Resolving workplace disputes - A Consultation - response form

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Please state if you are responding as an individual or representing the views of an organisation, by selecting the appropriate group. If responding on behalf of a company or an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled. Please tick the box below that best describes you as a respondent to this consultation:

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CHAPTER I: Resolving disputes in the workplace

Mediation

Q 1. To what extent is early workplace mediation used?

Our evidence suggests\(^1\) that nearly two-thirds of private sector businesses are aware of mediation as a tool for resolving workplace disputes. However, the use of mediation by companies is low:

a. Only a small minority (5 per cent) of private sector employers had ever used mediation. Use was particularly low amongst SMEs (4 per cent).

b. Half of those who had ever used mediation had done so in the past 12 months, but in most of these cases this had been limited to a single incidence.

Data from a 2007 CIPD survey of its members indicated a greater use of mediation in the public sector than in the private sector, though more research is needed to quantify this across the public sector as a whole.

Acas typically trains around 300 people a year to act as in-house mediators in their own organisations. In a survey of these trainees four in 10 had not undertaken a mediation case in the 12 months following their training\(^2\).

Q 2. Are there particular kinds of issues where mediation is especially helpful or where it is not likely to be helpful?

The most common reason for using mediation is to resolve interpersonal conflicts, in particular those relating to relationship breakdown between employees and/or between employees and their line manager\(^3\). The value and effectiveness of mediation is probably greatest in this context - by addressing, dysfunctional relationships and negative workplace behaviours problems can be nipped in the bud before they create or become formal disputes.

Whilst there is evidence that mediation may be used in any kind of dispute,\(^4\) the balance of evidence is that the technique may be less useful where it is felt that formal disciplinary procedures offer a more appropriate means of resolving a dispute\(^5\). Mediation is also largely inappropriate to either/or issues which are not amenable to compromise solutions, and could be counter-productive where an individual dispute is a symptom of a wider pattern of behaviour that might have detrimental consequences for others if not eliminated (eg, harassment).
Q 3. In your experience, what are the costs of mediation?

Evidence from one study suggests that the cost to an organisation of mediation provided by internal mediators is around £700 a case, compared to an estimated cost if the case proceeds to formal procedures of over £4,000. From anecdotal information reported by our conciliators it appears that private mediation practitioners’ day rates vary considerably – from around £300 up to as much as £2000. The durations of mediation interventions also vary - largely according to the subject matter. Whilst sometimes concluded in a day or less, mediations typically require two days of mediator’s time, and in many cases more. Overall the indications are that the average total cost is likely to be between £2,000 and £2,500.

Q 4. What do you consider to be the advantages and disadvantages of mediation?

There is widespread evidence on the effectiveness of mediation as a means of resolving workplace disputes internally, without recourse to the law, both from Acas’ own mediation service, and the mediations conducted by mediators trained by Acas, and wider research. Mediation is perceived to have an important wider impact in helping preserve relationships; in improving managers’ ability to manage; and reducing the burden on management time. The introduction of mediation can also impact more widely on the conflict management culture of an organisation, contributing to a more trust-based approach to difficult issues.

Where mediation is established, it can offer a speedier mechanism than formal disciplinary and grievance routes, and its resolutions can be longer lasting. However, over-reliance on third party mediation could potentially lead to managers, employees or workplace representatives abdicating their responsibilities. The evidence against use of mediation stems largely from concerns that it should not be a substitute for training line managers to handle individuals; that it may be inappropriate for individuals where language or cognitive functioning is a barrier; or, most widespread, that it is inappropriate where serious misconduct is identified.

Rather than being regarded as a universal panacea, mediation should therefore be viewed as one component of an overall conflict management strategy which includes effective training for managers and workplace representatives; and is underpinned by fair, effective workplace procedures applied consistently in appropriate circumstances.
Q 5. What barriers are there to use and what ways are there to overcome them?

Once introduced to the concept of mediation, employers generally take a positive view of its potential value. For example in the Acas survey around three-quarters of businesses agreed that “mediation is, or sounds like it would be, a good tool for resolving disputes in the workplace”\(^\text{14}\). Prior experience of using mediation would appear to be an especially important driver in future use.\(^\text{15}\)

However lack of employer and employee understanding of the nature and role of mediation appears to be an important factor in its non-use.\(^\text{16}\) The overwhelming reason given for not using mediation in the recent Acas poll was that the employer felt that they had not had a problem that would suit mediation, and a large number (6 in 10) saw mediation as a tool of last resort\(^\text{17}\). The experiences of those who have received Acas training in Workplace mediation also provide useful evidence here: they report that embedding mediation in workplace culture can take some time and that this can be a factor in the low use of the service.\(^\text{18}\)

The Acas poll suggests that for a minority of employers, perceived cost may be an issue, with over a third seeing it as an expensive way to resolve disputes.\(^\text{19}\) Research with SMEs has identified the need for more publicly funded support services for dispute resolution for smaller businesses that do not have access to internal HR expertise and are, therefore, more reliant on external sources of advice and support.\(^\text{20}\)

Factors which can contribute to the effective embedding of mediation include support and promotion by senior management and where appropriate trade unions\(^\text{21}\), appropriate resourcing\(^\text{22}\), active publicity to raise awareness of its availability and potential usefulness\(^\text{23}\) and allowing time for mediation schemes to fully embed. Another is encouraging a culture where individuals move away from the tendency to pursue formal procedures as the first response.\(^\text{24}\)

Q 6. Which providers of mediation for workplace disputes are you aware of? (We are interested in private/voluntary/social enterprises – please specify)

A register of organisations in England & Wales (including public, private and voluntary providers) that offer mediation on employment or workplace issues is maintained and publicised by the Civil Mediation Council (http://www.civilmediation.org/about-cmc/15/accredited-mediation-providers) For providers in Scotland, the Scottish Mediation Network maintains a similar register (http://www.scottishmediation.org.uk/mediationregister/index.asp).

Acas itself offers mediation on employment and workplace issues, and is a member of both CMC and SMN.

Q 7. What are your views or experiences of in-house mediation schemes? (We are interested in advantages and disadvantages)

Evidence from research on conflict handling in SMEs suggests mediation by an internal third party may well be perceived as inappropriate in a small business context - an external third party is more likely to be acceptable to the parties involved because of their distance from the organisation, making relationships easier after any such intervention.\(^\text{25}\) However, mediation by internal mediators may have a greater prospect of success - other research has indicated that mediations conducted by an in-house mediator have a greater chance of resolving the issues in hand than those where an external mediator is involved\(^\text{26}\).
Compromise agreements

Q 8. To what extent are compromise agreements used?

It is important to point out that compromise agreements are not in themselves a means of resolving disputes: they merely record the terms of an agreement which meets certain criteria that allow it to serve as a legally binding waiver of particular claims associated with a dispute or potential dispute.

SETA 2008 found that of those claims that resulted in a private settlement, two-thirds were resolved via a compromise agreement. It must be noted, however, that SETA data relates only to cases where an employment tribunal claim has already been lodged.

There is a shortage of research evidence on the use of compromise agreements prior to claims being lodged. However, from anecdotal information provided by Acas colleagues it seems that they are widely used by some employers and many legal representatives. There are some signs of geographical concentration associated with the preferences of representatives active in particular areas, and of a slightly higher propensity for their use in relation to terminations involving senior or high-paid employees. Whilst larger organisations seem more likely to use compromise agreements, there is some level of use by employers of all sizes. There is little indication that individual compromise agreements tend to follow third party intervention and/or genuine negotiation – most are thought to be based on “take it or leave it” offers. However we are aware of some which arise following collective negotiation or consultation, especially in large scale redundancy situations.

Q 9. What are the costs of these agreements? (Note: it would be helpful if you could provide the typical cost of the agreements, highlighting the element that is the employee's legal costs)

This is another issue on which published data is lacking. Acas colleagues report a wide range of costs being mentioned by parties and representatives. These include isolated instances of rates as low as £50 per employee in cases where significant numbers were being made redundant, no doubt on the basis that this offered economies of scale for the independent advisers. On the other hand we have heard of costs exceeding £3,000 in some individual cases. Typically the charges reported to colleagues seem to be in the range of £250 - £500 for independent advice to the employee, plus between £500 and £1,000 for the employer’s advice and the drafting of documentation.
Q 10. What are the advantages and disadvantages of compromise agreements? Do these vary by type of case and, if so, why?

The confidential nature of compromise agreements means that Acas seldom has direct contact with the parties involved, but anecdotal information suggests that the main attraction for both employers and employees appears to be the opportunity of a “clean break”. Both parties can also often share an interest in avoiding the need to air the dispute in a public hearing.

If a parting of the ways appears inevitable, employees may welcome the chance of an agreed settlement being available immediately rather than enduring the cost, stress, delay and uncertainty of pursuing compensation through tribunal litigation. The facility for a swift and dignified way of drawing the relationship to a close on confidential terms can be particularly appreciated by senior or long-serving employees, especially those in deteriorating health. Multiple compromise agreements also sometimes follow dialogue over collective redundancies, where they can offer finality to employers who are willing to offer enhanced severance terms.

Nevertheless, there is a risk that if organisations make routine use of compromise agreements in respect of virtually all terminations some managers could grow over-reliant on them as a “safety net”, and might be less inclined to embark on the difficult conversations necessary to address issues such as behaviour, performance or attendance at an early stage. This may not serve the best interests of organisational effectiveness overall.

Q 11. What barriers are there to use and what ways are there to overcome them?

Once again, there is a dearth of research evidence in this area. However, the cost in terms of legal fees is understood to be a factor in employers’ decisions on whether to use compromise agreements. Whilst the need for claimants to receive independent advice means that legal costs cannot be entirely avoided, it might be possible to reduce the expense of other elements of the process if guidance and some form of standard text were made available – perhaps online – so that employers could prepare much or all of the relevant documentation without the need to buy external services.

On a different note, we are aware that there is currently some perceived doubt over whether and if so how the wording of S147 of the Equality Act 2010 affects the capacity of employees’ representatives to serve as independent advisers in relation to compromise agreements. Diametrically opposed interpretations of this piece of legislation have been put forward by eminent QCs; but as yet the matter has not been resolved by a determination of a court or tribunal.

It has not been possible to detect the impact of the uncertainty surrounding S147 in statistical terms (eg, on the level of requests to Acas for PCC) but there is widespread anecdotal evidence that it has affected the willingness of many legal representatives to use compromise agreements – especially where the claim or potential claim has a discrimination dimension. This barrier seems likely to remain until the confidence of the legal profession in the efficacy of compromise agreements in all ET claims and potential claims can be restored.
We agree. Acas Pre-Claim Conciliation (PCC) is a highly effective way of resolving disputes before they reach an employment tribunal, and its effectiveness has increased since being launched nationally in April 2009.

In 2009/10 fewer than 30 percent of the disputes appropriately referred for PCC eventually became the subject of tribunal proceedings. For the period from April to December of 2010 the corresponding figure is less than 25 percent. A similar pattern is apparent among cases that were actively resolved in PCC (i.e., where the parties either reached a formal settlement or an informal agreement that resolved the dispute; or where the claimant informed the conciliator that they had decided to abandon the matter). Slightly less than 40 percent of the disputes appropriately referred for PCC in 2009/10 were actively resolved, and this has risen to almost 50 percent in 2010/11.

Independently-conducted research into users’ experiences of the PCC service also shows that PCC carries a significantly lesser time burden than tribunal claims, both for employees and employers:28

a. Employees spent median of 7 days on an ET claim; slightly more than 8 days if the claim went to hearing and more than 6 days if the claim was settled by Acas. This compares with a median of 5.7 hours on a PCC case.

b. Employers spent median 5 days on ET claim; 7.5 days if the claim went to hearing and 5 days if the claim was settled by Acas. This compares with a median of 1 day for PCC cases.

Including staff time and administration and legal costs, the average cost of resolving a PCC case for employers is £475, and the average cost of dealing with an employment tribunal claim is £5,685. For employees, the average cost of resolving a PCC case is £78, compared with £2,929 for dealing with an employment tribunal claim.29

More than 4 in 10 claimants in ET cases say the experience caused stress/depression/experienced loss of confidence or self-esteem, and this rose to 60% of discrimination claimants. This is further supported by qualitative research on the impact of tribunal claims involving allegations of discrimination on the grounds of race, sexual orientation, religion or belief which suggests that these can be particularly traumatic.30

Parties to PCC are far less likely to engage representatives, and thus incur legal costs, than those in ET cases. 32 per cent of claimants and 54 per cent of employers nominated a professional representative on the ET Forms, and 46 percent of claimants and 60 percent of employers used a representative to help with their case on a day-to-day basis31. In comparison, just nine per cent of PCC cases were represented (two-thirds of them professional representatives), six per cent of employers and ten per cent of employees. This lower level of representation is not completely explained by the differences in complexity between PCC cases and ET claims, and suggests that PCC is offering a more informal service32.
Q 13. Do you consider that early conciliation is likely to be more useful in some jurisdictions than others? Please say which you believe these to be, and why.

Analysis of PCC outcomes for the period April to December 2010 indicates that the proportion of appropriate referrals that are actively resolved varies slightly between jurisdictional “tracks”. Just over 52 percent of cases regarding “fast track” issues (largely monetary or time-off entitlements) are actively resolved. This falls to 48.5 percent among standard track cases (mainly potential unfair dismissals) and to 45.2 percent in open track cases (mostly discrimination claims).

These differences are comparatively small and do not undermine the added value of PCC in any category of case. On the contrary, given that the emotional and financial cost (to the taxpayer and the parties) of Tribunal proceedings tend to increase progressively between fast and standard track jurisdictions, and again between standard and open track, the potential benefits justify investing in PCC to promote the resolution of all kinds of dispute at the earliest possible stage.

It should also be noted that this pattern arises in the context of the current system. We can expect future outcome patterns to be influenced by changes in the dynamic of the new system - particularly if the proposed charging regime was to be implemented.

Q 14. Do you consider Acas’ current power to provide pre-claim conciliation should be changed to a duty? Please explain why?

Yes. If all aspiring claimants are obliged to intimate their intended claim to Acas for early conciliation it would be irrational to leave the provision of that service as a discretionary power. However, there may be a need to review the statutory criteria in S18[3] of ETA 1996 to avoid Acas being obliged to conciliate in patently inappropriate circumstances, such as where the employer is insolvent.

Q 15. Do you consider Acas duty to offer post-claim conciliation should be changed to a power? If not, please explain why.

No. It would be unwise and unhelpful to alter this duty to become a power. It is far from clear how the imposition of charges for ET claims will affect the behaviour of parties, especially as we currently have no information on the proposed structure of the charging system. If, for example, any fees levied at the point claims are lodged apply to the claimant but not the employer, we can expect some employers to rebuff attempts to conciliate at the pre-claim stage and only treat the matter seriously once the claimant has paid their “entry fee”. In any event, no system change will eliminate the tendency of some parties and representatives to defer negotiations until a hearing is imminent.

A departure from universal post-claim conciliation would increase the likelihood that cases lodged with the Tribunal would require to be determined by full hearings, with consequent extra costs to parties and the taxpayer. Experience from the current PCC service shows that where ET claims arise after an unsuccessful attempt at PCC, the proportion settled and withdrawn without a hearing does not differ significantly from the proportion in cases where there had been no PCC before the claim was lodged. Thus we are confident that there would still be net savings, both to parties and the exchequer, if Acas conciliation continues to be generally available at the post-claim stage as well as pre-claim.
Q 16. Whilst we believe that this proposal for early conciliation will be an effective way of resolving more individual, and small multiple, disputes before they reach an employment tribunal we are not convinced that it will be equally as effective in large multiple claims. Do you agree? If not, please explain why.

All multiples should be included in the scope of early conciliation. It would be a false economy to exclude them.

The issue of multiple ET claims is one in which there are significant gaps in the available research evidence. However, the growth in multiples has been responsible for most of the rise in ET claims in the last ten years and these now account for substantially more claims than single claimant cases. Multiples are potentially the most costly of all cases for the parties and the taxpayer if they go the distance, and even just registering the claims involved can place a high administrative burden on the Tribunals.

The current PCC service has had limited success in identifying multiple cases before they are lodged with the Tribunals, largely because the employees whose claims form part of multiples are invariably represented, and representatives seldom approach the Acas Helpline before lodging claims. The proposed system for submitting key details of the dispute to Acas will eliminate this problem.

Once identified, however, there is no evidence that multiples are in general less susceptible to PCC than single claimant cases. On the contrary, nineteen of the thirty-one multiples (involving from two to over 200 employees) that were subject to PCC in 2009/10 were actively resolved, as were sixteen of the twenty PCC multiples completed between April and December 2010.

Some larger multiples – particularly those which are manifestations of underlying collective disputes - can be difficult to resolve at the pre-claim stage, but each has its own characteristics and the prospects of resolution can seldom be assessed until conciliation commences. They are certainly not all dead ground for early conciliation. For example, since 2005/06 Acas has successfully resolved numerous large multiple equal pay claims in local authorities at the pre-claim stage – in aggregate involving well over 200,000 employees.

If, despite the overwhelming arguments to the contrary, it is determined that some large multiples ought to be excluded, the setting of any “size threshold” would raise some challenging questions such as:

- How might the size of the multiple be determined for this purpose?
- How might a particular threshold be justified?
- How would individual claimants and representatives know if the overall size of a particular multiple was above or below the threshold?

Regardless of the size of the multiple in question, there are compelling reasons why unrepresented claimants should not be excluded from early conciliation, and there is also a persuasive case for not excluding represented multiples that have not already been the subject of Acas collective conciliation.
Q 17. We would welcome views on: the contents of the shortened form

The shortened form must be straightforward to complete, and contain only the minimum essential information. This should comprise the identities, addresses and contact details of the parties (and the employee’s representative, if they have one); the dates of commencing and ceasing employment; the date of the incident that gives rise to the intended claim; and whether the employee is aware of other claims intimated by colleagues in the same circumstances.

The shortened form should not provide for a narrative description of the basis of the intended claim. Any requirement to produce such a narrative would disadvantage less literate employees and those whose first language was not English. It would also understandably bring demands from employers for sight of the forms, and we expect most would be unwilling to embark on conciliation until these had been received. In addition, it would encourage more parties to seek representation, which would delay the process and negate some of the cost benefit of early conciliation. We therefore favour a tick-box approach to intimating the grounds of the complaint, whereby the employee selects one or more items from a list of broad subject headings.

The form should also provide for situations where a representative is intimating the intention to lodge a single claim on behalf of an employee, or a multiple claim on behalf of a number of employees.

Around 10% of current PCC referrals are requests for conciliation by employers or their representatives after an employee has indicated to the employer that they are contemplating a tribunal claim. The form should therefore be designed to allow early conciliation to be triggered by either party or their representative.

Q 17a. We would welcome views on: the benefits of the shortened form

Experience of the current PCC service shows that early conciliation can function effectively without any form of written claim. However, we support the introduction of a shortened claim form at this stage for two main reasons:

- the need to obtain and complete a form declaring the intent to lodge a claim may deter “fishing expeditions” by employees who might not otherwise have been inclined to pursue the matter any further; and

the written notification will serve to record the date on which the process commenced, reducing uncertainties in the “clock-stopping” arrangements.

Q 17b. We would welcome views on: whether the increased formality in having to complete a form will have an impact upon the success of early conciliation

There is little doubt that the requirement to set down a written intimation of the intention to claim, even in very brief terms, would alter the dynamic of pre-claim conciliation. However it is impossible to predict whether the overall effect will be negative or positive. It could encourage some employees to reflect on why they feel aggrieved and what they want to happen, which might facilitate resolution or even lead them to change their mind and not complete the form at all. On the other hand, the very act of recording the basis of the dispute - even in tick-box form - could serve to harden some employees’ resolve to pursue it.
Q 18. We would welcome views on: the factors likely to have an effect on the success of early conciliation in complex claims

Many factors can combine to influence the success of early conciliation. Some of these are objective issues such as the financial value of the claim, or the extent of any scope for a mutually acceptable outcome; but even in cases where the legal aspects of the claim appear comparatively straightforward much often depends on intangible subjective factors such as the emotional temperature of the dispute and the attitudes of the parties to compromise. Overall, it is seldom possible from the outset to detect anything in the characteristics of a case that would serve as a prior indicator of significantly greater likelihood that conciliation will succeed; and there are certainly no “safe bets” to be identified in this way.

The number of jurisdictional complaints in a potential claim has little bearing on its complexity. For instance, a claim for unfair dismissal is just as likely to be resolved if it also involves subsidiary issues associated with outstanding notice pay or holiday pay as if it was a “stand alone” UD claim, and resolution is likely to take place just as quickly. That said, analysis of employment tribunal claims found that the number of jurisdictions cited on the ET1 is associated with the propensity of claimants to nominate a legal representative at the ET1 stage. Nominated representation on the ET1 rises from 11 per cent where a single jurisdiction is involved, to 17 per cent for two jurisdictions and 23 per cent for three or more jurisdictions. However the same pattern does not prevail in relation to employer nominations on the ET3.

Broadly speaking, single claimant cases tend to be less complex than multiples; but the substantial variation between the “resolvability” of particular multiples means that this is at most a somewhat unreliable indicator of complexity.

The best marker for complexity – though it is still imperfect - is jurisdictional “track”. Nomination of representatives is also more common on both ET1/ET3 forms in open track tribunal cases.

Q 18a. We would welcome views on: whether there are any steps that can be taken to address those factors

From our experience in the current PCC service it is clear that catching the dispute as quickly as possible and dealing directly with the parties can be critical to the effectiveness of early conciliation. In these circumstances a skilled conciliator has a much better chance of keeping the parties’ focus on resolving the problem with a minimum of formality rather than perceiving the need to resort to costly legal representation and adopting entrenched positions.

Q 18b. We would welcome views on: whether the complexity of the case is likely to have an effect on the success of early conciliation

Our response to Question 13 quotes relevant statistics.

Q 19. Do you consider that the period of one calendar month is sufficient to allow early resolution of the potential claim? If not, please explain why.

We strongly support this proposal. A “stop the clock” provision would offer the opportunity, currently unavailable, to conciliate on claims that are only intimated close to the normal time limit. At present we are generally unable to embark on PCC where less than two weeks remain to the deadline, and conciliation has to be curtailed in a further 7% of PCC cases because of the approach of the time limit. With the assurance
of at least a month in which to conciliate, the potential for resolution in such cases would be enhanced.

The existence of an explicit timescale for early conciliation could help to focus parties’ minds. However it is vital that the “stop the clock” mechanism must not act as a fixed conciliation period in the manner of the arrangements which signal failed under the now-repealed 2004 Regulations. Where negotiations are under way when the “pause” expires, the conciliator must remain free to continue the dialogue and broker a settlement before the ET deadline.

As regards the optimum length of the “pause”, much will depend on the shape of the system as a whole (for instance, more time would be needed if Acas had to copy the abbreviated claim forms to employers), and on exactly how the “clock-stopping” process works.

In most cases handled by our current PCC service, conciliation is concluded within a month. The median duration of all PCC cases completed between April and December 2010 was 23 calendar days, while the median duration of PCC cases resolved in that period was 20 calendar days. Therefore, as long as there is no barrier to continuing conciliation where negotiations are under way and time remains before the deadline for lodging a claim, it would appear that a month should suffice in most circumstances (but see our reply to Question 20 below).

In passing we should also mention that the effect of “stopping the clock” on potential claims in certain jurisdictions may have to be considered further. For example:

- claims for Interim Relief under ERA 1996 Sec 128 or TULR (C)A 1992 Ss 161 – 167 must currently be dealt with by Tribunals on a 7-day timescale;

awards in claims over failure to provide an adequate written pay statement (ERA 1996 S11[2]) are confined to the value of the un-notified deductions in the 13 weeks before the date the claim was received by the tribunal.
Q 20. If you think that the statutory period should be longer than one calendar month, what should that period be?

Although in general it would appear that a one month “pause” would be enough to allow for effective early conciliation, in cases where the deadline was already close when the clock was stopped, the lack of time remaining after it started ticking again might have a negative effect on conciliation:

- as the end of the “pause” approaches, some employees may shift their attention to finding and briefing a representative and preparing an ET1 so as to be ready to lodge a claim;
- where a financial settlement is reached, it often takes a week or two for the money to be paid - employees may be reluctant to settle in the latter part of the “pause” if they are not assured of payment before the ET deadline.

There are also some parts of the year when public holidays or traditional seasonal shutdowns in certain industries or localities would substantially erode the opportunity for conciliation within a one month timescale.

We therefore propose that there should either be flexibility for the conciliator to extend the “pause” by up to two weeks with the parties’ consent, or that it should be automatically extended by two weeks where less than that period would otherwise remain between the end of the “pause” and the deadline for lodging a claim.

CHAPTER II: Modernising our Tribunals

Part A : Tackling weaker cases - power to strike out

Q 21. What benefits or risks do you see from a power to strike out a claim or response (or part of a claim or response) being exercisable at hearings other than pre-hearing reviews? Please explain your answer.

Acas does not propose to reply to this question.

Q 22. What benefits or risks do you see from a power to strike out a claim or response (or part of a claim or response) being exercisable without hearing the parties or giving them the opportunity to make representations? Please explain your answer.

Acas does not propose to reply to this question.

Q 23. If you agree that the power to strike out a claim or response (or part of a claim or response) should be exercisable without hearing the parties or giving them the opportunity to make representations, do you agree that the review provisions should be amended as suggested, or in some other way?

Acas does not propose to reply to this question.

Q 24. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: the frequency at which respondents find that there is a lack of information on claim forms.
Our conciliators report that it is common, although far from universal, to find that the narrative information about the claim set out on the ET1 is not sufficient, or not clear enough, for conciliation purposes. This is most often associated with unrepresented claimants – especially those whose first language is not English - and appears to be particularly common in discrimination cases and, to a lesser extent, in unfair dismissal claims.

In general these omissions and inaccuracies in ET1s and ET3s are not thought to make it more difficult to resolve the claims in point; but they can create delays and add significantly to the amount of time that conciliators (and therefore parties or representatives) have to spend in dialogue over the case.

Q 24 a. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: the type/nature of the information which is frequently found to be lacking

Some of our conciliators have reported that it is already common to find that respondents submit a comparatively brief initial response on an ET3 and request the right to re-submit once fuller details are provided by the claimant; and that tribunals tend to accommodate this practice.

Q 24b. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: the proposal that “unless orders” might be a suitable vehicle for obtaining this information

We understand that early CMDs are held in many UD cases and almost all discrimination cases; and that Employment Judges use these to explain to unrepresented claimants what additional information is needed, following that up with a formal order for further and better particulars. If these are not forthcoming, the "unless order" mechanism tends to be used to threaten a strike out.

Q 24c. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: the potential benefits of adopting this process

Acas does not propose to reply to this question.
Q 24d. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: the disadvantages of adopting this process

Acas does not propose to reply to this question.

Q 24e. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: what safeguards, should be built in to the tribunal process to ensure that respondents do not abuse the process, and

Acas does not propose to reply to this question.

Q 24f. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: what safeguards/sanctions should be available to ensure respondents do not abuse the process?

Acas does not propose to reply to this question.

**Part A : Tackling weaker cases – deposit orders**

Q 25. Do you agree that employment judges should have the power to make deposit orders at hearings other than pre-hearing reviews? If not, please explain why.

Acas does not propose to reply to this question.

Q 26. Do you agree that employment judges should have the power to make deposit orders otherwise than at a hearing? If not, please explain why.

Acas does not propose to reply to this question.

Q 27. Do you think that the test to be met before a deposit order can be made should be amended beyond the current “little reasonable prospect of success test? If yes, in what way should it be amended?

Acas does not propose to reply to this question.

Q 28. Do you agree with the proposal to increase the current level of the deposit which may be ordered from the current maximum of £500 to £1000? If not, please explain why.

Acas does not propose to reply to this question.

Q 29. Do you agree that the principle of deposit orders should be introduced into the EAT? If not please explain why.
Part A: Tackling weaker cases – the costs regime

Q 30. Do you agree with the proposal to increase the current cap on the level of costs that may be awarded from £10,000 to £20,000? If not, please explain why. Acas does not propose to reply to this question.

Q 31. Anecdotal evidence suggests that in many cases, where the claimant is unrepresented, respondents or their representatives use the threat of cost sanctions as a means of putting undue pressure on their opponents to withdraw from the tribunal process. We would welcome views on this and any evidence of aggressive litigation.

We have canvassed conciliators for anecdotal evidence of the use of threats regarding costs, and a mixed picture has emerged. Some say that threats of cost sanctions are less common now than in the past, while others tell us these are on the increase and arise in up to 30% of cases. This is probably a result of variations in practice between representatives – reports suggest that a few representatives make almost universal use of this tactic when faced with unrepresented claimants, while the majority appear to be more selective and focus on cases where they perceive flaws in the claimants’ evidence.

Formal costs letters are commonly used to transmit such warnings, but conciliators also find themselves being asked to relay threats of costs orally in the course of conciliation dialogue. We even have one report that a small minority of respondents’ solicitors have taken to contacting unrepresented claimants directly to put across their view of the case.

Questions as to whether a threat of cost sanctions might be justifiable, or whether such threats amount to undue pressure on a claimant to withdraw or accept a particular level of settlement, are in large measure subjective and contingent on the circumstances of individual cases, so we cannot comment on these matters. However, on a purely practical basis we can say that the tactic appears to be something of a double-edged sword. There is evidence from qualitative research that some claimants who say they were threatened with cost sanctions by employers or their representatives withdrew their claims as a result. Conciliators confirm from their experience that this is sometimes the case. However, some also report that costs warnings often merely serve to antagonise claimants, and can actually make them less willing to settle.

Q 32. Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would welcome views on: what evidence will be necessary before those sanctions are applied

Acas does not propose to reply to this question.

Q 32a. Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would welcome views on: what those sanctions should be, and

Acas does not propose to reply to this question.
Q 32b. Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would welcome views on: who should be responsible for imposing them, and for monitoring compliance – for example regulatory bodies like the Solicitors Regulation Authority and the Claims Management Regulator, or employment tribunals themselves.

Acas does not propose to reply to this question.

33. Currently employment tribunals can only order that a party pay the costs incurred by another party. It cannot order a party to pay the expenses incurred by the tribunal itself. Should these provisions be changed? Please explain why you have adopted the view taken.

Acas does not propose to reply to this question.
Part B : Encouraging settlements – Provision of information

Q 34. Would respondents and/or their representatives find the provision of an initial statement of loss (albeit that it could be subsequently amended) in the ET1 form of benefit?

Acas does not propose to reply to this question.

Q 35. If yes, what would those benefits be?

Acas does not propose to reply to this question.

Q 36. Should there be a mandatory requirement for the claimant to provide a statement of loss in the ET1 be mandatory?

Information from conciliators suggests that tribunals – certainly in England & Wales – almost always order the production of a Statement of Loss in UD claims and discrimination cases, although tribunal practices vary between Regions as to when such orders are normally made.

In general, conciliators believe that a realistic assessment of the potential value of the claim can be an aid to resolution by moderating claimants’ expectations and giving respondents a guide to the value of the claim. An order for a Statement of Loss forces claimants make an assessment; but the outcome is not always entirely realistic or necessarily helpful. Conciliators tell us that it is not uncommon for claimants – whether represented or not – to take an optimistic approach to the calculations in question; and, more problematic, that unrepresented claimants often have difficulty appreciating the uncertainties inherent in litigation, and the various aspects of tribunals’ discretion to adjust awards. At best this can make the process of brokering negotiation more time-consuming; at worst, an unduly aspirational Statement of Loss can antagonise the respondent – especially if they are unrepresented - and lead them to resist settlement altogether.

Some conciliators have also pointed out that compiling Statements of Loss is particularly challenging for unrepresented claimants, especially those who are less articulate, have learning difficulties, or for whom English is not their first language. This can place additional demands on conciliators’ time associated with explaining the calculations in question, and often leads claimants to engage legal representation at an early stage, thus increasing their costs.

Q 37. Are there other types of information or evidence which should be required at the outset of proceedings?

Acas does not propose to reply to this question.

Q 38. How could the ET1 Claim Form be amended so as to help claimants provide as helpful information as possible?

Our reply to Question 24 above mentions that Acas conciliators often encounter omissions and ambiguities in ET1s and ET3s. Broadly speaking these can be divided into two categories: unclear narrative details of the claim, and factual errors or omissions (eg, key dates, pay rates, employer identity or contact details etc).
With regard to the narrative element of the claim, background circumstances tend to be described in detail (and sometimes in too much detail) but there is often a lack of information or clarity around what it is that the claimant regards as discriminatory or unfair about the events in question. Unrepresented disability discrimination claims are also prone to lack of information about the nature of the alleged disability, its effect on the claimant’s capacity to do the job, or what adjustments the claimant would regard as reasonable to accommodate it.

Although it is understood that tribunal staff scrutinise ET1s and return them to claimants where serious omissions are found, conciliators also report that the information on claimants’ earnings (either in the job related to the claim, or in subsequent employment) and/or the identity or contact information for the respondent is often incomplete or inaccurate. Recurring omissions on ET3s are also reported, particularly in relation to contact information and the correct legal name of the employing organisation.

In the main, these seem to stem for misunderstandings as to what is required when completing the existing forms rather than any fundamental lack of a place to record the information in question. If any improvement is to be achieved it would therefore be appropriate to concentrate less on the content of the forms and more on the surrounding guidance, especially with regard to particularising the claim and providing dates, earnings data, and accurate information on the contact details and legal identity of the employer.

This might best be taken forward by way of an administrative review of the forms and supporting guidance, in consultation with stakeholder groups including those representing people with disabilities, and followed by thorough testing. Acas officials would be glad to contribute to that process on the basis of our extensive experience of the documentation encountered in conciliation.

**Part B : Encouraging settlements - Formalising offers to settle**

Q 39. Do you agree that this proposal, if introduced, will lead to an increase in the number of reasonable settlement offers being made?

Information from conciliators indicates that it is already quite common for respondents’ representatives to make final settlement proposals on the explicit basis – often communicated to the claimant in writing - that if the proposal is declined they will seek cost sanctions. We also note that recent case law appears to support such practices.

Q 40. Do you agree that the impact of this proposal might lead to a decrease in the number of claims within the system which proceed to hearing

Conciliators’ perceptions are divided as to whether these practices, or any more formal version of them, can facilitate or speed up resolution. On the one hand, anything that creates additional uncertainty as to the outcome or consequences of a hearing can serve to propel parties towards consensual resolution; and the explicit threat of a costs application if a settlement proposal is rejected might sometimes help to crystallise the options for a party who is wavering over whether to accept. On the other hand, the very formality of such proposals might increase rather than reduce the level of entrenchment on both sides - as we have reported in our answer to Q31, threats of costs sanctions sometimes merely antagonise claimants, and make them
less willing to settle – and it is thought likely that their use will lead more claimants to seek representation, with consequent increases in their costs.

Conciliators also point out that many settlements encompass non-financial elements such as a simple apology or the provision of a reference in agreed terms. It seems unlikely that any system of formal offers could satisfactorily “monetise” such items, yet these are often greatly valued by claimants and their inclusion frequently serves to turn what might otherwise be a comparatively modest offer into something more attractive for the employee.

Overall, the weight of conciliators’ experience and opinion tends to suggest that the introduction of a formal mechanism on the lines described in this proposal would make settlements more likely, albeit perhaps with greater expenditure of conciliation resource because of the need to explain the position to unrepresented parties.

However, it will be essential for any such mechanism to be constructed with careful consideration for the potential impact on the conciliation process – both so that conciliators are always made aware of any “formal offer” transmitted to the tribunal and, more important, to ensure that conciliators are not given any formal or informal role in assessing or providing opinions as to what constitutes a reasonable level of settlement.

We therefore consider it imperative that the Tribunal Service should involve Acas fully in the design, development and testing of any new process of this kind.

Q 41. Should the procedure be limited only to those cases in which both parties are legally represented, or open to all parties irrespective of the nature of representation? Please explain your answer.

Acas does not propose to reply to this question.

Q 42. Should the employment tribunal be either required or empowered to increase or decrease the amount of any financial compensation where a party has made an offer of settlement which has not been reasonably accepted? Please explain your answer.

Acas does not propose to reply to this question.

Q 43. What are your views on the interpretation of what constitutes a ‘reasonable’ offer of settlement, particularly in cases which do not centre on monetary awards?

Acas does not propose to reply to this question.

Q 44. We consider that the adoption of the Scottish Courts judicial tender model meets our needs under this proposal and would welcome views if this should be our preferred approach.

Acas does not propose to reply to this question.

Part C : Shortening tribunal hearings

Witness statements taken as read

Q 45. Anecdotal evidence from representatives is that employment tribunal hearings are often unnecessarily prolonged by witnesses having to read out their
witness statements. Do you agree with that view? If yes, please provide examples of occasions when you consider that a hearing has been unnecessarily prolonged. If you do not agree, please explain why.

Acas does not propose to reply to this question.

Q 46. Do you agree with the proposal that, with the appropriate procedural safeguards, witness statements (where provided) should stand as the evidence of chief of the witness and that, in the normal course, they should be taken as read? If not, please explain why.

Acas does not propose to reply to this question.

Q 47. What would you see as the advantages of taking witness statements as read?

Acas does not propose to reply to this question.

Q 48. What are the disadvantages of taking witness statements as read?

Acas does not propose to reply to this question.

Expenses of witnesses and parties

Q 49. Employment tribunal proceedings are similar to civil court cases, insofar as they are between two sets of private parties. We think that the principle of entitlement to expenses in the civil courts should apply in ETs too. Do you agree? Please explain your answer.

Acas does not propose to reply to this question.

Q 50. Should the decision not to pay expenses to parties apply to all those attending employment tribunal hearings? If not, to whom and in what circumstances should expenses be paid?

Acas does not propose to reply to this question.

Q 51. The withdrawal of State-funded expenses should lead to a reduction in the duration of some hearings, as only witness that are strictly necessary will be called. Do you agree with this reasoning? Please explain why.

Acas does not propose to reply to this question.

Part C: Shortening tribunal hearings – Employment Judges sitting alone

Q 52. We propose that, subject to the existing discretion, unfair dismissal cases should normally be heard by an employment judge sitting alone. Do you agree? If not, please explain why.

We do not agree with this proposal. 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 such as unfair dismissal 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 relation to the increasing number of larger multiple cases – in all jurisdictions - which arise out of or have the characteristics of collective disputes.

With a few exceptions that yield only a handful of cases, the current legislation largely confines the practice of Employment Judges sitting alone to cases under jurisdictions that concern specific monetary claims or the interpretation of contractual terms. 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.

Notwithstanding the need to pay due regard to economy, we therefore believe the current scope for Employment Judges to sit without lay members should not be extended to include unfair dismissal cases, or indeed extended at all.

Ongoing research by Corby and Latreille, which has been endorsed by Acas, should when published provide further evidence on the role and value of lay members.

Q 53. Because appeals go to the EAT on a point of law, rather than with questions of fact to be determined, do you agree that the EAT should be constituted to hear appeals with a judge sitting alone, rather than with a panel, unless a judge orders otherwise? Please give reasons.

We do not agree with this proposal. The reasons are as set out in our reply to Question 52 above.

Q 54. What other categories of case, in the employment tribunals or the Employment Appeal Tribunal, would in your view be suitable for a judge to hear alone, subject to the general power to convene a full panel where appropriate?

Acas does not propose to reply to this question.

Part D : Maximising proportionality – Legal officers

Q 55. Do you agree that there is interlocutory work currently undertaken by employment judges that might be delegated elsewhere? If no, please explain why.

The report of the Employment Tribunal System Task Force drew attention to the fact that the Employment Rights (Dispute Resolution) Act 1998 contained a power for the Secretary of State to make regulations to provide for legal officers to be appointed to Tribunals to perform certain functions, with the aim of releasing Tribunal Chairmen (now Employment Judges) from some of their interlocutory, preliminary and other procedural work. We understand however that the Tribunals Service reported subsequently to the Task Force’s successor body, the Employment Tribunal System Steering Group, that this was not felt to be the appropriate way to proceed at the time, and that their focus was instead on providing additional training for existing staff. Given that the pressures under which the Tribunals are presently operating appear to have increased this may be a measure which merits reconsideration.

Q 56. We have proposed that some of the interlocutory work undertaken by the judiciary might be undertaken by suitably qualified legal officers. We would be
grateful for your views on: the qualifications, skills, competences and experience we should seek in a legal officer, and

Acas does not propose to reply to this question.

Q 56a. We have proposed that some of the interlocutory work undertaken by the judiciary might be undertaken by suitably qualified legal officers. We would be grateful for your views on: the type of interlocutory work that might be delegated.

We would suggest that in addition to the items mentioned in the proposal in the consultation document, consideration should be given to providing legal officers with the authority to dispose “administratively” of some or all claims where the employer is insolvent. These make up around 10% of all cases, concentrated in the “fast track” jurisdictions. With very few exceptions they are incapable of being resolved without a judicial decision; but they are generally uncontested and in many instances determining them would require no more than the comparatively straightforward application of well-established legal provisions.

CHAPTER IV : Business taking on staff and meeting obligations

Extending the qualification period for unfair dismissal

Q 57. What effect, if any, do you think extending the length of the qualifying period for an employee to be able to bring a claim for unfair dismissal from one to two years would have on: employers

Acas does not propose to reply to this question.

Q 57a. What effect, if any, do you think extending the length of the qualifying period for an employee to be able to bring a claim for unfair dismissal from one to two years would have on: employees

Acas does not propose to reply to this question.

Q 58. In the experience of employers, how important is the current one year qualifying period in weighing up whether to take on someone? Would extending this to two years make you more likely to offer employment?

Acas does not propose to reply to this question.

Q 59. In the experience of employees, does the one year qualifying period lead to early dismissals just before the one year deadline where there are no apparent fair reasons or procedures followed?

Acas does not propose to reply to this question.

Q 60. Do you believe that any minority groups or women likely to be disproportionately affected if the qualifying period is extended? In what ways and to what extent?
CHAPTER IV: Business taking on staff and meeting obligations

Financial Penalties

Q 61. We believe that a system of financial penalties for employers found to have breached employment rights will be an effective way of encouraging compliance and, ultimately, reducing the number of tribunal claims. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.

Acas does not propose to reply to this question.

Q 62. We consider that all employment rights are equally important and have suggested a level of financial penalties based on the total award made by the ET within a range of £100 to £5,000. Do you agree with this approach? If not, please explain and provide alternative suggestions.

Acas does not propose to reply to this question.

Q 63. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes: should the up-rating continue to be annual?

Acas does not propose to reply to this question.

Q 63a. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes: should it continue to be rounded up to the nearest 10p, £10 and £100?

Acas does not propose to reply to this question.

Q 63b. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes: should it be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?

Acas does not propose to reply to this question.

Q 64. If you disagree, how should these amounts be up-rated in future?

Acas does not propose to reply to this question.

If you wish to make any other comments on the consultation, please note them in the box below:

Please see separate document attached (Acas response to the RWD consultation – General Comments)
An evaluation of the impact of the internal workplace mediation training service (Internal Acas report 2009)
Derek Mitchell and Wendy Mitchell, Alpha Research Ltd

Managing Conflict at Work: Survey Report, CIPD (2007);
Knowledge and use of mediation in SMEs, Acas Research Paper 02/08, Tim Johnston.

Mitchell and Mitchell, op. cit

Acas Report 2009/10; Mitchell and Mitchell op. cit

Evidence summarised in Latrellle 2011, op cit

See detailed evidence in The Acas Small Firms Mediation Pilot: Research to Explore Parties’ Experiences and Views on the Value of Mediation, Acas Research Paper 04/05, Seargeant, J

SME attitudes towards workplace mediation: the role of experience, Paul Latrellle, Franz Buscha and Anna Conte, Acas Research paper 05/10 (Latreille 2010a)

Latreille 2011, op. cit

Latreille, 2011 op. cit

Williams et al, op cit

Small firms and workplace disputes resolution, Acas Research paper 01/08 Harris, L et al. Also Latrellle, 2010a op cit

Saundry et al, op cit

see also Mediation: A Guide for Trade Union Representatives TUC and Acas, www.acas.org.uk
After subsection (6A) of section 4 of the Employment Tribunals Act 1996 (which is inserted by section 3(6) of this Act) insert—

“(6B) Employment tribunal procedure regulations may (subject to subsection (6C)) also provide that any act which—

(a) by virtue of subsection (6) may be done by the person mentioned in subsection (1)(a) alone, and
(b) is of a description specified by the regulations for the purposes of this subsection,
may be done by a person appointed as a legal officer in accordance with regulations under section 1(1); and any act so done shall be treated as done by an employment tribunal.

(6C) But regulations under subsection (6B) may not specify—

(a) the determination of any proceedings, other than proceedings in which the parties have agreed the terms of the determination or in which the person bringing the proceedings has given notice of the withdrawal of the case, or
(b) the carrying-out of pre-hearing reviews in accordance with regulations under section 9(1).”

24 See Latreille 2011 op. cit for ‘conflict competent culture’. The ‘canons of practice’ are evidenced as emphasis ‘voluntarism’ and ‘confidentiality’ on management and where appropriate union support; and on the presence of a champion.
25 Harris et al, op. cit
26 Mediation at work, of success, failure and fragility, Acas Research Paper 06/10 Paul Latreille (Latreille 2010 b)
28 Evaluation of the first year of Acas’ Pre-Claim Conciliation service Acas Research and Evaluation Section and Infogroup/ORC International 08/10;
Peters et al, op. cit
29 Peters et al, op. cit; Infogroup/Acas op cit; ASHE
30 Peters et al, op. cit;
Race Discrimination claims: Unrepresented claimants’ and employers’ views on Acas’ conciliation in employment tribunal cases Paper 04/07 Maria Hudson, Helen Barnes, Sheere Brooks and Rebecca Taylor, Policy Studies Institute;
The experiences of sexual orientation and religion or belief employment tribunal claimants, Acas Research Paper 02/07, Ann Denvir, Andrea Broughton, Jonny Gifford and Darcy Hill, Institute for Employment Studies
31 Peters et al, op. cit
See also for fuller discussion on representation, Peter Urwin, Franz Buscha and Paul Latreille, Employment Tribunals and Representation: Analysis of the 2008 Survey of Employment Tribunal Applications Acas Research Paper x/11 (forthcoming)
32 The Dispute Resolution Regulations one year on: the Acas experience, Acas Research Paper 0x/11, Barbara Davey and Gill Dix (forthcoming)
33 Urwin et al, op. cit
34 Urwin et al, ibid
35 Hudson et al, op. cit; Denvir et al, op. cit
36 see for instance http://www.employmentappeals.gov.uk/Public/Upload/09_0207wwjudgmentoncostsDA.doc
(Appeal No. UKEAT/0207/09/DA)
38 5 Legal officers

(6B) Employment tribunal procedure regulations may (subject to subsection (6C)) also provide that any act which—

(a) by virtue of subsection (6) may be done by the person mentioned in subsection (1)(a) alone, and
(b) is of a description specified by the regulations for the purposes of this subsection,
may be done by a person appointed as a legal officer in accordance with regulations under section 1(1); and any act so done shall be treated as done by an employment tribunal.

(6C) But regulations under subsection (6B) may not specify—

(a) the determination of any proceedings, other than proceedings in which the parties have agreed the terms of the determination or in which the person bringing the proceedings has given notice of the withdrawal of the case, or
(b) the carrying-out of pre-hearing reviews in accordance with regulations under section 9(1).”
ACAS RESPONSE TO THE RWD CONSULTATION – GENERAL COMMENTS

Mediation
There is some ambiguity in the use of the word “mediation” as it applies to individual employment relations. The term itself does not appear in legislation, and to confuse matters further it has historically been used in the collective employment relations context to denote a form of directive third party intervention where recommendations are made to the parties, which has no parallel in individual rights disputes or employment tribunal claims.

The role that Acas plays in resolving actual or potential statutory employment rights claims is described in law as “conciliation” (eg S211 of TULRA 1992, S18 of ETA 1996). However this merely reflects the fact that until recently “conciliation” was common parlance for any form of non-directive third-party dispute resolution, which nowadays people would tend to call mediation.

In relation to individual disputes, “mediation” and “conciliation” are both terms for a process where an independent, impartial third party works in a non-directive way to assist two or more disputants to reach a voluntary agreement to resolve the matters between them. One can distinguish various practice models (eg evaluative, facilitative, transformational) or channels of delivery, but these are just alternative ways of going about the same basic process: there is no valid qualitative distinction between conciliation and mediation.

It can nevertheless be useful to differentiate between the service that Acas delivers under S18 of ETA 1996 in actual or potential employment tribunal claims (which we call “statutory conciliation”), and the facility which we and other providers offer to help resolve other individual workplace problems (which we call “non-statutory mediation”). Among other things, agreements reached in statutory conciliation have the legal force of ousting a Tribunal’s jurisdiction to hear a claim, and the confidentiality of information communicated to the conciliator in this context is protected by law.

Our responses to Questions 1 – 7 relate to non-statutory mediation.

Modern workplaces
Workplace conflict can still do considerable damage to employee engagement and productivity even where it does not escalate into disputes that become potential tribunal claims. There is a great deal to be gained by encouraging and supporting employers and employees to manage potential conflict more effectively so as to nip problems in the bud and avoid these consequences.

Acas already does much to help employers and employees deal with workplace problems themselves. For example, we provide information through our website and publications (especially the Acas Code of Practice) - in a recent survey, six in 10 users of Acas publications said that the publication they had obtained most recently had helped them to resolve a problem at work. The guidance that our Helpline supplies has been found both to help employees avoid the need to submit employment tribunal claims, and to help employers to generally improve
their policies and procedures. In addition, we offer an extensive range of training both on employment rights awareness and on matters such as holding “difficult conversations”. Line managers play a particularly crucial role in this respect, both in day to day working and in handling some of the most challenging aspects of the employment relations. Much of Acas’ training is targeted at the needs of line managers. These services are accessible to all, and are particularly valuable to SMEs who do not have access to in-house legal or HR expertise – around two-thirds of those attending Acas “Open Access” events are from organisations with fewer than 250 employees; and 45 per cent come from establishments with fewer than 100 employees.

The consultation also mentions that Government is looking to develop a vision for the modern workplace to promote a more long-term, positive and co-ordinated approach to issues related to employment relations and skills. This chimes with the work Acas has already done in devising the Acas Model Workplace and developed further through an Acas pilot initiative funded by the East Midlands Development Agency. The latter provided in depth support to ten organisations – with workforces ranging in size from 20 to 1,000 employees -, resulting in improvements in leadership skills, communication and employee engagement; and yielded a sound return on investment.

In addition, our integrated business model, developed around our reputation for independence and impartiality, enables us to provide support to organisations in both preventing and resolving problems in the workplace. This integrated approach has been identified as a key element of the value which Acas brings to the UK economy.

We would be glad to have further dialogue with BIS and other stakeholders to explore the potential for publicising these services and initiatives more effectively and making the benefits even more widely available.

In his report, Michael Gibbons said:

“Fundamentally, what is needed is a culture change, so that the parties to employment disputes think in terms of finding ways to achieve an early outcome that works for them, rather than in terms of fighting their case at a tribunal”

This requires a shift in underlying attitudes to conflict at work and cannot be achieved solely through altering legislation or tribunal processes, or even by making more dispute resolution services available.

There are indications to suggest that some employers and employees are growing more receptive to a “problem solving” approach rather than treating every potential conflict as a power struggle. Evidence on the introduction of workplace mediation schemes provides a case in point in this respect and recent Acas commissioned research has identified the features contributing to successful changes in conflict management. In seeking a way forward in managing individual relations, the sphere of collective relations is likely to be as important as a focus on one to one relationships, particularly in larger (including unionised) organisations.
Nevertheless a substantial task remains to promote this paradigm shift more widely. We would also welcome the opportunity for further dialogue with BIS and stakeholders across the employment relations spectrum as to how that might best be pursued.

**Employment Tribunals**

For disputes in which litigation proves unavoidable, it is important that the employment tribunal system should work swiftly, efficiently, effectively, and fairly.

Acas conciliation plays a vital part in enabling parties to reach an informed understanding of the likely costs, timescale and procedural requirements of the tribunal process; and to develop a realistic appreciation of the value of the claim and the factors which contribute to uncertainty. The value of that unique and highly effective role – both at the pre- and post-claim stage of the process – must not be underestimated and it is important that the implications for the successful functioning of conciliation are considered in relation to all the proposals in the consultation.

We share the view that modernising the employment litigation system should be achieved "without compromising what is unique and important about employment tribunals"\[xii\]. We have commented on some of the specific proposals in our replies to the consultation questions, but on a general basis we would prefer to have seen the system move further away from the civil court model rather than towards it. We are concerned that the current direction of travel may be inconsistent with preserving those distinctive features of employment tribunals, and as a result may distance them further from the realities of workplace relations and make them less accessible and acceptable to the employers and employees who have to use them.

**Interpreting ET statistics**

Reducing the incidence of employment rights litigation is a highly desirable policy goal; but we are concerned that the wider contextual background is fully understood so as to avoid misconceptions and unnecessary alarm among employers, especially in the SME sector.

The consultation document quotes statistics from the Tribunals Service showing that the number of claims rose by 56% between 2008-09 and 2009-10, to a record number of 236,100. These TS statistics report the overall number of individual claims. Whilst they serve as a good proxy for Tribunal workloads they mask the impact of comparatively small numbers of large multiple cases, which can tend to project a distorted picture of what is happening in workplaces across the economy as a whole. For instance, a multiple case in which a thousand employees of the same organisation are claiming in the same circumstances is in reality only one dispute, albeit involving many individuals. That distortion is exacerbated where, as at the moment, numerous large multiple cases are pursued simultaneously against employers in the same sector on very similar grounds.

Most of the increase in ET claims between 2008/09 and 2009/10 was created by large scale multiple cases\[xiii\]. The great majority of those were equal pay claims
against local authorities or NHS employers - a continuation of an upward trend in similar cases in those sectors which started in 2004. These large multiples are not representative of conflict levels or dispute resolution behaviours in the generality of workplaces.

The TS statistics also report the level of “single claimant cases”; but despite being a far better barometer of workplace disputes generally these are seldom quoted. Single claimant cases rose by some 14% between 2008/9 and 2009/10, much of which can be attributed to changes in the economic climate; but even in 2009/10 there were actually fewer single claimant cases than in 2000/01xiv.

Furthermore, there are indications that the recent increase has peaked and may be in reverse, perhaps in some measure due to the expansion of Pre-Claim Conciliation. If large equal pay multiples are excluded, the number of ET cases referred to Acas for conciliation in the 12-month period to the end of February 2011 was 14% lower than in the previous 12 months.

Looking further back, the general upward trend in employment litigation since the early 1970s has been comparatively slow, and can at least in part be attributed to the growth in the number of statutory employment rights over the same periodxv. Overall, therefore, once economic trends and special factors such as the long-running equal pay litigation in certain parts of the public sector are taken into account, there is no evidence of a growing “litigation culture” on employment rights in Britain.

Nor is there evidence to suggest that the level of employment-related litigation in GB is high by international standards. International comparisons are fraught with difficulty because of differences in the way that employment rights are enforced (for instance, New Zealand has a Labour Inspectorate which deals with many issues that are handled by tribunals in GB) and because information is not always collected or reported consistently. However, by way of an example, Michael Gibbons quoted data giving the approximate incidence of employment litigation in 2002 as a percentage of the working population as 1.5% in Germany; 0.7% in France; and only 0.4% in GB.

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i http://www.acas.org.uk/CHttpHandler.ashx?id=1047&p=0

ii Acas Advisory Publications Customer Survey 2010, Acas Internal Research Paper 05/10, IFF Research

iii 23 per cent of employee callers who had been considering an ET claim decided against this course of action as a result of their call to the Acas Helpline; around half (52 per cent) of all employers confirmed that they had updated or improved existing policies at their workplace as a result of their call, while one third (33 per cent) had implemented new policies. Acas Helpline Evaluation 2009, Acas Research Paper 03/10, Alex Thornton and Nicholas Fitzgerald (TNS-BMRB Social Research)

xiv For example, Acas Employment Relations Comment, December 2010, Dr Richard Saundry and Dr Carol Jones, Managing Workplace Discipline; Who holds the key? (www.acas.org.uk/policy publications). Acas is currently undertaking research on the role of line managers in conveying information regarding redundancy and severance.
vi see e.g. Acas Training Services 2008-2009 Evaluation, Acas Internal Research Paper 04/09, Geoff Pike, Employment Research.

vi The project was unique in many respects; it offered a multi method approach to workplace improvement including training, networking and Acas facilitation; leadership skills were implemented in a practical, rather than theoretical approach; and support was customised to individual organisational needs. Whilst the project was small in nature it resulted in a positive return on investment; for every £1 spent on the project, it generated £4 of direct benefit to the regional economy. The East Midlands Innovative Workplace Project: Evaluation Report, Harris et al, Acas Research Report 2011 forthcoming.

viii See A review of the Economic impact of Employment Relations Services Delivered by Acas (November 2007), Pamela Meadows NIESR; also evidence presented to BIS as part of the Acas public value programme review.

ix Better Dispute Resolution (DTI March 2007)


xi For example see Transforming Conflict Management in the Public Sector? Mediation, Trade Unions and Partnerships in a Primary Care Trust Acas Research Paper 01/11, Richard Saundry, Louise McArdle, Pete Thomas; see also the conclusion in Bullying at Work: Acas Solutions Dix, Davey and Latreille , in 2011 Bullying at Work Symptoms and Solutions, Routledge 2011 forthcoming

xii Foreword to the RWD Consultation document, page 4

