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The Role of Conciliation in the Employment Tribunal system

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The focus of this paper is on conciliation in respect of employment tribunal (ET) cases provided by the Advisory Conciliation and Arbitration Service (Acas), an independent state funded non departmental public body. The paper draws on my chapter 'ADR in the ET system' in *Making Employment Rights Effective* (Hart, Oxford 2012) where the evidence and arguments are presented more fully.

The attempt to dispose of tribunal claims through conciliation without the need for judicial determination has been a feature of the ET system since its early days in the 1970s, with Acas providing statutory post-claim conciliation in an increasing number of jurisdictions. More recently Acas was given the statutory power to offer conciliation before a claim has been made to a tribunal in cases where an employee is eligible to submit a tribunal application and intends to do so. This pre-claim conciliation (PCC), in place since 2009, aims to resolve at an early stage disputes which otherwise would result in a formal ET claim, thus reducing the potential volume of claims entering the ET system. The latest development is 'early conciliation' - from April 2014 all claims will have to go to Acas for conciliation to be attempted before lodging with ET.

This expanding role for Acas conciliation testifies to the success of the process in the eyes of policy makers. In this paper I look at the nature of conciliation, measures of its success and suggest there is untapped potential for it to contribute further.

Acas conciliators in tribunal claims discuss the issues of the case with parties, explain the ET process, the law and case law where appropriate, and encourage each party to consider the strengths and weaknesses of their case. They provide both parties with information on the options available to them and pass information between the parties, including details of any offers of settlement. Acas policy is that conciliation officers can help to clarify issues, but they do not give advice. Discussions are confidential; information given to the conciliation officer is not divulged to the other party without permission and what happens in conciliation cannot be used in a tribunal hearing. Settlements or withdrawals agreed through Acas conciliation bar access to an ET hearing. Once this was the only type of agreement which could do this but 'compromise agreements' (soon to be renamed 'settlement agreements') can be concluded with the involvement of other specified advisors such as lawyers or accredited TU officials.

There is no doubt that Acas conciliation provides a very cost effective filter, saving hearing days at tribunals (and thus saving public expenditure) and reducing financial and non-financial costs to the parties which would have been incurred in continuing to a tribunal hearing. Over two-thirds of applications do not reach a full merits hearing by the Employment Tribunal. Ministry of Justice figures show that in 2010-11 (as a proportion of disposed jurisdictional claims) 29% were settled by Acas - a proportion fairly constant over

time. Acas reports that it saved 78% of the potential hearing days arising from all cases received for individual conciliation in 2010/11¹.

PCC cases are usually identified through telephone calls to the Acas Helpline. Generally the parties agree to engage with the PCC process when it is offered and around half of cases referred are resolved in this way. In 2011 over 16,000 cases went to PCC. In terms of avoiding claims entering the ET system PCC has a high rate of success – Acas reports that around 70% of cases did not subsequently lead to the submission of an ET claim.

Acas intervention enhances the probability of settlement both by raising the likelihood of an offer being made and where an offer is made, of its resulting in a settlement. Why is this?

Conciliation takes place in the shadow of the tribunal and parties' perceptions of what might happen at a tribunal hearing. The relative advantages and disadvantages of proceeding (including the financial and non-financial costs) are crucial in determining the likelihood of settling. Conciliation officers bring 'realism' to bear, helping shape the desire to settle by conveying information about the nature of tribunal hearings, decision making and outcomes. They might for example discuss applicant success rates (relatively low); average levels of compensation in successful cases (around £5000 in unfair dismissal); how similar cases have fared and so on, as well as exploring the strengths and weaknesses of the case, indicating what will need to be demonstrated at an adversarial hearing; noting the ability for costs awards to be made etc.

In this way conciliation involves marshalling and channelling pressures towards settlement (or withdrawal) that are present in the system. For example learning of the risk of having to pay the other side's legal costs if they lose their case appears to weigh particularly with claimants when considering whether to proceed to a hearing (Peters et al 2010:63-4) although in practice cost awards are rare.

Some argue that this can amount to Acas putting pressure on parties to settle, and some claimants have indicated this is how they experienced it. However a survey of representatives show the majority say this is not the case (Harding and Garnet 2011:33) and evaluation of conciliation by users is positive, with some four-fifths of users expressing satisfaction with the service (Acas Research et al 2011a; Peters et al 2010:66).

It is clear that Acas conciliation reduces the volumes of cases entering the ET system and saves hearing days. It is cost effective for state and for the parties. For example, Acas has estimated that, once staff time and legal costs are factored in, businesses who resolve disputes through PCC save £3,700 on average compared with costs involved once an ET claim has been made. Employees save on average nearly £1,300.

But what of other measures of success? At times it has been suggested that conciliation as a process is able to produce 'better' outcomes than a tribunal hearing, in terms of fairness or nature of remedy, suggesting that there are criteria other than cost effectiveness by which the success of conciliation might be judged.

Whether in PCC or in Acas conciliation following an ET claim, settlements reached through conciliation are seen as matters for the parties themselves. Conciliation officers do not offer a

¹ The nominal PHDS value of cases is based on ETS nominal estimates for hearing durations for cases in different categories – highest for discrimination jurisdictions and lowest for those cases concerning unpaid wages, holiday or redundancy pay for example.

view as to the sufficiency or fairness of any settlement judged by any external standard or social policy. This is seen as part of the neutrality of Acas conciliation. Inputs of this kind, however, may be sought, particularly by unrepresented parties (most often claimants) who expect more support from the conciliation officer, of the kind associated with a professional representative. Research into race cases for example has shown that claimants may want the conciliation officer to help redress what they experience as an imbalance of power (Hudson et al 2007: 69). Acas can act as a broker, but what some need is an advisor and advocate.

As currently interpreted, conciliation is not concerned with the quality of settlements, nor the extent to which settlement may support or undermine the social policy objectives behind the legislation. The nature of any settlement obtained - indeed even *whether* any settlement is agreed, as against abandoning the claim - is not part of the formal performance indicators by which the success of conciliation is judged. The privileged status of agreements reached with Acas intervention (in barring access to the ET) resides *not* in the fact that they are reasonable, just or equitable ones (although they may be), but rather in the fact that the parties are reaching *informed* agreements. The parties should know their legal rights, understand what they are doing and the implications of settlement. The nature of the settlement is then up to them.

The appropriateness of this kind of neutral conciliation (where no view is taken as to the appropriateness or fairness of the outcome) in relation to statutory employment rights has been questioned, particularly with respect to the discrimination jurisdictions. Arguably there is a conflict between the search for compromise, which is at the centre of conciliation and the pursuit of rights. Conciliation (and also mediation) may be viewed as treating an alleged injustice as equivalent to a disagreement between parties. An approach which might address such concerns in jurisdictions where a particular social policy is being pursued is rights-based, committed intervention (eg see Hunter and Leonard 1997 in the context of sex discrimination). Unlike Acas' current neutral stance, this is where conciliation is designed to bring about agreed settlement promoting certain desired substantive ends.

Turning to the nature of remedy obtained, a potential advantage claimed of conciliation over going to a tribunal is that it increases the chance of avoiding a permanent breakdown of the employment relationship. In practice however, this is not being realised very often, whether through pre or post-claim conciliation. Although 97% per cent of complaints are brought by current or former employees at the time of application, only a very small proportion (around 8 per cent) remain with the employer against whom they complained (Peters et al 2010).

Acas identifies as an advantage of conciliation that it resolves the dispute to suit the employer and employee, rather than what the tribunal has the power to award - through provision of a reference or an apology for example. Settlement terms are not restricted to statutory remedies, but nonetheless 9 out of 10 settled cases across all jurisdictions involve some kind of financial settlement.

Finally, 'better' outcomes could relate to the extent to which an individual case stimulates broader change - helping improve workplaces, for example through employers reviewing their procedures or policies and developing workplace practice in keeping with employment standards. Currently however this is not a formal objective set for conciliation, nor something generally being realised in practice. Acas's survey of users published last year shows that 26% of employers involved in tribunal cases which were settled through conciliation made a change to policies or procedures as a result of guidance they received. The majority,

however, appear to take no such action. Changes may not necessarily be required in all cases, but this lack of action by over sixty per cent of employers nonetheless indicates limited positive impact beyond the individual claim.

The likelihood of procedural/policy review and change is reduced by a focus on short term, quantifiable measures of conciliation 'success' (hearing days saved) and by severe constraints on Acas resources which impact on the way in which conciliation is conducted. Such constraints, for example, have reduced the opportunities for conciliators to deal directly with parties in person. Conciliation tends to be conducted by telephone which makes any underlying employment relations issues which might give rise to further disputes less likely to be detected, explored or resolved. The growth in legal representation also has distanced the conciliator from the workplace and the parties, limiting any educative or advisory role Acas might play which could prevent similar disputes arising in that organization.

Acas could play the role of institutional intermediary facilitating an individual case feeding into organisation learning. The pursuit of broader outcomes would be in keeping with Acas' broader general mission - to improve organisations and working life through better employment relations. And it need not compromise the neutrality of conciliation as there could be some separation of process if desired with employers being referred on to Acas advisors to deal with more complex issues, or where a deeper level of involvement was required with a view to improving workplace relations for the longer term (rather than just tribunal avoidance).

Suitably resourced and structured, the proposed 'early conciliation' could provide a gateway to accessing employers with a view to Acas' broader mission. On the face of it the current public policy emphasis on conciliation suggests the possibility of an approach to avoiding the need for a tribunal hearing or a tribunal claim which is concerned less with dis-incentivising or barring tribunal applications and more with facilitating dispute resolution and conflict management. In practice however the context, rationale and nature of the current tribunal and employment law reforms makes this most unlikely. Indeed aspects of the current reform agenda - eg charging of fees - may risk undermining what conciliation currently achieves.

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