

# Acas Policy Discussion Papers

No 3, April 2006

## **New rules, new challenges: Acas' role in the employment tribunal system**

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

This paper has been written by Rachel Suff of the Acas Strategy Unit in collaboration with Keith Mizon and Chris Reid from Acas' individual conciliation unit. The views expressed are those of the authors and not the Acas Council.

We welcome your comments and opinions. These should be sent to the authors c/o [strategy@acas.org.uk](mailto:strategy@acas.org.uk)

The employment tribunal system has taken its fair share of criticism in recent years. The focus of the censure varies according to which corner of the employment relations arena it emanates from, although the main parties are united in some of their concerns, such as the increasing juridification and complexity of the process. Some commentators complain that, as a result, employment tribunals are now too adversarial. Another key concern is the fear that the system is too costly, primarily for employers and the state, and is subject to a growing compensation culture. According to others, access to justice for employees is slowly being eroded.

As an added complication, over the past year, everyone involved with employment tribunals – including the judiciary, conciliators and the parties to claims – has been adjusting to the biggest change in the way employment tribunals operate since their inception over 30 years ago. The

recent reforms to the employment tribunal system and dispute resolution framework have wide-ranging implications and have prompted a great deal of detailed commentary and concern.

The groundswell of criticism and the uncertainty about the future of employment tribunals has led to assertions in some printed media that the system is in 'crisis'. This is a serious charge that needs to be carefully evaluated before being accepted, but such an analysis needs to be made in the context of the wider employment relations framework that exists. Any recommendations for improving how the system operates and ensuring that individual conciliation provided by Acas is conducted with optimum effect also need to be based within this wider context.

The focus of this paper is confined primarily to those issues that impact most directly on the work of Acas, in particular the role of Acas individual conciliation in promoting increased

resolution of ET claims and how its ability to do so has been affected by the 2004 Dispute Resolution Regulations and revised tribunal rules. Its core argument, however, has wider implications. It is that, while it may contain some flaws, Britain's employment tribunal system still offers a far preferable alternative to the much more legalistic route for settling individual rights cases that exists in many other European countries such as Germany and France. The other key argument is that prevention is better than cure in promoting good employee relations. Finally, individual conciliation must be afforded sufficient time if the real benefits are to be realised.

It is especially important to remember the reasons for having employment tribunals. They were set up as a non-legalistic mechanism through which to resolve disputes, and as the basis for better promoting acceptable workplace solutions to settling workplace differences. The government's key aim in introducing the recent reforms of encouraging the settlement of disputes where they originate – that is, in the workplace – is therefore right. The logic of avoiding legal dependency is as strong, if not stronger, today as it was when employment tribunals were first set up. What needs further consideration is how best to make this happen more effectively in practice. Acas conciliation in employment rights cases has a key role to play here, but so does the wider application of alternative dispute resolution (ADR) techniques. Acas has also been seeking to expand its preventative advisory and training work to help organisations develop more effective employment relations, albeit against the backdrop of a significant reduction in funding.

### **Origin and purpose of tribunals**

Although the current role of employment tribunals was established following the

Donovan Commission that reported in 1968 and the subsequent introduction of statutory unfair dismissal protection in 1971, tribunals themselves pre-date these developments by some years. The Redundancy Payments Act 1965 provided the legal framework for employment tribunals to adjudicate on individual disputes between employer and employee – prior to this, the rights, duties and obligations of employers were regulated by the common law contract.

The Donovan Commission had been set up to review the state of employment relations, primarily from the perspective of collective bargaining and the part played by trade unions. The recommendation that the role of employment tribunals should be extended to deal with dispute resolution for individual workplace rights was borne of the realisation that collective bargaining was not the ideal forum to settle individual cases.

First referred to by the Commission as 'Labour tribunals', it was envisaged that these people courts would be 'an accessible, speedy, informal and inexpensive' dispute resolution mechanism. It is within the context of this overarching aim that the majority of today's criticism is presented and against which the performance of the employment tribunal system is often benchmarked.

Briefly, employment tribunals are specialist courts. The Chair of each tribunal is legally qualified and supported by two lay members, one from a trade union or employee background and the other from an employer background. The aim was to allow claimants to present their case in 'an investigative, non-adversarial setting', although the Chair's role has always been to ensure that there is due legal process.

The Judgments of an employment tribunal are binding upon the parties, although appeals can be made – on points of law only – to the Employment Appeals Tribunal (EAT). The Employment Tribunals Service (ETS), which is an independent agency, provides

administrative support for the work of the tribunals. This service is due to pass to the Department of Constitutional Affairs (DCA) when a new Tribunals Service is established in April 2006.

### **Acas and individual conciliation**

Acas is automatically involved in nearly all types of complaint to tribunals. Acas was established on a statutory footing under the Employment Protection Act 1975 as an independent, impartial non-departmental public body. Its independence is guaranteed by a Council made up of representatives of employers, employees and other parties. Its mission today is 'to improve organisations and working life through better employment relations.' In the 30 years of its existence, Acas has conciliated in almost two million individual employment rights disputes.

Contrary to common perception, Acas' statutory duty to provide conciliation relates to individual, rather than collective, disputes. Acas is of course expected to, and does, conciliate in collective disputes. The duty to conciliate in individual rights cases is contained in section 18 the Employment Tribunal Act 1996: it states that it is the duty of the conciliation officer "to endeavour to promote a settlement of the proceedings without their being determined by an (employment tribunal)." This duty relates both to actual and potential complaints to an employment tribunal.

The purpose of conciliation is to try and help the parties to resolve their differences on their own terms without the need for a tribunal hearing. The impartiality of the conciliator in talking through the facts and perceptions of the case can help the parties to focus on the key issues and see their strengths and weaknesses of their respective positions. The approach a tribunal will take in hearing a case will be explained, and the details of tribunal procedure made clear. The conciliator will also refer to case law and

outline how similar cases have been dealt with in the past. The benefits of a settlement will also be made clear, so that parties are in a position to make an informed decision. This information is relayed by the conciliator within clear boundaries of impartiality, and no explicit views on the merits of the case or likely outcome are expressed. The role of the conciliator is a sophisticated one that calls for a diverse array of interventions according to the specific circumstances of the case – a theme this paper returns to further on.

Unlike an employment tribunal judgement, the terms of any settlement made with the assistance of Acas are confidential and can be wide-ranging, enabling the parties to draw a line under their differences on terms acceptable to both sides. This can be particularly helpful where the main issue in dispute is something – for example, an agreed reference – not obtainable from a tribunal. Conciliators use a variety of methods to work with the parties to achieve an acceptable outcome to cases. Most contact is by telephone, but they may meet one or both parties face-to-face – separately or together – where they consider that this would aid resolution.

The significant and unique role that Acas performs in providing individual conciliation is widely acknowledged by many in the employment relations field. Its expertise in all forms of alternative dispute resolution makes a direct contribution to the productivity agenda. That Acas carries out its statutory duty very effectively is undisputed and demonstrated by year-on-year statistics: in 2004/05, for example, Acas conciliated in 86,816 actual or potential applications to employment tribunals. Only 23 per cent of these ended with a tribunal hearing and, of these, an even lower of proportion of discrimination cases (16 per cent) went down this route.

The consistently high resolution rate needs to be appreciated within the context of enormous change in the individual rights

landscape since Acas' inception three decades ago. For the first half of this period, the total number of cases hovered just over the 40,000 mark annually. By 1996, the number of actual and potential tribunal applications had soared to around 100,000, and continued to climb. While the level of cases may have plateaued presently, it has done so at an historically high level.

There are a number of factors that have prompted the dramatic rise in cases, most notably the huge increase in the number of employment rights jurisdictions. In the early days, employment tribunals were required to adjudicate in less than 10 jurisdictions – initially just claims under the Redundancy Payments Act and unfair dismissal – whereas now, the number of jurisdictions has swelled to at least 80. It is therefore not merely the quantity of cases that has increased but their complexity, with the majority now being multi-jurisdictional. This development has made the conciliator's job harder, as the different legislative strands and associated issues have to be explained to the parties, and covered in any settlement. It has also increased the challenge of achieving resolution.

Given these developments and the tougher conditions under which Acas conciliators are now working, it would not be unexpected for the resolution rate to dwindle. In fact, the reverse has happened. In its first 20 years, Acas typically resolved two-thirds of tribunal cases, with the remaining third proceeding to tribunal. Over the past decade, the resolution rate has gradually increased so that three-quarters of all cases are now either withdrawn or settled, with only a quarter progressing to a full hearing. While external factors – such as greater incidence of skilled representation on both sides in ET claims and more favourable economic factors that have a bearing on claimants' willingness to settle – may have a direct bearing on higher resolution rates, the

skill and professionalism of Acas conciliators also have a strong role to play. For instance, although not legally bound to, Acas tries to act in every case and endeavours to make contact with the parties as early as possible.

### **The collective dimension**

The individual rights agenda and the role that employment tribunals perform also need to be understood within the wider employment relations landscape, including the relationship with collective bargaining. The very creation of tribunals in their present guise was borne of the recognition, by the Donovan Commission, that a large number of workers were not members of a trade union and that an alternative route – that is, other than collective bargaining – was needed to settle individual workplace disputes.

In practice, the separation of individual and collective rights and disputes is not always straightforward. This is illustrated, on a visible level, by the statutory nature of employment tribunals themselves: while the majority of jurisdictions dealt with by the tribunal system are concerned with individual rights, there are some that allow trade unions to exercise collective rights, such as redundancy consultation.

But it is not merely the statutory overlap that can occur between the individual and collective dimensions in employment rights cases: this phenomenon is but a visible reflection of the deeper relationship that exists between the regulation of individual rights and the influence of collective bargaining. The rapid expansion of statutory employment rights has to be appreciated against the backdrop of significant shrinkage in the proportion of workers covered by collective bargaining and a big drop in trade union density. Historically, employment rights in this country had been determined by Britain's unique voluntarist system of

employment relations and the tradition of the main players in the employment relationship resolving issues among themselves. This 'joint regulation' ensured that employees, and their representatives, played a central role in the development of these rights that may or may not have been explicit.

The last two decades of the last century witnessed the growing influence of Europe in the employment relations landscape, and was marked by a lack of any statutory trade union recognition procedure in the UK. This period also saw the changing views of the UK's social partners towards the role of the law in industrial relations. The increase in individual employment rights throughout the Thatcher years may, on the face of it, seem ironic. But underlying this trend was a shift away from collective rights to a deliberate focus on the individual in the workplace. Often, the only legitimate route left for enforcing employment rights was the employment tribunal avenue.

With collective bargaining now covering well under a third of the workforce, and trade union membership below 20 per cent in the private sector, the individual rights agenda has gradually moved to one that is less influenced by collective bargaining and more determined by the state. The overwhelming majority of employers now have explicit procedures governing individual workplace relations. This has to be viewed as a progressive development, but at the same time it does not imply the same level of employee involvement and ownership of those procedures and employee rights as would have been the case in a 'joint regulation' model. Neither does a reduction in collective bargaining and organised conflict result in a corresponding reduction in unorganised conflict – an inverse correlation has been intimated to be the case in some research studies such as the latest Workplace Employment Relations Survey (WERS). The better management of collective relations can influence the more effective management of individual relations at work, and vice versa.

The growing focus on individual rights at work, partly driven by European legislation but also a calculated strategy on the part of successive governments, has had a wide impact on the employment tribunal system and employers and, inevitably, government policy. The most obvious – but nonetheless real – impact arising from the increase in employment rights is that an increasing number of people are willing to enforce those rights. This of course has implications for how employers deal with disputes, or potential disputes, in the workplace and on how the tribunal system, and Acas, copes with the larger volume and greater complexity of claims.

This is the background to the dispute resolution and employment tribunal reforms implemented under the Employment Act 2002. Before examining them in some detail, it is worth noting that these reforms are not the first legislative attempts to try and ease the burden on the tribunal system. Mechanisms to try and control the flow of tribunal applications can be traced back almost to their inception. Originally, the service qualification for claiming unfair dismissal was six months, but was raised to a year in 1979 and to two years in 1985 (it has since been reduced to one year again). Other operational changes have been introduced to the tribunal system over the years: for example, screening out weak cases in pre-hearing assessments was introduced in 1980.

## Routes to resolution

In 2001, the government launched the consultation document *Routes to Resolution* – its goal, 'a high skills, high productive economy'; at the forefront of its thinking, 'the fundamental principles of access to justice, fair and efficient tribunals and a modern, user-friendly public service.' A clear impetus for the proposals to change the way that employment disputes are resolved was the 'three-fold rise of applications to employment tribunals over the past decade' and a conviction that many of these 'could

be resolved in the workplace if employers and employees work together.'

Another clear imperative in introducing the reforms was the potential cost savings to the public purse and individual employers. For example, the DTI's 2004 Regulatory Impact Assessment cited potential savings in the region of £68 to £74 million to businesses as a result of the new statutory disciplinary and grievance procedures reducing the number of tribunal claims. The 2004 Tribunal Rules, meanwhile, were expected to accrue savings of up to £4.9 million to employers.

A quick study of the Employment Tribunals Service's annual budget in recent years helps to clarify the Government's concern about the rising cost of managing the tribunal system. The ETS's first annual report shows its net operating costs in 1998/99 stood at £43,150,000. By 2000/01 – when *Routes to Resolution* originated – its operating costs had risen to £51,728,000, an increase of £8.5 million. Even allowing for inflation, this represents a 20 per cent increase in just that brief period. By 2004/05, the ETS's operating costs had increased even further, to £69,770,000 – over £26 million more than six years previously. This pattern of increased operating costs reflects the rise in the number of ET claims, as well as their increasing complexity. Were it not for Acas' high resolution rates, the employment tribunal service would cost well over £100 million annually to run.

The Employment Act 2002 introduced a number of far-reaching changes to the tribunal system and Britain's dispute resolution framework. Firstly, Dispute Resolution Regulations came into force on 1 October 2004. These provide for a statutory discipline and dismissal procedure requiring employers to adopt a minimum three-step process. There is also statutory provision for a two-step modified procedure for appropriate cases. The regulations also made provision for a statutory grievance

procedure. Employers must follow a three-step process and, normally, employees must have raised a grievance in writing with their employer before they are able to bring an employment tribunal claim against that employer.

New Tribunal Rules of Procedure were also introduced in 2004. These include a pre-acceptance procedure – to filter out ineligible claims (including those that have not been through the new statutory procedures) default judgments for claims not opposed within the time limit for response, and a greater focus on case management. The scope for tribunals to order costs has also been extended.

*Routes to Resolution* also considered ways in which alternative dispute resolution could be strengthened, proposing incentives to encourage early settlement and widening the scope of compromise agreements. The 2004 regulations subsequently introduced fixed periods of conciliation for Acas according to the jurisdiction(s) included in the case.

### **The desired impact?**

It is still very early days to undertake an in-depth and realistic evaluation of the effect of the changes introduced by the 2004 reforms. Much attention has been drawn to the significant reduction in tribunal claims, from around 115,000 claims in 2003/04, to 86,181 claims in 2004/05. It should be noted that the main difference in volume of claims between these two consecutive years can be attributed to the surge in multiple claims in 2003/04. Another underlying trend not obvious from overall statistics is that, over the past five years, the number of single claims has been falling steadily – for example, from 77,757 in 2000/01 to 55,582 in 2004/05.

It is far too simplistic to assume from the 2004/05 headline statistic that the reforms are having their desired impact, although the number of claims does appear to be plateauing. Firstly, it was

not unexpected that there would be a lull in the number of claims due to the new procedures bedding down. There is also a whole range of implications that need to be properly evaluated arising from the different aspects of the reforms themselves, such as the effect of the new disciplinary and grievance procedures on both employers and employees. It is also difficult, at this stage, to isolate the effect of one aspect of the reform from another, and further empirical evidence is needed that takes into account all these variables.

It is interesting to note, however, the proportion of claims that are rejected at the pre-acceptance stage and to track whether these original applications are re-submitted or not. The evidence suggests that at least 10 per cent of claims submitted in the first year of the new regulations were rejected at the pre-acceptance stage, and less than half of these were re-submitted and later accepted. It is possible that claimants had by then lost their original energy to pursue a claim: this raises the question of whether access to justice has been affected by the changes. Clarification on this area is needed, and Acas welcomes the research that ETS and the DTI's Employment Market Analysis and Research Team (EMAR) are conducting into reasons why some people do not re-submit a rejected claim.

What it is possible to do, at this early stage, is to pose a number of questions that need to be answered before a full understanding of the reasons behind the fall in tribunal cases can be reached. For example, are potential claimants being deterred from bringing a claim by the new nine-page tribunal claim form (ET1) that is both lengthier and more complex than before?

There are wider questions that also need to be considered in order to evaluate whether the new rules and procedures are having their desired impact: crucially, does the drop in the number of tribunal claims mean that more disputes and differences are being resolved at workplace level? Does

the new statutory grievance procedure mean that disputes are potentially being formalised at too early a stage? And have the new procedures increased the aspirations of claimants with regard to potential tribunal awards, and thus made the work of Acas conciliators that much more difficult?

There is a real concern that the reduction in tribunal claims may only be temporary, and that the changes will not bring about a long-term reduction in the number of tribunal claims or, more importantly, encourage a genuine attempt to resolve disputes in the workplace. If so, to a large extent, the reforms – while having the very laudable intention of helping and encouraging employer and employee to adopt good practice to prevent and resolve disputes in the workplace – will have fallen far short of their core aim.

As the only statutory body with responsibility for intervening in workplace disputes, Acas is closely involved with every aspect of this country's dispute resolution framework and the resolution of individual rights issues. For example, in collaboration with other key bodies, we revised our discipline and grievance handbook and Code of Practice consequent upon the new regulations, and our operational staff advise on its application on a day-to-day basis.

This paper now turns to look in more detail at the impact of the recent reforms on just one area of Acas' core activity – individual conciliation. It questions whether the new fixed period approach is contributing to the desired reduction in, and increased resolution of, tribunal claims. Even if so, is it doing so in a manner that is encouraging the more effective settlement of workplace complaints? The paper also considers the wider role that conciliation and alternative dispute resolution can play in the regulation of workplace differences, and how it has the potential to perform an even broader function.

## Fixed Acas conciliation periods

Before October 2004, Acas had a duty to conciliate in tribunal claims right up to the date of the final hearing, and many cases were not settled until the last moment. By then, considerable time and expense had often been spent by the tribunals, as well as by the parties to claims, in preparation for a hearing that did not take place. The recent reforms are designed to encourage parties to settle at an earlier stage in the proceedings.

The major change for Acas has been that its duty to conciliate has been reduced to a 'short period' of seven weeks for certain claims, such as breach of contract, unlawful pay deductions and redundancy claims. For most other claims, such as unfair dismissal, there is a 'standard conciliation period' of 13 weeks. The regulations exclude the discrimination, equal pay and public interest disclosure jurisdictions from the fixed period for conciliation. This means that, where these jurisdictions are present, there is no change from previous practice. In the rolling year to 30 September 2005 (therefore the first year of the operation of the new statutory provision), Acas handled 14,118 short period cases; 33,145 standard cases and 17,275 other cases for conciliation.

At the end of the fixed period for standard period cases, Acas can continue to conciliate for a further two weeks if the parties are close to settlement. Additionally, in short and standard period cases, Acas can exercise a discretionary power to conciliate once the fixed period has ended. Acas conciliators follow strict guidelines in responding to requests to continue helping the parties in these circumstances. Acas has taken a stringent view of its new power – as opposed to duty – to conciliate, believing that if it routinely exercised its power under the Act, it would undermine the core purpose of the regulations. It therefore exercises its power to conciliate only in very particular circumstances. Essentially, where some unforeseen event beyond the

control of one of the parties, or Acas, has prevented any meaningful attempts to settle within the fixed conciliation period, then the discretionary power may be exercised. Examples so far include: severe communication difficulties, for instance, where a number of unrepresented claimants are involved; delays in receiving key paperwork from the employment tribunal; and the incapacity of a party due to serious illness.

Although these new arrangements have been in force for only a short time, the key question is how well they are working in practice. In the first eight months of the 2005/06 operational year, Acas' data suggests that the proportion of potential hearing days saved was 75 per cent – still a high level. But there is also some evidence to suggest that overall resolution rates may be falling, albeit marginally.

## *Differential service standards*

The cost-effectiveness of Acas' approach to casework is under constant review. Acas is particularly aware of the responsibilities of public funding, as we balance the pressures of high volumes of cases and limitations on our resources. This paper has already charted the dramatic rise in the number of tribunal applications over the past three decades: what it has not yet done is address the implications of the corresponding increase in caseload for individual conciliators. In the late 1980s, the average caseload of an Acas conciliator was around 250. Today, that person is expected to deal with 345 *new* cases per year and they could be actively managing between 100 and 200 cases at any one time. In addition, the number of jurisdictions has multiplied over the years, further intensifying the job of an Acas conciliator. A case now comprises an average of 1.8 jurisdictions, and there is no discernible pause in the flow of new employment legislation – indeed, the

forthcoming age discrimination legislation has significant implications for all those working within the employment arena.

In the face of these challenges, Acas has continued to run an efficient service and has managed to absorb the increase in both volume and complexity of tribunal claims. But these developments have to be appreciated within the context of the severe resourcing constraints that Acas is currently subject to as part of the ongoing efficiency drive affecting central government. Acas will suffer a 16 per cent budget cut by the 2007/08 operational year. Since 1 April 2005, Acas' service level agreement (SLA) with the Department of Trade and Industry (DTI) allows for a single key performance indicator in respect of individual conciliation – the proportion of potential hearing days saved, as opposed to the proportion of cases resolved.

Acas' long tradition of promoting settlement has been built on the understanding that 'a case is a case', and each and every tribunal claim has been afforded the response and treatment needed on its own merit. The key measure of success was the positive clearance rate, which showed the proportion of cases that were either settled or withdrawn. This indicator remains a key measure of success for Acas conciliation, as does the speed of resolution.

This new performance measure (proportion of potential hearing days saved), combined with the three tracks for tribunal complaints introduced under the 2004 regulations, has prompted Acas to introduce differential service standards. This proportionate view of individual conciliation cases means that, overall, conciliators have more time to deal with open, rather than short or standard period cases. This is based on an understanding that, if unresolved, short period cases will consume a quarter of a hearing day, standard cases one day and open cases 2.5 days.

With significantly reduced resources and in order to meet its SLA with the DTI, therefore, Acas has had to make the decision

to focus its resources and well-honed conciliation skills where it is assumed they are most needed: on those jurisdictions such as discrimination and equal pay that are typically more complex and more costly to the taxpayer and the parties if unresolved. While more time will be allocated to these open period cases, around the same time as before can be spent attempting to settle standard period cases (such as unfair dismissal), but conciliators will be constrained in the time they may spend on short period cases.

The implications of this much more targeted approach to conciliation is discussed in more detail below, but overall the new way of working is a marked departure from how Acas has operated in the past.

### ***Electronic case flow***

Acas is continually striving to be even more effective in its conciliation role and is currently overhauling the service it provides. This includes developing an electronic case flow system – in partnership with the Tribunals Service – to help process applications more quickly and efficiently. The new system, once it has been thoroughly piloted, will facilitate the electronic transfer of documents between the Tribunals Service and Acas and will revolutionise the capture of data. It is envisaged that this 21<sup>st</sup> century database will save almost 50 per cent in administrative time and produce significant productivity gains for the service. The new system will greatly enhance the speed with which tribunal claims can be put into the hands of conciliators. In tandem with this development, the ETS is also improving its online facilities and has a strategic objective to increase the number of claims made electronically. One of the ways in which this is being achieved is through the introduction of a system whereby representatives can transfer data from their own systems, via a web-based electronic application, directly to ETS's database.

## Conciliation undermined?

There is no doubt that the recent reforms have had a major impact on how Acas operates – and not only in relation to the substance of the changes themselves. There has been close liaison between Acas and Employment Tribunals Service staff, both at a national and a local level, to ensure as smooth a transition as possible from the old to the new arrangements. Inevitably, though, Acas conciliators have had to spend more time explaining the implications of the new tribunal and conciliation rules to the parties, while managing their caseloads to maximise their effectiveness within much tighter deadlines.

The key question that needs to be asked, however, is whether the new fixed period approach to conciliation is achieving what was intended. *Routes to Resolution* asserted that ‘a clearly defined period for conciliation within the process for resolving disputes should help increase the number of timely settlements through conciliation.’ The paper went on to point out that ‘the fact that many cases settle very close to a hearing suggests that many people do not engage properly in conciliation or do not concentrate fully on their case until it is listed for hearing.’ Fixing the period of conciliation, it was hoped, would concentrate the parties’ minds on a potential settlement prior to a hearing. This assumption may have been built on shallow foundations: settling at the last possible moment is in the nature of any type of litigation.

Ensuring Acas conciliation promotes increased and early resolution, and providing incentives to encourage the parties to do so, is a laudable aim and one that Acas fully supports. On the crucial issue of fixed conciliation periods, the Acas response to the consultation paper said that the approach may have some merit but emphasised that it needed further research, and suggested that as a matter of urgency more evidence should be collected through pilot exercises.

This suggestion was not taken up, and we are now in a position of slowly starting to evaluate the impact of the changes after they have been implemented ‘for real’. The emerging picture has done nothing to allay Acas’ concerns that the fixed period reforms will not alter parties’ behaviour and encourage the earlier resolution of cases.

There is also concern that the conciliation period in short and standard period cases expires too far in advance of the hearing date, effectively leaving parties in limbo while they wait for the case to be heard by a tribunal. The Acas response to *Routes to Resolution* pointed out that Acas would be very uncomfortable with a situation in which the parties would no longer be able to approach us for conciliation once the conciliation period had ended even though they might want to, and this remains a key concern.

The seven-week fixed period is proving far too short to offer meaningful conciliation in many cases, even from an administrative perspective. The nature and structure of large organisations means that, often, it is not even realised that an ET1 claim has been made by an employee until well into the seven-week period. The clock is ticking before the conciliation officer has even received the full paperwork from the ETS in many cases. Until the new caseflow system is introduced, there will also continue to be delays before the paperwork is in the hands of the conciliator and the process of conciliation can be initiated.

It is Acas’ experience that parties are more likely to think seriously about settling once they have had a clearer understanding of the relative strengths and weaknesses of the case, for instance, following case management Orders and Directions by the Tribunal, including the exchange of witness statements. There is little evidence to suggest that the time limits on conciliation are serving their intended purpose – that is, reducing the extent of ‘eleventh hour’ settlements on the eve of

the hearing. There is the very real concern that, in the short-term, the number of compromise agreements and consent orders is merely increasing. Unlike Acas-conciliated settlements, compromise agreements do not necessarily offer a general, final settlement of all employment claims. Neither do they offer the third party neutrality that is the Acas' hallmark that helps to ensure fair play to both sides. In the long-term, it is feared that the number of cases that proceed to a full hearing could increase.

### Promoting settlement

The fact that fixed conciliation periods themselves do not appear to be effecting the desired behavioural change and concentrating the parties' minds on earlier settlement focuses the argument back on the conciliation process itself. It is the expertise and efficacy with which this activity is carried out, rather than an approaching deadline for its expiry, that is most likely to bring about an out-of-court settlement. As Linda Dickens argues in her article for *Employment Relations in Britain*, the text commemorating 25 years of Acas, increasing caseloads in a context of reduced resources demonstrates that Acas is successfully 'doing more with less.'

The far preferred option, in financial terms alone, of settlements brought about by Acas conciliation as opposed to those achieved through a full tribunal hearing, is not disputed. A quick study of the cost of individual conciliation carried out by Acas compared to tribunal costs demonstrates considerable savings to the public purse because of the high resolution rates by Acas and proportion of hearing days saved. Currently, around 74 per cent of net cases are resolved without the need for a hearing resulting in 76 per cent of potential hearing days being saved. Figures in the ETS 2003/04 Annual Report indicate that the cost per heard case is just under £2,000, while the cost per case settled or withdrawn

through Acas is £393. The parties' own costs are also saved if a case is resolved without a hearing. The 2003 Survey of ET Applications (SETA) shows the mean cost to a claimant of a claim that proceeded to tribunal was £2,176 where the claim succeeded and £2,739 where it did not. The cost to the claimant where Acas brokered a settlement was £1,827. Similarly, the mean cost incurred by the respondent employer was £5,054 where the claim succeeded and £6,264 where it did not. In contrast, the mean cost to the employer where Acas brokered a settlement was £2,863.

But Dickens goes on to question whether the cost effectiveness and efficiency to which this testifies are not the only, or most important, criteria by which the function should be evaluated. This is a theme that this paper returns to below, but first it is worth highlighting why and how Acas conciliation achieves its impressive settlement rate. An appreciation of what factors are most conducive to the effective application of the process is also needed to assess the supportiveness of the current framework.

Acas conciliators play a pivotal role in influencing the parties' perceptions and providing the information so that they are able to weigh up the pros and cons of proceeding to a tribunal hearing. As Dickens points out, they provide parties with the ability to settle 'but also help shape the desire to settle by marshalling and channelling pressures towards settlement that are present in the system.' The range of sophisticated techniques that a conciliation officer may bring to bear during conciliation are examined in another article in the same text by Gill Dix. Conciliation is described as an iterative process, with conciliators often needing to switch back and forth between different roles, such as reflexive and informative, as a case progresses and the needs of the parties alter. It is at the substantive stage, where conciliators can have the most direct impact on the outcome

of a case – for example, dealing with the facts and details of a case, encouraging the parties to explore issues in a critical fashion, considering the strengths and weaknesses of the claim and realistically assessing the most acceptable outcome. The key challenge that also needs to be mentioned, that makes the job that much more complex but also ensures its ultimate effectiveness, is retaining impartiality. Conciliators are finely tuned to the need to draw a firm boundary between an information-provider and advice-giver.

This is but a brief overview of the conciliator's role and falls far short of capturing the flexibility and high level of sophistication that characterises it. A clear theme that emerges from Dix's research is that conciliation is a process that cannot be rushed – conciliation can be likened to a rich canvas of many layers and it takes time to build to a successful conclusion. Flexibility and responsiveness are the cornerstones of good conciliation and Acas has built up a unique tradition of knowledge and best practice based on 30 years' experience. As Dix concludes, it is the range of influencing techniques that have been proven to be the most powerful in determining case outcomes. The danger has always been – and is even more evident today – that pressures caused by increased caseloads, and now a fixed period in which to conciliate, will limit the creativity needed to respond to a varied caseload. Ultimately, giving Acas conciliators the time to do what they do best, and apply their finely-tuned skills, is the best way to achieve the overarching goal of a reduction in tribunal claims.

There is another perspective to individual conciliation that needs to be considered, alluded to in both the Dickens and Dix articles. This concerns Acas' wider role in promoting better workplace relations, and the additional benefits it can bring to bear. Acas conciliation has many positive results over and above the simple resolution of the case in question. By encouraging a critical analysis of the case by the parties, Acas

conciliation officers are often promoting a more in-depth discussion that can help employers to take action to avoid future claims. This qualitative appreciation of the wider impact of conciliation does not chime with the aims of the ongoing and recent reforms of the tribunal system that are driven primarily by administrative efficiency. There is therefore the potential for individual conciliation to play an even more powerful role in both reducing the number of tribunal claims and in promoting positive employment relations more widely. However, budget reductions and resource constraints risk reducing the opportunities for fully achieving these aims.

### Extending alternative dispute resolution

Up until this point, this paper has focused on the changes to the tribunal system. It now moves to another mode of analysis – rather than what *has* happened, to what *should* happen to both support the changes and fulfil the more overarching aim of improving British employment relations in the long-term.

*Routes to resolution* pointed out that 'recourse to litigation as a first resort to solve workplace disputes is neither good for business nor the individual...By the time the hearing is reached, it is common for the employment relationship to have broken down irretrievably.' This is very true – employment tribunals were never intended to improve employment relations. In practice, they have also done little to repair the employment relationship, although there exist the options of reinstatement or re-engagement. Encouraging better dispute handling in the workplace is absolutely the right aim, as the government's consultation paper highlighted. Far from effectively 'privatising' dispute resolution by maintaining it as far as possible at the level of 'the firm', as some critics have argued, introducing statutory minimum discipline and grievance procedures is, in principle, a progressive development. Differences

*should* be dealt with, wherever possible, at the point at which they originate – that is, between employer and employee in the workplace. However, policies and procedures on their own are not enough – it is how they are introduced, communicated to staff and, crucially, implemented by line managers and HR that counts. This is a key point and one that is taken up below, but first it is important to appreciate that, once procedures have been invoked, and a dispute has been formalised, it can very quickly escalate.

There is therefore a ‘missing link’ in the current focus on settlement of disputes in the workplace that needs to be addressed. If organisations are to become more effective and proactive in avoiding disputes, they need to embrace more fully a conflict management, rather than a conflict resolution, approach. This means managing employment relations in such a way that disputes do not have the opportunity to arise in the first place, or are quickly and informally resolved if they do. Much more needs to be done to promote alternative dispute resolution (ADR) at the earliest stage of conflict, or potential conflict. There is a section dedicated to ADR in *Routes to Resolution* where it is described as a ‘faster, cheaper, informal and confidential means of settling disputes.’ This is the key to encouraging an employment relations solution to settling workplace difference.

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

a variety of different approaches within the limits of its funding and resourcing constraints.

Achieving an early intervention before both parties become entrenched and the problem turns into a dispute is the most advantageous approach to sustaining good employment relations on a longer-term basis. ADR refers to a range of voluntary processes involving a neutral third party that brings two sides together to resolve disputes without having to resort to litigation. In most cases, this means the two parties working *together* to find a mutually acceptable agreement. ADR techniques can range from low-level facilitation of an informal meeting to discuss the next step to more interventionist forms such as ‘directive mediation’, where parties have reached an impasse and they welcome the recommendation of a mediator, or even the binding decision of an arbitrator. One of the key aims of ADR is to change a culture that assumes that the only route for resolving difficulties and disputes is through formal procedures, and to encourage more creative and proactive solutions to problems in the workplace. It is this approach that Acas has been working hard to promote.

### **Why reinvent the wheel?**

The proposed Court and Tribunals Bill will put the ability of employment tribunal chairs to provide mediation on a statutory footing. This process can dovetail with Acas conciliation and the two approaches are not mutually exclusive. It has been suggested that this approach could be particularly useful to aid the resolution of specified discrimination claims, especially where the employment relationship continues to exist, and a pilot exercise is planned.

It has already been accepted that a clear division would need to be established and maintained between the two processes – mediation provided by ET chairs and conciliation provided by Acas. The parties,

and all those involved in the tribunal system, would need to be very clear where Acas' role ends and the mediation intervention begins. The two approaches need to be distinct and Acas' impartiality preserved. Any proposal in this direction would also need to be aware of the potential confusion that could arise if the same tribunal members that adjudicated in these proceedings were also to mediate between the parties, and the Human Rights Act could be relevant here.

*Routes to Resolution* also considered the scope for other organisations to act as conciliators, or mediators, alongside Acas on the basis that 'greater capacity to engage in conciliation should increase settlement rates'. In its response to the consultation paper, Acas pointed out that if new organisations were to be given statutory conciliation duties it would be essential that they were closely vetted over a period of time to ensure that the services they offered were independent and impartial and of the highest standards of quality. Acas wholeheartedly agrees that greater capacity to provide conciliation could boost resolution rates – and the quickest and most effective way in which this could be achieved is by increasing the capacity of Acas conciliation. It is Acas that has over 35 years' experience and a proven track record in settling individual disputes. It is also uniquely placed to provide this service as it is the only body that is perceived as truly independent and enjoys the respect and trust of both employee and employer alike.

In order to appreciate Acas' unparalleled position as an independent and trusted provider of third party conciliation in employment rights cases, a brief consideration of compromise agreements is informative. In a bid to reduce the number of tribunal cases, the legislation making an agreement not to proceed to a tribunal hearing binding was extended in 1993 to compromise agreements, in addition to those agreements reached with the assistance of an Acas conciliator. Certain statutory conditions have to be met if the compromise

agreement is to be considered binding on the parties, including the applicant having obtained independent legal advice. In reality, very few compromise agreements are the product of third-party brokered settlements. The 2002 Employment Bill proposed that compromise agreements should have the same remit and status conferred upon them as Acas-brokered settlements – that is, to allow them to deal with any and all matters of actual and potential complaint, even those not in current contemplation. Parliament rejected the proposal on the ground that, without the presence of an Acas conciliator, fair play could not be guaranteed. The same could be said if other third party providers were in a position to provide conciliated settlements.

Boosting Acas' capability would therefore be the most cost-effective and efficient approach to take as it has the framework and conciliation machinery already in place – not to mention the knowledge and experience. Acas would welcome the opportunity to provide more face-to-face conciliation, for example. The realistic view has to take into account the resource implications, however. Opening up the mediation field to other providers, even within a kitemarking framework, would carry with it considerable resource implications and one that the tribunal system is hardly likely to take on at a time when reforms are intended to achieve the very opposite. The same resource implications apply to the current proposals to expand the role of ET chairs' to mediate in discrimination cases.

It is worth remembering the 1995 pilot whereby an Acas conciliation officer was available within the same building as the employment tribunal in the hope of facilitating settlements before or after hearings. Although found to be favourably received by the few that used it, the approach operated at a high cost to the tribunal and Acas. Any similar proposal, whereby face-to-face mediation is provided by external providers, will face similar

resource pressures – pressures that are even more acute at the current time. Giving Acas the resources to perform such a function requires an appreciation of the long-term benefits: an expansion of its individual conciliation service would save the system, including whole industries, time and costs. It would also help improve employee relations, and hence stability, in the workplace, thereby contributing to the productivity and high performance agenda.

### **Dispute prevention not resolution**

The key to reducing the pressure on the current employment tribunal system in the long-term lies in the opening paragraph of *Routes to Resolution*. It asserts that: 'Good employment relations underpin productivity. They help to reduce disputes, unnecessary turnover and absenteeism. They build employee commitment and trust.' With regard to employment tribunals, the paper later states that: 'Employment tribunals should take their proper place as the backstop to enforce individual rights.'

The core aim is therefore to challenge the growing culture of litigation and, aside from encouraging earlier settlement of tribunal claims, a preventative approach should start much earlier – in the workplace itself. This is the intention of the new disciplinary and grievance procedures but, firstly, it is clear that more guidance and advice is needed in order to embed these within organisations. Resources permitting, Acas stands ready to play a key role here. For example, a comprehensive publicity campaign with practical guidance for parties on how the procedures are applied and the implications of the failure to use them could be mounted. Acas sees value in targeting small firms in particular.

The planned review for Autumn 2006 of the Employment Act and how the regulations are working in practice, particularly the modified procedure, is welcomed by Acas. One year into their operation, there are a number of questions that need to

be satisfactorily resolved. For example, emerging evidence indicates that some organisations may be moving away from their own established grievance procedure and defaulting to the statutory minimum instead, a development that is not desirable. Should the minimum requirements that are currently applied to dismissals and contemplated dismissals be applied to all disciplinary matters? Is the current ET1 form too complex?

It is not possible to say with any certainty, at this stage, whether the significant reduction in tribunal claims is the result of local workplace resolution of differences, or individuals being deterred by the revised ET1 form – or possibly a combination of the two. Research is needed. Further thought also needs to be given to how the key aim of *Routes to Resolution* – that is, the more effective resolution of employment disputes in the workplace – can be more fully realised. As already noted, there needs to be more support and guidance for employers, employees and representatives on the implementation of the new statutory procedures, and further research on how well they are meeting their intended purpose. There also needs to be a much broader focus on dispute prevention rather than dispute resolution in the workplace.

### **Advice and training**

ADR is one technique that can be used to help encourage a more cooperative and constructive approach that carries with it the possibility of improving employment relations in the long-term. But Acas has also been putting more and more emphasis on education and prevention of disputes before they have a chance to occur. Our advisory and training capability, delivered by highly skilled frontline staff, has been developed and expanded over the past few years to help achieve this vision.

For example, we have adopted a much more proactive approach to working with the public sector to support them as part

of the public services reform agenda. By highlighting the employment relations implications of major public sector change initiatives at the earliest stage, organisations can benefit from our advisory services to enhance employee engagement before problems or difficulties arise.

Our good practice advisory work and other preventative initiatives extend beyond the public sector, however. For example, senior advisers carried out almost 400 in-depth workplace projects last year, working with managers, employees and representatives to improve relationships and develop partnerships. Other practical assistance included over 400 'healthcheck' visits to ensure that organisations' information and consultation procedures and processes were effective. Acas has also consolidated its reputation as a key provider of training in good employment relations practice, and we have launched a range of new training products and services including *Managing stress in the workplace* which is designed to support the introduction of the HSE Stress Management Standards. Acas has also recently launched its *Acas model workplace*; this benchmark device draws on Acas' experience to set out a range of factors to measure and improve workplace effectiveness.

The model includes putting into place the right systems and procedures and deals with areas such as discipline and grievance, and developing fair and open systems for reward, communication, consultation and health and safety. It also provides guidance on encouraging effective relationships in the workplace, where everyone is treated fairly and differences are respected and valued. Work should be organised to foster initiative, innovation and new skills, and the need to balance work and personal lives should be recognised. The model also highlights the benefits of greater employee involvement in decision-making.

The number of calls to the Acas helpline continues to increase and, last year, our advisers answered 880,787 calls – not surprisingly, the most frequently asked questions were about discipline and dismissal. The Acas helpline continues to be the gateway to other Acas services and helpline advisers often refer callers to other colleagues in Acas who may be able to help. Last year, this occurred particularly in relation to queries about the new Information and Consultation Regulations, for instance. When it was considered appropriate, callers were told of Acas' inhouse training and 'healthchecks' on the Regulations. Callers were also directed towards the Acas website, which contains guides and training exercises which can help organisations to develop effective policies and practices across the spectrum of employment relations issues.

As *Routes to Resolution* pointed out, based on the research (Genn, *Paths to justice*) only a fraction – between 15 per cent and 25 per cent – of justiciable disputes which involve a breach of legal rights are believed to be the subject of tribunal proceedings. The actual number of claims is therefore the tip of the iceberg. Acas strongly believes that the good practice advice and support it directly provides to both employers and employees make a positive contribution to reducing the number of employment tribunal claims and potential claims. For example, on the basis of a very crude – but wholly realistic – analysis: if just 2 per cent of the almost one million calls to the Acas helpline result in the avoidance of a claim, this translates into 20,000 claims that the ETS would otherwise have to deal with.

There is great potential to expand Acas' advice and information role: indeed, it is the 'missing link' that needs to be extended in order to deliver the key aim of *Routes to Resolution* – to ensure that a greater proportion of disputes, and potential

disputes, are settled in the workplace and the tribunal route circumvented. Such an approach would help deliver a virtuous circle of employment relations and help sustain relationships in the workplace for the long-term.

### **A European perspective**

Before concluding, a brief comparison with other European countries is worthwhile. Even a cursory glance at the incidence of claims from employees wishing to enforce their rights at work in countries such as Germany and France puts the figure of UK tribunal claims into a more welcome perspective. The comparison also serves to reinforce the original aims in setting up Britain's tribunal system as an alternative to a legal system – as such, it is unique and is without doubt worth preserving.

The experience of the far more legalistic systems that have been set up, particularly in Germany, illustrates very clearly what transpires if such a route is established. Put simply, employees are encouraged to exercise those legal rights, as the comparatively high employment rights claims in these countries clearly illustrate. For example, in a working population of just under 40 million, German workers submitted over 600,000 claims to the first tier labour court in 2002. From a workforce of around 25 million, French workers submitted around 175,000 complaints for legal redress during the same period. Britain's working population stood at around 26 million during the corresponding period and there were just under 100,000 tribunal applications. This equates to around one claim for every 280 employees, which hardly suggests an aggressive employment rights culture where employees are keen to 'have a go'.

### **Conclusion: room for improvement?**

The brief comparison with some of our European neighbours serves as a timely reminder that Britain's employment tribunal system is still a much preferred model to the fully legalised systems that exist elsewhere. The original aim in setting up the British system – as a cheap, speedy and flexible option for settling individual employment rights cases – is as valid today as it has ever been. This does not mean that it is a system without flaws and more work is needed to fine-tune the implementation of the recent reforms and assess their current effectiveness.

The tribunal system *is* characterised by a tendency towards legal dependency. The only way in which the current culture can be countered, if indeed this trend can be reversed at all, is by focusing on employment relations solutions in the workplace. This means re-examining the key role of Acas' individual conciliation, and how best this can be carried out. It also means targeting more resources on dispute prevention approaches in the workplace, including ADR and mediation services, and developing a wider framework for the provision of good practice advice and information. It should also be remembered that, while the reach of collective bargaining may have been reduced, representative employee voice remains a key mechanism for helping to regulate workplace relations in many organisations. The recently introduced Information and Consultation requirements are also of note here.

There is no short cut to bringing down the number of tribunal applications – it is only by the promotion of good employment relations in workplaces across the economy that this goal will ultimately be achieved.

## Further Reading

Linda Dickens. 2000. *Doing more less: Acas and individual conciliation from Employment Relations in Britain: 25 years of the Advisory, Conciliation and Arbitration Service*. Blackwell, Oxford

Gill Dix. 2000. *Operating with Style: the work of the Acas conciliator in individual employment rights cases from Employment Relations in Britain: 25 years of the Advisory, Conciliation and Arbitration Service*. Blackwell, Oxford

This is the third edition of the *Acas Policy Discussion Paper*. Please let us know if any of your details are incorrect.

Name .....

Organisation .....

Address .....

.....

.....

I would like extra  copies.

I no longer wish to receive *Acas Policy Discussion Papers*, please remove my name from your mailing list (please tick the box)

I would like to receive *Acas Policy Discussion Papers* by email in future

Acas, Brandon House, 180 Borough High Street, London SE1 1LW

Fax 020 7210 3687 c/o [strategy@acas.org.uk](mailto:strategy@acas.org.uk)





*Acas can help with your employment relations needs*

### **We inform**

We answer your questions, give you the facts you need and talk through your options. You can then make informed decisions. Contact us to keep on top of what employment rights legislation means in practice – before it gets on top of you. Call our helpline **08457 47 47 47** or visit our website **[www.acas.org.uk](http://www.acas.org.uk)**

### **We advise and guide**

We give you practical know-how on setting up and keeping good relations in your organisation. Look at our publications on the website or ask our helpline to put you in touch with your local Acas adviser. Our Equality Direct helpline **08456 00 34 44** advises on equality issues, such as discrimination.

### **We train**

From a two-hour session on the key points of new legislation or employing people to courses specially designed for people in your organisation, we offer training to suit you. Look on the website for what is coming up in your area and to book a place or talk to your local Acas office about our tailored services.

### **We work with you**

We offer hands-on practical help and support to tackle issues in your business with you. This might be through one of our well-known problem-solving services. Or a programme we have worked out together to put your business firmly on track for effective employment relations. You will meet your Acas adviser and discuss exactly what is needed before giving any go-ahead.