

## Resolving disputes in the workplace

### Question 1

Should the statutory dispute resolution procedures be repealed?

Yes

No

No view

#### Comments

Employment relations problems should be resolved in the workplace through speedy, fair, and transparent procedures that entail the minimum of formality. The Dispute Resolution Regulations sought to codify that by prescribing a single set of statutory procedures for handling matters of discipline, dismissals and grievances. In principle this had much to commend it. Many employers, employees and representatives welcomed the new procedures because they set out plainly what was expected of parties and offered the prospect of increased consistency in the way matters were handled.

To a limited degree those expectations have been realised; but the statutory procedures have proved ill-suited to some situations and have either made little difference or actually hampered effective dispute resolution in many others. They are widely perceived as over-formal and bureaucratic, often create delays, and tend to add to the costs for parties. For instance, research conducted with its members by the CIPD reported less likelihood of resolving disputes informally since the introduction of the statutory procedure. There was also evidence that statutory arrangements are a drain on management time: the same research found an average of 13 days spent in preparing for handling statutory disciplinary hearing, (with 15 preparation days for a Tribunal Hearing)<sup>1</sup>.

One fundamental flaw in the statutory procedures is that they impose a “one size fits all” approach to the handling of employee grievances, disciplinary matters, and dismissal on any grounds. Whilst certain common principles ought to apply in handling any of these situations, they require different procedures that serve different functions. This has been particularly unhelpful in relation to disciplinary action, which has often been misunderstood in the past as merely being a mechanism to punish employees for contravention of workplace rules. The statutory procedures’ narrow focus on process and sanctions, and their perceived link with dismissal, have perpetuated that misconception and have done nothing to highlight the true purpose of workplace disciplinary action, which is to elicit a change in employees’ behaviour.

Michael Gibbons’ Review (paras 2.7 – 2.19) sets out in some detail the benefits and drawbacks of the way the present system operates in practice. The issues he raises and the examples he puts forward are entirely consistent with our own experience of the statutory procedures, and we share his analysis that their overall impact has been significantly more negative than positive.

We therefore favour the repeal of the current statutory dispute resolution procedures, as long as they are replaced by a package of measures (in particular, those discussed in our responses to Questions 2, 3, 4, 7, 8, 9, 10, 12 & 15 below) to promote and support sound workplace decision making and effective dispute resolution; all of which must be underpinned by a statutory Acas Code or Codes of Practice articulating fundamental principles of fairness in workplace procedures.

## Question 2

Would repealing the procedures have unintended consequences that the Government should address, in legislation or otherwise?

Yes

No

No view

### Comments

As noted in our reply to Question 1 above, there is a substantial danger of adverse consequences if the statutory dispute resolution procedures were to be repealed without being replaced by a package of measures to promote and support the avoidance and resolution of workplace disputes. In particular, it will be essential to take steps to establish and publicise appropriate standards for procedural fairness in workplace decisions, especially those concerning dismissals (see response to question 7 below); and to revise the Acas Code of Practice to provide a statutory underpinning for the fundamental principles concerned.

The most obvious potential consequence is that tribunal claims would increase because in the absence of common standards some employers might take a less rigorous approach to disciplinary decisions and dismissals; and because without effective in-house procedures for resolving grievances many employees would see the tribunals as the only route to obtain redress. The impact of this may be felt particularly by SMEs, and by employees in vulnerable groups such as migrant workers from recent EC accession countries.

However, the corrosive effect of unresolved problems in the workplace is not just manifested in the incidence of tribunal claims. Research has shown that only a minority of employees who experience problems at work will chose to address their complaints through any kind of formal action, and only a very small proportion of those go on to make a tribunal claim<sup>ii</sup>. But this does not mean these problems can be disregarded. Issues such as poor attendance or performance directly affect productivity and customer relations; while dysfunctional relationships can be even more harmful to organisational effectiveness and are often also detrimental to the health and well-being of employees. Matters like these do a great deal of damage long before they become formal grievances or tribunal claims – and even where they never surface that way at all. Avoiding and resolving disputes in the workplace is therefore a bottom line issue for employers and a quality of life issue for employees.

Subject to our detailed comments against subsequent questions in this consultation, we believe that the proposals put forward in the Review, if they are properly funded, would in general form a sound basis on which to build a more effective system for the future. Indeed, given the evident ineffectiveness of the current statutory procedures in promoting good employment practice and workplace dispute resolution, it can be argued that such measures are necessary whether or not the present Regulations are repealed.

### Question 3

Should the Government offer new guidelines on resolving disputes?

Yes  (subject to comments below)

No

No view

#### Comments

It is important to distinguish between statutory guidelines – which will have a status in law such that tribunals will take account of their provisions – and non-statutory guidance giving advice on good practice. Both are required

Statutory guidelines set fundamental standards of fairness and outline the essential components of reasonable practice in handling issues that might lead to workplace disputes or claims. These should be published in the form of one or more Acas Code(s) of Practice. The current Code of Practice on disciplinary and grievance procedures has long been respected as the yardstick for good workplace practice, and by virtue of the tripartite nature of the Acas Council and the statutory status of the Code it carries the unique imprimatur of being endorsed by Parliament, the Social Partners and independent experts in the employment relations field. The credibility and effectiveness of the Acas CoP have been confirmed by client feedback - for example, during 2002/03 Acas conducted a survey with a sample of those who had ordered a copy of the CoP. Two-thirds of respondents to the survey were employers and more than ninety percent found the publication to be quite or very useful<sup>iii</sup>.

We note what the consultation document (para 2.6) and the Review (para 2.24) say about the desirability of enhancing the guidance in the existing Acas CoP, especially in relation to smaller employers and situations where employment has already terminated. The Code reflects the legislative and employment relations environment in which it was drafted – in particular the 2002 Act and the 2004 Regulations – and would in any event require substantial updating in the light of the changes that emerge from the Review. We welcome the opportunity to work with Government and other stakeholders to revise the CoP to meet the needs of the new system, and to consider whether it would be desirable to produce additional Codes on other key topics. As with the current CoP and its predecessors, close collaboration between social partner organisations in the course of that revision will ensure that the new version is practical, effective, and takes proper account of differences in the size and administrative resources of employers. This joint approach to developing the Code will also facilitate acceptance across the employment relations spectrum.

Comprehensive non-statutory guidance in printed and web-based form should also be readily available to employers, employees and representatives alike. We discuss that in detail in our response to Question 8.

*(See continuation on following page)*

**Comments on Question 3 (continued)**

The function of both statutory Codes of Practice and non-statutory guidance is not just to help employers and employees resolve disputes but - arguably more important - to provide them with information and advice that enables them to avoid workplace disputes in the first place. If problems with performance or behaviour are identified at an early stage and addressed informally, they are less likely to escalate into disputes and therefore cause less damage to all concerned. The benefits of early and informal resolution apply both to employee grievances and to disciplinary matters. For instance, most grievances can best be sorted out informally before anyone involved starts to think of the matter as a “dispute” at all. Even where an informal approach is not appropriate, disputes on grievances or matters of discipline can still be avoided through the use of workplace procedures that follow basic principles of transparency and natural justice. The extent to which employees and their representatives have confidence that a decision has been reached by a fair and equitable process can be as important as the substantive outcome in determining whether or not they will challenge it. And in relation to discipline, the fact that decisions are soundly-based and generally acknowledged as fair also means the procedure stands a greater chance of achieving its fundamental aim of improving future behaviour or performance.

The provision of guidelines and information is a necessary foundation for effective workplace practices; but that alone is not enough. Managers and employee representatives must have the skills and confidence to apply them. Our experience shows there is a widespread need to enhance these skills, particularly among first-line supervisors and managers in SMEs without specialist HR resources. The benefits of training in discipline and grievance handling are clear - in evidence collected in respect of the impact of Acas training, delegates report improved personal confidence as well as a higher incidence of disputes being avoided or managed more effectively<sup>iv</sup>. Workplace representatives also have a key role in avoiding and resolving conflict, and WERS has shown they receive a comparatively low level of training in this area<sup>v</sup>. There is therefore also a challenge for trade unions to ensure that representatives are properly equipped to play their part.

It will thus be essential for Government to consider how best to ensure that this area of competency is properly developed. Employers and trade unions should be given every encouragement, and where possible support, to improve managers' and representatives' capabilities in this respect. Among other things, this issue must be given a suitable profile in the wider skills agenda and the Leitch action plan.

#### Question 4

Should there be a mechanism to encourage parties to follow such guidelines?

Yes  (subject to comments below)

No

No view

#### Comments

The guidelines will require to cover two distinct aspects of workplace practice: firstly the way that managers arrive at decisions which affect an employee – whether in response to a grievance or in relation to matters such as pay, discipline, absence, redundancy, and so on – and secondly the extent to which both parties make meaningful efforts to resolve any dispute that arises in relation to a decision or situation in the workplace - preferably before a tribunal claim has been lodged but, failing that, before the matter reaches a hearing. Although closely linked, these are different processes.

In relation to the former, the guidelines should articulate certain fundamental principles of fairness and transparency that must be applied when reaching such decisions. Those principles will have a direct bearing on any tribunal decision in jurisdictions that provide for a test of reasonableness, should the case reach that point. Indeed they are central to determining matters such as whether a dismissal was fair, or whether an employer has properly considered a request for flexible working. By virtue of the guidelines being published in the form of a statutory Acas Code of Practice, endorsed by Parliament, tribunals would be obliged to have regard to the provisions in question when reaching decisions. That in turn would offer a clear incentive to employers to deal with such issues in accordance with the guidance.

When it comes to resolving disputes arising *after* workplace decisions have been made, the current statutory procedures have shown that an over-prescriptive one-dimensional approach that concentrates on penalties is likely to be counter-productive, and liable to fall prey to tokenism. The guidelines on this subject should therefore be persuasive rather than directive - stressing the benefits of early and effective dispute resolution; offering parties advice and information on a range of options as to how they should go about it; and pointing them to sources of support should they need third party assistance.

It is important to stress that workplace dispute resolution is already widely practiced and frequently very effective. The great majority of organisations have some form of procedures in place, and by and large they make appropriate use of them. We also increasingly find that larger employers and trade unions are investing in measures such as in-house mediation services to enhance their capacity in this area. Resourcing some of the more sophisticated mechanisms for this purpose can be difficult for smaller employers, and one challenge in drafting the guidelines will be to ensure they contain information and advice on a range of approaches and techniques that suit the circumstances of all sizes of organisation.

*(see continuation on following page)*

**Comments on Question 4 (continued)**

We are confident that most parties will be receptive to well-publicised encouragement backed by sound practical guidance and support. Equally, however, a small minority will not. The Review rejected the introduction of a mandatory system of dispute resolution, and we believe that was the correct decision. Conciliation/mediation does not work well against a background of compulsion or coercion. Instead, a judicious mixture of carrots, sticks and enablers should be employed to maximise voluntary take-up of dispute resolution. The “stick” element ought to be kept to an absolute minimum, and should focus purely on parties who unreasonably fail to make use of any of the opportunities that would be available to assist them to resolve a dispute before it reaches a full tribunal hearing.

**Question 5**

Should the mechanism take the form of a power for employment tribunals to impose penalties on those who have made wholly inadequate attempts to resolve their dispute?

Yes  (subject to comments below)

No

No view

**Comments**

Tribunals can do much to prompt parties to resolve their cases without having to impose formal sanctions. In particular, Chairmen may often be able to promote dispute resolution in the course of case management discussions. Such an approach has been formally endorsed by the President of the Tribunal in Scotland, who recently issued a Practice Direction allowing for cases to be sisted (the equivalent term in England and Wales is “stayed”) to enable parties to pursue mediation. This will follow on from a case management discussion in which parties are encouraged to resolve the claim rather than proceeding to a full hearing. There has been close dialogue with Acas in Scotland to ensure that Acas is alerted to the relevant cases and makes early contact to renew efforts to conciliate; but parties are free to choose private mediation providers if they prefer. We are also in discussions with the tribunals in both Scotland and England & Wales over a proposal for a pilot arrangement whereby conciliators will attend selected case management discussions in person so as to make their services available immediately if parties wish to use them. It is too early to quantify the impact of these initiatives, but in principle we believe that the focus should be on measures that enable the tribunals to add their weight to other stimuli for dispute resolution that are built into the system, rather than simply on their power to impose penalties.

Persuasion is always preferable, but tribunals may have to retain some power of sanction as a last resort. Research evidence suggests that the way parties handle their case can be influenced by the risk of penalties. SETA’03 explored parties’ response to the then-new regime of issuing penalties against parties where a tribunal decides a case should not have been brought, or that the people involved had acted unreasonably. Of those applicants and employers involved in cases which were withdrawn or settled, *and* who were aware of the new cost regime, a quarter said that awareness of the threat of such penalties had influenced their decision to settle or withdraw (applicants only) the claim<sup>vi</sup>.

*(See continuation on following page)*

**Comments on Question 5 (continued)**

Four key principles should apply in determining whether to impose any such sanctions in a particular case:

- Only unreasonable failure to engage in dispute resolution should be penalised. It would be all too easy, with the benefit of hindsight and objectivity, to say what one or indeed both parties *might* have done better to resolve the matter, but dispute resolution is almost always conducted in a tense atmosphere against a background of imperfect information and strong personal feelings on both sides. It is also often an asymmetric process where an unrepresented party – employer or employee - could be intimidated into accepting inequitable terms by the threat of sanction if there was not such a clear boundary.
- The reasonableness of the party's behaviour should be considered in the light of all the circumstances. It would be inequitable to penalise an employer who declined to offer a "nuisance" settlement in the face of an extremely weak claim; or an employee who refused to accept an offer well below the value of an extremely strong claim. And, for example, it must be recognised that an employee may have reasonable grounds to refuse to engage in a face-to-face conciliation / mediation process with a person by whom they have been subjected to workplace bullying or harassment.
- Tribunals must look "in the round" at the extent to which the party has sought to resolve the problem. For instance, employers who invest in well-developed internal appeal procedures or mechanisms such as in-house mediation services should not be penalised for relying on these and declining to settle cases simply because an employee does not like the outcome. Equally, parties whose initial attempts to address the problem may have been hampered by lack of knowledge or resources should not be penalised as long as they subsequently take advantage of the guidance and support provided by the system to help them try to resolve it.
- The absolute confidentiality of conciliation / mediation must be preserved, as must the manifest independence of conciliators / mediators from the decision-making process. In particular, under no circumstances should conciliators who have been involved in a case be drawn into tribunal proceedings to describe how the parties approached conciliation, or be required in any way to offer views on the vigour or sincerity of the parties' efforts to resolve the case. Confidentiality is currently assured by S18(7) of the Employment Tribunals Act 1996, which says that "Anything communicated to a conciliation officer in connection with the performance of his functions under this section shall not be admissible in evidence in any proceedings before an [employment] tribunal, except with the consent of the person who communicated it to that officer". Acas' statutory status, coupled with the organisational separation between Acas' duty to provide conciliation and the administration of the tribunals by ETS, guarantee the independence of conciliation. These safeguards should not be undermined.

**Question 6**

What form should such penalties take?

**Comments**

The first type of situation distinguished in our response to question 4 is where there is a procedural flaw in the way management made the decision that led to the claim. That can be taken into account in the tribunal's decision. The penalty would effectively be any award that emanated from that, assuming the flaw in question was severe enough to turn the outcome against the employer. We discuss the specific issue of procedural unfairness in UD cases in response to Question 7 below.

The second – and quite separate - issue is what should be the appropriate sanction against a party who unreasonably fails to engage in any meaningful form of dispute resolution prior to the hearing.

We have considered several options, including reducing or enhancing awards for employees or providing for some minimum award against employers who unreasonably refuse to participate in dispute resolution. On balance, however, we believe that provision for a costs award against the offending party offers tribunals the most accurate way to reflect the consequences of that party's actions or inaction.

We note that under Section 40(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, tribunals' currently have the power to award costs "*where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.*" In our view, the terms of this statutory provision are sufficiently broad to allow tribunals to address situations where a party or representative has unreasonably failed to pursue opportunities for dispute resolution prior to the hearing. We therefore do not consider it necessary for any new powers of sanction to be created.

At present, failing to follow the statutory grievance procedures before submitting a claim to the tribunal will generally result in the claim being rejected at the pre-acceptance stage. If the statutory procedures are abolished, a claim could in theory be lodged before the employer knows there is a dispute. On the face of it, this would run contrary to the thrust of the Review. However, assuming the proposals for enhanced guidance and support proposed in the Review are implemented, an employee would not reach that stage without being fully apprised of the alternatives, actively encouraged to pursue them, and offered third party facilitation to do so. If prospective claimants have comprehensive information about the options, and this is backed up by the offer of conciliation / mediation in appropriate cases, we are confident that the great majority will pursue alternative channels before submitting ET1s.

*(See continuation on following page)*

**Comments on Question 6 (continued)**

Against this background, retaining the requirement to present a grievance, or introducing new measures to prevent or penalise claims being lodged without prior steps to resolve the dispute, is unlikely to result in any significant increase in pre-claim resolution, and may actually have an adverse impact on the effectiveness of voluntary methods of dispute resolution. There is widespread anecdotal evidence, for instance, that “statutory grievances” under the current Regulations are frequently no more than a token process that serves only to delay the inevitable claim. And, as we have said in our response to Question 4, third party conciliation / mediation seldom works in an atmosphere of coercion. In addition, as we say in our response to Question 10 below, it is essential that any new common channel for entering the ET system must not become, or be perceived to become, a “gatekeeper” that restricts access to justice by making it conditional on specific procedural steps. For all these reasons, we would not support any measure that automatically penalised a prospective claimant for failing to take advantage of the opportunities that would be available for voluntary dispute resolution prior to submitting an ET1.

Finally, we have considered the matter of “repeat offenders”. Vexatious serial claimants can be highly disruptive to the employers they target, but such individuals are rare and tribunals already have powers to deal with them. In addition, however, there is a small but persistent minority of employers who habitually refuse to engage with the present statutory conciliation process in cases that they are well aware they will lose - typically claims for small sums by way of unpaid wages or holiday pay. Some openly admit that this is a tactic to enable them to delay payment until the last possible moment. It is also not unknown to find representatives who habitually frustrate any attempt at resolution – often by simply failing to respond to attempts to contact them. It may be appropriate to give the tribunals the power to issue improvement notices as to the future conduct of parties or representatives who repeatedly display such behaviours.

## Question 7

If the statutory dispute resolution procedures were repealed, should the law relating to procedural fairness in unfair dismissal:

- revert to the pre-2004 position, or
- be reviewed in order to assess whether it should be restated entirely?

Revert  Review  (subject to comments below) Other  No view

### Comments

Workplace procedures do not exist simply for their own sake. Their function is to provide a framework that helps managers to make decisions that affect employees – whether in relation to dismissal or any other matter - in a transparent and consistent manner that accords with reasonable standards of fairness and natural justice. One of the adverse consequences of the 2002 Act is the way that Section 98A(2) has encouraged parties to disregard this fundamental purpose of workplace procedures in favour of a tick-box approach that focuses mechanistically on whether certain events took place in the course of reaching or challenging the decision. This has served only to create anomalies. In some cases employers are able to legitimise ill-founded decisions retrospectively, while in others employees can gain findings of unfair dismissal despite the decision-making process having been objectively reasonable.

As we explain in our answers to Questions 1, 2 & 3, much of the benefit from effective workplace procedures lies in the prevention of disputes; both by nipping problems in the bud and by enabling employees to have greater confidence that managers' decisions are fair and consistent. For the future, the law needs to strike a delicate balance between encouraging employers to adopt and comply with fair procedures and not penalising them disproportionately for "technical" errors in handling situations that lead to what in all other respects would be justifiable dismissals. As the 2002 Act and 2004 Regulations have shown all too well, that cannot readily be achieved by prescriptive legislation. A more effective approach (as we have suggested in our reply to Question 2 and elsewhere in this response) would be to emphasise the fundamental principles of natural justice and certain basic standards of fair practice through a revised Acas Code of Practice which tribunals are obliged to take into account; and then leave the tribunals sufficient discretion to enable them to weigh up all the evidence in reaching their decision in individual cases.

The Supplementary Review invited stakeholders to consider three options. There are pros and cons to each, and we do not wish to state a clear preference for any one of them.

The first option is to return to the pre-October 2004 approach, which was characterised in particular by the House of Lords' decision in *Polkey* in 1988. Applying *Polkey*, a tribunal could find a dismissal unfair if the employer had failed to comply with their own procedures, or with generally accepted standards of fair procedure as set out in the Acas Code of Practice. The issue of whether or not that failure had made a difference to the decision to dismiss only came into play when calculating the compensatory element of the award, which could be reduced by as much as 100% if the tribunal believed that it had made no difference.

Regardless of the extent and impact of any procedural irregularities, the employee could still receive in full any basic award to which they might otherwise be entitled, but the basic award could be reduced if the employee had contributed to his / her dismissal, or declined a reasonable offer of an alternative job with the same employer.

(See continuation on following page)

**Comments on Question 7 (continued)**

The *Polkey* approach had much in its favour. It embraced the principle that procedure is a key determinant of fairness, whilst giving tribunals a measure of flexibility that provided scope to reflect the extent of both procedural and substantive unfairness (without obliging tribunals to split hairs over which was which) in compensation awards. However, some parties felt that this flexibility did not always make for consistent outcomes, and employers resented the potential for full and potentially substantial basic awards to be payable even where any shortcomings in procedure had had little effect on the decision to dismiss.

Option two is to repeal section 98A, but provide explicitly in law for alternative findings reflecting the balance of procedural and substantive unfairness in the dismissal. This is a novel approach without direct precedent in the statute concerning unfair dismissal. At first sight it has certain attractions, but in seeking to codify formally what was a matter of discretion and judgement for tribunals under *Polkey*, it runs the risk of imposing a rigid and over-simplified interpretation of procedural unfairness. In reality, the term “procedural unfairness” can encompass a wide range of shortcomings in the handling of a dismissal, ranging from a failure to comply precisely with the detailed provisions of an employer’s own internal procedures (for instance, the timetable for notifying the outcome of a hearing) through to fundamental failings in the application of natural justice (for instance, failing to investigate an alleged incident before deciding to dismiss). To brigade all of those into a single category with a specified penalty would be inequitable; whereas any statutory framework constructed to enable tribunals to reflect the range of impact that different degrees and types of procedural unfairness could tend to become little more than a complex and perhaps imperfect statutory articulation of the principles applied in *Polkey*. It must also be said that at the margins there is scope for ambiguity between what might constitute procedural or substantive unfairness. Attempts to define this boundary spawned a body of sometimes ambiguous case law in the pre-*Polkey* days. Given that the proposed differences in compensation would offer an incentive for challenging a finding of purely procedural unfairness, tribunals could expect to face protracted and increasingly esoteric legal debates about what actions fall under which headings, and in the short to medium term appeals may increase until new case law is established.

The final option advanced in the Supplementary Review is to return to the “no difference” rule emanating from *British Labour Pump v Byrne*, which constituted the leading case law on procedural fairness until the House of Lords’ decision on *Polkey* in 1988. On the face of it, this could offer a measure of clarity and consistency that might not be so readily achieved by other approaches, and would answer the concerns of firms, particularly SMEs – who feel aggrieved that minor shortcomings in procedures can lead to significant awards even where they had no effect on the decision to dismiss. However, it has the potential to import both the speculation inherent in *Polkey* (about what difference a certain action would have made) and the debates on interpretation (about whether a particular action or inaction created substantive or procedural unfairness) that are likely to arise under Option 2.

The most serious danger in reinstating the “no difference” approach, however, is that it could send a signal that unscrupulous employers need not observe the basic standards of fairness that the new Code of Practice would be setting out to encourage, as long as they were able to justify their actions after the event. That appears to run contrary to the entire thrust of unfair dismissal legislation; would undermine the ability of employees to enforce this basic right; and is likely to reduce the effectiveness of other measures put forward in the Review.

**Question 8**

Should the Government invite the CBI, TUC and other representative organisations to produce guidelines aimed at encouraging and promoting early resolution?

Yes  (subject to comments below)

No

No view

**Comments**

As noted in our reply to Question 3, it is important to distinguish between statutory guidelines and non-statutory guidance in this context.

We consider that the statutory guidelines should take the form of one or more Acas Code(s) of Practice, updated and expanded as necessary. The legal status of Acas Codes of Practice enables them to serve as the yardstick of fair and effective workplace procedures for tribunals and parties alike. And, having been jointly agreed by stakeholders on the Acas Council and endorsed by Parliament, our Codes of Practice also publicly demonstrate “buy-in” from Government and key interests in the employment relations community to the principles they set out.

Statutory guidelines are best kept comparatively brief, and should focus on the common principles and practices that ought to be applied generally rather than seeking to address in detail the plethora of different situations that give rise to workplace problems. The Code(s) of Practice should therefore be complemented by a comprehensive body of non-statutory guidance and information to assist and encourage employers, employees, and representatives to understand and apply the widest possible range of techniques and processes to avoid or resolve disputes in the workplace. Acas can play an important part in providing this. We already produce a highly respected series of non-statutory publications containing relevant guidance material (see references in the Appendix). These publications are agreed with the Acas Council, and therefore enjoy joint approval from the social partners as with the Code of Practice. In addition, the Acas Website contains a very substantial body of information and advice on good workplace practice, including self-help guides and examples of procedures and documentation. All of this material can and will be updated and enhanced to reflect whatever changes emerge from the Review.

Representative organisations will no doubt also wish to produce guidance for their members. This is to be welcomed and should be encouraged. However, it is important for two reasons that the advice from different sources projects a consistent message.

Firstly, it would be confusing to users of the system if different organisations produce conflicting guidance on what is ostensibly the same subject. As far as possible there should be common understanding of the practices to be followed in the workplace. The revised Code(s) of Practice to which we refer above and in our reply to Question 3 will provide a sound foundation for that.

*(See continuation on following page)*

**Comments on Question 8 (continued)**

Second, and equally important, it must be recognised that the success of the new dispute resolution system will hinge on the extent to which it stimulates real changes in behaviour in individual workplaces. This in turn depends on winning “hearts and minds” to the principles concerned. Representative organisations can play a vital role in this context by encouraging members to follow fair practice, pursue early resolution of problems, and embrace alternatives to litigation. Ideally this will extend to providing advice, training and support to assist their members in making the system work. A clear common message will be important in this context, and if groups of organisations were able to come together to produce guidance and training material jointly there would be benefits in terms of consistency and cost effectiveness – not to mention a valuable re-emphasis of the broad consensus in favour of effective dispute resolution. Acas is uniquely placed to broker initiatives to develop such material and would welcome the opportunity to explore the potential for doing so, should stakeholders wish to proceed in that direction.

**Question 9**

Should the Government develop a new advice service with the structure and functions suggested?

Yes  (subject to comments below)

No

No view

**Comments**

The provision of advice and information that employers, employees and intermediaries can trust to be accurate and impartial is an essential measure to help them avoid workplace problems and encourage them to make maximum use of alternatives to litigation in resolving those disputes that still arise. The advice service must be well publicised and appropriately resourced to ensure comprehensive, up-to-date expert content is readily accessible to all. Advice and information, whether provided via telephone, web-based sources or printed material must be consistent and closely integrated; and the advice service must link seamlessly with the provision of conciliation / mediation. The aim must be to offer all users a common source to access the support they need to deal with workplace problems and disputes. However, this is emphatically not a “one size fits all” service. It must be flexible and sensitive to meet the needs of users from all parts of the employment relations spectrum in an appropriate way - no matter whether that is for a simple item of factual information or for a substantial third party intervention to assist in resolving a particularly intractable dispute.

*(See continuation on following page)*

**Comments on Question 9 (continued)**

The present Acas Helpline and Acas Website provide a highly effective and well established foundation from which this service should be developed. The Helpline answered almost 900,000 calls in 2006/07, with usage balanced between employers, employees, and intermediaries representing the interests of one or other type of party. Among its many other benefits, the Helpline already assists a substantial number of employers to identify and avoid actions that might lead to tribunal claims, and provides employees with independent guidance to enable them to reach informed judgements on the options for responding to workplace problems. In many cases this results in employers modifying their workplace procedures or employees deciding against taking the tribunal route. For example, our latest user survey shows that around a quarter of employee-side callers had been considering making a claim, but three in 10 of them decided not to go ahead following their contact with the Helpline. The survey also explored the same issues from the employers' perspective. Employers were asked whether their calls had been made in response to concerns that employee(s) were considering making an ET claim. Eleven per cent said that this was the case. An indication of the impact of the advice given to employers is that although 21% of these employers reported that their employees had subsequently gone on to make a claim, over twice as many - 46% - said that the employees had decided against making a claim<sup>vii</sup>.

We are conscious that the positioning of the new advice service will need to take account of the "Varney" agenda to rationalise the points of contact through which citizens and businesses access Government-funded services. However, the highly specialised nature of the expert content that this service will require to deliver sits uneasily with the emerging Varney model, as does the need for it to be a single common service available equally to employers, employees and intermediaries alike. The effectiveness of the advice service will depend on establishing and maintaining credibility with customers from all parts of the employment relations spectrum. In achieving that, it will be essential to make best possible use of the Acas brand - in particular the reputation that Acas has earned for the impartiality and expertise of our Helpline staff, and the clarity and relevance of our Website content. The Appendix to this response gives detailed information on the strength of the Acas brand in this context. Independent research on customers' experiences of Acas advisory services and the reasons why Acas is used also provides strong support for Acas' role and shows how Acas is equally (and possibly uniquely) valued by both employers and employees. Acas advisory services, including the Helpline, consistently achieve over 90% client satisfaction, and the independence of Acas advice is one of the main reasons for its use.<sup>viii</sup>

**Question 10**

Should the Government redesign the employment tribunal application process, so that potential claimants access the system through a new advice service, and receive advice on alternatives when doing so?

Yes  (subject to comments below)

No

No view

**Comments**

We entirely support the principle that anyone contemplating a tribunal claim should be provided with adequate information on the potential costs, consequences, and options available to them; and that they should be encouraged to consider – and, if they wish, be supported in pursuing - alternative ways of addressing the problem before embarking on the tribunal route.

It is nevertheless critical to stress that the proposed advice service will lose all credibility and effectiveness if its primary function becomes, or is perceived to become, that of a gatekeeper to the tribunal process. For employers and employees alike it must offer an independent source of a broad range of information to equip them to make informed decisions according to their situation. In addition, it must be delivered with sensitivity to maintain strict impartiality and strike a proper balance between apprising users of the options to resolve an issue without the need for judicial determination; making them aware of the potential costs and consequences of litigation; and ensuring they know their statutory rights and how to enforce them.

Research shows that many employees would welcome such a service - SETA '03 found that 26% of claimants, (33% of those without a representative) would have liked advice in handling their claim<sup>ix</sup>. In addition, there is evidence that improving access to advice and mediation at an early stage can be an effective way to avoid and resolve disputes. In 2003/04, Acas took forward the recommendations made by the Employment Tribunal and Better Regulations Taskforces to pilot employment law advice visits (ELVs) free of charge to businesses with less than 50 employees. A free mediation service was also offered under the same pilot. Around a third of the employers who asked for ELVs during the pilot sought help with a dispute concerning an individual. The remainder wanted assistance in developing or implementing a procedure, or help on interpreting the law. Of those experiencing problems with individual employees, the vast majority confirmed that the advice given had helped stop the situation escalating and prevented an ET<sup>x</sup>.

Much will depend on the detailed design of the new process, and we would welcome the chance to work with DTI colleagues and other stakeholders to develop that. For instance, the application process will have to interact constructively with the time limits for submitting claims. People often only enquire about their rights several weeks after the event. This can leave insufficient time to pursue alternative means of resolution, and could encourage an unscrupulous employer to spin the process out in the hope that the employee may overlook the deadline - indeed Acas research on the impact of the 2003 Employment Equality Regulations has found that claims being out of time is a key defence used by employers in cases under those Regulations<sup>xi</sup>.

*(See continuation on following page)*

**Comments on Question 10 (continued)**

In certain circumstances the current Dispute Resolution Regs allow for the time limits to be extended to allow for internal procedures to be completed, and some analogous provision ought to be built into the new process. This needs to be flexible enough to cater for the possibility that both internal procedures and third party conciliation might be pursued and may need time to bear fruit; but on the other hand to avoid unnecessary delays it should not be entirely open-ended.

The application process will also need to find a way to cater for large scale multiple claims without swamping the advice service, and in general it should be designed to minimise any administrative costs and avoid diverting too much of the time of skilled and knowledgeable advice service staff into clerical tasks associated with recording claim details.

Para 3.3 of the consultation document raises the issue of how to ensure that claimants whose representatives contact the advice service on their behalf are still encouraged to consider alternative channels for resolving the problem. We recognise that this could in theory present a barrier to effective dispute resolution, but we do not believe it will have that effect in practice. In our experience most representatives prefer to resolve disputes rather than proceed to hearing, and represented cases currently have a higher propensity to be settled or withdrawn than those involving unrepresented parties. So saying, represented cases also have a tendency to be resolved late in the day - indeed our evidence suggests that the gap in case duration between represented cases and cases as a whole has increased<sup>xii</sup> - and there may be scope to encourage representatives to adopt a more speedy approach. Ultimately, the provisions to which we refer in our response to Questions 4, 5 & 6 would enable the tribunal to deal directly with a representative who unreasonably fails to try to resolve the matter.

## Question 11

Should there be a new, swift approach for dealing with straightforward claims without the need for employment tribunal hearings?

Yes  (subject to comments below)    No     No view

### Comments

With some concerns over the categorisation of the cases in question and the process to be employed, we support this proposal.

Cases in certain jurisdictions tend to exhibit characteristics that distinguish them in broad terms from those concerning most other employment rights. The type of claims in question include many of those for breach of contract, failure to pay wages / unauthorised deductions, failure to pay a redundancy payment, failure to allow a worker to take or to be paid for statutory annual leave entitlement under the Working Time Regulations, and claims under the National Minimum Wage legislation. Cases in this group generally revolve around sums that can be calculated arithmetically by reference to contractual terms or statutory rules, and do not require tribunals to make judgements about uncertain future losses or intangibles such as injury to feelings. In addition, they typically hinge on legal or contractual entitlements that apply in specific circumstances, rather than requiring a test of reasonableness or an in-depth interpretation of the motives or actions of the parties.

All other things being equal, the legal and factual issues in cases under these jurisdictions tend to be *relatively* straightforward, and thus the cases concerned may generally be suited to a somewhat simplified determination process. The current Regulations recognise this by placing these jurisdictions in the “short period” category, of which they comprise the great majority.

Nevertheless, it would be misleading to describe all cases concerning monetary disputes, or every claim in the jurisdictions mentioned above, as “straightforward”. Such cases also tend to share other characteristics which can create complications of their own. For instance, they are slightly more liable than other types of case to present as multiple claims, and appear to be especially prone to raising interlocutory issues such as whether the claimant was a “worker” within the meaning of the legislation. It is frequently the case that two or more of the jurisdictions concerned appear in combination with one another in a single claim. The issues in question are often found to affect the most vulnerable groups of employees, especially the low paid and migrant workers from the “A8” recent EU accession countries. Cases in these jurisdictions are also more than twice as likely as the norm (over 10% compared with less than 5%) to be brought against employers who are insolvent or have ceased trading, which makes conciliation effectively impossible.

The Review (para 3.24) suggests two options for a simplified model: a streamlined tribunal process involving short hearings by a Chairman sitting alone; or the introduction of “compliance officers” who would issue enforcement orders after a desk-based investigation.

The “streamlined tribunal” approach would be preferable – among other things because it would be capable of a swifter and more flexible response to the myriad of atypical situations that can arise in these cases.

*(See continuation on following page)*

**Comments on Question 11 (continued)**

There is nevertheless merit in considering the scope to allow for a form of “administrative decision” in one set of circumstances. In our experience, cases where the employer is insolvent are often only lodged because without a tribunal determination the claimant cannot receive certain statutory compensation from the Redundancy Fund. A mechanism that entitled a suitably qualified official, perhaps from the Redundancy Payments Office, to give a determination that would satisfy this requirement could speed up payment to the ex-employees concerned and remove thousands of cases from the tribunal system. Providing a fallback right to challenge such administrative decisions in the tribunal would ensure this causes no detriment to the rights of the individuals in question.

**Question 12**

Should additional Acas dispute resolution services be made available to the parties in potential tribunal claims, in the period before a claim is made?

Yes       No       No view

**Comments**

We fully endorse the approach proposed in paras 3.6 & 3.7 of the consultation document, and would welcome the opportunity to enhance the extent to which we can offer pre-claim conciliation / mediation.

As noted in para 3.8, Acas already has a statutory duty to provide conciliation in some circumstances where matters could become the subject of tribunal proceedings but no claim has yet been submitted. With the substantial, but atypical, exception of current large-scale conciliation exercises on potential claims for equal pay from local authority employees, this facility is not at present widely used or actively promoted. That is partly because of resource constraints and partly due to concerns over the risk of stimulating “latent demand” by way of requests for conciliation / mediation on matters that would not in the end have led to tribunal applications. However, the proposed new application process to which Question 10 refers has the potential to minimise (although perhaps not entirely eliminate) the effect of latent demand and we are confident that the investment of resources necessary to expand the pre-claim conciliation facility would yield significantly reduced costs for parties and net savings for the public purse in the long term.

Research evidence demonstrates a range of benefits from Acas interventions. Acas involvement has been found to have a positive impact on the psychological well-being of parties, especially those acting without professional help. In many cases the intervention of an Acas officer is thought to have influenced the desire of one or both parties to settle, by providing information which affected their assessment of the case and the value of settlement. In others, Acas appears to have affected the parties’ ability to settle, by providing a medium for communication and a mechanism for formalising a settlement as legally binding<sup>xiii</sup>

*(See continuation on following page)*

**Comments on Question 12 (continued)**

In addition, several sources show the demands for and benefits of *early* Acas intervention. The Lewis and Legard study indicated that representatives would welcome an extension of the involvement of Acas in tribunal cases perhaps to become involved in individual disputes before a tribunal application was made. Similar findings are emerging in new qualitative research of unrepresented claimants and unrepresented employers in race discrimination claims. This has found that the parties, particularly claimants, would like Acas to make earlier interventions. Recurring reference is made by parties to a need for intervention before any approach is made to an Employment Tribunal, on the basis that this intervention would improve people's awareness, at an early stage, of what is involved in making a claim; stop disputes escalating; and increase the scope for early settlement<sup>xiv</sup>.

We do not have any research currently available on the impact of Acas' Non-ET1 role. However, a study evaluating the impact of the timing of contact with claimants involved in Unfair Dismissal claims found that earlier intervention of Acas conciliation (after the ET1 was received rather than waiting until the ET3 was received) made conciliation more effective in terms of speeding up the resolution of the case and bringing parties closer towards resolving the case<sup>xv</sup>. In addition, the evaluation of the 2003 mediation pilot project, illustrated the potential benefits of Acas intervention prior to any submission of an ET claim. These included positive impact on early dispute resolution; savings on management time and an improved climate for future dispute resolution<sup>xvi</sup>.

There is potential for further benefits if the current statutory duty were to be extended. At present, in order to trigger the statutory duty it is necessary for the employee to have alleged that "*action has been taken in respect of which proceedings could be brought by him before an Employment Tribunal*" (Employment Tribunals Act 1996, S18[3]). In reality the best chance of resolving many relationship-based workplace problems with the minimum of adverse impact comes before matters have reached the point where a tribunal claim is contemplated, or even before the parties have started to think about the issue in terms of legal rights or potential claims. However, the current statutory provision requires us to bring the prospect of tribunal proceedings to the fore in discussion with parties who are looking for help to resolve a problem at an early stage. Furthermore, unless parties opt to delay resolution until a potential claim is alleged, the only form of support that can be provided prior to that is by way of non-statutory mediation services, which not only must be charged for, but also does not offer virtual finality in debarring future claims on the matters concerned. This perverse disincentive to early dispute resolution would be eliminated if the statutory duty was extended to a limited degree to encompass situations where a workplace issue has arisen which, if not resolved, has a reasonable prospect of forming the basis of subsequent tribunal proceedings.

### Question 13

If it is necessary to target these new services, should the Government set criteria to guide Acas to prioritise particular types of dispute?

Yes  (subject to comments below)

No

No view

#### Comments

We welcome the provision of criteria that indicate the priorities shared by Government and other stakeholders. It will nevertheless be imperative to ensure that the system is funded to maintain a “fit for purpose” conciliation / mediation service across the full range of jurisdictions and the entire client base.

In any discussion of prioritisation, it is important to stress that conciliation as currently practiced is far from being a homogeneous process. The attitudes and awareness levels of different parties, the presence or otherwise of representatives (and the extent of different representatives’ expertise), and the varying background circumstances in different types of claim make a wide range of approaches appropriate, some of them more resource-intensive than others. In addition, the benefits of conciliator intervention may be greater at some stages in the life of a claim than others. Conciliators constantly prioritise their time and how they use it so as to be as effective as possible in meeting the needs of a diverse set of clients in the numerous claims for which they may be responsible at any one time. They must balance the fact that every claim is vitally important to the parties concerned, with consideration of the relative impact of resolving disputes whose potential costs for parties and the taxpayer may differ greatly.

A somewhat more formal type of prioritisation is already imposed by Acas’ Service Level Agreement (SLA) with DTI, which gauges the success of conciliation in terms of the proportion of hearing days saved (PHDS) in cases settled through Acas or in which customer feedback indicates that a decision to withdraw has been influenced by dialogue with the conciliator. The nominal PHDS value of cases in each category is based on historical data on hearing durations from the Employment Tribunals Service database, and is highest for “open period” cases (almost all involving claims of discrimination or equal pay) and lowest for short period cases (mainly concerning unpaid wages, holiday pay breach of contract, or redundancy pay). This prioritisation was, for instance, a key factor informing Acas’ decision in 2005 to adopt differential service standards between the categories of case defined by the 2004 Regulations, and has also guided the development of short term measures to focus attention on open period cases during times of resource shortage over the past year.

It would be extremely unhelpful if such priorities were enshrined in statute. Among other things, this might risk undermining the credibility of Acas’ impartial approach – perhaps leading parties in “high priority” groups to suspect that they were liable to be put under duress to settle; and conversely giving parties in “low priority” groups the impression that their cases might be neglected. The inclusion of carefully structured Key Performance Indicators in Acas’ SLA with its sponsoring Department serves to signal stakeholders’ legitimate priorities without prompting such concerns, and offers a flexible framework that can respond to changing circumstances. The assurance of both accountability and transparency can be provided by recording outcomes against the relevant KPIs in the Acas Annual Report.

**Question 14**

If the new services are to be targeted, then in the current circumstances, would it be appropriate for the Government to guide Acas to prioritise the following types of dispute:

- those likely to occupy the most tribunal time and resources if they proceed to a hearing, e.g. discrimination and unfair dismissal cases;
- those where the potential claimant is still employed; and
- those where the employer is a small business with fewer than 250 employees.

Yes  (subject to comments below)

No

No view

**Comments**

We appreciate the logic behind the criteria proposed, and can see no grounds in principle to suggest they are inappropriate.

We believe it would also be reasonable to add a number of other priority categories, such as:

- multiple claims (see comments in relation to Questions 23 & 24)
- cases involving unrepresented parties on either or both sides
- cases where the claimant is a member of a particularly vulnerable group of workers

Between them, however, these categories account for the great majority of claims. For instance, one claim in four concerns some form of discrimination; one in five is for unfair dismissal; a quarter of all claims are lodged before the employment relationship has terminated; and three out of every five claims come from employees of SMEs. Almost all cases would fit into one or other priority group.

It may therefore be more helpful to consider the list in question 14 (supplemented by the additional categories we have identified above) as the basis for some form of hierarchy of priority groups. Alternatively, priority should perhaps be given to cases which display more than one of the characteristics concerned. SETA 03 provides evidence of the numbers of cases falling in to the first two categories and illustrates overlaps between the groups, for example showing that discrimination claimants are amongst the most likely to still be in employment at the point at which a claim is submitted<sup>xvii</sup>.

It is also important to provide for a degree of flexibility and avoid rigid categorisation that might prevent resources being deployed where they could be of greatest benefit. For example, at an early pre-claim stage the full range of jurisdictions that might eventually be at issue will not always be apparent, even though it may already be evident that the underlying problem is causing significant damage.

**Question 15**

Should the fixed conciliation periods which place time limits on Acas' duty to conciliate employment tribunal claims be removed?

Yes No No view **Comments**

We concur with the analysis set out in paras 3.49 and 3.50 of the Review, and are firmly of the view that statutory fixed conciliation periods should be abolished.

Clients almost universally dislike the bureaucratic constraints imposed by fixed conciliation periods. The ostensible aim was to prompt parties and representatives to resolve cases at an earlier stage; but although there is some evidence of a marginal shift in this direction among unrepresented parties, few if any regular representatives have shown any appetite for changing their practices. Indeed, as noted in our response to Question 10, it appears that the gap in case duration between represented cases and cases as a whole has increased rather than fallen since the fixed conciliation periods were introduced.

In addition there have been other negative consequences. Analysis conducted by Acas comparing Acas IC case data for two comparable six month periods before and after the introduction of fixed period the periods indicates that their introduction has led to a decline in the proportion of claims settled through Acas. There is evidence that opportunities for resolving cases are frequently lost because parties were unable to access the service after the fixed period had expired. In particular, our analysis suggests that cases in the "short period" category (which mostly concerns the sort of monetary claims discussed at question 11 above) are now considerably less likely to be resolved prior to a Tribunal hearing<sup>xviii</sup>.

As with the statutory dispute resolution procedures, the existence of fixed conciliation periods leads to an increased and ultimately damaging focus on the minutiae of process including timescales. One consequence is that the flow of the conciliation dialogue and the critical exploration of substantive issues and problem solving are at best hampered and at worse obstructed by discussion of timescales and deadlines.

Research conducted before the introduction of fixed conciliation periods shows the complexity of the relationship between conciliation activity, hearing dates and cases settlement. There are good grounds to believe that client satisfaction is associated with early and proactive conciliation, coupled with comparatively swift progress towards a hearing. This emphasises the importance of ensuring that the removal of fixed periods does not result in the later or less predictable hearing dates<sup>xix</sup>.

**Question 16**

Should the Government simplify employment tribunal forms?

Yes  (subject to comments below)    No     No view

**Comments**

There have been some benefits from the introduction of prescribed claim and response forms, chiefly in terms of getting important information out into the open at an earlier stage. However, the new forms are widely perceived to be daunting for unrepresented parties and those from vulnerable groups, especially where English is not their first language. For example, a new qualitative study of people involved in race discrimination claims has confirmed that there is a significant lack of understanding of key legal concepts among unrepresented parties – both claimants and employers<sup>xx</sup>. And even items that might seem comparatively straightforward to practitioners, such as the requirement for claimants to classify themselves as either workers or employees, are a recurring source of confusion.

Some of the complexities would be eliminated if the statutory procedures were to be abolished, but there may be further scope to structure the prescribed forms in a more user-friendly format, and either to rephrase some items or provide more explicit guidance for their completion. It may also be worth considering the introduction of more than one format for claim forms, so that a much-simplified version could be used for the “monetary” types of claim discussed at Question 11 with a slightly more expansive version covering other jurisdictions.

Any review of the application form should also take account of the value of collecting certain standard items of demographic information to enable effective analysis in future. Without such information the capacity for research to provide sound evidence to inform policy-making could be jeopardised.

**Question 17**

Should claimants be asked to provide an estimate or statement of loss when making a claim?

Yes  (in certain circumstances - see comments below)    No     No view

**Comments**

There are persuasive arguments for seeking an immediate quantification of certain types of claim; mainly those entailing breach of contract or failure to pay wages, redundancy payments, holiday pay or NMW. As the consultation document suggests (para 4.3) this could facilitate speedy resolution in the right circumstances, and for claims under the jurisdictions mentioned above we would support such a requirement.

*(See continuation on following page)*

**Comments on Question 17 (continued)**

However for those types of claim where awards are less readily calculated, the benefits of imposing this requirement are less clear and there are some possible adverse impacts. In particular, when seeking to resolve claims that do not centre purely on a specific monetary entitlement – especially discrimination cases that arise while the claimant is still in employment - it can be unhelpful to focus parties' minds on financial outcomes at an early stage. Often it is more constructive to encourage them to think of solving the problem rather than putting a price on the claim.

Among other things, a requirement for quantification might also limit the capacity to simplify claim forms. It could also present an unnecessary hurdle to unrepresented parties and claimants from vulnerable groups - research consistently shows that unrepresented claimants in particular are often looking for Acas to provide guidance on the merits of their case and the likely outcome, suggesting that they may find it difficult to do this themselves. Requiring full quantification of a claim may lead to further pressure on Acas staff to provide this guidance, much of which is not in fact appropriate to the conciliator's role<sup>xxi</sup>. In addition, it might increase "upfront" costs (and thereby the investment parties make in pursuing rather than resolving the claim) by leading parties to seek legal advice at an earlier stage. At best, it may often just yield speculative estimates that do little to help parties gauge the true value of the claim.

We would not therefore favour imposing this requirement across the full range of jurisdictions, although it should of course remain within a Chairman's discretion to seek relevant information at a comparatively early stage if he or she thinks fit.

**Question 18**

Would simplifying the current time limits regime through harmonisation be a helpful additional reform, whether or not the statutory dispute resolution procedures are repealed?

Yes

No

No view

**Comments**

We appreciate that the variation between the time limits that apply to different jurisdictions creates a theoretical complication that may contribute in a small way to the sense of "legalism" that makes employment rights issues less easily understood by non-specialists, and that standardisation would be consistent with the broader employment law simplification agenda. Nevertheless, we are not aware of any widespread confusion arising from this difference, or of any groundswell of demand for harmonisation. Whilst standardising the time limits might appear tidier, it is difficult to identify any tangible benefit that would flow from doing so.

*(See continuation on following page)*

**Comments on Question 18 (continued)**

The three month limit that currently applies to almost all jurisdictions is generally sufficient to enable employees to pursue internal grievances or appeals and, if that fails, to obtain advice and compose an application. In some cases - particularly those involving large employers with multi-stage procedures - we find claims being lodged as a precautionary measure to avoid over-running the time limit while attempts proceed to resolve the matter internally; but such claims are in the minority and would not warrant a general increase in time limits. On the other hand there is a sound case for the longer time limit that applies to the equal pay and redundancy payments jurisdictions at present. Both types of claim commonly emerge in the form of particularly large multiples and almost inevitably involve issues on which internal procedures are slow in yielding resolution.

On balance, therefore, we do not support any change to the present differential time limits.

On a slightly different issue (as mentioned in our response to Question 10) if the statutory procedures are repealed it will be important to introduce new arrangements that ensure sufficient time is provided for pre-claim dispute resolution. One way to achieve that might be to redefine the points at which the “clock” starts and stops for determining whether the time limit has been met. For instance, the three-month limit might be regarded as commencing not with the “effective date of termination” but with the (probably later) date on which internal procedures, where invoked, are exhausted. Alternatively, it may be desirable to allow the “clock” to stop – at least for a finite extra period – on the date at which the claimant first contacted the advice service described in Questions 9 & 10 so that breathing space is made available for pre-claim dispute resolution. Neither of these approaches is without some potential drawbacks, but if opportunities for dispute resolution are not to be squeezed out in last minute claims, this issue must be satisfactorily addressed.

**Question 19**

If so, should the harmonised limit be three months, six months or another time period?

3 months

6 months

Other

No view

**Comments**

In view of our response to Question 18 above, this question is not applicable.

### Question 20

Would total or partial harmonisation of the grounds for extension to the extent possible subject to legal constraints, be a helpful additional reform?

Yes  (subject to comments below)    No     No view

#### Comments

As with the issues discussed in question 18, we do not detect widespread confusion or concern regarding this apparent inconsistency; but we appreciate that harmonisation would chime with the broader employment law simplification agenda and reduce the potential complexity for parties. In principle we have no objection to this proposal.

### Question 21

If so, what should the grounds for extension be in respect of the relevant jurisdictions?

#### Comments

The present “reasonably practicable” criterion is well established in the jurisdictions to which it applies, and offers a strong incentive to parties to expedite claims and responses. In cases where compliance with time limits emerges as an issue, any complaints tend not to be about the nature of this criterion *per se* but - more often from claimants – by way of perceptions that it has not been applied consistently to both sides. We do not say that such views are well-founded, but it is not uncommon to encounter them. The wider discretion that would be offered to Chairmen if the “just and equitable” criterion was adopted across the board might help to eliminate that perception, and could improve access to justice without adding significantly to the volume of claims.

### Question 22

Do you have views on specific ways in which employment tribunal procedures and case management could be improved?

#### Comments

The 2004 Rules of Procedure created a complex and resource-intensive pre-acceptance procedure that is a major source of confusion for parties and hampers effective dispute resolution. The elimination of that cumbersome process, which would not need to exist if the statutory procedures were repealed, would be particularly welcome.

It will be important to ensure that every opportunity is taken to encourage parties to attempt to resolve their differences without a costly judicial determination process. We have commented on some of the ways in which this might be incentivised in our response to question 6.

*(See continuation on following page)*

**Comments on Question 22 (continued)**

From a conciliation / mediation perspective, early and pro-active case management can be helpful, particularly if it quickly resolves preliminary questions such as employment status. In addition, as we mentioned in our response to question 5, Case Management Discussions provide a context in which tribunals can give parties a positive steer to reconsider alternative forms of resolution, and allows claims to be stayed / sisted to provide time for conciliation where the parties can be persuaded to follow that route.

We have no view as to whether or not the introduction of legal officers might prove helpful. Whilst they could assist with some routine and administrative tasks, it is also possible some of these could be delegated to suitably-trained administrative support staff. We are not convinced, however, that legal officers could cost-effectively be used to provide early neutral evaluation unless they were sufficiently senior and very experienced, in which case one might wonder how they would differ from Chairs. Nevertheless, we do believe there to be unexploited scope for the issue of Practice Directions, as has been the case in the EAT, to ensure greater consistency in the way cases are managed.

**Question 23**

Would it be helpful to change the case management powers available to employment tribunals in respect of multiple-claimant claims?

Yes  (subject to comments below)    No     No view

**Comments**

In responding to questions 23 and 24, it is helpful to differentiate multiple claims brought in support of a collective dispute (i.e., those represented by a recognised trade union, generally in regard to claimants who continue to be employed by the respondent) from other multiple claims.

In the former situation, there is much to be said, from an employment relations perspective, for doing everything possible to encourage and enable the disputants to resolve the collective dispute directly or with third party assistance, with determination by the tribunal very much a last resort.

Where that does not prove possible, or where there is no “collective” dimension to the multiple claim, it may be desirable to extend tribunals’ management powers to formally identify appropriate test cases, particularly where the parties are unable or unwilling to do so; and for the outcome of those test cases to be binding on other related cases.

**Question 24**

Do employment tribunals provide the most appropriate way of resolving multiple-claimant claims, or could other mechanisms better serve the interests of all the parties involved?

**Comments**

Again, it is useful to make the distinction described in our response to question 23 above.

Individual employment rights on matters as diverse as holiday entitlement and equal pay are often caught up in the subject matter of collective negotiations. As a result, collective disputes are increasingly pursued via large scale multiple claims to the tribunals. This is seldom a satisfactory way of conducting collective employment relations. Litigation tends to polarise views and entrench positions on the immediate issue, and can damage relationships in the long term. Tribunals are obliged to adhere to legal criteria and precedents that often do not fully reflect workplace realities, and decisions on the legal issues concerned rarely do anything to address the wider underlying problems that have given rise to the dispute in the first place. None of this serves the best interests of businesses or employees - such matters ought to be determined through internal bargaining processes, where necessary with third party support in the form of conciliation or arbitration.

On the other hand, existing tribunal practices appear from our perspective to offer an appropriate and effective means of determining other multiple claims, such as those brought by individuals no longer employed by the respondent and unrepresented by a trade union.

**Question 25**

Are the existing powers of employment tribunals sufficient to deal with weak and vexatious claims?

Yes       No       No view

**Comments**

In considering this question it is helpful to look separately at weak and vexatious cases.

Inevitably, some claims are weaker than others, but in our experience very few appear entirely unarguable from the outset. Nevertheless, many parties - employers and employees alike – start out with unrealistic perceptions as to the strength of their case. Conciliation provides them with an invaluable reality check, and the great majority of weak cases are withdrawn as a result.

The matter of whether a case is vexatious often lies in the eye of the beholder. What may seem like a vendetta by an employee or unreasonable intransigence by an employer is often simply a manifestation of a deep-seated sense of injustice concerning the events surrounding the claim. The level of emotional intensity that arises as a consequence of a claim is sometimes out of all proportion to its monetary value, and can be accompanied by a passionate desire to shame the other party or “clear one’s name” - often bearing little relationship to the legal issues on which the tribunal will base its decision.

*(See continuation on following page)*

**Comments on Question 25 (continued)**

Again, conciliation offers parties the opportunity to ventilate their feelings in a less destructive way, and given time conciliators can often encourage them to take a more dispassionate view of the issues and likely outcomes. As a result, once more very few such cases ever reach tribunal hearings.

That is not to say that everything possible should not be done to minimise the incidence of weak or vexatious claims and resolve them at the earliest possible point in the process. The proposed new application procedure discussed in Question 10 will ensure that all prospective claimants have the opportunity for a “sense check” at an earlier stage, and enhanced provision of early and effective dispute resolution makes it likely that the proportion of such cases that reach hearings will diminish further in future.

We do not consider it necessary for tribunals to be given new powers in this context.

**Question 26**

Do you have views on when chairs should sit alone to hear cases?

Yes

No

**Comments**

With a few exceptions that yield only a handful of cases, the current legislation largely confines the practice of Chairmen sitting alone to cases under jurisdictions that concern specific monetary claims or the interpretation of contractual terms. The majority of these fall into the “more straightforward” jurisdictions discussed in our response to question 11. This appears to reflect an appropriate balance between the need for a wider base of experience when tribunals are hearing cases where reasonableness in workplace practice is at issue, and the most cost effective use of resources in cases where such experience is less likely to add value in the decision making process.

We do not support any alteration to the status quo.

### Question 27

Do you have views on how best to structure employment tribunal panels and use lay members more efficiently?

Yes  No

#### Comments

Our response to question 26 is also relevant to this item.

Lay side members can add value to decision making in cases that entail an appreciation of the practical realities of day-to-day workplace employment relations - particularly claims of discrimination and those in jurisdictions where a test of reasonableness applies. More important, their presence is a significant factor in ensuring the confidence of users from all parts of the employment relations spectrum in the tribunal process. Both of these factors are also especially important in the case of "collective dispute" multiples as discussed in Questions 23 and 24.

Notwithstanding the need to pay due regard to economy, we therefore believe the current role of lay members should not be diminished.

### Question 28

Should the Government aim to promote employers' compliance with discrimination law through better advice and guidance, rather than by widening the powers of employment tribunals to make recommendations in discrimination cases?

Yes  (subject to comments below) No  No view

#### Comments

The short answer is both. Most employers will be receptive to well structured and well publicised advice and guidance. The current Acas Helpline and website provide invaluable practical support in this respect, and that is backed up by the wide range of training and in-company facilitation which Acas can offer both on specific equality and diversity issues and more widely in connection with improving organisational effectiveness through better workplace practices. The proposed new advice service can build on this, and such voluntary approaches ought to be the preferred way of promoting non-discriminatory behaviour.

However, experience shows that many successful discrimination claims reveal evidence of wider malaises that are not being addressed in the workplaces concerned. An extension of tribunals' powers along the lines proposed in the Strategy Unit report quoted in para 4.24 of the consultation document could offer an effective prompt to ensure that such matters are taken seriously and confronted by the minority of less proactive employers who fail to respond to the voluntary approach.

## **APPENDIX - The Acas brand: what it means to our customers and stakeholders and how we promote it**

### **Introduction**

Acas is an independent body mostly funded by the DTI. In addition to its traditional role of collective and individual conciliation, it provides employment relations training and advisory services. Its vision is to be Britain's champion for successful workplaces and a motivated workforce. Its mission is to improve organisations and working life through better employment relations.

Acas occupies a unique position in that – in addition to offering outstanding services to employers and employees – it is trusted by all sides in the employment world.

At the Trade and Industry Parliamentary select committee hearing in January 2006, the Chair commented of Acas that 'this is one of those rare occasions when you cannot get a cigarette paper between the views of the CBI and TUC'.

Evidence at that hearing from the CBI quoted a 95% satisfaction rating from its members for Acas' services.

### **The Acas brand and its inherent values**

The values customers attach to the Acas brand – and which are central to making it so successful – are:

- impartiality/fairness
- independence
- discretion
- trust
- excellence (based on 'real life' experience and expertise).

Because Acas is in a unique position of trust, it carries considerable influence with employers and employees. It has a reputation with customers based on a long and successful track record. The brand represents credibility, expertise and prestige.

### **Acas brand awareness in a growing market**

Acas has made outstanding progress in developing its profile and reaching a wider customer base. This was underlined most recently in the British Superbrands Council's 2007 B2B superbrands survey (published in *Sunday Telegraph*, 25 February 2007). Acas was placed 220<sup>th</sup> on the list, ahead of many blue chip multinationals. It was one of a very small handful of public sector organisations to make the top 500. The list is decided by an independent panel of top-flight marketing, business and brand-management professionals.

Rankings are based on three criteria:

- quality of products and services;
- reliability in terms of delivering consistently against standards; and
- distinction (awareness with audiences, differentiation from competitors, and unique personality and values).

The website received 2.6 million visits in 2006 – a traffic increase of over 50% in two years, while downloads doubled over the same period. In January 2007 alone, there were 280,000 visits. Acas also provides online training, for which it currently has 57,000 registered users.

Similarly, Acas' customer database is growing at a prolific rate – increasing from 56,000 in 2004 to over 400,000 customers in the current year (adding 50,000 new names following the age discrimination campaign alone). Calls to the helpline are set to top the million mark in 2006/07, while Acas distributed 485,000 hard copies of its guidance publications in 2006.

In 2006, media coverage of Acas increased by 500%. Its age discrimination awareness and advice PR campaign gained £860,000 of positive free publicity. Acas is increasing its public profile and awareness of the organisation has entered popular mainstream culture. For example, in May 2007 the soap opera 'Eastenders' made reference to Acas and its conciliation role.

### **Research-based evidence**

The 2004 Workplace Employment Relations Survey (WERS) (published in 2006) was sponsored by DTI and Acas. It is the definitive source of statistics and information about employment relations in the UK, canvassing a sample of 2,295 employers and 22,451 employees.

The survey revealed significant inroads for Acas and confirmed its growing reputation for excellence and customer awareness of its products and services.

Top-line findings:

- Acas rose from being fifth in 1998 to being the second most used source of employment relations advice by managers. Solicitors came top with 26%, with Acas second on 23%.
- Of those managers who used Acas: 67% used the help line; 55% the website; 35% advisory publications; and 11% training.
- 26% of managers in workplaces of 10 or more employees said they had used Acas in 2005, compared to 16% in 1998.
- 28% of private sector managers said they sought advice from Acas in 2004, compared to 17% in 1998.

In summer 2006 COI/IFF conducted tracking research for Acas to measure the progress it had made in reaching SME target audiences since conducting its 'Better World' PR campaign in April 2004. The post-campaign research showed an increase in awareness, which has steadily increased in the two years since.

The main conclusions were:

- use of Acas has increased significantly (up from 49% of respondents in 2004 to 63% in 2006)
- the helpline and website are the most commonly used services now and will be into the future
- a significant number of employers are likely to use Acas in the next two years.

## General findings

- 49% of respondents named Acas as the organisation that provides services that prevent problems in the workplace
- For information and assistance regarding employer-employee relations, 28% put Acas top, with solicitors in second place on 17% and industry/trade associations third on 13%.
- In terms of familiarity and favourability for employment relations services, Acas came top on both counts ahead of CIPD, legal firms, DTI, Business Link, IIP, CAB, and Chambers of Commerce.

## Perceptions of Acas

- For those SMEs who knew of Acas, 78% were favourable or very favourable, while only 2% were unfavourable.
- 88% saw Acas as professional, 86% as trusted, and 86% as impartial.
- 75% believed Acas keeps up with the times.
- Reasons for favourability were: past experience 40%; good advice 36%; good reputation 22%; and trusted 25%.

## Demand for services

Of those respondents who said they had used Acas:

- 59% had used the helpline
- 55% had used the website
- 50% had used Acas publications
- 14% had used Acas training services.

## Expertise

Acas came top among all respondents in terms of its perceived expertise for:

- equal opportunities 46%
- general employment law 45%
- discipline and grievance 66%
- workplace performance 17%.

## Future use of services

Of those who said they would be likely to use Acas services in future, the demand was as follows:

- 62% said website (40% in 2004)
- 54% said helpline (31% in 2004)
- 46% said publications (28% in 2004)
- 26% said training (13% in 2004).

## Quality of Acas services

### Helpline

The Acas helpline is a unique resource and is trusted by employers and employees for its impartiality and integrity. These are the unique brand values that other public sector organisations cannot match. The 2005 customer survey showed that 94% of users were either satisfied or very satisfied with the service.

More than four out of five callers surveyed said their queries were answered in full, while the same proportion confirmed that the advice given by Acas helped them to decide what action to take.

There is a high level of interactivity between the helpline and website. Together they constitute an effective and integrated information service, characterised by cross-referrals from one to the other.

### Website

Our website is popular with customers and use is growing steadily. Following audits and research in 2006 and 2007, we are conducting a major exercise to develop the quality of our content and target it more effectively at priority segments. The first phase is due for completion in May 2007, subject to developments in transformational government.

### Training

Acas provides a wide range of training courses and workshops to help managers improve workplace practice – in particular to help small firms get it right. In 2005/06 31,000 people attended Acas training days, with 97% saying they were either satisfied or very satisfied.

Follow-up research shows that 65% of attendees revised existing procedures and policies – or introduced new ones – as a result of attending an Acas course.

### Publications

In 2006 COI Publications conducted an audit of Acas' publications and gave it an unusually high rating in comparison to other public sector offerings. A number of recommendations were made and are currently being implemented to improve content further.

Acas is currently conducting customer research to determine effectiveness with key target groups. Qualitative evidence to date shows a very high approval rating. This will be qualified shortly by quantitative evidence.

### Direct marketing

The Acas quarterly newsletter goes out to over 350,000 customers (mainly SMEs and HR professionals). It provides information on the latest developments in employment relations, as well as products and services.



A survey conducted in January 2007 by Continental Research showed that:

- 88% of readers saw the content as useful, while 55% considered it essential
- 98% said the newsletter provided up to date information
- 96% said they felt more informed
- 94% said the advice was independent
- up to 37% said the resources the newsletter offers are not available elsewhere.

### **The future – raising brand awareness**

The research shows clearly Acas has a valuable brand that both employers and employees trust and respect. This is based on its unique position and reputation for integrity, backed by expert knowledge, experience and quality services.

## END NOTES: KEY RESEARCH EVIDENCE

<sup>i</sup> *Managing Conflict at Work*, CIPD 2007

<sup>ii</sup> Research evidence has shown that a minority of employees who experience problems at work will chose a formal approach to addressing their complaints and a very small proportion go on to make a ET claim. For instance, Casebourne et al 2006 found that while 42% of employees reported experiencing a problem at work in the past five years, one-quarter of these put their concerns in writing to their employer; and less than one in four took the matter to a formal meeting. An estimated 3% had brought an employment tribunal case against their employer as a result of the problem(s).

*Employment Rights at Work Survey of Employees 2005* J Casebourne et al,

<sup>iii</sup> In respect of the existing Acas Code of Practice, a survey with a sample of those who had ordered a copy of the Acas COP during 2002/3 (prior to the change) found a high degree of satisfaction with the publication.

48% rated the clarity of language in the COP as very good, and 51% as good.

89% said they found level of detail in the COP about right and 10% said they would welcome more detail

62% said it was very useful and 36% quite useful in providing the information they needed.

*Survey of Acas Readers, 2003 (internal only)*

<sup>iv</sup> The presence of discipline and grievance procedures is just the first step. Training parties in the use of procedures is critical and can be found to have far reaching benefits. For example in recent research with delegates who had attended Acas training on handling discipline and grievance at work, delegates reported that following the training:

- 94% felt their understanding of handling discipline and grievance matters had increased;
- 82% felt more able to prevent problems at work and 69% more able to deal effectively with discipline and grievance matters;
- 93% said that personally, they felt more confident in handling this area.( *Acas Training Services, 2005-6.*

*Evaluation Internal Report 0/06* )

In addition further evidence of the benefits of training in the area is shown in more detailed studies of Acas interventions. One example is the case study of Acas work with the food manufacturer Pataks which shows the positive impact on equality in the workplace of discipline and grievance training, cited in *Introduction to Human Resource Management*, Bloisi W.M.B, 2006

<sup>v</sup> Training representatives (both union and non-union) is by no means a given. One third reported receiving training the past 12 months and just one in seven (13%) cited training on grievance and disciplinary matters. 63% had received some training during their time as a representative though the coverage was significantly higher among union, compared to non union representatives, in larger workplaces and where a recognised union was present.

*Inside the Workplace* , Kersely et al, 2006

<sup>vi</sup> *Findings from the Survey of Employment Tribunal Applications 2003* Hayward, B. Peters M. et al, BMRB DTI Employment Relations Research Series No.33

<sup>vii</sup> Other analysis based on the 2007 helpline survey supports the argument that we are well placed to provide this service. In particular our analysis shows that the helpline already plays a role in helping callers to resolve issues without resorting to an employment tribunal claim. In the 12 months February 06 to January 07 871,361 calls were dealt with by the Acas telephone Helpline. The 2007 helpline survey indicates that 38% of these were from an employee or former employee, a quarter (23 per cent) of whom said that, prior to their call, they had been considering putting in a claim to the Employment Tribunal Service. Following their call, over a third of these (36 per cent) decided against this course of action. These respondents were asked how important the information received from the Helpline had been in helping them to reach this decision: 70 per cent said that the call was quite important or very important in this respect. This implies that 30 per cent of employees and former employees who had been thinking of making an Employment Tribunal claim decided against this as a result of their call to the helpline. Applying these figures to the total number of unique employee callers to the helpline implies that around 17,800 were dissuaded from submitting a claim. These figures should be offset by the number of claims submitted to an ET by employees who prior to ringing the Helpline had not considered making an ET claim (64%), but who did so following the information received from Acas (4%). This suggests that the net number of claims averted as a result of the information provided by Acas to employees in the year to January 2007 was 11,772.

Calculation notes:

- The Acas helpline dealt with 335,474 calls from employees and former employees in the year to January 2007
- An analysis of the number of times individuals had called the helpline indicates 76% of calls were from unique callers
- Taking account of this repeat call ratio, in the year to January 2007 the service received 255,913 employee/former employee callers. 23% of these said they had considered making a claim prior to calling the service (59,116) and of this group 30% (17,794) said that they had decided against submitting an ET form as a result of their call to Acas. In contrast 64% (162,761) said they were not considering making a claim prior to calling, but of these 4% (6,022) did put in a claim. The overall savings to the system should be offset by the costs of these claims.

viii Independent research on customers’ experiences of Acas advisory services and reasons why Acas is used, provides strong support for Acas role’. Table 1 below shows the high level of satisfaction with existing Acas advisory services as evidenced by our customer surveys.

Table 1: Satisfaction with Acas Advice

	Helpline Survey 2007 <sup>1</sup>	Advisory Projects: 2004/6 Evaluation <sup>2</sup>		Training services evaluation 2005/6 <sup>3</sup>		Equality and Diversity projects Impact Survey 2007 <sup>4</sup>
		Manager reps	Employee reps	Open Access event	Tailored workp lace events	
Satisfied	94%	92%	92%	97%	97%	91%
Neutral	4%	3%	5%	2%	3%	4%
Dissatisfied	2%	2%	3%	<1%	<1%	5%

<sup>1</sup> Scale used: 1 “very dissatisfied” to 5 “very satisfied”. “Satisfied” = responses of 4 or 5; neutral = 3; Dissatisfied = 1 or 2

<sup>2</sup> Scale used Very dissatisfied; Fairly dissatisfied; Neither satisfied nor dissatisfied; fairly satisfied; very satisfied. “Satisfied” = responses of fairly and very satisfied; “Neutral” = Neither satisfied nor dissatisfied; “Dissatisfied” = responses of fairly or very dissatisfied

<sup>3</sup> Scale used Very dissatisfied; dissatisfied; Neither satisfied nor dissatisfied; satisfied; very satisfied. “Satisfied” = responses of satisfied and very satisfied; “Neutral” = Neither satisfied nor dissatisfied; “Dissatisfied” = responses of dissatisfied or very dissatisfied

<sup>4</sup> Scale used Very dissatisfied; Fairly dissatisfied; Neither satisfied nor dissatisfied; fairly satisfied; very satisfied. “Satisfied” = responses of fairly and very satisfied; “Neutral” = Neither satisfied nor dissatisfied; “Dissatisfied” = responses of fairly or very dissatisfied

The surveys also demonstrate how Acas is equally (and possibly uniquely?) valued by both employers and employees, as evidenced in the data on advisory projects in the table In another example: the helpline survey, out of a maximum score of 5 for satisfaction, employees gave Acas an average score of 4.53 and employers gave Acas a score of 4.54.

Acas skill in maintaining an impartial stance in its dealings with parties and the trust that this engenders is shown in a number of studies. For example in the Advisory projects evaluation 94% of managers and 95% of employee representatives said that the Acas adviser had been good or very good at maintaining impartiality. Similarly the most recent (2005) survey of the Acas individual conciliation service showed that 92% of survey participants said the conciliator was trustworthy and the majority, approximately 80% said that the conciliator neither took the claimant’s side of the claimant nor that of the employer

A number of studies of Acas services have explored the reasons why Acas is used by customers. These survey items are multiple response questions with up to 20 response categories; however once again the importance of Acas’ independence from management and trade unions is shown in the reasons given by management and union representatives for seeking Acas advice, rather than the help of any other organisation. Table 2 summarises the key reasons for using Acas.

Table 2: Main reasons for using Acas:

Reasons	Advisory Projects: 2004/6 Evaluation		Equality and Diversity projects Impact Survey 2007
	Management Reps	Employee Reps	
Acas advice independent of management and trade unions	33%	34%	7%
Acas has relevant expertise	26%	17%	7%
Acas good reputation	24%	17%	47%
Previous use of Acas	15%	17%	10%
Acas publicity	1%	2%	13%

Preliminary findings of our recent survey of Collective Conciliation customers has identified similar reasons why organisations and trade union representatives come to Acas: 25% had used Acas collective conciliation in the past; 24% had used other services; and 20% used Acas’ conciliation services because Acas is independent of management and trade unions. In addition, 22% used Acas because an Acas role is written into their dispute procedures.

<sup>ix</sup> *Findings from the Survey of Employment Tribunal Applications 2003* Hayward, B. Peters M. et al, BMRB DTI Employment Relations Research Series No.33

<sup>x</sup> *Evaluation of the Acas Pilot of Mediation, Appeals and Employment Law Visit Services to small firms (2005)* Fox, M. Acas.  
*The Acas small firms mediation pilot research to explore parties’ experiences and views on the value of mediation (2005)* Seargeant, J. Acas

<sup>xi</sup> *Sexual Orientation and Religion or Belief Discrimination in the Workplace*, Savage B, Acas (Forthcoming)

<sup>xii</sup> This analysis compares results from the Acas database of individual conciliation in Employment Tribunal cases for two six-month periods: 1 July 2003 to 31 December 2003, and 1 July 2005 to 31 December 2005. Hence the first period ended nine months prior to the implementation of the 2004 Dispute Resolution Regulations and the second period commenced nine months after that implementation. For simplicity in the following analysis cases from the earlier period will be referred to as “2003 data” and from the later as “2005 data”. After data cleaning a total of 41,927 cases were available for analysis from 2003 and 37,143 from 2005. To enable comparison and ensure consistency a variable was derived which grouped both the 2005 and the 2003 cases into period type according to the jurisdiction(s) of the case. The jurisdiction of the case which has the longest conciliation determines the period type The following table compares data on case duration for all cases with that where at least one of the parties was represented. It shows that represented cases in both 2003 and 2005, and for all period types, had a longer average duration than cases as a whole. It also shows that although between 2003 and 2005 there was a decline in average case duration, the duration of represented cases increased on average.

**Table: Average duration of Acas settled cases by period type and where represented (days)**

	2003		2005	
	Median duration – days All	Median duration – Rep’ ed only	Median duration – days All	Median duration – Rep’ ed only
Short	69	100	56	102
Standard	105	136	85	142
Open	148	168	153	162
<b>All</b>	<b>101</b>	<b>133</b>	<b>90</b>	<b>143</b>

<sup>xiii</sup> *Acas Individual Conciliation – a qualitative evaluation of the service provided in industrial tribunal cases.* (1998) Lewis, J. and Legard, R. Acas

<sup>xiv</sup> *Unrepresented claimants and unrepresented employers in race discrimination claims*, Policy Studies Institute, forthcoming

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<sup>xv</sup> *Evaluation of the Acas Pilot of Mediation, Appeals and Employment Law Visit Services to small firms* (2005) Fox, M. Acas  
*The Acas small firms mediation pilot research to explore parties' experiences and views on the value of mediation* (2005) Sargeant, J. Acas

<sup>xvi</sup> Acas established a pilot project in 2003 to evaluate the effectiveness of mediation in disputes in small firms. The study found

- For most parties the mediation went according to their expectations, and the experience was positive.
- The key positive feature of mediation was identified by parties as the external mediator, whose role was seen as invaluable.
- Mediated agreements were made up of explanations and apologies, changes in behaviours, changes to working practices, procedures and policies.
- These agreements effected changes in the disputes immediately, and these were partly sustained over the longer-term in all cases.
- Improvements gave employers a breathing space in which to reflect, and coupled with the confidence and extra knowledge gained through contact with Acas, some employers felt better able to deal with disputes than before.
- Mediation also saved a lot of time for firms, not only by removing the need for further actions, but also by using fewer resources.
- Mediation also avoided the unpleasant prospects of further internal disputes, with associated blame and possible departures from the firm.
- Employees benefited from improvements because of the reductions in day-to-day conflicts, and also because it became possible for them to remain at the firm.
- The service parties received from Acas was widely praised, and parties' knowledge and use of Acas services increased following mediation.
- Most parties were impressed by mediation as a tool for employment dispute resolutions, and confirmed their willingness, if necessary, to use mediation again in that context.

*Evaluation of the Acas Pilot of Mediation, Appeals and Employment Law Visit Services to small firms* (2005) Fox, M. Acas  
*The Acas small firms mediation pilot research to explore parties' experiences and views on the value of mediation* (2005) Sargeant, J. Acas

<sup>xvii</sup> According to SETA 2003, of a sample of 2236:

- 5% of claimants said they were still with their employer at the time of the SETA interview
- 67% had left their employer before putting in their claim
- 25% left their employer after putting in their claim.
- The status of the remaining three percent is unknown.

Where discrimination (as defined in SETA) was the main jurisdiction:

- 46% had left the employer before putting in their claim
- 30% had left after putting in their claim
- 12% were still with their employer at the time of the SETA interview.
- 14% unknown.

Comparing discrimination with other jurisdictions the following percentages had left their employer before putting in a claim:

- 46% discrimination
- 72% Unfair Dismissal
- 77% Breach of Contract
- 66% Wages Act
- 69% Redundancy payments
- 59% Other

<sup>xviii</sup> This analysis compares results from the Acas database of individual conciliation in Employment Tribunal cases for two six-month periods: 1 July 2003 to 31 December 2003, and 1 July 2005 to 31 December 2005. Hence the first period ended nine months prior to the implementation of the 2004 Dispute Resolution Regulations and the second period commenced nine months after that implementation. For simplicity in the following analysis cases from the earlier period will be referred to as "2003 data" and from the later as "2005 data". After data cleaning a total of 41,927 cases

were available for analysis from 2003 and 37,143 from 2005. To enable comparison and ensure consistency a variable was derived which grouped both the 2005 and the 2003 cases into period type according to the jurisdiction(s) of the case. The jurisdiction of the case which has the longest conciliation determines the period type. This data shows how Acas involvement remains critical in fostering early resolution of ET cases without reference to an ET hearing, however it also illustrates that the fixed periods have lead to an increase in the “fast track” jurisdictions which go to a full Tribunal, with this effect being particularly strong where parties are represented.

The following analysis shows the outcome of cases before and after the introduction of fixed period conciliation . Table 1 explores the outcome by period type for each of the data collection periods.

**Table 1: Case outcome by period type**

	Settled by Acas		Withdrawn/ privately settled		Full ET hearing		Other	
	2003 data %	2005 data %	2003 data %	2005 data %	2003 data %	2005 data	2003 data %	2005 data %
Short	37	31	35	32	24	28	4	10
Standard	46	40	27	35	21	17	5	8
Open	48	40	30	40	16	13	6	7
<b>All</b>	<b>44</b>	<b>38</b>	<b>30</b>	<b>35</b>	<b>22</b>	<b>18</b>	<b>5</b>	<b>8</b>

This table indicates a decrease between 2003 and 2005 in the proportion of all kinds of cases that are settled by Acas; and an increase in those that are withdrawn or privately settled cases (the findings of the 2005 survey of client perceptions of IC case shows that Acas may have had an influence on as many as two-thirds of withdrawn and privately settled cases).

Taking settled and withdrawn cases together, it is apparent that the proportion of standard and open cases which had either outcome increased marginally in 2005 compared to 2003. However, there was a fall in the settlement/withdrawal rate for short cases. Compared to 2003 data 2005 figures also suggest an overall decrease in the number of cases going to a full ET hearing: down from 22 per cent to 18 per cent. However, the proportion of short cases that reach an ET has increased: from 24 per cent to 28 per cent.

The following tables offer further investigation into the differences in outcomes between the two data collection periods, by looking at the relationship between party representation and settlement patterns. Due to a lack of complete data on representation in the following analysis the focus is on those cases where parties were known to have representation.

**Table 2: case outcome by party representation - 2003**

	Settled		Withdrawn/privately settled		Full ET hearing		Other	
	Claim rep'ed %	Res rep'ed %	Claim rep'ed %	Res rep'ed %	Claim rep'ed %	Res rep'ed %	Claim rep'ed %	Res rep'ed %
Short	46	54	37	32	16	12	2	2
Standard	57	61	22	21	19	16	3	3
Open	57	56	27	26	13	14	4	4
<b>All</b>	<b>55</b>	<b>59</b>	<b>26</b>	<b>24</b>	<b>17</b>	<b>17</b>	<b>3</b>	<b>3</b>

**Table 3: case outcome by party representation – 2005**

	Settled		Withdrawn/privately settled		Full ET hearing		Other	
	Claim rep'ed %	Res rep'ed %	Claim rep'ed %	Res rep'ed %	Claim rep'ed %	Res rep'ed %	Claim rep'ed %	Res rep'ed %
Short	25	27	33	35	35	37	7	2
Standard	46	45	36	36	13	16	5	4
Open	62	59	24	16	11	13	2	4
<b>All</b>	<b>45</b>	<b>44</b>	<b>33</b>	<b>33</b>	<b>17</b>	<b>19</b>	<b>5</b>	<b>3</b>

Comparing these tables suggests that the introduction of fixed period conciliation has had a stronger negative impact on settlement rates where the claimant or respondent were represented, compared to the pattern shown in table 1 for all cases. The following are some of the main differences between the 2003 and 2005 data:

- Although in both data collection periods represented parties were more likely to settle, this difference was less marked in the post-DRR compared to the pre-DRR period.
- The decline in the proportion of cases that were settled by Acas was particularly strong in those instances where the respondent was represented, down to 44 per cent from 59 per cent (compared to a fall from 44 per cent to 38 per cent for all cases)
- However, this pattern of a reduced level of settlement for represented claimants did not apply in open cases. The proportion of open cases where an Acas settlement was reached was higher in the 2005 data collection period than in 2003, for both claimant and respondent represented cases
- Whilst the analysis above showed a substantial increase in the proportion of open cases that were withdrawn or privately settled (up from 30 per cent to 40 per cent), this trend was not shown in represented cases, where there was a fall in withdrawal rates in open cases, particularly in those cases where it was the respondent who was represented
- The finding (mentioned above) that the overall proportion of cases going to an ET hearing was lower in 2005 than 2003, does not apply to those cases where the parties were represented. The proportion of represented cases reaching a full tribunal was stable for the two periods.
- This overall stability hides considerable change by period type. The proportion of short cases where the respondent was represented and that went to an ET in the 2005 data collection period was more than three times that in the same period in 2003 (up from 12 per cent to 37 per cent). There was also a substantial increase in the claimant represented short cases going to tribunal.

This is the aspect of the Regulations which has had most impact on the working arrangements of our conciliation staff. (In addition to having limited periods to conciliate on the majority of cases, they have also seen from 1 March 2006 the introduction of differential service standards, consequent upon the changes made in the 2004 Regulations.)

<sup>xix</sup> Earlier research has shown that a number of factors influence the length of time a case is in the system prior to resolution (so called 'case duration'). One is the imminence of hearing dates. The research utilised 2003 ETS data drawn from a period prior to the Regulations instigating fixed periods for conciliation in order to explore the duration of cases, map the resolution of claims, and consider the triggers for resolution.

Taking those cases subsequently handled under fast track, whilst 46% of settlements and 60% of withdrawals/private settlements were established prior to the hearing being issued, the remainder happen in the run up to, and the shadow of a hearing. Indeed 32% of settlements, and 21% of withdrawals/private settlements occurred in the fortnight before the hearing and half of these in both cases were in the last three days. The same patterns were true of cases later to be

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handled under fixed period conciliation though resolution tends to be nearer scheduled hearing dates. Of cases that settled, 23% of settlement occurred prior to the issue of the IT4 whilst 62% of settlements happened in the fortnight prior to the hearing (33% in the last three days). 41% of those cases that were withdrawn or privately settled were resolved prior to the issue of the hearing date but a further 45% of withdrawal/private settlements occurred in the fortnight prior to the listed hearing date (36% in the last three days).

*What does the data demonstrate?*

The data is a powerful indicator of the triggers that encourage resolution of tribunal claims. In the first instance, it shows the power of conciliation as a stand alone mechanism for resolving disputes with around a third of cases settling without the immediate pressure of a hearing date. But it also shows that conciliation works in conjunction with the imminence of a hearing to bring about the voluntary resolution of a claim. Conciliators will rely on the issue of hearing dates as a trigger to encourage dialogue with parties. It is important that such dates are predictable and set to a time beyond the fixed periods than they have a sense of reality for the parties. Withdrawals and private settlements would equally seem to be affected by the imminence of a hearing.

<sup>xx</sup> *Unrepresented claimants and unrepresented employers in Race Discrimination Claims* Policy Studies Institute forthcoming;;

<sup>xxi</sup> *The experiences of sexual orientation and religion or belief discrimination Employment Tribunal claimants*, Denvir, A, Broughton A, Gifford J, Hill, D, Institute for Employment Studies 2007; *Unrepresented claimants and unrepresented employers in Race Discrimination Claims* Policy Studies Institute forthcoming; Lewis and Legard *Acas Individual Conciliation – a qualitative evaluation of the service provided in industrial tribunal cases*. (1998) Lewis, J. and Legard, R. Acas