involved complete resolution are more likely than both of the other two groups to report not being inhibited (56.5 per cent compared with 43.8 per cent for the 'Partly resolved' sub-group and 37.9 per cent for 'Not at all resolved'). In terms of management as a restraint to greater use, the data reveal only modest percentages in each sub-group citing this as a factor, and where it is, lack of interest among senior managers is more commonly reported than resistance from line managers and the risk that mediation might undermine managerial authority. Senior management buy-in and support for mediation is of course critical (Lipsky and Seeber, 1998; Donais, 2006) if it is to be successfully embedded and to receive the resources it requires to function effectively. Indeed this was a key factor highlighted by several participants in the Acas/CIPD case studies.

A more important consideration than management support/resistance is the issue of cost, something identified in previous studies including SMEs. This is especially the case for those whose most recent mediation did not resolve the issues at all, albeit the differences are not statistically significant. A similar pattern is evident

¹³ This non-parametric test, rather than the Analysis of Variance (ANOVA) is necessitated by the observed non-normality of the responses (and confirmed by a Shapiro-Wilk W statistic in each case).

too in relation to difficulties in finding an external mediator, with those whose most recent mediation did not resolve the issues being twice as likely to cite this as an inhibiting factor as those where full resolution was obtained. Interestingly, respondents where the most recent mediation either did not resolve the issues or only partially resolved them are both more likely to report having made use of the services of an external mediator at some point than those whose most recent case was fully resolved (both around 67 per cent compared with 52 per cent among those in the fully resolved group, $p=0.042$). Both are also more likely to report using external mediators more generally as part of their suite of practices to deal with people problems and conflict (55.2 per cent and 56.1 per cent respectively, compared with 46.9 per cent), albeit the differences are not significant. Strikingly, when those who had used an external mediator were asked to say how satisfied they were with the services received, 72.9 per cent of those whose most recent claim was fully resolved were 'Very satisfied' compared with 39.7 per cent of the 'Partly resolved' group, and just 26.3 per cent of those where the issues were not resolved at all. Thus it is unclear whether the reported difficulty in finding a mediator refers to a problem of finding a mediator at all, or instead to finding one who is suitably qualified or that they feel 'delivers' (especially perhaps when factoring in the related cost consideration). Interestingly, in the wider commercial mediation context considered by Lipsky and Seeber (1998: 148), they also identify a lack of "trust and confidence in ADR neutrals, [but] especially arbitrators ... [and] a shortage of truly qualified neutrals", the latter referring to specialist skills in relation to the industry in which the commissioning organisation operates. As one of the participants in the Acas/CIPD case study series commented of external mediators:

"They don't always know the organisation or understand the problems. And I'm not saying they should understand the individuals' issues, but if they've got a feel for the organisation and the culture, they'll have a better understanding of maybe helping the individuals sort the issue out."

(HR staff development manager)

In respect of identifying suitable external mediators, the Civil Mediation Council pilot registration scheme introduced for organisations offering workplace mediation in the UK constitutes an important development in what is essentially an unregulated industry. It remains to be seen whether further steps will include the establishment of a (universal) mediation 'code of ethics' to which practitioners subscribe¹⁴.

Strikingly, around a fifth of those in the survey with experience of mediation reported a lack of understanding of mediation as inhibiting its wider adoption. This again resonates with responses in the Acas/CIPD case studies, where several of those interviewed noted that, notwithstanding efforts to promote their mediation offering and to raise awareness of what mediation was and entailed, a lack of awareness and understanding was nonetheless evident in their organisations:

¹⁴ The US is again more advanced, but even there no single code exists: as Peppet (2000: 78) notes, "Ethics codes abound", for example the American Arbitration Association or the Model Standards of Conduct for Mediators, with various states and courts also establishing their own (for example the Virginia Department of Employment Dispute Resolution Employee Code of Ethics).

I think the biggest weakness is just that people don't know about it... Which is one of the reasons why we're really trying to launch it alongside the [harassment and bullying] policy. That's the biggest weaknesses is that probably a large proportion of our managers across all the different workplaces don't know that this is a tool that's there. So that's the weakness.

(Equalities adviser/mediation coordinator)

Or as a human resource (HR) staff development manager put it very succinctly: "Barriers? Education I'd say; a lack of understanding." In these case studies this lack of understanding sometimes involved unreasonable expectations about what mediation was about or might deliver, with referred parties sometimes reported as seeing it as about apportioning blame. On occasions some staff were even reported as viewing it as a punishment or necessarily the result of a complaint.

Misunderstandings may of course underpin a lack of trust by employees in the process of mediation, and the survey indicates that this was seen by some as a hindrance to its greater use (lack of workforce/union support in contrast was identified as a problem by only 14 respondents). The data indicate that such lack of trust is perceived as more problematic in organisations where the most recent mediation did not resolve the issues compared with those where full resolution was effected (31.0 per cent and 9.8 per cent respectively).

Clearly one or two experiences generate impacts that are perhaps disproportionate and affect the way mediation is viewed more widely in the organisation. This is perhaps best summed up by the same equalities adviser/mediation coordinator in the Acas/CIPD case study series who expressed the concern that:

I think there's another issue. I mean I'm interested in reputation management and I'll be quite bold and say I think we're good at what we do. So as far as I know none of them have gone pear shaped yet. You'd only need one or two to start going pear shaped and then the credibility of it might get a bit ropey.

(Equalities adviser/mediation coordinator)

Such mistrust might also be occasioned by, *inter alia*, a feeling of obligation to participate or to settle (Hedeen, 2005), fears about power in hierarchical relationships in mediation (Wiseman and Poitras, 2002), inflated sanctions (Poitras *et al.*, 2005), and the use of managers or HR professionals as mediators and a perception that they are there as agents of, and hence representing, the organisation's interests. It may also reflect concerns around other forms of diversity imbalance or, where external mediators are used, a concern that they will side with the organisation by virtue of their role, in general, as the commissioning party¹⁵. Mediation may thus be the subject of some scepticism (Balc, 2002), and organisations therefore have to work hard to overcome 'resistance'. Good education and publicity are key and, as the Acas/CIPD case studies make clear, the role of the mediation gatekeeper is also critical.

¹⁵ For reviews and discussions of these and wider concerns in relation to justice in employment mediation, see for example Dolder (2004) and Green (2006).

Table 3: Impeding factors by outcome of most recent mediation

	All		Extent to which most recent mediation resolved issues						p-value ^a	Pairwise ^b
			Completely resolved (A)		Partly resolved (B)		Not at all resolved (C)			
	%	n	%	n	%	n	%	n		
<i>Line managers support the use of mediation in the organisation^c</i>	35.7	97	51.7	45	30.8	49	15.0	3	0.001	A>B,C
<i>Factors inhibiting greater use of mediation (multiple responses permitted):</i>										
Lack of understanding of mediation	21.2	65	19.6	18	22.2	41	20.7	6	0.881	
Lack of interest by senior management	12.4	38	10.9	10	14.1	26	6.9	2	0.479	
Difficulties finding a mediator	11.8	36	8.7	8	12.4	23	17.2	5	0.416	
Cost of mediation	20.9	64	15.2	14	22.7	42	27.6	8	0.230	
Resistance from line managers	11.1	34	9.8	9	13.0	24	3.4	1	0.281	
Risk of undermining managers' authority to use disciplinary sanctions	8.8	27	6.5	6	11.4	21	0.0	0	0.087	
Lack of support from workforce/trade union	4.6	14	3.3	3	5.9	11	0.0	0	n/a	
Lack of trust by employees in the mediation process	14.7	45	9.8	9	14.6	27	31.0	9	0.019	A<C
Other	6.2	19	7.6	7	3.8	7	17.2	5	0.016	B<C
Not inhibited	47.1	144	56.5	52	43.8	81	37.9	11	0.079	
<i>Change in use of mediation over last 3 years:</i>										
Did not use mediation 3 years ago	20.7	62	26.6	25	76.4	35	8.3	2	n/a	n/a
A lot more use of mediation	16.7	50	17.0	16	19.2	32	8.3	2		
Slightly more use of mediation	35.0	105	26.6	25	39.6	72	33.3	8		
About the same use of mediation	23.0	69	28.7	27	19.2	35	29.2	7		
Slightly less use of mediation	2.0	6	1.1	1	2.2	4	4.2	1		
A lot less use of mediation	1.7	5	0.0	0	2.2	4	4.2	1		
Since abandoned the use of mediation	1.0	3	0.0	0	0.0	0	12.5	3		

^a p-value relates to Pearson χ^2 .

^b Significant pairwise comparisons (5% level) with Bonferroni correction for multiple comparisons.

^c Those responding that 'Line managers support the use of mediation' (reference category is all those stating 'Line managers support the use of mediation in principle but can be reluctant to agree in practice', 'Line managers have a neutral stance about the use of mediation' or 'Line managers are hostile to the use of mediation').

The final panel of Table 3 considers changes to the use of mediation in surveyed organisations over the previous 3 years. Given cell scarcity, statistical tests of differences are precluded (even merging cells to 'More/started', 'Same' and 'Less/stopped'). Notwithstanding the absence of formal statistical tests and small cell sizes, the data reveal organisations are substantially more likely to have stopped using mediation where their most recent experience was not successful in resolving any of the issues. As such, it is clear that the success (or otherwise) of mediation matters not only in terms of attitudes, but also the continued use of the process itself.

Given the critical role of mediation outcomes, the remainder of the paper undertakes an exploratory analysis of several factors that might determine these outcomes. The dependent variable in this case takes one of three possible values: 'Not at all resolved' (1), 'Partly resolved' (2) and 'Completely resolved' (3). As such it is an ordered polychotomous variable, and estimation is therefore undertaken using the ordered probit estimator.

The explanatory variables available in the survey (means of which are presented in Table 4) include banded information on organisation size and also information on sector. The regression model thus incorporates two dummy variables for medium sized (50–249 employees) and large enterprises (250 or more employees), as well as dummies for private manufacturing, private services and the public sector.

In addition to these demographic features, the survey also includes information on whether the mediation was undertaken in response to an actual or threatened ET claim, the type of mediation (i.e. between two employees, between one or more employees and their manager, or of some other form (for example, group mediation)) and who initiated the mediation (line manager, HR, or anyone else, including self-referral). A final factor, included only in the second set of estimates in Table 5, is whether the mediation involved an external mediator. Estimates including and excluding this variable are presented since it may be measured with error by virtue of being proxied from questions on whether organisations incurred costs for their most recent mediation, and if so, whether the use of a mediation service was listed among these costs.

Clearly there are many other factors that could be taken into account (degree of hostility, nature of issue(s), complexity, party and mediator characteristics, intervention techniques used, timing, etc. – see for example Kochan and Jick, 1978; and Henderson, 1996 for more extensive discussions of other possible determinants). However, the choice of variables here is necessarily dictated and constrained by those available in the survey. As such the results should be seen as very much exploratory in nature. Nonetheless, they do provide one or two interesting results.

Table 4: Means of variables used in estimation

Variable	Mean
Outcome (dependent variable) ^a	2.203
Mediation in response to actual/threatened ET claim	0.153
Mediation between 2 employees	0.407
Mediation between one or more employees and their manager	0.533
Mediation between other [ref] ^c	0.060
Mediation initiated by line manager	0.123
Mediation initiated by HR	0.757
Mediation initiated by other [ref]	0.120
Sector: private manufacturing	0.140
Sector: private services	0.363
Sector: public	0.443
Sector: voluntary [ref]	0.054
Organisation size: <50 employees [ref]	0.080
Organisation size: 50–249 employees	0.210
Organisation size: 250+ employees	0.710
External mediator	0.322

^a Values are 'Not at all' (1), 'Partly' (2) and 'Completely' (3).

^b Sample size is n=300 except for External mediator (n=283).

^c [ref] denotes reference category (omitted in estimation).

Table 5: Ordered probit estimates of outcome of most recent mediation^a

	(1)			(2)		
	Coefficient (s.e.)	Marginal effects ^b		Coefficient (s.e.)	Marginal effects ^b	
		Not at all resolved	Completely resolved		Not at all resolved	Completely resolved
Mediation in response to actual/threatened ET claim	-0.037 (0.202)	0.006	-0.012	0.007 (0.211)	-0.001	0.002
Mediation between 2 employees	-0.346 (0.306)	0.056	0.115	-0.245 (0.331)	0.037	-0.082
Mediation between one or more employees and their manager	-0.393 (0.301)	0.060	-0.134	-0.270 (0.326)	0.039	-0.092
Mediation initiated by line manager	0.270 (0.277)	-0.036	0.097	0.168 (0.288)	-0.022	0.059
Mediation initiated by HR	0.319 (0.211)	-0.055	0.104	0.276 (0.220)	-0.045	0.090
Sector: private manufacturing	-0.112 (0.228)	0.018	-0.037	-0.183 (0.237)	0.029	-0.060
Sector: private services	-0.176 (0.207)	0.028	-0.059	-0.275 (0.213)	0.043	-0.091
Sector: public	-0.560 ^{***} (0.211)	0.091 ^{**}	-0.186 ^{***}	-0.520 ^{**} (0.216)	0.080 ^{**}	-0.173 ^{**}
Organisation size: 50–249 employees	-0.469 (0.302)	0.086	-0.146 [*]	-0.755 ^{**} (0.325)	0.148 [*]	-0.220 ^{***}
Organisation size: 250+ employees	-0.643 ^{**} (0.275)	0.083 ^{***}	-0.231 ^{**}	-0.894 ^{***} (0.297)	0.105 ^{***}	-0.322 ^{***}
External mediator				-0.457 ^{***} (0.159)	0.076 ^{**}	-0.147 ^{***}

α_1	-2.345*** (0.499)	-2.725*** (0.537)
α_2	-0.405 (0.487)	-0.744 (0.523)
Log-likelihood	-252.920	-234.209
N	300	283

^a *, ** and *** denote significance at the 10%, 5% and 1% level respectively.

^b By construction, marginal effects across outcomes sum to zero. Hence marginal effects for 'Partly' (omitted) are equal to minus the sum of 'Completely' and 'Not at all'.

As the first set of estimates show in the columns headed (1) in Table 5, (which omit the external mediator variable) only a very limited set of the included factors impact on the outcome of the most recent mediation. Thus, mediation was typically less successful in the public sector relative to the reference group (organisations from the voluntary sector). The marginal effects presented allow some quantification of this difference: *ceteris paribus*, organisations in the public sector were 18.6 percentage points less likely to obtain full resolution of the issues than those from the voluntary sector, with part or no resolution each being around 9 percentage points more likely¹⁶.

In terms of size, the marginal effects reveal that while the medium sized dummy is not significant overall, organisations of this size were somewhat less likely to see complete resolution of the issues (by around 15 percentage points) than those with fewer than 50 employees, and more likely (by 6 percentage points) to see partial resolution. The same pattern is evident in large firms, among whom no resolution is around 8 percentage points more likely than for small organisations, partial resolution 15 percentage points more likely, and full resolution accordingly 23 percentage points less likely.

Although the magnitudes of individual effects vary somewhat in the second set of results in Table 5 (organisational size marginal effects in particular are larger for this specification), a qualitatively similar picture is evident. Importantly, the inclusion of the external mediator (proxy) dummy variable is negatively related to outcome, with complete resolution almost 15 percentage points less likely where an external mediator was used, and no resolution and partial resolution 7.6 and 7.1 percentage points more likely respectively. At first sight this may not be encouraging to mediation providers. However, it is likely that a significant proportion of cases where an external mediator is used are those which are more complex, longer-standing and where the issues are simply more intractable. The data provide some circumstantial support for this conjecture in that some two thirds of the most recent mediations in the sample where an external mediator was engaged took 2 or more days compared with 47 per cent for internally mediated cases. Internal mediators may also benefit from familiarity with and hence a greater sensitivity to local context, language and issues that enhances their ability to get to the root of the issues and to facilitate agreement¹⁷. In the absence of direct data on these matters however, the present results should be regarded as exploratory. Nonetheless, they do suggest there is potential value to be had from examining such issues in the UK context (in the US see Kochan and Jick, 1978; Henderson, 1996), albeit requiring richer data designed specifically for this purpose and accounting appropriately for the various methodological complications arising in such analyses (see Mack, 2003; Esser, 1989).

4. Conclusions

This paper uses CIPD survey data to examine the relationship between the outcome of organisations' most recent mediation experience and a series of questions examining respondent attitudes to mediation. In so doing, it seeks to examine the extent to which the perception of mediation is 'fragile', to use Feuille and Kolb's (1994) terminology. The basic idea is well summarised by the earlier

¹⁶ As the notes to Table 5 describe, marginal effects across outcomes sum to zero.

¹⁷ Thanks to Karen Bailey for this insight.

comment by one of the Acas/CIPD case study respondents concerning the potential vulnerability of mediation's credibility to cases that go awry.

It should of course be emphasised and reiterated that the vast majority of those in the survey reported their organisation's previous experience of mediation as being positive in the sense of either full or partial resolution of the issues. In that sense the glass is very much 90 per cent full rather than 10 per cent empty¹⁸. But the data do serve to offer a cautionary note: attitudes towards mediation are in many instances only as positive as the last experience. Importantly, this is true even in a sample like that used here which, by its very nature, likely represents organisations that are among the most well-informed and also enthusiastic, early adopters of mediation. Such organisations are also more likely to be those whose use of mediation has been largely as a matter of principle and whose attitudes might therefore be expected to be more robust in the face of 'problematic' mediation experiences; negative experiences may exert a greater impact among later adopters, and especially any organisations who do so primarily out of a sense of compulsion from for example, the fear of an uplift to awards at ETs.

This is also an important finding in a policy environment in which, following Gibbons (2007) and the revised Acas *Code of Practice on Disciplinary and Grievance Procedures*, organisations are being encouraged to change the way they deal with workplace conflict. For such changes to be robust, the evidence here suggests they must continually strive to ensure the quality of their offering, be that via an internal scheme or external mediators. This must necessarily entail ensuring, *inter alia*, that mediation is properly resourced, timely and suitable for the circumstances, that mediators are trained, accredited and appropriately supported, and that senior managers, line managers, staff and employee representatives are educated about mediation and what it has to offer. Organisations need to understand too that mediation is not a 'magic bullet'; not all cases will resolve. Crucially, greater efforts are also needed by organisations and mediation providers to evaluate the process, partly to underpin learning and the development of practice, but to ensure that individual 'failures' are seen in the context of wider success, thereby avoiding this facet of fragility.

¹⁸ An interesting issue however, is the extent of selection bias in that those cases referred to, and where the parties agree to take up mediation, may be those where resolution is most likely.

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Technical appendix

In order to examine the effect of various characteristics on the outcome variable (Y) in Table 4, which is ordered and takes a discrete number of observed values (3), we assume this reflects an unobserved latent variable Y^* determined by $Y^* = X\beta + u$, where X denotes a matrix of K being the number of explanatory variables (excluding a constant), β a corresponding vector of coefficients, and u a vector of disturbance terms.

If $\alpha_1 < \alpha_2$ are unknown 'cut points' or threshold parameters, the values of the dependent variable will take the value 1 if $Y^* \leq \alpha_1$ while:

$$Y = 2 \text{ if } \alpha_1 < Y^* \leq \alpha_2$$

and

$$Y = 3 \text{ if } \alpha_2 < Y^*$$

Denoting the cumulative density function of u by $F(\cdot)$, the conditional distribution of Y is:

$$P(Y = 1|X) = P(Y^* \leq \alpha_1 | X) = P(X\beta + u \leq \alpha_1 | X) = F(\alpha_1 - X\beta)$$

$$\begin{aligned} P(Y = 2|X) &= P(\alpha_1 < Y^* \leq \alpha_2 | X) = P(\alpha_1 < X\beta + u \leq \alpha_2 | X) \\ &= F(\alpha_2 - X\beta) - F(\alpha_1 - X\beta) \end{aligned}$$

$$P(Y = 3|X) = P(\alpha_2 < Y^* | X) = P(\alpha_2 < X\beta + u) = 1 - F(\alpha_2 - X\beta)$$

The log-likelihood function to be maximised (with individuals indexed by i) is given by:

$$\log L = \sum_{i=1}^n \sum_{j=1}^3 D_{ij} \log[P(Y_i = j)]$$

where $D_{ij} = \begin{cases} 1 & \text{if } Y_i = j \\ 0 & \text{otherwise} \end{cases}$ for $i = 1, \dots, n$ and $j = 1, 2, 3$

The assumption of a standard normal distribution for the error terms gives rise to the ordered probit model. Estimation was carried out using Stata 10.

