

***Operating with style:
The work of the ACAS conciliator in individual employment rights
cases****

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INTRODUCTION

The factors which bring about an out-of-court settlement in a dispute are varied and complex. But one issue which is becoming recognised as of special significance is the use of different techniques, by the mediator, in handling the dispute situation. This aspect of dispute resolution has strong resonance within the Advisory, Conciliation and Arbitration Service (ACAS). If the Service is to continue to meet its statutory duty of promoting the settlement of cases brought to employment tribunal, against a tide of ever-increasing claims, more information is required about the process of conciliation, and why some methods and styles are most powerful than others. A recent evaluation of ACAS conciliation in employment rights cases (Lewis and Legard, 1998) identified the differing 'pro-active' and 'reactive' techniques used by ACAS conciliators. These descriptions were derived from consultations with parties to cases, yet to date, there has been no systematic account of styles of operating as described by ACAS conciliators themselves¹. This paper redresses the balance.

The paper explores the core dimensions of conciliation², describing and discussing the different roles and styles as perceived and described by ACAS conciliators. Twenty five years since the formal creation of ACAS, the picture of conciliation in individual employment rights is very different to that found at the birth of the organisation. Other chapters in this volume* have charted in detail the change in emphasis within the Service from conciliation in collective disputes to conciliation in the rapidly expanding volume of employment tribunal cases (Dickens, Goodman). But the change has not just been numerical. The entire arena of individual employment rights, in which ACAS is a player, has changed dramatically. The period has seen an increase in the number of employment rights jurisdictions: ACAS has a statutory duty to conciliate in thirty employment rights jurisdictions (Dickens chapter*). Cases are more complex - in 1998, just under half involved more than one jurisdiction (ACAS, 1998). With the growth in legislation, and the exercise of these rights, has come a vast swathe of case law, and perhaps not surprisingly, more and more parties engage representation. In spite of the Donovan Commission (Cm 3623, 1968) vision of labour tribunals providing an 'easily accessibly', 'informal' and 'inexpensive' procedure, today, around forty per cent of cases dealt with by ACAS are handled by a formal representative.

*This paper is adapted from a chapter in: Towers, B. and Brown, W. (eds.) (2000) *Employment Relations in Britain: 25 years of the Advisory, Conciliation and Arbitration Service* (Oxford, Blackwell).

¹ Some preliminary work in this area was carried out as part of a wider evaluation of a pilot initiative involving ACAS conciliator working at employment tribunal premises (Lewis,1995).

² Within ACAS the term 'conciliation' is used to describe the involvement of a neutral third party acting as communicator between parties and encouraging a move towards a resolution, but without offering suggestions. This contrast with ACAS 'mediation', a process includes offering suggestions to parties to help them move towards a settlement. In other spheres beyond ACAS however, the term 'mediation' is used more generally, and can include activities ACAS categorise as conciliation. Research findings on other 'mediation' initiatives reported in this paper relate to the latter wider categorisation.

Such change has placed new demands on ACAS conciliators who must now be capable of managing the vast array of legislation, and the varied circumstances and knowledge levels of parties and representatives dealing with claims. The result is that conciliation in employment rights cases is, at its best, a highly sophisticated service. Discussions with conciliators reveal that the roles they play are both varied and highly responsive, according to the demands of individual cases. Conciliation is not formulaic. The disposition of conciliators is likely to influence the nature of their interventions, and by looking at styles of working, it is possible to gain an insight into the relationship between attitudes, and actions. The paper presents a systematic account of the different *roles* played by ACAS conciliators in employment tribunal applications. These are described in the first part of the paper which sets out a model of conciliation interventions. The second part looks at the different *styles* of conciliation, exploring the *manner* by which different roles are fulfilled. Again, a model is used as a vehicle for exploring conciliators' working styles. It becomes apparent that the different roles of conciliation, and the varied styles of operating are interlinked and it is this relationship that forms the essence of conciliation. The third part of the paper examines the interaction of roles and styles, exploring the discrete components set out in the paper and considers the relationship between these different dimensions. The diversity and complexity of employment tribunal cases call for a finely tuned approach on the part of ACAS conciliators if they are to be effective in fulfilling their role.

METHODOLOGY

The material in the paper is based on a series of depth interviews conducted with ACAS conciliators. The interviewees were selected to reflect a mix of length of service and gender, and were drawn from across the ACAS regional offices. The study used qualitative techniques to explore the ways in which conciliators construct their roles, and to identify the nature and range of tactics they use in their work. The paper provides an understanding of the perceived merits and benefits of difference approaches. However, the reliance on qualitative data makes it impossible to discuss, in any statistical way, which techniques are associated with successful conciliation. To achieve the latter would require a different research approach based on a quantitative data, and factors determining case outcomes³.

The paper includes verbatim quotations taken direct from transcriptions made from the taped interviews. On occasion, words are added in parenthesis by the author to bring greater clarity to the interview extract. Throughout the text considerable emphasis is placed on reporting the language of conciliation as used by conciliators. This helps give a feel for the way conciliators describe their work, and adds definition to what is becoming a growing vernacular in ACAS conciliation. The exception to this is found in the model at Figure 1, which draws on the terminology of other research on mediation.

³ Quantitative research within ACAS is currently underway examining determinants of outcomes in employment rights cases. Other studies have used quantitative measures to examine factors associated with successful conciliation and mediation - see for example on ACAS collective conciliation Hiltrop, J, (1985).

THE ROLES INVOLVED IN CONCILIATION

A model of conciliation interventions

Figure 1 sets out a model describing the large array of roles that conciliators identified when describing their work. The different actions are grouped under three broad headings as follows⁴.

A reflexive role which is concerned with responding to the needs of parties and establishing a positive working relationship, and at the same time give the conciliator a greater orientation in the case.

An information provider which involves clarifying the details of a case and conveying factual information to parties. In acting in an informative role conciliators are, amongst other things, attempting to redress any imbalance in the knowledge of opposing parties, aiming to ensure that both sides are equally aware for instance of the legislative dimensions of their case.

A more *substantive involvement* may be required of conciliators in order to move parties to resolve their dispute. This may involve: exploring with parties the strengths and weaknesses of a case; assessing where parties interests lie; what is achievable within the confines of the law; and where possible promoting a settlement.

FIGURE 1
A model of the roles of the ACAS conciliator

Type of intervention	Reflexive	Informative	Substantive
Aims of intervention	To build the trust of parties	Place parties in a more informed position Redress a balance between parties Establish interest in ACAS, case and non-case specific	To narrow the gap in parties' positions and precipitate a settlement
Tasks	Building professional confidence and trust Building personal rapport Being sensitive and flexible in dealing with parties Acting as a buffer	Clarifying issues of case Explaining ACAS role Explaining ET process and purpose Explaining case law	Identifying and ordering issues in a case Bringing realism to parties' expectations Facilitating communication Examining strengths and weaknesses Promoting the settlement

⁴ The model draws on previous studies examining mediation in social conflict, including labour as well as family and community disputes. In particular it takes ideas developed by Kressel and Pruitt, (1985 and 1989) who identify three basic tactics - reflexive, substantive and contextual - used by mediators. See especially Carnevale *et al* in Kressel and Pruitt (1989). For a useful overview of mediation typologies see Pruitt and Carnevale (1993).

Each dimension is considered in detail in the following sections. First, some caution is required in interpreting the model. While it provides a useful vehicle for exploring conciliation, like any model, it is by no means perfect. For instance, the identification of a series of distinct roles may suggest that for conciliation to be productive, each type of intervention is required in each case. This is not necessarily so since, as the paper demonstrates, different people and cases call for a different array of interventions. Second, the division of roles into three discrete areas is somewhat misleading suggesting that conciliation is a single dimensional, linear, process in which conciliators move from a reflexive to an informative and then substantive intervention in cases. In some instances this may be true: early contact with parties may indeed focus on building a positive relationship while later contact will focus on actively finding a resolution to the dispute. However, in reality, conciliation is an iterative process. Conciliators may act simultaneously to fulfill a range of functions itemised in the model, switching back and forth between roles as a case progresses, and the needs of the parties alter.

The reflexive role in conciliation

This element of conciliation refers as much to the nature of conciliators contact with parties, as to the purpose. The need to establish a trusting relationship with parties was central to the thinking of the conciliators interviewed in the study and it was by taking a reflexive or responsive role with parties, that trust was most likely to be gained. Gaining trust was important since it was felt to have a powerful bearing upon whether or not the parties respect and believe information given by the conciliator. Winning the confidence of parties was also a gateway to allowing conciliators to successfully promote a settlement. As once conciliator put it:

...the first thing that I am aiming for is to get their trust and confidence. I feel that once I have got that trust and they realise that I am totally neutral - I have got no axe to grind with either party - I find that if it's going to settle you can manipulate, conciliate, which every way you want to look at it.

Conciliators identified a number of dimensions to this reflexive role all relating to the process of winning the confidence of parties as well as becoming attuned to cases. Aspects of the role are discussed below, and summarised in the model at Figure 1.

Gaining the trust of parties

Conciliators must win parties' trust, both on a personal level, and in their professional knowledge and judgement. The tactics for achieving the two are often interlinked. Conciliators placed considerable emphasis on 'building rapport' (a phrase repeatedly used in the interviews), and it was widely perceived that face to face contact with parties, especially those without representation, provided the most effective means for succeeding in this. Much was felt to depend on the demeanour and presentation of the conciliator at the point of introduction, but also the way the conciliator responded throughout the case. Conveying professional knowledge and experience was important, and this partly involved explaining the impartial stance of ACAS, and maintaining integrity in this stance throughout their dealings with parties.

Gaining trust and rapport meant being alert to the *sensitivities* of the parties in all types of cases. There was a widely held view that conciliators needed to be particularly aware of the sensitivities associated with cases relating to sex or race discrimination. However, it was stressed that grievances related to loss of employment or loss of wages, for instance, can have equal weight in people's lives and that conciliators needed to be alert to the reactions of parties in all circumstances:

It is one of the things you have got to be - sensitive ... if you are talking about a week's wages in lieu of notice, it can generate more passion for some than sex and race cases can. So I think you have got to be sensitive in every case. That is what the job is about. Getting the feel of it, and responding to the needs of the parties and the situation at the time.

I think you would perhaps be, try to be, more sensitive maybe with sex or race (cases). At the same time, losing your job is very distressing, so you can't necessarily say that you would be less sensitive there.

Being responsive involved being a good listener. Parties unfamiliar with the employment tribunal system may feel daunted by the prospect of a tribunal, or by the bureaucracy surrounding claims. In such circumstances, some conciliators saw it as their role to make the party feel they could turn to ACAS for clarification and information, but also as a 'hand to hold' in the initial stages. These roles were felt more relevant to unrepresented parties:

I think it (the role) is to try and, I suppose, offer some comfort - in that someone knows about it is doing something about it. They are not just lost in a vast machinery ... it is just to offer them that hand to hold initially.

I think the role is such that you need people from all backgrounds and all walks of life really because of the very nature of the job and the people you are dealing with. The key attribute would be really an ability to take on board and listen.

Yet this dimension of the job could be time consuming. Conciliators spoke of the need to devote time for instance with unrepresented parties, to allow them to recount their case in detail, and visit all their concerns. This contrasted with some of their more expedient dealings with solicitors where conversations were confined to discussion of a settlement. Allowing parties to speak was seen as beneficial in giving them a chance to release their feelings. Listening to the detail of people's experiences was also important to progressing conciliation. It was the main means by which to gain a depth understanding of a case, and of the interests and motivations of parties. But it was also of 'human interest' to conciliators. Nevertheless it could also be stressful, placing a 'burden' on the conciliator and some felt the need to curtail parties with a propensity to talk at length about their case. The demand for this 'hand holding role' needed to be balanced with the time constraints faced by conciliators in having to manage their full case load - 'you certainly have not got the time to be agony aunts'. Some also spoke of feeling 'impatient' with parties, or becoming 'hard faced' about problems, and this was sometimes felt to stem from doing the job for a long time.

Winning the confidence of parties involves not only listening, but acting as a buffer to anger or frustration; to be a 'calming influence' while retaining impartiality. Such demands called for much patience and attentiveness, even when the conciliator felt under stress. These roles were relevant to applicants and employers alike:

So sometimes you find your initial telephone contact is about allowing an employer to get their feelings off their chest. Let them have their say, and gradually try to persuade them that you are there to service them in an equal capacity to the applicant.

A lot of people are defensive, and a lot are very hostile. They say things that could be defamatory, and they can have misconceptions. You have a professional job to sort the cases out, and you have to approach with 'I can see you are very upset about it'. And you let them gather themselves and calm your voice. ... You have people who are always shouting and you let them shout it out, and then pick out points that are obviously wrong.

Developing a flexible approach

In describing their approaches to building trust and rapport, conciliators emphasised the need for *flexibility* in dealing with different people in different circumstances. This sometimes meant simply varying the range of issues they may cover in discussing a case. With some solicitors, for example those well-versed in employment law, it may not be appropriate or welcome to discuss case law, or the merits of a case. Yet on occasions, the use of legalistic terminology may provide an assurance to a party of the competence of the conciliator. Some situations, for instance with less knowledgeable parties, warranted less technical or legalistic language, since it may be confusing.

Yet building trust may involve less palpable differences in approach. Gaining the respect of parties was sometimes easier if the conciliator demonstrated a sense of empathy with the circumstances or concerns of a party. Regional accents could have some bearing on the way parties relate to a conciliator:

You respond to the needs of the case, and you respond to the attitudes of people you are dealing with. It even goes so far as the sort of language that you use. A colleague once remarked that she felt it was more difficult for her to do the job than it was for me because she came from (another town) and she felt it difficult to have an affinity with local people. ... your accent varies, depending on who you are talking to. It becomes stronger or weaker. You do whatever gets you onto their wave length. It's a fascinating job ... you make adjustments without ever realising ... it just comes naturally.

The language that you use varies according to who you are talking to and you don't say that particular language to an applicant, that to a respondent. You can be talking to half a dozen respondents, and your approach is totally different to every one. It all depends on the individual.

Creating a rapport with a party, or 'getting on the same wave length' as parties was not only confined to language and terminology. It might be appropriate to draw on one's own personal background in creating an affinity; or where appropriate introduce humour as an 'ice breaker'. The secret lies in a flexible approach. Here the words of the conciliators best describe their sentiments:

Your flexibility is in how you approach the people and your attitude and its about your style I think. That's the way I see it anyway. ... You don't come on as Jack the Lad to the Managing Director of ICI, whereas there are other people you can do that with, and build up a rapport much more quickly.

The only change to my approach is the person I am dealing with. The way I present myself. I come to work - black trousers and dark shirt, and I am quite comfortable. If I go to see an employer, I am wearing a business suit, cuff links, shiny shoes, and all the bits. It's just presentation.

Reaping the benefits of a reflexive role

The process of getting to know parties allows conciliators to orientate themselves to the dispute, and the respective positions and goals of parties. But a good working alliance was also widely regarded as having other short and longer term benefits. First, good relations were seen as crucial to promoting a settlement. Having created a sense of empathy with parties, conciliators were able to use their position to 'feed back' to parties 'in a way that makes sense to them, and they are liable to accept'. Gaining trust was also believed to have longer term benefits particularly in relation to employers having future contacts with ACAS. Positive contact on a case was more likely to result in positive contacts in the future. As one conciliator pointed out 'you wouldn't buy another car from a dealer if you'd got a poor car previously'. Finally, in seeking to gain the confidence of parties, the good reputation of ACAS was sometimes felt to be helpful. This reputation was for integrity, in playing an active role in attempting to bring parties to some form of agreement, and at the same time in maintaining impartiality:

I think the big thing ACAS does is gain the trust of people. I think it's the impartial, friendly advice. When I started someone said to me, the people who will generally be let into people's homes are vicars, doctors and ACAS officials. ... I think a lot depends on the initial contact and then the rapport you build up with people. But I think the big bonus is ACAS has got a good reputation and it's trusted.

Protecting this reputation was regarded as important. This required consistent and sound judgement and ensuring that conciliation stayed within the bounds of impartiality whilst at the same time seeking to influence the outcome of a case. These dual roles of the conciliator are discussed throughout this paper.

Information provider

Conciliation also involves conveying information on issues related both to the employment tribunal process and to the case in question. The aim is to ensure that each party has sufficient understanding of the various dimensions of their case, and the proceedings surrounding their case, to allow an informed consideration of the options for resolving their dispute (the latter, according to the model, involves a more substantive intervention by ACAS). Providing information to parties was described by some as the 'first block in terms of the conciliation process', 'the foundation for building on':

I see my role as two-fold. Firstly, to make sure that both parties... have the same information - in other words, to explain the system of the Tribunal, what the compensation awards are, and the kind of things a Tribunal will look at. That's very important, before you get to the second stage which is obviously to try and facilitate a settlement. But you can't get to that stage unless the parties have got all the information.

Information conveyed could and should be referred back to at all stages of conciliation, to refresh the memories of parties. In particular the role of the conciliator was described as one of ensuring an even balance in the knowledge of opposing parties such that neither was disadvantaged by lack of information. The

role had particular significance in cases where there is an imbalance in representation where the onus was to focus most on an unrepresented party⁵:

I think with the unrepresented parties, we have an even greater role ... because a lot of them have never had a tribunal case, they haven't a clue what it is about. They are at risk of incurring massive legal bills. What I tend to say is 'perhaps you would like to see me and I can discuss all the options with you, and if you feel then it's appropriate (to find a solicitor) then obviously, go ahead.

There were exceptions when conciliators felt they had a role in conveying factual information to solicitors. Some legally trained professionals may not specialise in employment law, or not encounter as many cases as an ACAS officer. In such circumstances, the conciliator may recognise the benefits of conveying relevant information to the representative, but to do so in a way that would not cause offence - 'we have got to be seen not to be implying that they don't know what they are doing'.

Pacing the flow of information to parties was important. Once contact with a party was established, or visit arranged, there was some pressure to review all aspects of the case, the options facing parties and thoroughly describe the role of ACAS. Face to face contact provided a good opportunity for covering a wide range of issues, though in practice visits were relatively rare, taking place in around 10 per cent of cases and almost exclusively with unrepresented parties. At the first point of contact, parties are at different stages in their understanding of their cases and of the employment tribunal process. Conciliators spoke of the need to judge carefully how much information to pass to parties, and at what pace, and when. They need to consider how receptive parties are to a mass of information and new ideas, but balance these considerations with their own constraints on time, and competing demands of other cases. These demands mean that conciliators often have no choice but to cover a vast amount of information in their first discussion with a party but 'good conciliation' was felt to involve constantly reiterating the technical issues involved in a case.

The following provides a description of different aspects of the information role performed by conciliators.

Clarifying the issue of a case

With unrepresented applicants, the first contact may involve exploring in detail issues raised in the application form (Form IT1). A similar role may be played with unrepresented employers. However where an employer had not completed a Notice of Appearance (Form IT3), there was some wariness about entering into detailed discussion since the conciliator may, inadvertently, convey information about the applicant's position that would otherwise not be known. Clarifying the facts of a case may involve ensuring that a claim is 'within scope' by seeking clarification of length of service, or length of time elapsed since an alleged unfair dismissal. Other aspects of parties misunderstandings were more complex, for example relating to parties conception of a tribunal as a forum which can 'sort out' any perceived injustice at work. An example given was a claim brought by a

⁵ Evidence from a study carried out within ACAS in 1996 suggests that: in around 50 per cent of cases both parties are represented; in 15 per cent, neither party was represented; and in around 35 per cent of cases there was an imbalance in representation, with either the applicant or the employer being represented.

party for alleged bullying at work, an allegation which the party believed could be dealt with under the discrimination jurisdiction.

Describing the role of ACAS

At the outset of a case, ACAS sends an introductory letter and leaflet, explaining the role of ACAS to parties. Conciliators generally check that this information has been received during their initial contact with parties, and in the main, parties report to have read and understood the material. However, conciliators said that as discussions progress, there are often signs that parties are confused about the exact role and status of ACAS⁶. They may be unaware of the independence of ACAS and may perceive ACAS to be in a 'policing role' or likely to 'impose' a settlement or be biased towards one type of party. It was important to remind parties of the parameters of conciliation since misunderstanding could result in parties acting 'defensively' towards suggestions made by the conciliator. Working with employers to build their confidence in ACAS and to ensure they understand the impartiality of the organization was felt to be especially valuable since it is the employer who holds the balance of power in deciding whether or not a settlement can be offered:

You have got to be very careful with a respondent that they don't feel that you are on the side of the applicant. This is particularly true when you have got Wages Act cases and Breach of Contract ones where you almost seem as though you are approaching them for money on behalf of an applicant, and they can see that as your role.

I think some people find it very difficult to understand. There are a lot of people who actually think you are representing them. ... Employers tend more to think that you are representing the applicant, and they talk about 'your client'. Now solicitors do this as well - 'your client'. I say, 'No, he's not my client'. And they say things like 'Well will you take instructions from our client?', 'Well no, because I am not a representative'. So you do need to keep reminding people.

Explaining employment legislation and case law

A further dimension of the information provider role was in making parties aware of provisions in employment law, and relevant case law, both potential sources of information in helping parties understand the likely outcome of their case. While there was wide recognition of the value of conciliators having some knowledge of case law, in practice there was reported to be considerable variation in the extent to which case law was discussed with parties. Discussing case law with representatives was regarded as important, in part to ensure that conciliators were respected for their knowledge of the subject matter. Yet conciliators often make the decision not to introduce case law when talking to parties since they sometimes feel wary about how it may be interpreted, particularly among those unfamiliar with the notion of legal precedent. Some feared that referring to previous cases could be off putting, and unhelpful to parties new to tribunal proceedings. Others felt that this process carried the danger that parties may interpret the information as the conciliator saying that 'this is what is *also* going

⁶ Research with parties similarly found that parties often felt they did not fully understand the role of ACAS (Lewis and Legard, 1998). This may in part be due to the need for conciliators to place more emphasis on explaining the purpose of ACAS, but was also due to parties inexperience of the role of an impartial, third party, in resolving disputes.

to happen in your case'. With these concerns in mind all of the conciliators interviewed said they chose to use case law sparingly, or avoid it:

Earlier on (in doing IC work), you get very bogged down with case law, trying to prove that the person has got a weak case, by bombarding them with case law and whatever. Often (it) doesn't help the person because they just become sort of alienated.

A compromise for some conciliators was to avoid using what they described as 'glossy' case law, meaning well-known cases, in favour of referring to cases which had been heard at their local tribunal, and which they sometimes had been directly involved in:

I tend not to use glossy case law, the lead cases. I usually try and find a similar one (to that heard at) the tribunal they are actually going to go to, which I think has much more impact.

Exploring Employment Tribunal procedures

Conciliators try to deal with parties misunderstandings about tribunal proceedings in order to alleviate concerns and fears about appearing in court. Here the conciliator can help by explaining all aspects of proceedings: the composition of the panel; the way the day is organised; the role of witnesses; the use of witness statements; the role of preliminary hearings and pre hearing reviews; and the use of 'further and better particulars'. One suggestion was that parties, unfamiliar with proceedings, visit a tribunal before hand - 'go along and sit in the back'. Giving parties a clearer understanding of the employment tribunal process was important in helping parties recognise what they want most to achieve from their case, and whether or not they wish to go through to the hearing stage:

We have got to tell them about the tribunal because it's one of the issues that helps them to decide whether they want to go or not. ... I explain to them it's quite a formal situation. It's not that you sit around a table and have a cosy chat about something. ... I definitely think that is our role. ... I think that helps them to put into perspective any offers of settlement there might be, whether they really want to go or not.

Maintaining a boundary between information and advice—remaining impartial

Drawing a boundary between an information providing, and an advisory, role presents a constant challenge for conciliators, but one which they are highly sensitive to in wishing to remain impartial. Clearly the manner by which conciliators present information, including case law and tribunal proceedings as discussed above, can be subject to considerable variation, and can be used more or less as tools of persuasion. The same is true of many of the dimensions of conciliation described so far, and in the next section on 'substantive involvement' in cases.

Much too depends on the different styles of individual conciliators (again discussed in the next section), but nevertheless all of the conciliators interviewed spoke of the constant pressure on them from parties to give personal views on the merit of a case, and how best to proceed. This was particularly the case with unrepresented parties some of whom look to the conciliator to respond to the 'nitty gritty of running their case', as well as advice on the likelihood of their case

succeeding. Drawing the line between information and advice was a challenge. It involved reading and interpreting the case and the parties motivations, and offering real help without overstepping the mark. Some conciliators felt that achieving the right balance came with experience. Others spoke of their inherent tendency to feel sympathy for the 'underdog' who in the context of employment tribunal cases was normally the unrepresented party, or the applicant. Conciliators have their own 'rules of thumb' on how to deal with these kinds of demands. Some distinctions were made:

- it may be the conciliator's role to inform an employer about the timescale for completing an IT3, but not to assist him or her in presenting the arguments for rejecting the allegations of a claimant.
- conciliators may describe the detail of the tribunal process, inform parties of the role of witnesses in a hearing, and tell them the value of a prepared witness statement, but do not in contrast see it as their role to assist in rehearsing for a tribunal, or selecting witnesses.
- a conciliator may be prepared to respond to a request for simple, factual information –'What are "Further and Better Particulars"', but not respond to questions seeking direct advice, such as 'Which piece of evidence should I be taking to the tribunal?'

It's like all things in this job. You talk about where that line lies. It can be difficult sometimes, particularly where you have sympathies with one party or the other, and the other party is represented.

They say 'they are offering this, do you think that this is a good offer?' and I say again that it isn't for me to decide. 'What would be a good offer for me may not be for you. What would be a lot of money for me...' And then it's usually approached from 'Well I have explained to you how the Tribunal view things, and you really need to look at how you feel the Tribunal would view what you are going to tell them in the light of this offer. But I can't recommend it to you.'

Substantive involvement

Beyond rapport building, and informing parties of procedural issues, conciliators identified a wide range of roles which they undertake in endeavouring to meet their central objective of promoting a resolution of parties' disputes. Following the model at Figure 1, the likelihood of ACAS being successful in helping parties to reach a resolution - be it a settlement or a withdrawal of the case - is far stronger if a good working alliance has been developed (reflexive intervention), and parties are on a more sound footing if they fully understand the options open to them, are aware of tribunal proceedings and understand the role of ACAS (influenced by conciliators playing an informative role). Yet the stage in which the conciliators are required to make a substantive input is where conciliators can have most direct impact upon the outcome of the cases. This involves dealing directly with the facts and details of a case; getting parties to explore issues in a critical fashion, consider the strengths and weaknesses of the claim, and looking realistically at what may be the most acceptable outcome.

How an ACAS conciliator approaches this element of the work will vary depending on the style of that conciliator. As Kressel found in other areas of mediation, some mediators may be non directive, and leave much of this substantive work to the parties; at the other extreme, mediators will grapple directly with the issues, seek new ideas and advocate them vigorously to parties (Kressel and

Pruitt, 1989). A similar range of approaches is likely to be found across the three hundred or so conciliators operating in ACAS and the different styles of conciliation in seeking to influence case outcomes are discussed later in the paper. Whatever the approach however, this element of conciliation is undoubtedly the most tactical, requiring a high level of skill and diplomacy on the part of the conciliator.

An important goal of ACAS intervention at this stage, according to conciliators, is to reassert to that parties what are the options open to them - either to settle the case, for the applicant to withdraw, or to seek an outcome via a tribunal hearing - and most importantly to inform parties of the implications of each course of action. There was a marked variation in the ways conciliators described how they go about exploring each of these options. In particular, they differ in the timing, and degree of emphasis they place, on asserting the ACAS role in seeking to resolve the case. While the range and quality of information given to parties does not appear to differ according to the prominence given to ACAS settlements in discussion, some conciliators are clearly more vigorous and explicit than others in pursuing this outcome. The following quotation demonstrates some of the considerations in deciding a course of action:

It's very easy for someone to withdraw and really you could argue that no action need be taken. But I don't see it like that. I think that we are here to offer a service. If someone wants to withdraw, we can deal with that. If they want to pursue it, we will conciliate. So I think there is a service to offer. To let them know the range of what they can do, and I like to feel that they know what their rights are... If they want to withdraw because they don't want to carry on, that's fine. But if they are not sure, or if they have been frightened off, then I let them know what the options are. It's tailoring it to what you are faced with really. Yes, it's when I feel that they are not fully informed, we have a role there to inform them, and if they still want to withdraw, then fine.

The following sections explore the kinds of tactics associated with conciliators substantive interventions in cases.

Clarifying the issues of the case

An important role for the conciliator is to assist each party to examine more critically the issues of a case and the arguments presented in defending their position: a task defined by one conciliator as stemming from the 'need to put questions their way' in order to 'open up new lines of thought'. For the conciliator, this will involve highlighting and explaining the strengths and weaknesses of each party's position sifting through all their concerns in order to focus on those issues most pertinent to a case; most importantly, it involves helping parties to understand the 'position of the other side'. Identifying key issues in this way was a tactic for 'build(ing) momentum' (Kolb, 1983), and moving parties towards a settlement. In exploring these avenues, the issues covered are likely to be diverse, depending on the jurisdiction of the case, and influenced by a time as far back as the circumstances leading to the claim. For instance, with an employer, the conciliator may explore what lies within the range of 'reasonable conduct', or what 'represents a fair procedure', but may also involve seeking to explain some of the reasons why the applicant feels particularly aggrieved. With an applicant, the focus may be on what records or evidence the applicant has to support his or her position, and talking through precisely which internal procedures, if any, the employer used, for example before a dismissal:

I think that once they (the parties) have decided what their case is, if you like, what their version is, I think it's then our role to point out to them where the strengths lie and where the weaknesses lie.

We try and encourage people. I call it Brownie Points. I tell them that they have a Brownie Point there, 'because the Tribunal will chalk that one up for you'.

This kind of role was considered to be more relevant with unrepresented parties:

If there is a solicitor acting, I think the phone calls are very short and to the point. You don't tend to get too bogged down on the merits of the case - you would, may be, just have one or two comments to be made about the strengths and weaknesses. You would take it really as read that the rep' was actually able to see what the strengths and weaknesses of the case were.

The role of encouraging a more critical analysis of a case was felt to have extra potential benefits when dealing with employers who may benefit from a more in depth discussion by taking action to avoid future claims:

ACAS is a vehicle for understanding. ACAS is a way of asking 'Why has it happened?' 'How has it happened?' 'Would it happen again?'. I mean, if we achieved nothing else, I would like to think that when we get a case, that by our role, we have a chance of it not happening again.

Having a good rapport with parties was seen as crucial to being successful in helping people assess their case critically. A good relationship helped ensure that parties are comfortable and confident about hearing the conciliator give a critical appraisal of a case. The timing of such interventions was also important. A critical, or harsh, assessment made too early in a case may inappropriately reduce the party's confidence in their case; yet leaving a detailed discussion of the weaknesses of a case too late may by implication lead to a party having false expectations of what they may achieve:

If you are going to point out the weaknesses in their case, you have got to choose your moment for doing it, and it may not be a good idea to go in feet first at the beginning. It may be better as time goes on - let them down gently that they have not got perhaps the strongest case.

Although the value of this kind of careful intervention was appreciated by conciliators, constraints on their time was sometimes felt to hinder as thorough an analysis as would be considered desirable. One conciliator reported that pressure on time mean that he tended to simply 'look at the points (issues in a case) that stick out and hit you, and concentrate only on those'. He added that it may be that other issues would emerge if more time was spent talking to parties.

Talking through how a tribunal would view a case

One tactic for highlighting the strengths and weaknesses in a case, and bringing about a more critical understanding of the issues involved, is to explore the likely perspective of the tribunal. In some instances this might involve strategic reference to case law (though see earlier discussion on the use of case law). It may also involve looking at the compensatory side of the claim and the nature and size of award the tribunal may grant. It may mean offering some guidance on the likely viewpoint of the tribunal panel in relation to aspects of the case: with an applicant, explaining how their current circumstances may affect a tribunal's interpretation of a case (e.g. if they have a new job); and with an employer

explaining what kind of procedures a tribunal may perceive as 'fair'. One conciliator described the purpose of this stage of conciliation as explaining to parties the 'hurdles they need to get over' if their case is heard at a tribunal. The aim of posing challenging questions was not necessarily to confront or question the party, as much as to encourage the parties themselves to assess the likely perspective of the tribunal:

With employers (I say) 'This is what they look for in procedures. This is how they would expect a reasonable employer to act'. And you say to them 'Well, you need to put yourself and what you are going to say, to the tribunal. Ask yourself what they are going to make of your particular statement, your particular case.' I think it's a case of a lot more input (from ACAS) there, because generally speaking they don't appreciate what tribunals are all about.

You would normally explain to them the way the tribunal system works, and you would paint a picture for them of what could happen if it went their way in tribunal, financially. Explain to them the way the awards are calculated and explain to them one of the things the Tribunal is going to be looking at would be how much they were the architect of their own downfall, because that is going to affect the award

Taking parties through this process was seen as a powerful tool in ensuring parties critically assess their cases. One constant challenge was handling requests for direct advice about how to deal with a case, or responding to parties who want to know whether the conciliator felt their case was 'good' or a 'strong'. One tactic for dealing with such a query while retaining impartiality, was to refer to how a tribunal may view the case. Equally where a case is genuinely unclear, or sensitive, it can be helpful to draw on the possible perspectives of a tribunal in order to clarify a party's thinking. For example in handling a discrimination case, where a claim of discrimination on grounds of race is based not on 'blatant evidence' but on the apparent attitudes of the employer, conciliators may rehearse with an applicant how they may have some difficulty 'proving their case' to a tribunal. This approach was seen as favourable to the conciliator himself or herself trying to make clear the apparent 'weaknesses' of the party's position:

You would look through the incidents that have occurred and then try to say 'Well, the Tribunal will be looking to see if you have suffered any sort of detriment and the Tribunal will be seeing your evidence. If it is subtle then you (the conciliator) may be able to say 'The burden of proof is on you at the Tribunal, so you may not be able to prove it. You may convince me as an individual possibly, but you may not be able to win at a Tribunal because you have to ... show that discrimination has occurred and it is not easy to define unless there is a blatant act.'

The process is not without difficulties. Anticipating the issues a tribunal may pick up is more predictable in some cases, such as fair selection for redundancy, than others for example where allegations relate to whether or not certain actions were taken or a series of events took place. Conciliators stressed the need to exercise caution in the level of certainty they attached both to areas that an employment tribunal would consider, and what their likely perspective may be:

Take a redundancy case. What I would normally say to people (is) the sort of issues that a tribunal looks at are. Was it a genuine redundancy situation? What were the selection criteria and are they reasonable? How were the criteria applied? How was the consultation done? .. Sometimes you are being more prescriptive. ... Where it's clearer what should be done, you are able to say to them 'You haven't done that'. In other areas, perhaps where it's an area of fact that is in dispute as to whether something was done or not, in that situation it is difficult.

Bringing realism to parties' expectations

Another role identified by conciliators was to help parties achieve a more realistic assessment of what they may achieve by pursuing a claim. The very process of getting parties to achieve a greater understanding of the merits and weaknesses of their case may have the immediate effect of reducing or raising expectations. But conciliators sometimes needed to be more direct in pointing out areas of misunderstanding.

Unrealistic expectations sometimes related to the sum of money parties expect a tribunal to award. Applicants may be influenced by national press coverages of employment tribunal cases attracting large settlements. Employers, in the same way, may be aware of high profile cases and fear the likely outcome of a claim brought against them. ACAS conciliators said they felt it important to stress early in discussions with parties, that very high settlements are quite rare. Calculating an actual sum of compensation that a tribunal is likely to award was a useful tactic in helping parties have a more realistic feel for the likely outcome of a case, though it was stressed by some that this process should always be couched by a degree of uncertainty about how a tribunal may view the case:

People think that if they go to tribunal, it's going to be like winning the lottery. Of course, it's just not like that. They way the tribunal calculate compensation is very prescriptive.

Sometimes you can identify a case that will only win a small sum of money because they have got a new job, and they have already been paid their redundancy money. So you can immediately say, 'What are you expecting to get from a tribunal?' And they say 'I think they should be paying me £5000'. And you then say that you have just worked it out and they could only win £500 or whatever. Once you have established something like that, it gives out a realistic prospect as to what they can do.

Other unrealistic expectations related more to the range of issues that a tribunal will cover in making an assessment of a case. Conciliators spoke frequently of encountering applicants whose prime goal in submitting and seeing through a case was to 'clear their name', and in so doing, bring a sense of 'justice' to their case. By bringing a claim to a public hearing, and 'winning' their case, they believed their reputation would be exonerated, and their employer will be publicly admonished. For applicants holding this view, the privacy of an ACAS settlement provided little attraction⁷. Clarifying with parties what issues a tribunal is likely to address often involved getting applicants to accept that these kind of outcomes were unlikely to be forthcoming with the weight of tribunal decisions resting on procedural issues. This element of conciliation, of 'seeking some outcome other than retribution' (Peachey, in Kressel and Pruit, 1989) was reported as time consuming, and complex. Parties hold such views tended to be firmly entrenched in their beliefs and conciliators needed to constantly restate the purpose of tribunal hearings. Applicants who were unwilling to grasp this dimension were unlikely to agree to settling their case:

It's amazing the number of people who think that when they get to tribunal, they see it as a forum for them to express their grievances in general, as a public humiliation of the employer and this sort of thing, and of course it isn't about that.

⁷ Settlements agreed through ACAS are private with details available only to the parties involved. This contrasts with employment tribunal decisions, the details of which are in the public domain.

He wanted to clear his name. This was obviously taking over his life and it took a lot of explaining to him that this isn't what a tribunal is for. That whatever the outcome of the tribunal, he wasn't going to clear his name (of alleged fighting at work). He wasn't going to get anything more than a decision on how the respondent had treated him.

Other parties simply have unrealistic expectations of the action a tribunal may take. One example was that the tribunal may 'force an employer to re-employ' the party. Some may have genuine misunderstandings about what a tribunal might consider to be a fair procedure, or acceptable action on the part of the employer.

Interestingly while many of the tasks of the conciliator were associated with building the confidence of parties, in some circumstances, it was considered appropriate to diminish parties confidence in their cases. An instance given was where an applicant felt particularly angry about the poor treatment they had received from their employer to an extent that they were unable or unwilling to see weaknesses in their case. In such circumstances, some conciliators saw it as within their role to question directly with the party, how 'water tight' their case really was. Similarly, conciliators cited examples in which employers had felt confident that they had behaved appropriately towards an employee; saw the claim as a 'waste of time'; and were determined that representation or advice was not necessary in their case. Once again, disabusing such employers was felt to be a legitimate role for the conciliator.

When I first started, I always remember (my manager) saying something to me that stuck in my mind. He said 'What you are trying to do in a way is tug the rug'. Not to say they haven't got a case, because we certainly wouldn't go down that avenue at all, but quite a lot of people are so cock sure that they have got a cast iron case.

I have always thought that was part of our role - to destabilise the parties. Actually to make them think that maybe they could lose - both sides.

Promoting a settlement

So far, this section has explored the substantive roles identified by conciliators in bringing parties to a more realistic and informed understanding of their case. In carrying out all, or some, of these tasks, conciliators aim to bring parties to a greater awareness of the options open to them, including the possibility of pursuing a settlement involving ACAS.

This final section on substantive interventions considers some of the wide range of tactics that conciliators use in promoting and pursuing a settlement. At its simplest level, conciliation involves a third party conveying offers and counter offers between parties yet, in negotiating parties acceptance of the terms of a settlement conciliators draw on a range of strategies and tactics.

1. One tactical approach is to seek to alter the parties perceptions so that they are closer together, and can agree some common ground on which to agree a settlement. This involves conveying the other sides viewpoint in an impartial fashion, and listening and talking through the most acceptable compromise for both sides:

You are there basically to listen to what both sides have to say and to try and just really reach some sort of compromise on whatever position both sides have. To try and just really reach some sort of compromise ... giving people as much information as you can so that they can make the best decision for themselves.

The key attribute would really be an ability to take on board and listen, understand each other's view point and being able to impartially convey someone's view point to the other side - in a way influence them to move away from their own entrenched position to consider someone else's viewpoint.

2. In seeking to influence parties it may be appropriate on occasions to play 'devil's advocate'. This was a concept referred to frequently by conciliators and involved posing new questions, or turning questions round to bring a new insight into the case, for one or both parties. 'Playing devil's advocate' thus involved taking an active role as a third party. The approach could provide a challenge to parties thinking and contribute to their considering settlement. Yet this was not a tactic favoured by all conciliators, or of use in all circumstances. Some feared that it was an approach that antagonised parties, and could create negative feelings towards the conciliator:

People talk about playing the devil's advocate ... But actually, you usually find that often it just makes the person feel very negative towards you, and the whole question of settlement.

3. Where parties are particularly entrenched in their position or for example, are worried about the implications of the case for their reputation, it is sometimes appropriate for the conciliator to intervene by taking action on their behalf, but not directly under their auspices. This kind of action was known as 'face saving'. It involved for example the conciliator putting an option to an employee which may open the door to a settlement, but doing so without admission, and thus 'loss of face' for the employer:

There are just ways of raising things. I think an awful lot of it is face saving. You are trying to put things to them so that they can say 'Yes, I will do that' but almost without a loss of face which I think for them is very important. I might say 'Well look, I know you probably feel you have got a very strong case ... but would you like just as an option, for me to find out..' I think it's how you put it, and you have got to spend quite a lot of time in phrasing things the right way so that you really achieve what you want to achieve.

4. Similarly, in certain circumstances, employers were reported to feel more comfortable speaking 'off the record' to the conciliator for example about some evidence which is not widely known regarding the case. In suggesting the terms of a settlement, a party, or representative, may also speak 'off the record' to a conciliator about the lowest, or highest figure they are prepared to meet, or accept. This kind of dialogue was welcomed by some conciliators as a positive stage in successful conciliation, and an achievement which they believed resulted from careful building of the confidence of the party in the conciliator. Other conciliators felt uncomfortable when parties invited them to speak 'off the record' seeing this as a compromising their impartiality.

5. At different points in the conciliation process, and for different reasons, conciliators may suggest that a party seek advice elsewhere about their case, and may propose that a party seek formal representation. This may occur where it is clear that the case has a number of flaws, but that a party appears unwilling to acknowledge areas of weaknesses. Similarly where a party is looking for advice, for example on how good the case was, or whether to accept an offer, the

conciliator may suggest that the person approach another advice agency or solicitor who could provide 'more pointed', or direct advice, than ACAS can provide:

Let them down gently that they don't have perhaps the strongest case, or get them to get advice which tells them that they haven't got the strongest case so that you are not then the bearer of the bad news. They always shoot the messenger sort of thing.

STYLES OF CONCILIATION

Following this discussion on roles and tactics involved in conciliation this section provides a further layer to the canvas of conciliation, discussing the different styles used by ACAS officers. The data reported is derived first, by asking conciliators to describe their own style; and second, by inferring something of the conciliator's style from the language and terminology used when describing their work.

Conciliation styles model

Again as a reference point, a model is used to describe conciliation styles. Here, approaches are described as operating on three broad dimensions, each of which is presented as a continuum between two extremes. These are set out in the model at Figure 2.

FIGURE 2
A model of conciliation styles

A	B	C
<p>Reactive Responds to calls Works to high priority cases and Employment Tribunal dates</p>	<p>Message bearer Conveys offers</p>	<p>Passive Makes parties think Turns issues upside down</p>
<p>Proactive Promotes contact with parties Chases Probes Works to high and lower-priority cases</p>	<p>Influences Works within framework of bands Use 'natural pressures' 'Speaking off the record' Opposes message bearing that may antagonise</p>	<p>Forceful Make the odds explicit Bullying – 'others do it'</p>

A Reactive–Proactive. The first is a continuum describing the extent to which conciliators are active and persistent in initiating and responding to contact with parties.

B Message Bearer–Seeking to Influence. The second relates more closely to the goal of conciliation, but also suggests a style of working. In acting as a third party in disputes, some conciliators see their role as primarily a message bearer conveying information from one side to another. Others see themselves as more actively engaged in the detail of the case, and in attempting to influence parties' decisions about whether or not to settle a case.

C Passive–Forceful. The third dimension refers less to the substance of conciliators' involvement in cases, and more to their approach to parties, and the ways in which arguments are presented. In particular, it describes the extent to which conciliators are assertive in seeking to influence (B) parties in the resolution of a dispute.

Conciliators have each developed their own terminology to describe how they approach their work. While the terminology used is drawn entirely from the words of conciliators, it is worth noting that some of the terms are in practice used interchangeably having quite different meanings for different conciliators. Most noticeable is the very different uses of the terms 'reactive' and 'proactive', which, whilst part of the everyday conciliation vernacular, are used to refer to all three dimensions summarised in the model. This is apparent in some of the quotations used in the following text.

Reactive–Proactive styles

This dimension of style refers to the way in which conciliators manage their cases, and their caseloads. Are they proactive, or reactive in contacting parties? 'Proactive conciliators' will tend to initiate first contact with parties while a reactive approach is associated with waiting for parties to make the first call to ACAS. Proactive conciliators are more likely to follow up contacts swiftly, maintain frequent contact, and respond efficiently to parties calls or queries. Conciliators adopting a more reactive approach may leave long or indefinite periods of time between contacts, or may after an initial discussion with parties, leave the onus on parties to contact ACAS. Another element of a proactive style of conciliation is ensuring that high priority be given to swiftly passing offers and counter offers between two sides in a case. This approach is akin to the characteristics of the 'persistent' approach identified by parties and reported in Lewis and Legard (1998):

Good conciliation involves consistent contact, not necessarily early contact, but consistent. Once having established contact, maintaining that relationship and being persistent.

It is not just a question of making contacts in the beginning and you get nowhere, that's it, forget about it, put it in the drawer, that's the end of it. My involvement is one of a sort of continuous means of contact with the parties to see if the situation has changed.

I am very proactive in that I keep the pan on the boil ... the parties moving. Whereas a lot of them (conciliators) think once we have done our bit ... then some of the willingness should come from the parties. I still think its more productive to keep having a go.

A proactive approach was regarded as an essential ingredient in 'gaining control' of individual cases and also important if in managing a full caseload. In contrast, there was some evidence to suggest that reactive conciliation tended to be associated with a less rigorous approach to handling cases, either implying a considered laissez-faire approach or, less positively, a sense of cases being beyond the control of the conciliator. In the case of the latter, a reactive stance was often accompanied by a sense of the conciliator feeling over-burdened by the job, or by the number of cases on the desk.

Nonetheless, reactive conciliation was felt also to have a place. As one conciliator pointed out, a reactive approach was on occasions regarded as a positive tactic since it allowed parties time to reflect on their case and possibly change their position. Another view was that repeated contact from the ACAS officer could be misinterpreted by the party as equating to a 'strong case' with a good chance of winning:

I am a great believer that sometimes isolation is a great conciliation tool. You give them the ammunition and leave them to think about it for a while. I think there is a danger in being too proactive sometimes, not all the time, in that you can give someone the impression that their case is far more important than probably it is. Say if you are an unrepresented applicant and I ring you every couple of days – ‘Oh, I must be on to a good thing here. ACAS keeps ringing me’.

While ‘proactivity’ may be the favoured option for many, conciliators are often in practice, constrained by the style which they can adopt. Their options may be limited by *external factors* especially pressure on time, or having to deal with a rising case load, or new areas of jurisdiction, all of which may lead to a more reactive approach to cases. Sometimes the *particular circumstances of the case* had a bearing on the type of approach adopted. Indeed the circumstances of a case may require a varied approach to conciliation at different points in its duration. Finally, it is likely that the *individual disposition of the conciliator* (including their judgement of how best to proceed with conciliation) will shape the way they approach case management, and influence the vigour and enthusiasm with which they go about contacting, and dealing with parties:

It (conciliation) can be a bit of both (pro-active and reactive). I would like to think in an ideal world conciliation is pro-active, but I think because of the time limits (between receipt of IT1 and issue of a hearing date) that are on us, we must react to particular situations in that we alter our opinion or conception of the job. But I think it is probably 50:50.

Message bearer—seeking to influence outcome

In describing the way the conciliation role can be approached, conciliators draw a comparison between being a ‘message bearer’ on the one hand which involves simply conveying information about the case, and offers made, between parties and on the other hand actively ‘seeking to influence the outcome of a case’. These two approaches equate to the administrative versus the ‘analytical’ role identified by Lewis and Legard in their discussions with conciliation parties (Lewis and Legard, 1998).

Conciliators seeking a more ‘influential’ role in cases were more likely to vigorously pursue the range of interventions and techniques described earlier in this paper, and particularly those described under the categories of reflexive and substantive roles. Where the end goal is to influence parties’ decisions, a conciliator may feel it is essential to build a strong working relationship, and develop the trust of the parties. She or he may also see it as essential to work with the parties in weighing up the strengths and weakness of a case; posing new questions, playing ‘devil’s advocate’, presenting how a tribunal may view the case, and encouraging parties to move to a greater awareness of the perspective of the other party. One conciliator explained that successfully influencing parties involved working on the ‘natural pressures’ that exist in the case in order to bring about a compromise. Another described the process as ‘exploiting the weaknesses of a case that make them (the parties) more amenable to settlement’. Conciliators have their own definitions of what conciliation should seek to achieve, as the following quotations demonstrate:

Some people do want you to be a passer-on of messages. Now to me that is not what conciliation is about. Perhaps to some extent towards the end of the life of an application, that's what it can be, but I think for it to be meaningful conciliation, it is not just a question of passing on messages. You have got to inform as well. Perhaps persuasion is not quite the appropriate word ... in terms of the conciliation officer having an influence on whether the case settles or not. I like to operate in such a way that my involvement is an influential involvement rather than simply a process of carrying messages between parties.

The key attribute would really be an ability to take on board and listen ... being able to impartially convey someone's view point to the other side, and in a way, influence them to move away from their own entrenched position to consider someone else's viewpoint.

One of the things that was drilled in when I first came to ACAS is that ACAS is impartial, and it takes a while to twig to the fact that conciliation is not a passive process. Conciliation is very much an active process and being impartial doesn't mean the same as never expressing a view, or sitting on the fence.

According to the last of these quotations, the construct of conciliation involves the conciliator as an active third party in a case. She or he adopts a dynamic role in conveying information but also acts as a stimulus in challenging the views of parties. In one sense it is an approach which is regarded as a high risk strategy, placing the conciliator in a more vulnerable position with a danger of falling out of favour with the parties, or making a poor judgement - 'sometimes you have to stretch yourself and put yourself almost in a lions den'. Yet, from another perspective, it is an approach which is empowering, and for those who favour this method, potentially more fulfilling:

In my experience, I think the conciliation officer is calling the shots in so much as they are weighing up the strengths and weaknesses, and going back to either party pointing out the problems that could occur if they go to tribunal.

None of the conciliators interviewed favoured the 'message bearer' as a predominant role at all times in the conciliation process. Nevertheless, almost all saw a potential role for the conciliator in simply conveying messages, at certain points in the life of a case. This was especially true towards the end of a case in which a series of offers and counter offers were to be passed between parties. Simply conveying the words of one party to the other was sometimes a tactic for the conciliator:

If the offer is £5 and you just know the guy isn't going to settle for £5, you relay the offer, wait for the rejection, and then start again. The messenger boy. It's as simple as that. Convey it. Tell them to think it over. Make sure that you follow it up if they don't come back. It's as simple as that.

Conciliators, then, see quite diverse roles for themselves according to the parties involved. Whilst with unrepresented parties, they tended to identify a broader 'more influential role', where the party is a representative, it may be highly appropriate to act as message bearer. Even when dealing with representatives however, the role as messenger may not be insignificant. An example given was where representatives for each party 'did not get on particularly well' and ACAS was the 'person in the middle', objectively conveying facts of the case between the two sides with no overt vested interest. Equally acting as a message bearer was more feasible where conciliators felt less pressurised by time. Where they felt more pressure on their time, they felt a greater onus to hasten parties to a more analytical assessment of their case:

If you have a heavy caseload, then maybe something has to go out of the window. ...If you are perhaps not as busy, then you might be prepared to go along to a certain extent with passing on messages, whereas if you are very busy you literally can't go along with that in the hopes of maybe developing it at a later stage into a positive outcome.

Yet in certain circumstances, conciliators took exception to acting as a message-bearer. This was particularly the case where a party asked ACAS to convey information which in their judgement would antagonise the opposing party. In response, the conciliator may indicate the dangers of a particular offer, for example, in creating a stale mate and make clear that the party is unlikely to find the offer acceptable. Where they adopt the strategy of conveying offers, for example which they know to be lower than a party's expectations, they may do so in carefully chosen language, or by using intonation, to imply their awareness that the offer is unacceptable:

I will make it clear to the employer that I know that (an applicant's suggested settlement) is more than what could be awarded at tribunal, but the applicant has requested it. It works the other way round. When employers say 'Tell them they can have £50 to go away', and they want £5000. I will ring and say 'They are offering £50!!.' There are times I would like to be in a position to say 'No come on, this is nonsense, and I don't want to do this', but we don't do that. You might try and point out that this is probably unreasonable, but at the end of the day the duty is to put the proposal without comment'

These kinds of strategies allow the conciliator to protect their own credibility. Whilst acting as message bearer, they are simultaneously bring some 'influence' on parties decisions, albeit at a low level. Here the boundaries between the 'message bearer' and 'influential' stances of ACAS become less clear.

Forceful–Passive

In the process of attempting to resolve a dispute, the conciliator may apply pressure tactics in an effort to push disputants towards an agreement. A recent evaluation of a pilot mediation scheme for the county courts found that some mediators chose to focus rapidly and heavily on the disadvantages of litigation, and uncertainty of a trial outcome (Genn, 1998). These mediators tended to a 'head-knocking' approach to influencing case outcomes, an approach which often attracted criticism for creating a pressure to settle. There is a prevailing ideology that such a stand point is alien to good conciliation (Kressel, 1989). This sentiment was echoed widely among the ACAS conciliators. Yet where there is a commitment to an 'influential' style of conciliation, as discussed above, the boundary of what may and may not be acceptable in terms of pressure is difficult to define.

The challenge for the conciliator is to find a position on a notional scale between being 'forceful' and 'passive' which is dynamic and persuasive, yet acceptable to the parties involved, and within the norms of the ACAS role. One conciliator described this process as working 'within a framework' in which the goals may be clear, but within which the fine lines between 'pressuring' and 'coercing' are difficult to tread:

I think the important thing you need to know is that the framework in which you are required to operate is not a standard 'this is what you must do', 'this is what you must say'. But its like you have got to know the band into which you can operate.

There's a very fine line between what is influencing the parties, and what's actually coercing them, putting pressure on them. You have got to be careful not to overstep it. It's a bit hairy sometimes.

We do influence whether a case is going to settle because our job is to weigh the strengths and weaknesses of the case. I mean we never ever go and say to an applicant 'You haven't a hope in hell - withdraw this case.' It's just not on. If they are hell bent on taking that case to a Tribunal, that is their right to do so.

One alternative may be a more passive 'cajoling' style of bringing about a greater level of awareness and understanding of the case by the party. This may involve carefully posing questions about a case, and presenting difficulties inherent in parties arguments which lead to a desired outcome for the conciliator. Bullying or being aggressive was felt to be inappropriate not least because it was feared that such an approach would negatively affect the conciliator's acceptability to the parties, both in the current and future potential cases (see also Kolb, in Kressel and Pruitt, 1983). None of the conciliators interviewed confessed to this style of conciliation, though it was believed to be an approach that 'others', probably a minority, in ACAS had adopted. Nevertheless, conciliators clearly do see opportunities for applying pressure to parties. Remaining influential without being perceived to place pressure on parties was a 'difficult path to tread'. Experience, gave conciliators confidence to tread this line more effectively. Through experience, conciliators felt more able to judge the responses of parties:

In some ways (it is) a difficult path to tread because if you tread the influential path you have got to be careful that you don't go too far in the way of pressure or perceived pressure.

You have to be careful that you don't use that pressure in a way which causes the person to feel that you, as the conciliation officer, have used undue influence, and it is hard to describe where the lines are.

Second, in one conciliator's view, his vast experience of doing the job for ten years had enabled him to make judgements about the likely outcome of a case. Where he felt on 'solid ground' about a case, he may say to a party 'you are in a mess', or that 'there was no point in taking this case forward'. In his experience, parties tend to welcome this direct advisory stance. He emphasised that it was an approach which he may use 'sparingly', and where he feels that parties have confidence and trust in his judgement. Nonetheless this was an approach which other conciliators would most certainly feel at odds with.

Another expression of this dimension was how *direct* conciliators felt able to be in dealing with parties. Here conciliators were again divided in their views. Whilst for some giving a personal view direct to the parties was an overt infringement of impartiality, there was a view that actively persuading parties of the merits of settling was felt to be both acceptable, and a good service:

It may have taken the penny a long time to drop with me, but I think you have got to actively persuade people to settle. I don't see anything wrong with that. It says in the (legislation surrounding ACAS) that conciliation officers should 'endeavour to promote a settlement', and promoting a settlement to me means trying to persuade people to settle. It's as simple as that. (Later in the interview) I am not prepared to go so far as to bully people into doing things that they don't want to do, but I do honestly think that if I can identify what's important to a person and feed that back to them in a way that satisfies, that's good enough.

Being direct requires judicious interpretation on the part of the conciliator - they can only do this where they feel they have build sufficient understanding of the parties to have a strong sense of what the party wishes to gain from a case. Experience allowed conciliators to more effectively tailor their style to match the confidence of the party. Where a party is more confident about themselves, and the nature of their claim, it may be possible to be more up-front about the likelihood of success at a tribunal; whereas being direct with a less confident party may precipitate a speedy, and sometimes inappropriate withdrawal:

It depends on the person, because I think if the applicant is quite confident, you feel quite confident in putting your side of the case to them. Now I think there is a danger where somebody is very unsure that if you say 'Well you have no hope at all' that they immediately say 'Well ACAS said I have no hope, so therefore I'll withdraw my claim'. I think where you have got somebody who will weigh what we have said against what they know, I think you can be more forceful.

THE INTERACTION OF ROLES AND STYLES IN ACAS CONCILIATION

The paper has explored the roles and styles of ACAS conciliation. These descriptions are underpinned by what conciliators believe to be the goals of conciliation, and how they go about achieving these goals. By taking the two sets of information - on roles and styles - together, it is possible to build an in-depth understanding of the conciliation process. While conciliation in employment tribunal cases is a statutory function for ACAS, and conciliators are guided by organisational policy set out in internal guidance, it is apparent that there is a considerable amount of discretion left to individuals in the way they go about their work. Not all of the interventions discussed were mentioned by all the conciliators. Some identified a wide range of goals, but others clearly gave preference, or priority to certain tasks or certain approaches. It clear from conciliators descriptions that no one simple model can be applied either to what conciliation involves, or what constitutes 'good conciliation'.

Conciliators in practice will make, and are required to make, different kinds of interventions in cases, and may possibly draw on a wide range of styles of conciliation, depending on a number of factors. These factors are:

- the circumstances of the case and the jurisdiction;
- the parties involved, especially whether or not the conciliator is dealing with the party
- direct, or a representative;
- their current workload, especially the time available to them; and
- the interests, personality and disposition of the conciliator involved.

Considerable emphasis was placed on the need to take on board the particular circumstances of the case and to use discretion in how best to proceed with a case. As discussed earlier, the information requirements and level of analytical interventions needed and requested by unrepresented parties, is likely to be greater than those from legally qualified, and experienced representatives. Equally parties will have different confidence levels; may be less or more open to absorbing complex information at different points in the life of their case; and may be less or more sensitive or susceptible to forceful, or persuasive techniques by the conciliator. The complexity of a case, the level of interpretation required and the scope for influencing parties are likely to be greater in some jurisdictions than others. Many conciliators are aware of these differing demands and articulated them in the interview situation:

Each case is individual so how I react to each case would be different. But my actual way of thinking or outlook is to reach a settlement if I possibly can. How I set out to achieve that would obviously be different in different cases.

I think that one of the things with this job is that you can't say we always do it this way, or we always do it that way, because every case is different and we have always got to be slightly different in the way we approach things in some cases, than you are with others.

There has always been this argument about are we just a messenger, passing messages between the two parties, or do we have a more pro-active role. I think the role varies depending on the case, and the parties to it, and whether they are represented or not.

So it is clear that the conciliation process is a complex arena. The interventions and style explored in the paper closely interact and shape the conciliation process. It is likely that across ACAS, different 'types' of conciliators may be identified. For example:

Type A – may use a wide range of reflexive, informative and substantive interventions, operating in a clearly pro-active style which seeks to actively influence the outcome of cases.

Type B – may focus most closely on reflexive roles, of rapport building and gaining the trust of parties in order to seek to influence the outcome of cases.

Type C – may be more concerned with the informative role of ACAS, aiming to ensure that parties are fully aware of the procedural issues surrounding their case and the options open to them - but may act purely as a message bearer, leaving the prime decisions and thought processes to the parties.

There are a range of other 'types' that could be envisaged using the models of interventions and styles described. Equally important, some conciliators will shift between different 'types' depending on the nature of the case, on their current workload, and the pressures and constraints on their time. This flexibility comes more easily to some conciliators than others. Those who are more adaptable are likely to be more able to judge the precise demands of the case. They may draw skillfully and selectively from a 'kitbag' of possible roles they can play, and styles which they can adopt in seeking to affect the outcome of a case. Others may feel more comfortable operating a formulaic approach to conciliation, or utilising a single style and mode of operating. It was apparent from these interviews that many types of conciliators are operating in ACAS. Nonetheless, attitudes in this study, and from consultations with parties to cases (Lewis and Legard, 1998) point clearly to the merits of a flexible and adaptable approach as the optimum way of operating, and maximising the chances of settlement in cases.

As the verbatim quotations throughout this paper suggest, some conciliators are very much in tune with the different demands of their job. Indeed, it is the challenge that emerges from the different circumstances that they encounter and the scope afforded them as individuals to respond, which makes the job so attractive and fulfilling for them. Other conciliators were less able to reflect broadly on the tasks and goals associated with their work. It is not easy to find a clear pattern of explanation for this. One possible reason was that the more reticent conciliators simply felt less comfortable in the interview situation. It may also have been associated with lesser levels of experience in doing the job. Finally, it is likely that these conciliators may have been of a less analytical disposition than some of their colleagues, and that this affected both the way they responded in the interview, and more broadly, the way they approach their cases and their conciliation role.

CONCLUDING COMMENTS

There has clearly been a recent growth in the number of alternative dispute resolution systems throughout the civil justice system, but many schemes are new, and there has been relatively little evaluative research on the benefits and techniques involved in the process. Within the British context, ACAS with its experience of handling a high volume of employment rights cases over the past quarter century, arguably, stands as a 'grand old man' of conciliation making it well placed to share its experiences and knowledge. The messages in this paper are likely to have significance to other spheres of conciliation and mediation. The study reported has demonstrated that flexibility and responsiveness are the corner-stone of good conciliation. This involves the ability to adapt to the demands of different people and different cases. ACAS has clearly responded to the challenges which have emerged from the growth in employment rights jurisdictions by developing a service which has the potential for a high level of sophistication and professionalism. Yet the future holds further challenges for ACAS if a high quality service is to be retained.

First, the messages from conciliators is that good practice is widespread, and the means for *best* practice are understood. But there is also evidence of variation in the current quality of practice. ACAS must look to consolidating and spreading understanding of the methods of conciliation which are most effective, through training, mentoring and developmental initiatives. One idea is that the skills and knowledge required for the job should be formally recognised through accredited training. This may be a sound move, though any accreditation system tailored to ACAS conciliation must clearly place equal weight on the interpersonal and cognitive skills required for the job, as well as the technical knowledge base.

A second challenge will be to retain a sophisticated and diverse service in the face of the rising tide of employment rights cases. New recruits to ACAS conciliation must be taught the tactics of the job which have been developed during quieter times. Current and longer serving conciliators must continue to retain the range of influencing techniques which they know to be most powerful in determining case outcomes. Yet a danger is that pressures caused by the increasing number of cases will have a bearing on the time afforded individual cases, and the creativity needed in responding to a varied caseload. Top of the agenda must be the imperative for ACAS to maintain settlement rates – the *raison d'être* of the Service. However, evidence in this paper suggests that this achievement may well be predicated upon the kind of quality conciliation which ACAS has, over the years, devised. As an extra, good conciliation, and especially contact with parties where there is no formal representative involved, would seem to have an additional benefit in bringing greater clarity and awareness to parties' understanding of their case, and of the employment tribunal process. ACAS must continue to meet its statutory duty while allowing conciliators the opportunity to operate with the style that is most fitting to effective conciliation.

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