

Research Paper

SETA survey of representatives in Tribunal cases 2008

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SETA SURVEY OF REPRESENTATIVES IN TRIBUNAL CASES 2008

AUGUST 2010

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Executive Summary

About the survey

The survey of representatives was undertaken as part of SETA 2008. The main aim of the 2008 survey was to obtain a specialist perspective on the system of employment rights litigation with a particular interest in understanding the views of representatives about the role of Acas conciliators in the process. Additionally, the survey provided the opportunity to gain a greater understanding of the role of Acas.

The interviews were mainly specific to the sampled case, but questions were also asked about the general experience and opinions of the representatives.

Representation of the other party (Chapter 3)

- Eight in ten (80 per cent) respondents reported that the other party was represented during at least some part of the case.
- In these cases, the most common representative was a solicitor (79 per cent).
- Just over half (53 per cent) of representatives contacted the party through their representative. Thirty six per cent reported contact through Acas, and 27 per cent reported that they contacted the other party directly.
- In cases where the other party was represented, two thirds (66 per cent) of respondents reported that this (the other party being represented) made it easier to resolve the case.
- Views regarding representation of the other party were largely positive. Three quarters of respondents (77 per cent) reported that in general, cases where both parties are represented are easier to resolve.

Advice and Outcomes (Chapter 4)

- Sixty four per cent of representatives first became involved in the case before the claimant had applied to the ET. As might be expected representatives of claimants were more likely than those of employers to be involved earlier (91 per cent versus 32 per cent).
- Eight four per cent of representatives reported that they advised their client of their chances of winning the case if it went to hearing. Of these representatives, just over half (54 per cent) advised their client that they were likely to win; 24 per cent advised that their chances were about even and 16 per cent advised that they were likely to lose.
- The findings suggest that most representatives had a high degree of confidence in the merits of their client's case and the likely outcome.

- In terms of the subsequent course of action recommended; six in ten representatives (61 per cent) advised their client to seek a settlement without a hearing, and 17 per cent advised their client to go for a full tribunal hearing. Three per cent advised their client to withdraw the case.
- Ninety six per cent of representatives reported that their client followed their advice. Additionally the findings suggest that adhering to advice is related to what the advised course of action is, with clients more likely to follow recommendations to settle and to withdraw the case.
- Fifty six per cent of representatives reported that they advised their client that it might be possible to settle their case using a compromise agreement and of these; 54 per cent advised their client that they should 'formally' seek such a settlement.
- One third of representatives (33 per cent) involved in settled cases reported that the case was settled via a 'formal' compromise agreement. Representatives of claimants were more likely to report this (40 per cent compared with 24 per cent of employers).
- Representatives' views around whether the terms of compromise agreements are more or less favourable in comparison to the awards that can be expected from an ET hearing were mixed, with 55 per cent of representatives not able to make a firm judgement and reporting 'it depends'.

The Role and Use of Acas (Chapter 5)

- Seven in ten representatives (70 per cent) reported that an Acas conciliator was involved in the case in some way (excluding the introductory letter sent).
- Forty three per cent of representatives reported that they had had direct contact with Acas two to five times, and 26 per cent reported that they had had direct contact six times or more.
- Of those representatives who had had direct contact with Acas, almost seven in ten (68 per cent) reported that it was before their client had received the date for the full tribunal hearing.
- In settled cases, where an Acas conciliator was involved in the case the majority of representatives (86 per cent) reported that the conciliator had been involved in the settlement.
- Representatives' views of Acas' involvement the case were largely positive. Representatives expressed high levels of trust (84 per cent completed trusted the information given to them by Acas), and 94 per cent felt that the conciliator was 'even-handed' when dealing with the case. Seventy one per cent felt that Acas tried either 'very' or 'quite' hard to promote a settlement.
- Ninety six per cent of representatives who had involved an Acas conciliator in their client's case reported that they would recommend involving Acas again in the future.

Mediation (Chapter 6)

- Eleven per cent of representatives reported that they had discussed the possibility of using mediation with their client. Solicitors were less likely to do so (nine per cent) than other types of representatives (16 per cent).
- Two per cent of representatives reported that mediation was used in the case (8 representatives).
- Nine in ten (90 per cent) representatives who had not used mediation to help resolve the dispute reported that they would consider using it in the future.
- When asked whether they thought the outcomes at mediation were in general better or worse for employees than pursuing the claim to a hearing, representatives' views were mixed. Thirty seven felt that the outcomes were better, and 39 per cent felt it depended on other factors. Six per cent felt they would be worse.
- Forty two per cent of representatives stated that they had heard of 'Pre-Claim conciliation', and a further 18 per cent reported that they had heard of it and also used it previously.

1 Introduction

1.1 Background to the Employment Tribunal System

Employment Tribunals (ETs) are a distinctive feature of the British system of administrative law that aim to provide speedy, accessible justice. They play an integral part in the provision of fairness at work and the enforcement of individual employment rights. For people concerned that their employment rights have been infringed they are the place where, when other methods fail, they can be finally resolved. ETs are widely recognised for their independence and impartiality.

ETs are independent judicial bodies supervised by a President, supported by Regional Judges. Each Employment Tribunal includes a legally qualified Judge, who has an important dual role: to ensure due legal process and to ensure that people without legal representation are given full opportunity to present their case in an investigative non-adversarial setting. Decisions of ETs are binding upon the parties. Appeals can only be made upon points of law to the Employment Appeals Tribunal (EAT). The enforcement of Employment Tribunal awards lies with the County Court in England and Wales.

The work of ETs is supported by the Tribunals Service (TS), which is an executive agency that provides premises and administrative support. The cost of the ETs is borne by the Exchequer, administered by the Ministry of Justice (MoJ).

1.2 Acas

The Advisory, Conciliation and Arbitration Service (Acas) is an independent tripartite body, separate from Employment Tribunals service although both are integral to the overall system for resolving disputes concerning statutory employment rights. Acas was created in 1974 and put on a statutory footing in 1975 under the Employment Protection Act 1975. Acas has a statutory role to conciliate in actual or potential complaints to ETs arising from most employment law jurisdictions. This duty is carried out by Acas conciliators who try to help parties to settle their dispute, if they wish to, without the necessity of a full merits Tribunal hearing; henceforth referred to as Employment Tribunal hearings. Since April 2009, the statutory duty to conciliate in potential complaints has been changed to a statutory power. This duty is known as 'individual conciliation' (to distinguish it from the 'collective conciliation' service provided in collective disputes). The Acas Annual Report reports that in 2009-2010 Acas dealt with over 85,000 net ET cases for individual conciliation, which is an overall increase of 13 per cent from 2008/2009 and the highest number ever¹.

Acas individual conciliation is free of charge and voluntary; claimants and employers take part voluntarily and can stop at any point. It is independent

¹ Annual Report and Accounts 2009-2010
<http://www.acas.org.uk/CHttpHandler.ashx?id=2859&p=0>

(because Acas is not part of the TS), and conciliation is impartial as Acas do not take sides in the dispute or judge who is right or wrong.

In seeking to promote settlement, conciliators have no power to impose solutions. Conciliators work with both parties or their representatives (usually over the telephone) to try to help both sides reach a mutually acceptable resolution. The conciliation officer can:

- Explain the tribunal procedures and the tribunal's approach to hearing cases
- Explain the relevant employment and case law if appropriate
- Help the parties establish the facts
- Ensure that each party has heard the other side's perception and views
- Convey offers and explore the feasibility of different settlement options.

1.3 Initiation and TS handling of disputes (ET processes)

Initiation of disputes

Employment Tribunal applications have to be initiated by the claimant (or their representative). The process is usually triggered by the completion of an ET1, an official form that provides details of the employer, the dispute and, where the claimant is represented, contact details of their representative. The ET1 has to be sent to a Regional Office of the TS.

On the basis of the information provided on the ET1, the TS then determines both whether the application meets judicial requirements, and the jurisdiction under which the case will be heard. In cases involving more than one jurisdiction, the TS no longer determines the main jurisdiction, as there is no official hierarchy of jurisdictions. All this information is then registered on the TS administrative database (ETHOS). In order to count cases, one of the jurisdictions is designated 'principal jurisdiction' but this is for administrative purposes only for the classification on jurisdictional reporting in ET statistics. A copy of the ET1 is then sent to the employer with a blank ET3, another tribunal form, on which the employer is required to respond to the claim presented on the ET1 and provide specific factual information, including contact details of their representative, where appropriate. A copy of the ET1 is also sent to the nearest Acas Regional Office for allocation to an Acas Conciliator for conciliation. Copies of the completed ET3 are sent to the claimant and to Acas. Any correspondence relating to the case which is received by the TS is also copied and sent to all the parties involved and to Acas.

Processing ET applications and administrative outcomes

Once an application has entered the system, there are effectively seven possible outcomes:

- the claimant may withdraw the application (this may follow contact with Acas or advice from their representative);
- the Chairman may dismiss the application because it is not in the scope of the legislation or because a Pre-Hearing Assessment found that there was insufficient evidence to progress the case;
- the parties may reach an Acas conciliated settlement, where Acas is involved in ratifying the final settlement. This is recorded as an Acas settlement (on the COT3 form);
- the parties may reach a private settlement outside Acas either on the basis of a legally binding Compromise Agreement or an 'informal agreement'. These are known as 'private settlements';
- the application may result in a full merits Tribunal hearing, which may be upheld (claimant wins) or dismissed by the Employment Tribunal (claimant loses);
- A default judgement may be issued if no response to the claim has been submitted within the 28 day time limit.

Compromise agreements were introduced under Section 39 of the Trade Union Reform and Employment Rights Act 1993. They provide for the parties involved in employment rights disputes to settle on the basis of a legally binding agreement in which the claimant waives his or her right to take the claim to an employment tribunal provided the claimant has received independent advice from a bona fide independent adviser (a trade union officer or advice centre worker accredited for this purpose, or a qualified lawyer). 'Private agreements' which have been reached without a compromise agreement do not put a bar on tribunal proceedings.

1.4 Representation in cases

Both employers and claimants have the right to seek legal or other advice and/or representation in ET cases, including speaking on their behalf at hearings. In many cases the representative will have been nominated on the appropriate originating forms (ET1 in the case of claimants and ET3 in the case of employers). Where representatives have been nominated, subsequent correspondence by the TS and Acas is addressed to this representative.

The complexity of employment tribunal cases has increased since their introduction. Whilst one of the main indicators of this is the increasing volume of applications involving more than one jurisdiction, Dix et al (2008) reports that a further indicator of complexity is the increase in the level of representation which has grown over the years. In the mid 1980s around four in every ten claimants were represented, however Dix et al report that SETA 1998 and 2003 data shows that this figure has grown and had begun to stabilise (in SETA 2003 55 per cent of claimants and 59 per cent of employers had a representative handling their case). SETA 2008 data suggests that this figure has remained fairly static for employers (with 60 per cent having a representative), but has reduced amongst

claimants to 46 per cent. However, this figure still remains higher than the levels seen in the mid 1980s, and indicates that representatives are an integral part of many ET cases.

The main roles of a representative includes providing advice to their client, acting on their behalf in dealings with the other party and with Acas, and presenting the case at the tribunal hearing if it progresses to this stage. Representatives will often have a greater experience of employment law matters (and the law itself in the case of solicitors) and it is expected that this will result in a better understanding of the system and the most appropriate way of proceeding. In terms of the advice that they give; there are two main aspects involved: firstly to assess the merits of the case and make a prediction about the likely outcome at tribunal. Then in relation to this prediction the second aspect is to recommend the best course of action to their client about how to proceed with the case. Representatives therefore potentially play a key role in the direction of the case and its final outcome depending on the advice that they give and the influence this has on their client's actions.

The interaction between the representative and Acas is important. In cases where a representative is involved, Acas generally conciliates through the representative and rarely deals with the claimant or employer directly. Representatives are usually but not always empowered to agree settlements with Acas on behalf of their client, after taking appropriate instruction.

Representatives often have substantial and repeat experience of the ET system (Latreille et al, 2004) and are therefore likely to have a wealth of experience around the working of the system and its agents. Claimants and employers will often have much more limited experience of the system; in many cases relating to one specific case only. Representatives therefore offer a valuable and unique perspective on the system, however it must be borne in mind that representatives are not completely impartial and their views may still reflect their own perceived role of the system.

1.5 Policy context

The workload of ETs grew rapidly in the 1990s, with a threefold increase in claims to tribunals between 1991 and 2001, when the number of applications peaked at over 130,000². Although the number of applications was lower than this in subsequent years, it increased from 86,000 in 2004-05 to 115,000 in 2005-06, and to a new peak of 133,000 in 2006-07³.

² Routes to Resolution, Government Consultation Paper, DTI, 2001

³ Employment Tribunal Service Annual Report and Accounts 2005-06; Employment Tribunal and EAT Statistics (GB) 1 April 2006 to 31 March 2007
<http://www.employmenttribunals.gov.uk/Documents/Publications/AnnualStatistics0607.pdf>

Employment disputes resolution review

In June 2001, the Government announced a Review of the process of employment dispute resolution, with the main aim of identifying steps that could be taken to promote resolution within the workplace as an alternative to parties having to go through the tribunal system. A consultation paper, *Routes to resolution: Improving dispute resolution in Britain* was published in July 2001, setting out proposals for a programme of reform. Following the consultation process, the Government announced that there would be light-touch legislation binding both employees and employers that would build on existing good practice and recognise the particular needs of small businesses.

Employment Act 2002

This model for dispute resolution was laid out in primary legislation, forming part of the Government's Employment Act 2002⁴, which came into force in October 2004, requiring all employers and employees in Great Britain to follow statutory minimum dispute resolution procedures in the event of an employment dispute.

Fixed conciliation periods

Until 2004, Acas' statutory duty to conciliate subsisted up to the point where all matters of liability and remedy had been determined by an employment tribunal. In October 2004 new Regulations placed time limits on the conciliation periods in the majority of cases. The purpose of these fixed conciliation periods was to prompt parties and representatives to engage in conciliation at an early stage rather than, as had often been the case, in the last few days before a scheduled tribunal hearing, which can cost time and money to all concerned, including the tribunals. Cases were divided into three categories according to the jurisdictions involved in the claim:

- those allocated a 'Short' seven week conciliation period - in the main, jurisdictions which concern unpaid statutory or contractual entitlements, or the granting of time off in specified circumstances.
- those allocated a 'Standard' thirteen week period - more complex cases, primarily those involving claims for unfair dismissal.
- those allocated an unrestricted 'Open' period for conciliation - the most complex and sensitive claims, such as those concerning discrimination or equal pay in which there are no set time limits.

In March 2006, Acas adopted differential service standards to prioritise reduced conciliation resources more effectively. Broadly speaking, the service standard for standard period cases reflected existing practice. However, a more streamlined approach was adopted for conciliation in short period cases seeking to make the best of the narrow window of opportunity available to resolve these cases.

⁴ The Employment Act 2002 (Dispute Resolution) Regulations

The Gibbons Review and the future of dispute resolution

In December 2006, Michael Gibbons was commissioned to review the options for simplifying and improving all aspects of employment dispute resolution, to make the system work better for employers and employees. The Gibbons Review⁵ looked at all aspects of the system, including the existing legal requirements, how ETs work, and the scope for new initiatives to help resolve disputes at an earlier stage.

Gibbons found that, while the 2004 statutory dispute resolution procedures had brought some benefits, they were burdensome for both parties and had unintended negative consequences. Gibbons made a number of recommendations to the Government as a result of the Review, primary among which was that the statutory dispute resolution procedures set out in the 2004 Dispute Resolution Regulations should be repealed, to be replaced by simpler, less prescriptive guidelines on grievance and disciplinary issues, with better quality advice made available to claimants and respondents, and a strong focus on using mediation as a route to resolving disputes at an early stage and without recourse to tribunals. Other key recommendations included allowing ETs to take into account parties' attempts at early resolution in making awards and costs orders; introducing a new simple process to settle monetary disputes without the need for tribunal hearings; and abolishing the fixed Acas conciliation periods.

Employment Act 2008 and changes since 6 April 2009

The Government welcomed the review and published 'Resolving disputes in the Workplace - A consultation' which set out measures for taking the Gibbons Review forward. Responses to the consultation enabled the Government to identify key legislative reforms for inclusion in the 2008 Employment Act. Details of all these measures are set out in the Government response to the consultation.

On 6 April 2009 the Employment Act 2002 (Dispute Resolution) Regulations 2004, which laid down a mandatory "three-step" procedure were repealed and replaced by a new framework based on the provisions of the Employment Act 2008 in Great Britain.

The new framework for resolving employment disputes in Great Britain emphasises the importance of the early resolution of disputes in the workplace. The two key elements are i) legislative and ii) non-legislative measures. As a result of these measures, employees and employers have greater flexibility to deal with workplace discipline and grievance issues in a way which suits them best.

- *Legislative measures* - The legislative measures are based on the Employment Act 2008. The Act paved the way for a new Acas statutory Code of Practice on discipline and grievance, which sets out the principles that employers and employees should follow when dealing with disputes at work.

⁵ Better Dispute Resolution: A Review of employment dispute resolution in Great Britain
<http://www.berr.gov.uk/files/file38516.pdf>

- *Non-legislative measures* - The Government is also investing a significant amount of resources into providing new services to help employers and employees resolve their disputes earlier including the Acas Helpline, Acas Pre-Claim Conciliation and Mediation.

1.6 Background to the SETA Series

The origins of this study can be traced back to Courtney's survey of Unfair Dismissal applications, commissioned by the then Department of Employment (1975). This was followed by a survey of Unfair Dismissal applications carried out by the ESRC Industrial Relations Unit, University of Warwick (1978). The initiation of this series of surveys of Tribunal applications (SETA), however, can be traced back to a Rayner Efficiency Review in the mid 1980s. The Review recommended that it would be more cost effective to collect information on items such as the characteristics of claimants and employers using sample surveys rather than collecting them through administrative means. The Scrutiny also pointed out that sample survey methods would provide an opportunity to collect other relevant information for policy research purposes.

The first SETA was undertaken in 1987, with subsequent surveys undertaken in 1992, 1998, 2003 and 2008.

SETA 2008

The 2008 Survey of Employment Tribunal Applications (SETA 2008) was the fifth in the series. The SETA series aims to provide information on the characteristics of the parties in, and key features of, employment tribunal cases. A report of findings from SETA 2008 has been published as part of BIS's Employment Relations Research Series (No. 107) and is available to download from the BIS website⁶. The dataset for SETA 2008 has been deposited in the UK Data Archive⁷ for the use of bona fide researchers registered with the Archive.

1.7 Aims and objectives of the Survey of Representatives in Tribunal Cases

The survey of representatives was undertaken as part of SETA 2008. A previous survey was undertaken in 1998 as part of SETA 1998. This was an innovative aspect of the survey design and enabled analysis of the role and views of this important group within the ET system. Before the 1998 survey there was some previous evidence concerning the role and experiences of representatives both from surveys by Acas and also a small scale study reported by White (1989). However, this survey allowed the role of representatives to be examined further.

⁶ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008.pdf>

⁷ <http://www.data-archive.ac.uk>

The main aim of the 2008 survey was to obtain a specialist perspective on the system of employment rights litigation with a particular interest in understanding the views of representatives about the role of Acas conciliators in the process. Representatives are involved in a large number of ET cases⁸, and are a key component in the ET process.

One of the main roles for a representative is to provide advice to their client; both in terms of the recommended merits of their case (and the likely outcome at a tribunal hearing) and the best course of action in how to proceed with the case. They therefore play a role in direction that the case takes and the final outcome depending on the advice that they give and the influence it has on their client's action. The survey was also concerned with exploring representatives' views on the extent to which they were able to influence the parties towards settlement of the case without a full tribunal hearing.

Additionally, the survey provided the opportunity to gain a greater understanding of the role of Acas. In SETA 2008, questions were included concerning the parties contact with Acas, however in many cases, where representatives had been nominated on the appropriate originating forms (ET1 in the case of claimants and ET3 in the case of employers) subsequent correspondence by the TS and Acas would have been addressed to this representative. Many claimants and employers would not have experienced direct contact with Acas, and their answers would have been dependent upon their representative's reported contact with Acas (of which they may have had little or no knowledge). Representatives/advisors on the other hand, should typically be far better informed in this regard and therefore it is important to speak to representatives directly to get their views around the role of Acas within the ET process.

Representatives are typically able to draw on knowledge and experience from a larger number of ET cases than claimants and employers and are better placed to give thoughts and opinions on the system itself. Claimants and employers will generally have less experience of experience of the ET system, and the majority will base their views on just one specific case or a small number of cases.

The interviews were mainly specific to the sampled case, but questions were also asked about the general experience and opinions of the representatives. The questionnaire for the 2008 survey was initially based on the questionnaire used in the 1998 survey before it was significantly updated and piloted (see Chapter 2 for details).

1.8 Design of the Survey

The sample was drawn from a sample of represented ET cases provided by Acas. All the cases had closed between the start of February 2007 and the end of January 2008 (the same sampling period as used in SETA 2008) and at least one party had a formal representative (informal representatives were removed from the sample). A simple random sample of claimant representatives and employer

⁸ In SETA 2008 60 per cent of employers and 46 per cent of claimants had a representative.

representatives was drawn from these cases. Further details of the sampling design and process can be found in Chapter 2⁹.

The sample only includes cases where the representative was named on either the ET1 or ET3 form. Representatives can be appointed later in the process, but such details are not included on the Acas database and are therefore not included in the survey. This must be borne in mind when interpreting the findings of the survey, as the stage when a representative is involved may have an effect on the views held around the case and the actions recommended.

A total of 406 interviews were conducted.

1.9 Overview of Case and Representative Characteristics

Case Characteristics

Main Jurisdiction and Track

Table 1.1 shows a breakdown of the main jurisdiction as reported by the representatives in the survey.

	N	%
Unfair Dismissal	270	67
Breach of Contract	11	3
Wages Act	14	3
Redundancy Payments	2	1
Any discrimination	80	20
Other	29	7
Base – All representatives (406)		

In terms of a breakdown by track, this is shown in the Table 1.2 below.

	N	%
Short Conciliation Period (Fast Track) Cases	33	8
Standard Conciliation Period cases	244	60
Open period discrimination cases	129	33
Base – All representatives (406)		

Table 1.3 shows the relationship between main jurisdiction and track. As mentioned earlier, many cases have more than one jurisdiction. The conciliation period is determined by the jurisdiction which falls under the longest period. For

⁹ Re-contact details of representatives were collected from claimants and employers interviewed in SETA 2008 (who had a representative), and it was originally intended that these representatives would form the sample of this survey. Full contact details, however, were collected for very few representatives and interviews were achieved with 102 representatives. The sample was therefore supplemented with representatives sampled from the Acas database. At the analysis stage it was decided that the interviews achieved from the representatives sampled through the SETA 2008 re-contact details should be excluded from analysis due to the differences in sample sources and procedures.

example, a case which lists unfair dismissal followed by sex discrimination would be an open period case.

Table 1.3 Relationship between 'main jurisdiction' and 'track'

Track	Main Jurisdiction					
	Unfair dismissal	Breach of contract	Wages Act	Redundancy payments	Discrimination	Other
All Short Conciliation Period (Fast Track) Cases		91%	71%			45%
All Standard Conciliation Period cases	86%	9%	29%	100%		17%
All Open period discrimination cases	14%				100%	38%
Base – All representatives (406)						

Outcome

Table 1.4. shows a breakdown of case outcome as reported by the representatives in the survey. The majority of cases were settled (77 per cent).

Table 1.4 Case outcome (as reported in survey)

	N	%
Claimant won at hearing	10	3
Claimant lost at hearing	16	4
Settled	312	77
Withdrawn	54	13
Dismissed / Disposed of	14	3
Base – All representatives (406)		

Settled cases

Seventy seven per cent of cases were settled. The details of settled cases are as follows:

- In terms of the details of the settlement, over nine in ten (92 per cent) settled cases involved money and 11 per cent involved a reference.
- In cases where the settlement involved money, the mean settlement amount was £9,721. However, the median was much lower at £5,000.
- Ninety eight per cent of representatives reported that the claimant had been given everything agreed to in the settlement.
- Representatives involved in settled cases who also stated in the interview that Acas had been involved in the case in some way were asked whether Acas was involved in the settlement between the parties. Of these 242 representatives, 86 per cent reported that they were. Overall this suggests

that of all the 312 'settled' cases, 208 were 'Acas' settled cases, and 104 were 'privately' settled¹⁰.

- Respondents involved in settled cases were asked about whether the settlement was a 'formal' compromise agreement. Overall, three in ten (30 per cent) settled cases were a 'formal' compromise agreement.
- In cases which were settled using a 'formal' compromise agreement, 35 per cent of respondents reported that Acas was also involved in the settlement, and just under two thirds of respondents (65 per cent) reported Acas was not involved in the settlement.
- In cases which were not settled, 11 per cent of representatives reported that an offer of money was made to settle the case by the employer.

Client

Representatives of both claimants and employers were included in the survey. Fifty five per cent were claimant representatives, and 45 per cent were employer representatives.

Representative Characteristics

Representative Type

The majority of representatives interviewed were solicitors, barristers or some other kind of lawyers (72 per cent). The table below shows the full breakdown of representative type:

	N	%
Solicitor, barrister or some other kind of lawyer	293	72
Trade union / Worker representative at workplace	38	9
Citizens Advice Bureau	16	4
External Consultant / Insurance company advisor	17	4
Employment Rights Advisor / Employment Consultant	10	3
Legal specialist in company / company lawyer	11	3
Personnel or human resources specialist	6	2
Employers association / Trade Association	4	1
Other	11	3
Base – All representatives (406)		

Professional legal training/Qualifications

Eighty six per cent of respondents reported that they had professional legal training / qualifications. Looking only at representatives who were not solicitors, barristers or some other kind of lawyers (113 representatives), just over half (53 per cent, 60 respondents) had professional legal training / qualifications.

¹⁰ This distinction between 'Acas' settled cases and 'Privately' settled cases should be treated with caution. Additionally it should be noted that the case outcome in the current survey was collected differently to 'SETA outcome' in the SETA 2008.

Number of claimants and employers represented in the last 12 months

Looking at involvement in ET cases in the past 12 months, 70 per cent of representatives had represented at least one claimant in the past 12 months and 69 per cent had represented at least one employer in the last 12 months. Table 1.6 shows the full breakdown:

Table 1.6 Number of claimants and employers represented in the last 12 months

	Claimants represented in last 12 months		Employers represented in the last 12 months	
	N	%	N	%
None	117	29	118	29
1 to 2	51	13	24	6
3-5	37	9	44	11
6-10	59	15	48	12
11-24	65	16	74	18
25-49	35	9	59	15
50-99	21	5	20	5
100 or more	17	4	12	3
Don't know	4	1	7	2
Base – All representatives (406)				

When looking at representatives of claimants; 47 per cent (105 of the 198 claimant representatives) reported that they had not represented any employers in ET cases in the last 12 months. When looking at representatives of employers, 50 per cent (93 of the 184 employer representatives) reported that they had not represented any claimants in the last 12 months. Overall this indicates that when looking at all representatives interviewed 26 per cent have only represented claimants in the past 12 months, 23 per cent have only represented employers, and 51 per cent have represented both claimants and employers.

Working time spent on employment law

Fifty seven per cent of representatives reported in the last year they had spent 80 per cent or more of their working time on matters related to employment law. A quarter (26 per cent) reported that they spent 20 to 80 per cent of their working time on matters relating to employment law in the last year, with 13 per cent reporting one to 19 per cent of their time, and three per cent reporting that it was too little to say. Unsurprisingly solicitors, barristers and other kinds of lawyers, were more likely than other representatives to spend more of their working time on matters related to employment law (75 per cent spent at least half (or more) of their working time on matters related to employment law, compared with 57 per cent of other representatives).

1.10 Format and Outline of Report

This report presents the main descriptive findings from the survey of representatives. The following analysis is included in the report:

- Track – Short conciliation period cases / Standard conciliation period cases / Open period discrimination cases (see Table 1.2 earlier in this chapter for further details)
- Who was represented – Claimant (55 per cent) / Employer (45 per cent)
- Type of representative – Solicitor, Barrister or some other kind of lawyer (72 per cent) / other type of representative (28 per cent). In the report this analysis refers to 'Solicitor' and 'Other type of representative'.

Analysis is reported in terms of percentages, except for when the base of a particular question or sub-group is less than 100 respondents. In these cases the number of respondents is quoted.

Chapter 2 provides further details of the methodology of the survey. Then the following four chapters cover:

- Representation of the Other Party (Chapter 3)
- Advice and Outcomes (Chapter 4)
- The Role and Use of Acas (Chapter 5)
- Mediation (Chapter 6)

A conclusions chapter at the end of the report draws together some of the key findings and implications of the research.

Comparisons with the 1998 survey of representatives

Full details of the sampling procedure are given in Chapter 2. The sampling procedures of the 2008 survey representatives differed from the sampling procedures used in the 1998 survey¹¹. In the report some comparisons are made between the two surveys however they must be treated with caution. They were included to help give some broad context and background to the issue of representation in ET cases and aid interpretation of the current findings. When reviewing these comparisons the differences in sampling approaches must be borne in mind, and such comparisons should be treated as indicative only.

¹¹ The 1998 survey of representatives was based on a selection of 'depth' cases in the main SETA 1998 survey in which a claimant or a employer had reported the use of an advisor/representative and gave their permission for this person to be approached for the survey. Full details are provided in 1998 survey report by Latreille et al (2004).

1.11 Glossary

Table 1.7 Abbreviations

SETA	Survey of Employment Tribunal Applications
BIS	The Department for Business Innovation and Skills
Acas	The Advisory, Conciliation and Arbitration Service
TS	The Tribunal Service
ET	Employment Tribunal
PCC	Pre-Claim Conciliation

2 Methodology

In this chapter the methodology for the survey is discussed. It includes discussion of the sampling process, the piloting of the survey, details of the questionnaire and the survey response.

2.1 Sampling Preparation

BIS provided TNS-BMRB with two files from Acas. The first file was a file of all cases which had closed between the start of February 2007 and the end of January 2008, where at least one party had a representative which was named on either the ET1 or ET3 form¹².

The second file was a processed version of the first file. The file had been split into two sample files – all cases where the employer was represented (with the representative details of the employers' representative), and all such cases where the claimant was represented (with the representative details of the claimants' representative). Acas had made the following exclusions to the file:

- Cases which had not been cleared/closed;
- Representatives where no name was recorded;
- Within the employer representative file, Acas checked and identified any duplicate representatives (i.e. where the same representative appeared in the file more than once). In all such instances, one case was chosen at random to be deleted;
- Within the claimant representative files, Acas also checked and identified any duplicate representatives (i.e. where the same representative appeared in the file more than once). Again, in all such instances, one case was chosen at random to be deleted.

After these exclusions, 3365 employer representatives and 2854 claimant representatives remained. Between these two sets of representatives, Acas marked cases which appeared in both sets (i.e. 'matched cases'), and representatives which appeared in both sets (i.e. 'dual representatives'). TNS-BMRB reviewed the file, and any representatives with an incomplete or missing telephone number underwent an external telephone lookup. Records without a telephone were removed. TNS-BMRB then made the following further exclusions to the files:

¹² The sample only includes cases where the representative was named on either the ET1 or ET3 form. Representatives can be appointed later in the process, but such details are not included on the Acas database and are therefore not included in the survey.

- Representatives with incomplete address details;
- Representatives whose client was interviewed in SETA 2008 but refused to have their representative contacted;
- Representatives who were contacted for the 2007 Customer Survey of the Acas Individual Conciliation Service;
- Representatives who were family members or friends (informal representatives);
- Representatives included in the SETA re-contact sample.

TNS-BMRB also reviewed all the 'dual representatives' and chose to retain the representative in the claimant sample file. The duplicate representatives in the employer file were excluded.

After all these exclusions 2446 claimant representatives and 2258 employers remained.

2.2 Survey Pilot

TNS-BMRB conducted a pilot of the survey between 2nd September and 9th September 2009. Interviewing was conducted at TNS-BMRB's telephone interviewing centre in Ealing and interviewers were briefed and de-briefed face-to-face by the research team.

A total of 28 interviews were conducted.

Sample information

The sample information for representatives was generally good and non-problematic. There were, however, a few cases where the case information was incorrect, where the contact was unknown at the company or where the contact had left the company.

Timings

The timing of the survey was not a major issue as the agreed length and average length of the interview were both 20 minutes. There was however a large variation in interview length with interviews ranging from 14 minutes to 34 minutes.

Questionnaire

Overall the questionnaire generally worked well and there were no major issues related to whole sections. Following the pilot, minor modifications were made to the questionnaire.

2.3 Selection of Main Stage Sample

A simple random sample of claimant representatives and employer representatives was then drawn for the main stage; 623 claimant representatives, and 524 employer representatives were selected.

2.4 Questionnaire

The questionnaire was divided into several blocks, with their order being largely chronological. The blocks and their content are summarised in Table 2.1. The questionnaires were implemented via Computer-Assisted Telephone Interviewing (CATI). All question names were prefixed with the letter of the block in which they were asked, and the remainder of the name attempted to convey the subject of the question.

Table 2.1 Blocks used in Questionnaire

Block	Main topics
A. Background	Check on identities Representative Type Main and other jurisdictions Outcome Details of awards and settlements Representation on other side
B. Advisor/representative characteristics	Experience of ET cases
C. Advice	Time spent on employment law matters Complexity of case Assessment of likely outcome Legal advice Mediation
D. Acas	Contact with ACAS Role of ACAS in promoting settlement Assessment of ACAS Conciliation Officer General experience and assessment of ACAS Conciliation Officers
E. Compromise Agreements	Whether advised on compromise agreement Whether settlement was compromise agreement Experience and use of compromise agreements
F. Representation on the other side	Effects of representation of other side on settlement in this case and generally
G. Tribunal Hearing	Whether outcome at tribunal expected Representation of claimant at hearing (employer representatives only)
H. Satisfaction with Acas/TS	Satisfaction with ACAS and TS in this case and generally

2.5 Survey Fieldwork

All representatives were sent an advance letter prior to the start of telephone fieldwork.

All interviews were conducted at TNS-BMRB's telephone interviewing centre in Ealing and interviewers were briefed face to face by the research team. Fieldwork took place from 2nd September 2009 to the 23rd December 2009.

2.6 Survey Outcome

Table 2.2 shows overall survey response. A 63 per cent response rate (based on valid sample) was achieved.

Table 2.2 Survey Response

	TOTAL		Claimant Representative		Employer Representative	
	N	%	N	%	N	%
Advance letters sent	1147	100	623	100	524	100
Invalid sample data						
Invalid telephone number	109	10	59	9	50	10
Business closed down	1	0	1	0	0	0
Business moved	3	0	0	0	3	1
No recollection of case	48	4	29	5	19	4
Sample/ETHOS information incorrect	18	2	9	1	9	2
Case is confidential/have a confidentiality agreement	28	2	12	2	16	3
Contact unknown at company	36	3	22	4	14	3
Contact left the company	237	21	127	20	110	21
Ineligible representative type	3	0	3	0	0	0
Case details not confirmed	13	1	7	1	6	1
Contact deceased	2	0	2	0	0	0
Opt-out/refusal						
Office opt-out	2	0	2	0	0	0
Personal refusal	56	5	30	5	26	5
Gatekeeper refusal	1	0	1	0	0	0
Personal soft refusal	30	3	13	2	17	3
Gatekeeper soft refusal	7	1	3	0	4	1
Abandoned interview	3	0	1	0	2	0
Unavailable during fieldwork period	66	6	37	6	29	6
10+ Unsuccessful calls	78	7	42	7	36	7
Full interviews	406	35	223	36	183	35
Invalid sample data (N)	498		271		227	
Opt-out/refusal (N)	243		129		114	
Full interviews (N)	406		223		183	
Valid sample data (N)	649		352		297	
Invalid sample data (%)	43		43		43	
Opt-out/refusal (%)	21		21		22	
Productive (%)	35		36		35	
Productive of valid sample (%)	63		63		62	
Refusal/unproductive of valid sample (%)	37		37		38	

3 Representation of the Other Party

Both parties involved in an ET claim have the legal right to advice and/or representation and in this chapter representation of the other party is examined. This chapter focuses firstly on representation of the other party in the surveyed case, and follows on to examine views of representation in general.

3.1 Representation of the other party in the current case

Eight in ten (80 per cent) respondents reported that the other party was represented during at least some part of the case. Fourteen per cent reported that the other party did not have a representative, and six per cent reported that they did not know. In cases where the other party did have a representative, the most common representative was a solicitor mentioned by 79 per cent of respondents who knew that the other party had representation.

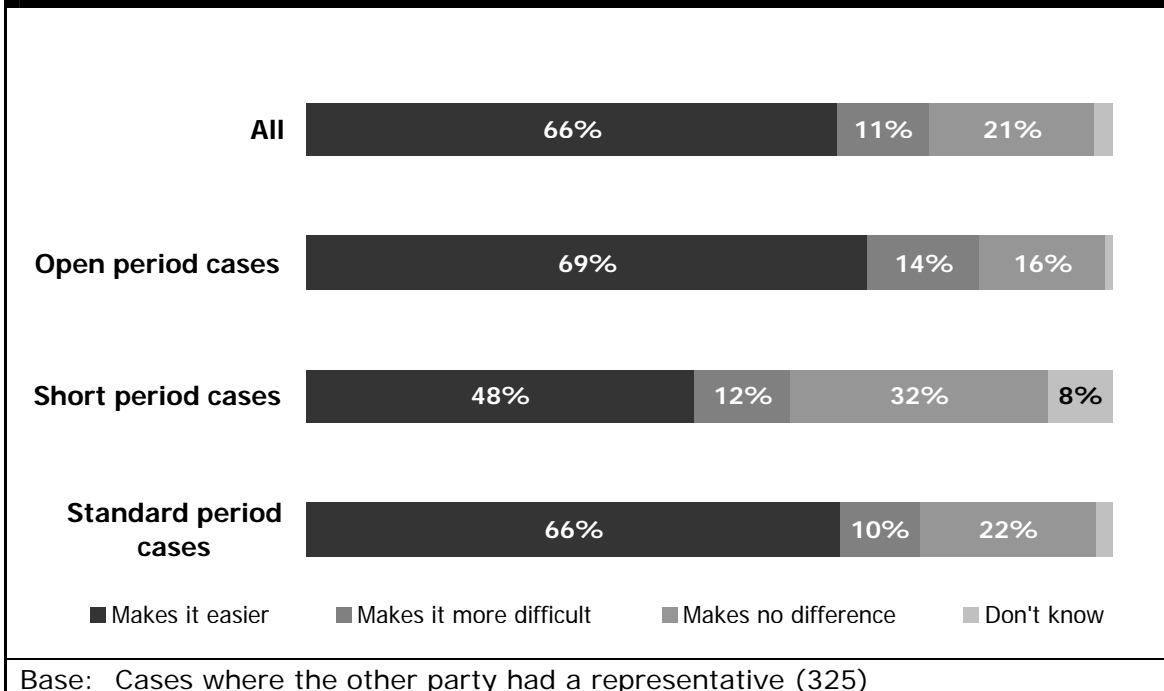
When asked about how they contacted the other party, just over half of all respondents said that it was through the other party's representative (53 per cent). Just over a third (36 per cent) reported that it was through an Acas conciliator, and 27 per cent said they contacted the other party directly.

- Looking at representative type; those who were solicitors were more likely than other types of representatives to contact the other party through their representative (61 per cent compared with 35 per cent).
- Representatives of employers were also more likely to contact the other party through their representative than representatives of claimants (63 per cent compared with 46 per cent).
- There was also found to be a difference in contact by track; representatives involved in standard period cases were more likely to contact the other party through an Acas conciliator than representatives in other types of cases (41 per cent compared with 29 per cent in open period discrimination cases and 24 per cent in short period cases). However, when looking only at cases where both parties had representation, there were no differences by track.

Respondents involved in cases where the other party was represented at some point during the case, were asked whether this made the case easier to resolve, more difficult or if it made no difference. Two thirds of representatives (66 per cent) reported that it made the case easier to resolve, 11 per cent thought it made it more difficult, and 21 per cent reported it made no difference.

- As illustrated in Figure 3.1 respondents in short period cases were less positive about representation of the other party compared with other case types. Forty eight per cent reported that the other party being represented made it easier to resolve the case, compared with 66 per cent of representatives involved in standard period cases and 69 per cent in open period discrimination cases.

Figure 3.1 – The effect of representation of the other party on resolution of the case



- Solicitors were more positive than other types of representatives about the other party being represented; 70 per cent of solicitors thought it made the case easier to resolve, compared with half (53 per cent) of other types of representatives. Other types of representatives were more likely to report that it made it either more difficult to resolve the case (18 per cent versus nine per cent of solicitors), or that it made no difference (30 per cent versus 18 per cent of solicitors).

Of those respondents who reported that the other party was represented, 39 per cent thought that this had enhanced the level of settlement received by the other party. A similar proportion (43 per cent) felt that it had made no difference, and eight per cent felt it had lead to a worse settlement for the other party (see Figure 3.2).

3.2 Representation of the other party in general

Representatives who had been involved in previous ET cases were asked about their thoughts in general about representation of the other party. Views were largely positive; with over three quarters of respondents (77 per cent) reporting that in general, cases where both parties are represented are easier to resolve. Only two per cent reported that it makes it more difficult, with a further two per cent reporting it makes no difference. Twenty per cent reported that it 'depends on other factors'.

- Looking at representative type, in line with the opinions expressed about the case on which the survey was focused; solicitors were more likely to favour 'balanced' representation in ET cases. Eighty per cent reported that

cases where both parties are represented makes it easier to resolve the case, compared with 64 per cent of other types of representatives.

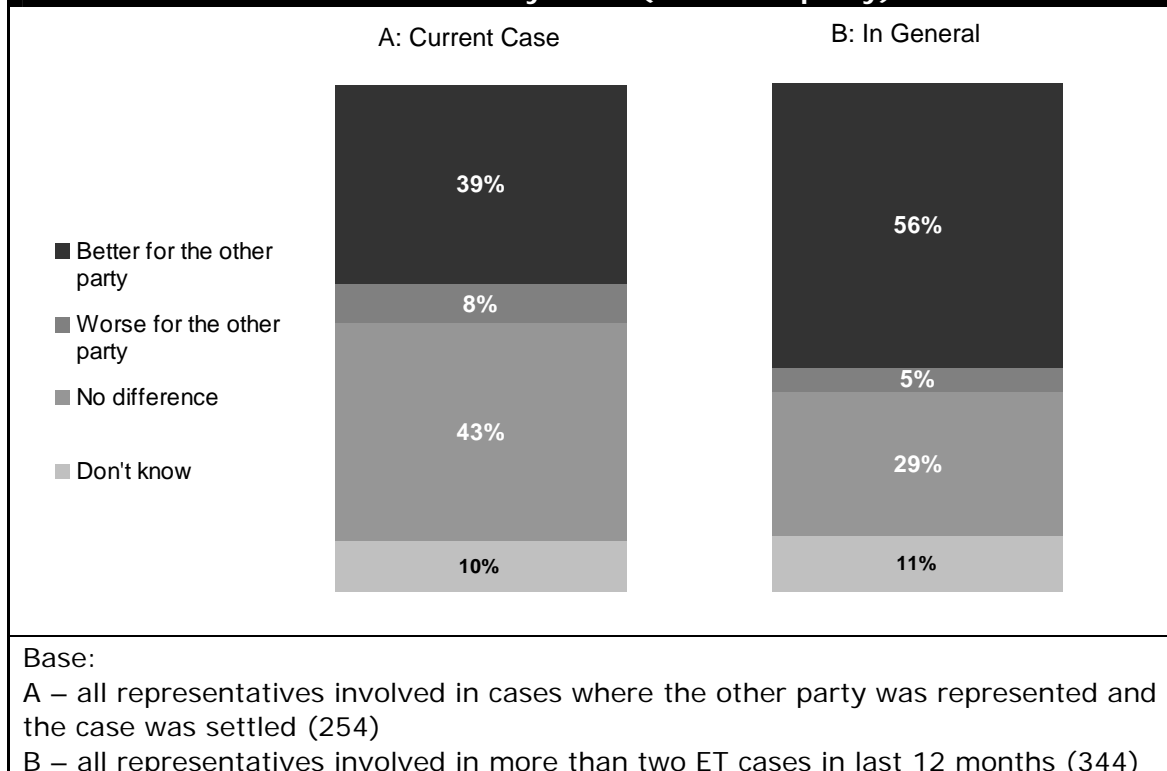
- Solicitors were also less likely to report it made it more difficult (one per cent of solicitors compared with six per cent of other types of representatives), or that it made no difference (17 per cent compared with 29 per cent of other types of representatives).

Respondents who had represented claimants and/or employers in previous cases were asked whether, in general they felt that the other party being represented had an effect on the level of settlement the other party received. Six in ten representatives (61 per cent) thought it did have an effect on the level of settlement; with 56 per cent reporting it made it better for the other party and five per cent that it made it worse. Just under three in ten representatives (29 per cent) said they felt the other party's representative status made no difference, with 11 per cent unsure of the impact it made.

- Once again, solicitors had more positive views around this issue than other types of representatives. They were more likely to feel that when the other party was represented the level of settlement for them (the other party) was better (58 per cent compared with 49 per cent of other types of representatives).

As shown in Figure 3.2 representatives had differing views on this topic between the case on which the survey was focused and ET cases in general.

Figure 3.2 – Whether the other party being represented has an effect on the level of settlement received by them (the other party)



4 Advice and Outcomes

One important aspect of the survey was to examine the involvement of representatives in ET cases, particularly focusing on advice that they give and the (perceived) influence they have on the case. This chapter first discusses the involvement of representatives in the cases, the advice they gave, and their client's acceptance of this advice. The second part of the chapter examines the advice given around compromise agreements. Compromise agreements provide the parties involved in employment rights disputes the opportunity to settle on the basis of a legally binding agreement. In this agreement the claimant waives his or her right to take the claim to an ET provided the claimant has received independent advice from a bona fide independent adviser (a trade union officer or advice centre worker accredited for this purpose, or a qualified lawyer)¹³.

4.1 Advice Given

First Involvement in the case

Sixty four per cent of representatives first became involved in the case before the claimant had applied to the ET.

- As would be expected, representatives of claimants were more likely than those of employers to be involved earlier; 91 per cent of claimant representatives were involved in the case before the claimant applied to the ET, compared with 32 per cent of employer representatives. This is in line with the findings from the 1998 survey of representatives and probably most likely due to claimants seeking advice prior to starting an ET application and then nominating a representative on the ET1 form. (SETA 2008 reports 32 per cent of claimants nominated a professional representative on the ET1 form). The majority of employer representatives are not likely to be involved until the 'notice of appearance' (the ET3 form).
- There was also found to be variation in involvement by representative type. Solicitors were less likely than other types of representatives to be first involved before the claimant had applied to the ET (61 per cent compared with 72 per cent), and were more likely than other types of representatives to be involved after the claimant had applied to the ET (37 per cent compared with 27 per cent).

Complexity of the case

Representatives were asked to indicate whether they would describe the case to be simple or complex in relation to both the facts of the case, and how the law applied to the case circumstances.

¹³ The questions regarding compromise agreements were asked to all representatives who were involved in settled cases.

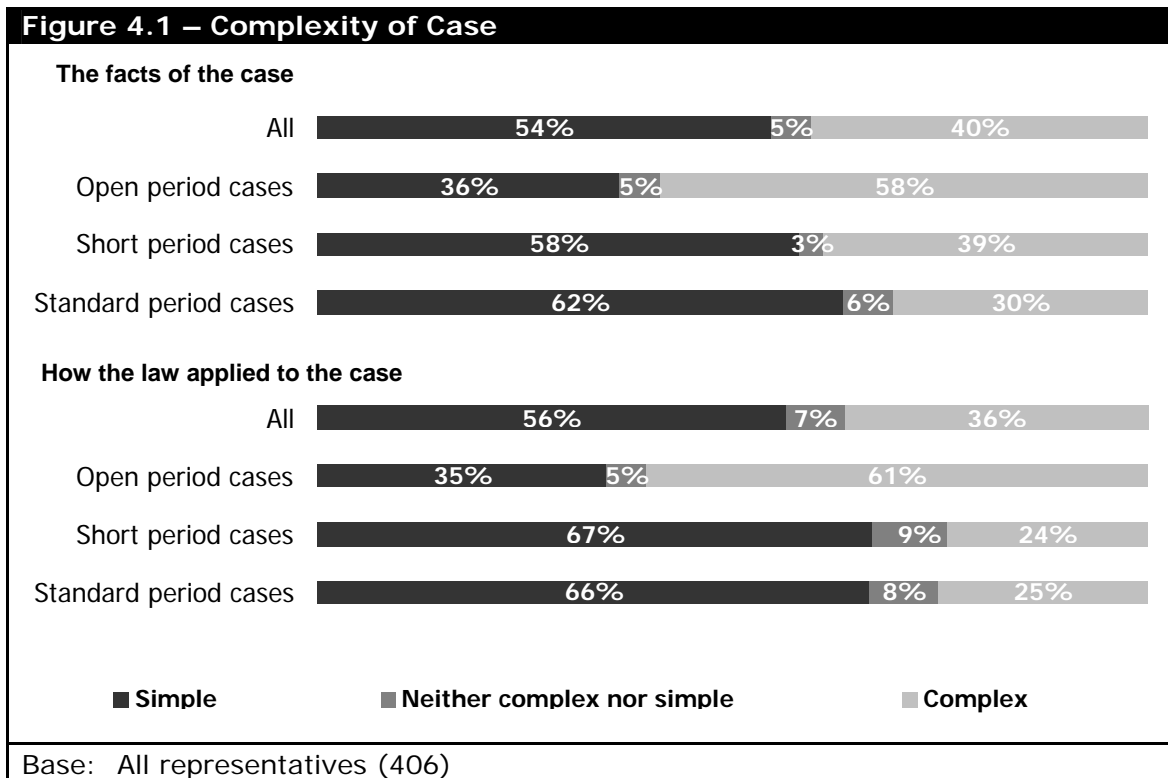
'The facts of the case'

Just over half of representatives (54 per cent) perceived the facts of the case as being very or fairly simple, and 39 per cent perceived the facts of the case as either very or fairly complex.

'How the law applied to the case'

Representatives had similar views regarding the complexity of the case in terms of how the law applied to the case; with 56 per cent viewing it as either very or fairly simple, and 36 per cent as very or fairly complex.

- As shown in Figure 4.1 the ratings of complexity of the case varied by track; representatives in standard period cases were more likely to rate the facts of the case as being either very or fairly simple (62 per cent) than open period discrimination cases (36 per cent). They were also more likely to rate the complexity of how the law applied to the case as either very or fairly simple (66 per cent) than open period discrimination cases (35 per cent).



- There was also found to be variation by client type, with representatives of claimants more likely than representatives of employers to perceive the facts of the case as complex (51 per cent versus 26 per cent) and how the law applied to the case as complex (43 per cent versus 28 per cent).

In addition to the above, there was also a high correspondence between representatives' ratings on the two respective measures. This is illustrated in Figure 4.2:

- Sixty five per cent of representatives who gave a valid answer to both questions, rated the complexity of the case on these two elements as the same.
- A further 12 per cent rated the complexity of the case on the two measures different by just one category (e.g. 'very complex' and 'fairly complex'; or 'very simple' or 'fairly simple'.)

Figure 4.2 – Complexity of Case: Correspondence between ratings

(n)		How the law applied in these circumstances				
		Very Complex	Fairly Complex	Neither simple nor complex	Fairly Simple	Very Simple
The facts of the case	Very Complex	5%	3%	*		*
	Fairly Complex	1%	20%	2%	9%	
	Neither simple nor complex		1%	3%	2%	
	Fairly Simple	1%	6%	2%	31%	4%
	Very Simple	*			4%	6%

Rating of the complexity between the two elements is the same
 Rating of the complexity between the two elements is different by one category

Base: All representatives who gave a valid answer at both complexity of case questions (399)

Advice Given on Case

Eighty four per cent of representatives said that they advised their client of their chances of winning the case if it went to hearing. Of these representatives:

- Just over half (54 per cent) advised their client that they were likely to win;
- Twenty four per cent advised their client that their chances of winning were about even;
- Sixteen per cent advised their client that they were likely to lose;
- Five per cent gave different advice at different times.

In general, these findings suggest that most representatives had a high degree of confidence in the merits of their client's case and the likely outcome. The main sub-group differences that emerged were:

- Representatives of claimants were more likely than representatives of employers to advise their client that they were likely to win (51 per cent

versus 39 per cent) and were less likely to advise that their client was likely to lose (9 per cent versus 19 per cent).

- Representatives involved in short period cases were more likely than those involved in standard period and open period discrimination cases to advise their client that they were likely to win (77 per cent in short period cases, compared with 51 per cent in standard period and 55 per cent in open period discrimination cases).
- Solicitors were more likely to advise their client that they might win their case than other types of representative (58 per cent versus 43 per cent).

As highlighted by Latreille et al (2004) in the 1998 survey of representatives, one of the factors that may influence whether a representative gives advice to their client about how to proceed, is the complexity of the case. In cases they rate as 'simple' the more certain they are about the potential outcome at tribunal, which may increase their likelihood of giving advice. In the 1998 survey, 68 per cent considered the facts of the case as 'simple' and how the law applied to the case as being 'simple'. Latreille concluded that this might contribute to the high number of representatives that gave advice to their client (80 per cent). Looking at the 2009 data only 54 per cent of representatives reporting the facts of the case as 'simple', and 56 per cent reporting how the law applied to the case as 'simple', but the number of representatives advising on a course of action has remained similar (84 per cent). This suggests that the complexity of the case is not the only factor which may play a role in the provision of advice.

Representatives were also asked about the subsequent course of action that they advised. Six in ten representatives (61 per cent) reported that they advised their client to seek a settlement without a hearing. Seventeen per cent reported that they advised their client to go for a full tribunal hearing and five per cent of claimant representatives advised them to withdraw the case. One in ten (10 per cent) representatives advised a different course of action and four per cent did not give any advice on the matter.

- Representatives involved in short period cases were more likely than those in standard period and open period discrimination cases to advise their client to go to a full tribunal hearing (27 per cent in short period cases, compared 18 per cent in standard period cases and 12 per cent in open period discrimination cases).
- Solicitors were more likely to advise settlement without a hearing (65 per cent) than other types of representatives (50 per cent), and were less likely to advise their client to attend a full tribunal hearing (13 per cent compared with 26 per cent of other types of representatives).
- There were no differences between representatives of claimants and representatives of employers.

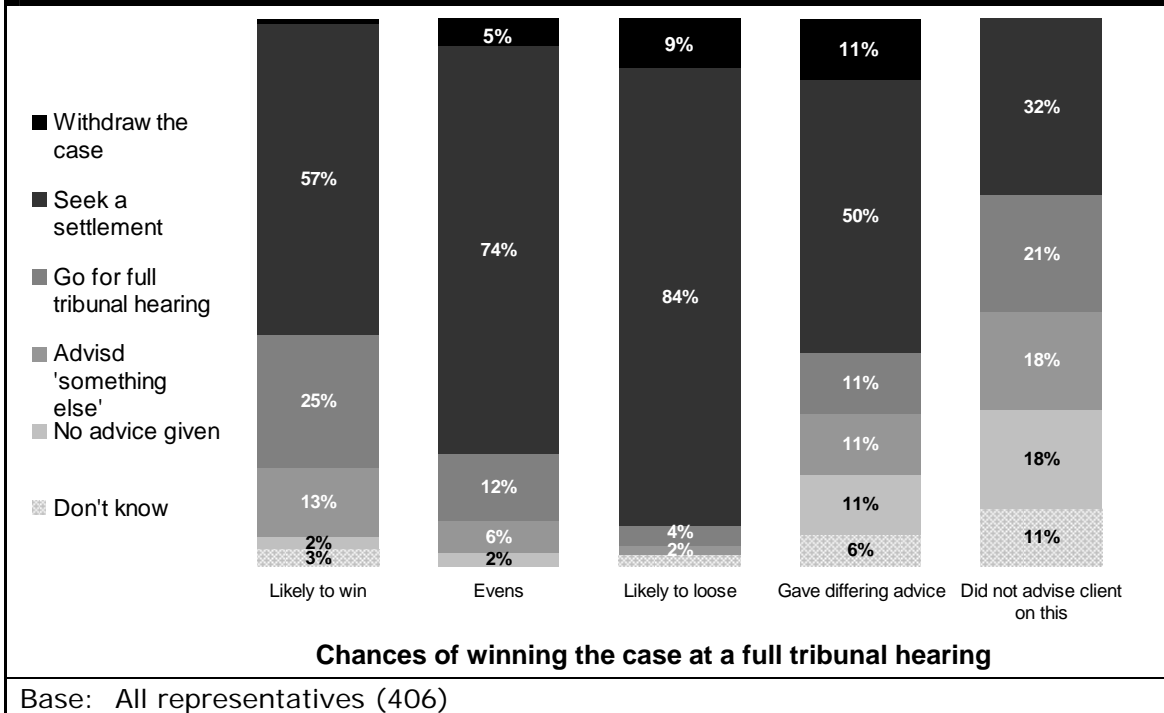
It must be borne in mind that whilst a claimant representative can suggest that their client seeks a settlement, this side of the case cannot give any actual settlement offer; this can only be made by the employer's side (the claimant's representative can only propose a settlement or suggest what would constitute an acceptable settlement to their client). Additionally employer representatives

cannot advise their clients to withdraw the case; this can only be initiated by the claimant.

When comparing the recommended course of action from the representative with their anticipated outcome at the tribunal hearing, some interesting findings emerge. These are shown in Figure 4.3:

- Unsurprisingly, in cases where the representative thought their client was likely to lose if the case went to a hearing; the representative's most common recommendation was for their client to seek a settlement without a hearing.
- Similarly, representatives who thought their client's chances of winning at the hearing were 'evens' were most likely to recommend that their client should also seek a settlement without a hearing.
- However, it is interesting to note that representatives who thought their client was likely to win at a tribunal hearing, were not most likely to recommend that their client attend a full tribunal hearing - 25 per cent recommended this. Their most common recommendation was also to seek a settlement without a hearing; recommended by 57 per cent. This is a change from the 1998 survey of representatives, where in such cases the most common recommendation was to advise attendance at a tribunal hearing. The reasons for this change are unclear. As noted in the introduction there are differences in the sampling approaches used for the two surveys which may account for this change. However, in addition it may be related to other factors such as the time and costs associated with attending a tribunal hearing. In the 1998 survey of representatives a significant proportion of claimant representatives (28 per cent) thought that their client would win their case at a tribunal hearing, but advised that they sought a settlement. Latreille et al (2004) suggested that this may in part reflect the fact that no matter how confident the representative feels about the merits of the case, the tribunal outcome will involve some level of risk. However, the main consideration being one of cost, that settlement can offer a more cost-effective means of resolving the case. He also emphasised that the extent to which there is confidentiality in a settlement may play a role, particularly if there are opportunities for protecting reputation.

Figure 4.3 – Recommended course of action by anticipated outcome of the case



4.2 Parties acceptance of representative's advice

Of those representatives who were involved in cases where they advised their client of a particular course of action, 96 per cent reported that their client followed their advice. When comparing the representative advice with the outcome of the case some interesting findings emerge:

- In cases where the representative advised that their client should settle the case, 90 per cent of these cases were settled (221 cases out of 246 cases).
- In the 12 cases where the representative advised withdrawal of the case, the majority of cases were withdrawn (nine cases).
- In the 67 cases where the representative advised attendance at a tribunal hearing, only 12 cases went to a tribunal hearing. Thirty four were settled, with 17 being withdrawn and four being dismissed.

These findings suggest that adhering to advice is related to what the advised course of action is, with clients more likely to follow some recommendations than others; namely proposals to settle and to withdraw the case.

When asked to rate how influential they thought their advice to their client was, 76 per cent thought their advice was very important in influencing decisions, with a further 21 per cent rating it as fairly important.

4.3 Compromise Agreements

Recommendation and use of compromise agreements in current case

Fifty six per cent of representatives reported that they advised their client that it might be possible to settle their case using a compromise agreement. Of these representatives just over half (54 per cent) advised their client to 'formally' seek a settlement using a compromise agreement.

- These were more likely to be representatives involved in short period cases (69 per cent), than those involved in standard period cases (53 per cent) and open period discrimination cases (52 per cent).
- They were also more likely to be representatives who were representing claimants (67 per cent) than employers (37 per cent).
- Looking at representative type; solicitors were less likely to advise their client to seek a settlement using a 'formal' compromise agreement than other types of representatives (47 per cent versus 70 per cent).

Representatives involved in settled cases who advised their client on the use of compromise agreements, were asked whether the settlement was a 'formal' compromise agreement - one third (33 per cent, 95 cases) reported that it was.

- Representatives of claimants were more likely to report that the case settlement was a 'formal' compromise agreement than representatives of employers (40 per cent versus 24 per cent).
- Solicitors were less likely to report the settlement was a 'formal' compromise agreement (30 per cent), than other types of representatives (43 per cent).
- Looking at the involvement of Acas, in 35 per cent of the cases where the settlement was a 'formal' compromise agreement Acas were also involved in the settlement, and in 65 per cent of cases they were not.

These findings suggest that clients generally followed their representative's advice. As noted earlier, representatives of claimants were more likely to advise their client to seek a settlement using a compromise agreement (than those representing employers), and solicitors were less likely to do so (than other types of representatives).

In addition to this, of those representatives who advised their client to seek a compromise agreement, but the settlement was not a 'formal' compromise agreement¹⁴, most (13 respondents) reported that their client had accepted their suggestion to pursue a compromise agreement. Of these 13 respondents, eight reported that the other party expressed a willingness to consider settling the case under this arrangement.

¹⁴ N=17

Representatives involved in cases where the settlement was a 'formal' compromise agreement (95 respondents) were asked whether they thought the terms of the settlement were better or worse for their client than they could have expected from a tribunal hearing. Views were mixed; 41 respondents reported that they were better than could be expected from a tribunal hearing, and 38 respondents reported that they were the same. Few representatives (seven respondents) thought they were worse, and nine respondents said that they were unsure.

General views on compromise agreements

Representatives who had been involved in ET cases in the past and were aware of compromise agreements were also asked about their general views as to whether the terms of compromise agreements are more or less favourable in comparison to the awards that can be expected from an ET hearing:

- Just over half of representatives (55 per cent) were not able to make a firm judgement and reported that 'it depends';
- Sixteen per cent said the terms of a compromise agreement were more favourable for the claimants (in comparison with the awards they could expect from an ET hearing);
- A further 16 per cent said that they were less favourable;
- Eleven per cent said that they were the same.

5 The Role and Use of Acas

The role of Acas is central in ET cases, as Acas conciliators have a statutory duty to promote a settlement through conciliation. In SETA 2008 claimants and employers were interviewed directly about the involvement of Acas in their case. However, many of the parties who had a representative will have had little or even no direct contact with Acas, and therefore their knowledge and evaluation of Acas would have been limited by the amount their representative involved them in the case. One of the key aims of the current survey of representatives was therefore to collect information directly from representatives regarding the role of Acas within the ET process. This chapter provides information about the parties' contact with Acas, the involvement of Acas, and representatives' satisfaction with Acas.

5.1 Contact with Acas

First Involvement of Acas

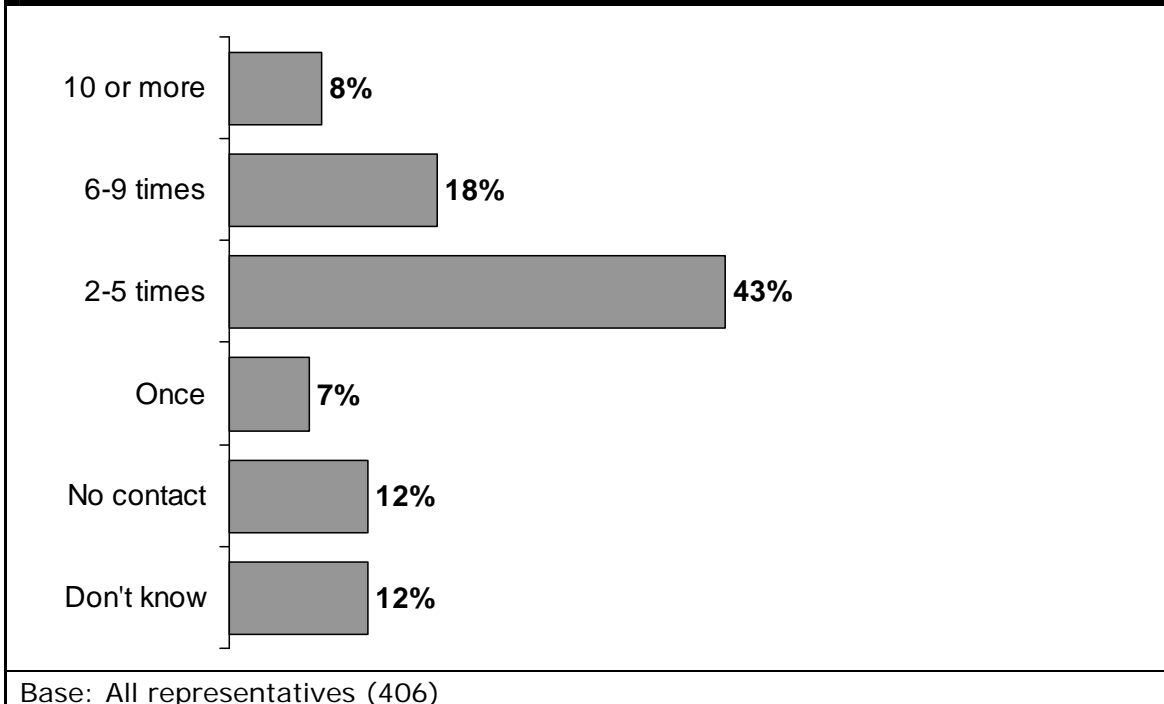
Seven in ten (70 per cent) representatives reported that an Acas conciliator was involved in the case in some way, excluding the introductory letter that was sent. Almost a quarter (24 per cent) responded that Acas were not involved in the case in any way. This is in line with the 1998 survey, where 69 per cent of representatives interviewed reported that an Acas conciliator had been involved in the case in some way. As was discussed in the 1998 survey, this may be something of an underestimate since representatives may not always have wanted to acknowledge Acas' contribution.

Of those representatives who stated that Acas were involved in their case, one sixth (18 per cent) said that the parties were close to reaching an agreement just before the first involvement of Acas (nine per cent for both 'very close' and 'quite close'). However, the majority (68 per cent) of representatives said that the parties were not close to reaching an agreement before Acas' first involvement.

Direct contact with Acas

The number of direct contacts between representatives and Acas conciliators varied, as displayed in Figure 5.1. The modal value was two-five contacts (43 per cent). However, in more than a quarter of cases (26 per cent) where Acas were reported as involved, representatives claimed to have had contact on more than six occasions. In the majority of instances it was found that contact occurred several times (this was also the case in the 1998 survey). It is therefore evident that substantial time and effort may be involved in attempting to promote settlement in ET cases.

Figure 5.1 – Number of direct contacts between representative and an Acas conciliator



Although unusual, sometimes Acas conciliators contact the representative's client directly. Only six per cent (23 representatives) stated that there was direct contact between an Acas conciliator and their client, excluding the introductory letter. Of these 23 representatives, 18 reported that they had advised their client about involving Acas in the case.

- Solicitors were less likely than other types of representative to report that there had been direct contact between their client and an Acas conciliator (four versus 10 per cent).

Representatives who had direct contact with an Acas conciliator were asked when they received their first personal contact with them. Almost seven in ten (68 per cent) representatives stated that this was before their client had received a date for a full tribunal hearing, with one seventh (15 per cent; 45 representatives) stating it occurred after.

Of the 45 representatives that received first contact after a full tribunal hearing date had been received:

- one representative had their first contact with an Acas conciliator 1-7 days before the full tribunal hearing;
- three representatives 8-14 days before;
- eight representatives had contact more than two weeks but less than a month before; and
- twenty-seven representatives one month or more before.

Who initiated contact

Around half (53 per cent) of representatives who had direct contact with an Acas conciliator reported that the first contact between themselves and Acas had been initiated by Acas.

Representatives who had direct contact with an Acas conciliator on more than one occasion were then asked who had initiated contact most of the time:

- 25 per cent reported that Acas contacted them most of the time;
- 34 per cent that they had contacted Acas most of the time; and
- 37 per cent that the contact had been shared equally between themselves and the Acas conciliator.

These findings differ from the 1998 survey where the majority of representatives who had contact on more than one occasion reported that the contact was either initiated by Acas (39 per cent) or shared equally (43 per cent) and in just 13 per cent of cases the initiative for contact was mainly taken by the representative. In the 2009 survey, representatives of claimants were more likely than representatives of employers to report that Acas had contacted them most of the time (33 versus 13 per cent).

5.2 Involvement of Acas

Fourteen of the twenty-three representatives who reported direct contact between their client and an Acas conciliator felt that it had been a help in terms of resolving the case. In contrast, not one of the twenty-three representatives reported that the Acas conciliator had been a hindrance in terms of resolving the dispute.

In settled cases where an Acas conciliator was involved in the case, the majority (86 per cent) of representatives reported that the Acas conciliator had been involved in the settlement between the parties.

- Representatives of employers were more likely than representatives of claimants to report this (92 versus 81 per cent).

When asked how hard they felt the Acas conciliator had tried to promote a settlement between their client and the other party, a fifth (21 per cent) of representatives felt that the Acas conciliator had tried 'very hard' and half (50 per cent) felt that the Acas conciliator had tried 'quite hard'. These proportions are similar to those found in the 1998 survey where 69 per cent of representatives perceived the Acas conciliator to have tried either 'very hard' or 'hard'.

Forty two per cent of representatives reported that the Acas conciliator had explained the strengths and weaknesses of their clients' case, and 58 per cent reported that they had not. Representatives who reported that the strengths and weaknesses were explained were asked how well the Acas conciliator had done this:

- Twenty two per cent reported that the Acas conciliator explained the strengths and weaknesses very well;
- Forty six per cent fairly well;
- Fourteen per cent neither well nor poorly;
- less than one per cent fairly poorly; and
- Seventeen per cent gave a 'don't know' response.

It is important that Acas conciliators maintain an appropriate balance between facilitating and promoting settlement without exerting undue pressure on representatives or their clients. Supporting findings from the 1998 survey, the vast majority (96 per cent) of representatives felt that the Acas conciliator put no pressure on them or their client to settle the case (the equivalent proportion in the 1998 survey was 92 per cent).

Representatives of settled and withdrawn cases in which Acas were involved were asked whether they felt the outcome would have been the same without Acas' involvement. Four-fifths (79 per cent) of representatives felt that their client would have settled/withdrawn their case without Acas' involvement, 40 per cent responded 'definitely' and 38 per cent 'probably'.

- Solicitors were more likely to respond that their client 'definitely' would have settled/withdrawn their case than other types of representative (44 versus 29 per cent).

Three-fifths (61 per cent) of representatives felt that the case was resolved more quickly than would have been likely without Acas involvement. This is an increase from the 1998 survey when 44 per cent felt that the Acas conciliator helped resolve the case more quickly.

Representatives' views of Acas involvement in their clients' cases were largely positive. Representatives expressed very high levels of trust in the Acas conciliator with 84 per cent of representatives completely trusting the information given to them. The vast majority (94 per cent) of representatives felt that the Acas conciliator was 'even-handed' when dealing with the case. In SETA 2008 lower proportions responded positively to these questions, with two-thirds of employers (66 per cent) and claimants (64 per cent) reporting that they completely trusted the information given to them by the Acas conciliator. Seventy-eight per cent of employers and 65 per cent of claimants reported that they felt the Acas conciliator was 'even-handed'. The 2009 findings are similar to those found in the 1998 survey where 76 per cent trusted the information given by the Acas conciliator 'a lot' and 82 per cent felt that the Acas conciliator was 'even-handed'.

In cases where the Acas conciliator had direct contact with their client, 19 out of 23 representatives felt that their client had made the correct decision involving Acas (in the 1998 survey, the corresponding figure was 28 of the 40 representatives). Overall in cases where Acas had been involved, nine in ten (90 per cent) representatives felt that their involvement in the case had been helpful.

5.3 Involvement of Acas in previous cases

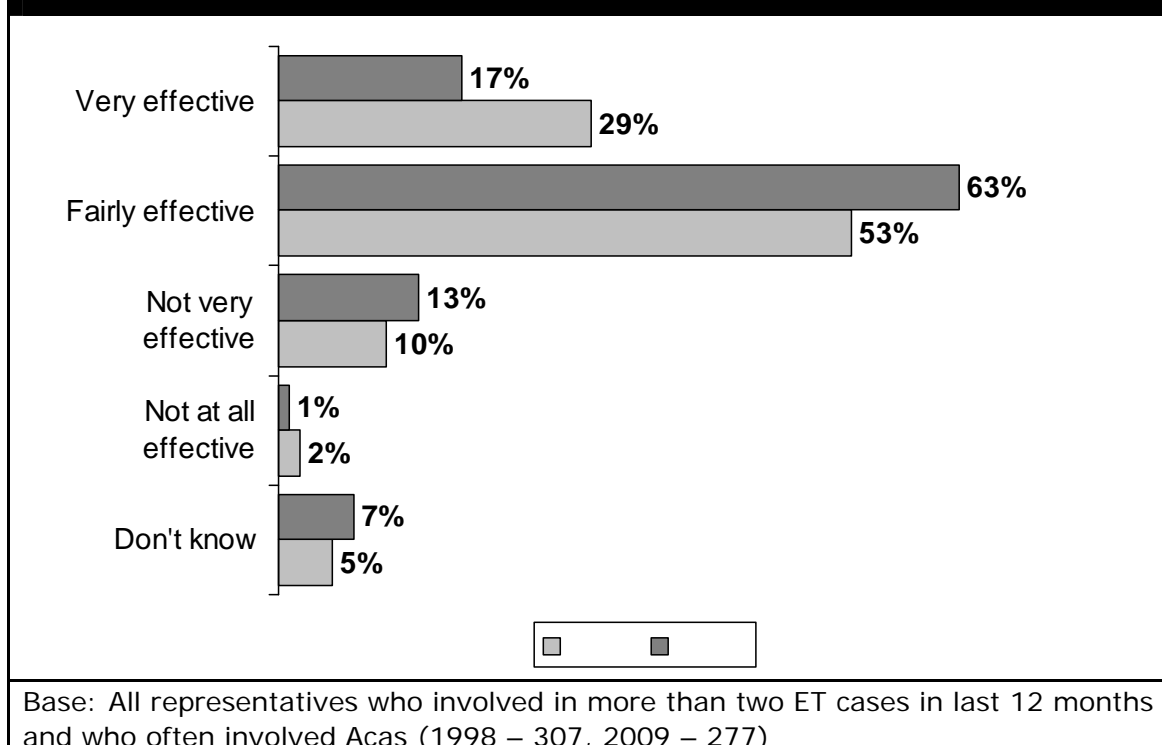
Respondents who had represented more than two clients (claimants or employers) in the last 12 months were asked whether they generally involve Acas in ET cases:

- 81 per cent of representatives responded often;
- 15 per cent sometimes; and
- less than one per cent responding never.

The vast majority (98 per cent) of respondents who had represented more than two clients in the last 12 months were generally in favour of Acas' involvement in ET cases. This is higher than was found in the 1998 survey, when 88 per cent were in favour.

Representatives who often involved Acas in ET cases were asked to rate the effectiveness of Acas in terms of helping parties to see the strengths and weaknesses of their cases. A similar proportion to the 1998 survey found Acas effective in doing so, 80 versus 82 per cent. These findings are displayed in Figure 5.2.

Figure 5.2 – Effectiveness of Acas in helping parties to see strengths and



Representatives who often involved Acas in ET cases were reasonably evenly divided between those who initiated contact with Acas (38 per cent) and those who said Acas initiated contact (34 per cent). A further 27 per cent said there was equal initiative to make first contact.

- Representatives of claimants were more likely to report that Acas initiated contact with them than representatives of employers (40 versus 28 per cent).

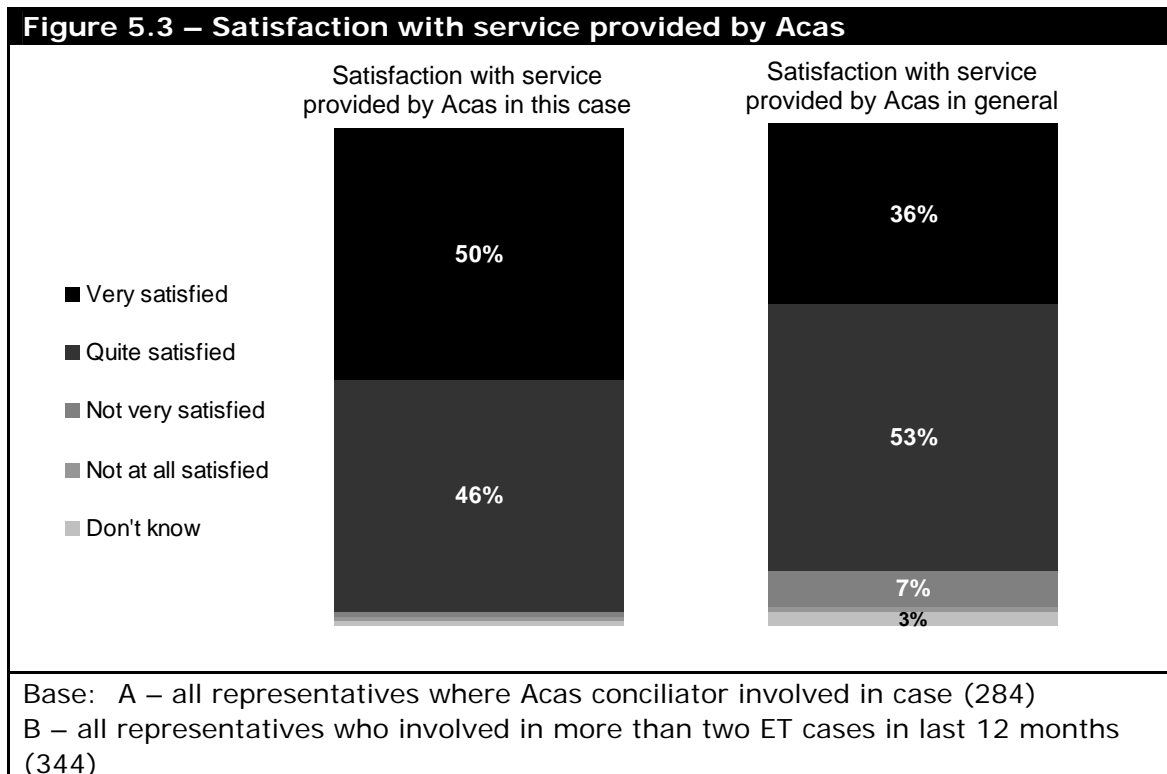
Representatives who often involved Acas were asked how much, in general, Acas conciliators outlined the advantages of settling a case. In line with the 1998 survey, seven in ten representatives (70 per cent in 2009 and 71 per cent in 1998) responded Acas conciliators did so 'about the right amount' with a fifth (20 per cent) of representatives reporting that Acas conciliators did so 'too little'.

As was also the case in the 1998 survey, the vast majority (92 per cent) of representatives who often involved Acas rated conciliators as being effective at bringing parties closer towards a settlement (21 per cent very effective and 71 per cent fairly effective).

5.4 Satisfaction with Acas

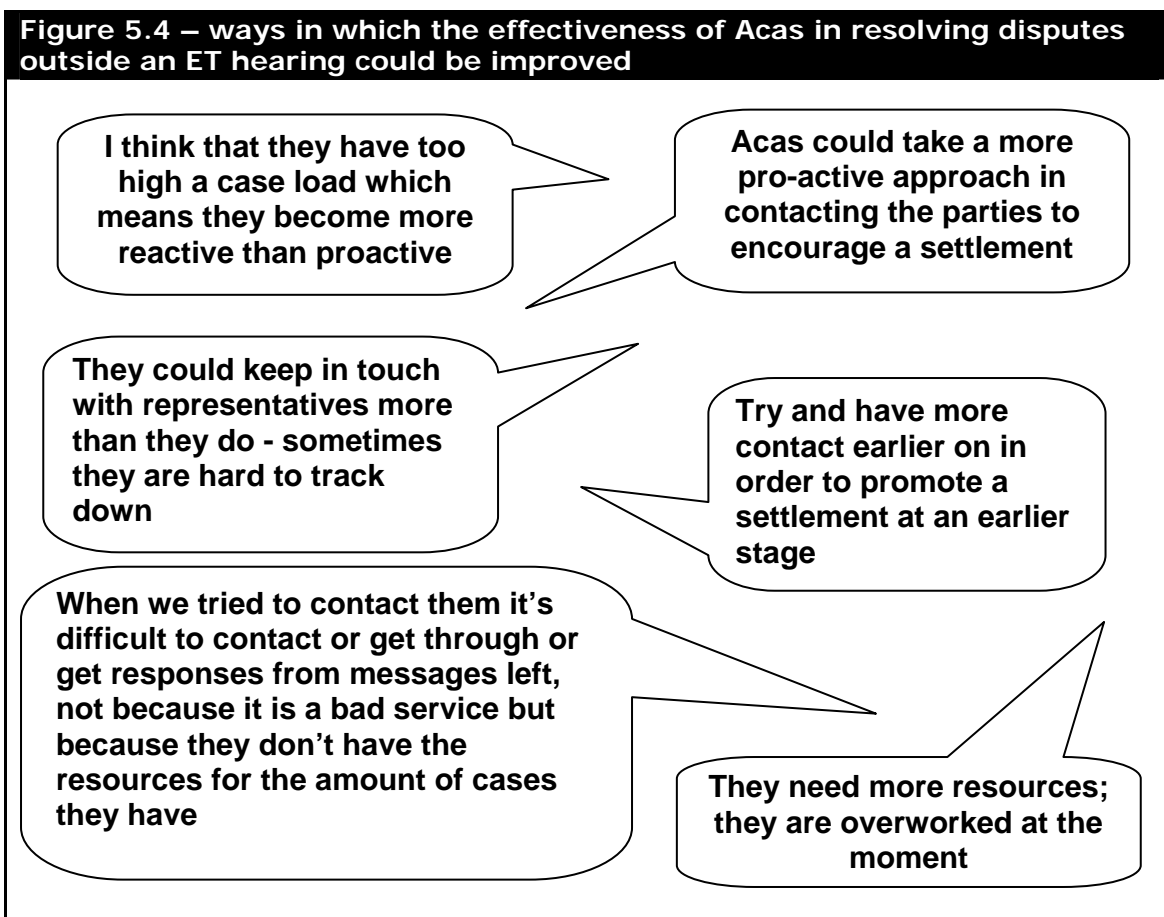
The vast majority (96 per cent) of representatives who had involved an Acas conciliator in their client's case stated that they would recommend involving Acas in a similar dispute in the future, with 81 per cent stating that they 'definitely' would and 16 per cent that they 'probably' would.

These representatives were also asked how satisfied they were with the service provided by Acas in this case and how satisfied they were in general with the conciliation service provided by Acas. Responses are shown in Figure 5.3.



Satisfaction levels were high; ninety-seven per cent of representatives were satisfied with the service provided by Acas in the surveyed case and nine in ten representatives (89 per cent) were satisfied in general with the conciliation service provided by Acas.¹⁵

All representatives were asked if there were ways in which the effectiveness of Acas in resolving disputes outside an Employment Tribunal hearing could be improved. A third (33 per cent) of representatives gave no comment and a further three per cent stated that no improvement was needed/they were fine as they are. A variety of answers detailing suggested improvements were mentioned, these included: 'More resources/more conciliators' (18 per cent), 'Be more pro-active' (13 per cent), 'Acas conciliator work load is too great/too many cases' (10 per cent), 'Be involved in mediation/mediate more' (nine per cent), 'Improve availability/easier to contact' (nine per cent) and 'Get involved sooner/longer period of involvement' (nine per cent). Some verbatim quotes are shown in Figure 5.4.



¹⁵ The research paper 'Service Users Perception of Acas' conciliation in Employment Tribunal cases 2007' (<http://www.acas.org.uk/CHttpHandler.ashx?id=974&p=0>) discusses satisfaction with the service provided by Acas. Four-fifths (81 per cent) of respondents who had accepted assistance from Acas were satisfied. This survey included four key customer groups: unrepresented claimants, unrepresented employers, representatives of claimants and representatives of employers so direct comparison is, however, not possible.

6 Mediation

Mediation is a process in which an independent and impartial individual assists parties in working out a mutually acceptable agreement to resolve their dispute. In this chapter information is provided about representatives' awareness, use and attitudes towards mediation. Representatives were asked to answer the questions 'thinking about mediation and not conciliation that is offered free by Acas to parties involved in employment tribunal claims'.

The use of mediation as a route to resolving disputes at an early stage and without recourse to tribunals is one of the recommendations from the Gibbons Review¹⁶.

6.1 Whether mediation was suggested or considered

Representatives were asked whether they discussed the possibility of using mediation with their client, 11 per cent (44 representatives) responded that they had done so.

- Solicitors were less likely than other types of representative to report this (nine per cent versus 16 per cent).
- Representatives of employers were also less likely to mention this than representatives of claimants (seven per cent versus 14 per cent).

Representatives who had discussed the possibility of using mediation were asked what advice they had given to their client:

- 25 representatives had advised their client to use mediation;
- seven representatives had advised their client not to use mediation;
- two representatives had advised their client about mediation but not whether to use it or not; and
- nine representatives had not advised their client about mediation at all.

Three per cent of representatives stated that mediation was used to help resolve the dispute. There is difficulty in asking survey questions relating to subtle concepts such as 'mediation' as responses are reliant on respondents' interpretation of this concept. A 'check' question was added to the survey for respondents to confirm that they were thinking of mediation rather than conciliation. It was found that some representatives had indeed been thinking of conciliation rather than mediation and this reduced the total number of representatives who had used mediation from twelve to eight representatives and the percentage from three to two per cent¹⁷. Relatively low proportions (eight per

¹⁶ Better Dispute Resolution: A Review of employment dispute resolution in Great Britain <http://www.bis.gov.uk/files/file38516.pdf>

¹⁷ It is important to bear in mind that this is a survey where any form of dispute resolution prior to ET1 submission had failed

cent) of respondents in SETA 2008 reported that mediation was used to help resolve their dispute¹⁸.

For cases where mediation was not used:

- 25 per cent of representatives felt that the dispute would have been suitable for mediation;
- 71 per cent of representatives felt that the dispute would not have been suitable.

Representatives of claimants were more likely to report that the dispute would have been suitable for mediation than representatives of employers (31 per cent versus 19 per cent).

Of the 98 representatives that felt that mediation would have been useful, 48 felt that mediation would have been useful before the claimant submitted an ET application, whilst 45 representatives felt it would have been useful after the claimant had done so.

6.2 Use of mediation

Eight representatives had used mediation to help resolve their clients' dispute. Of these eight representatives, one had used mediation before the claimant submitted their ET application and seven had done so after it was submitted.

Six of the eight representatives felt that mediation was used at the right time in their case. The two representatives who felt that mediation had not been used at the right time felt that it should have been used earlier in the case.

Mediation was provided by a range of sources including Acas (three representatives), an employment judge (three representatives) and other sources (two representatives).

All eight representatives that used mediation agreed that it had helped to resolve the case.

6.3 Future use of mediation and pre-claim conciliation

All representatives who used mediation to help resolve their clients' dispute (eight representatives) reported that mediation is something they would consider using again in the future.

Nine in ten (90 per cent) representatives who had not used mediation to help resolve the dispute reported that they would consider using mediation in the future. Solicitors were more likely than other types of representative to respond that mediation is something they would consider in the future (93 per cent versus 82 per cent). In SETA 2008 the majority of employers and claimants said they

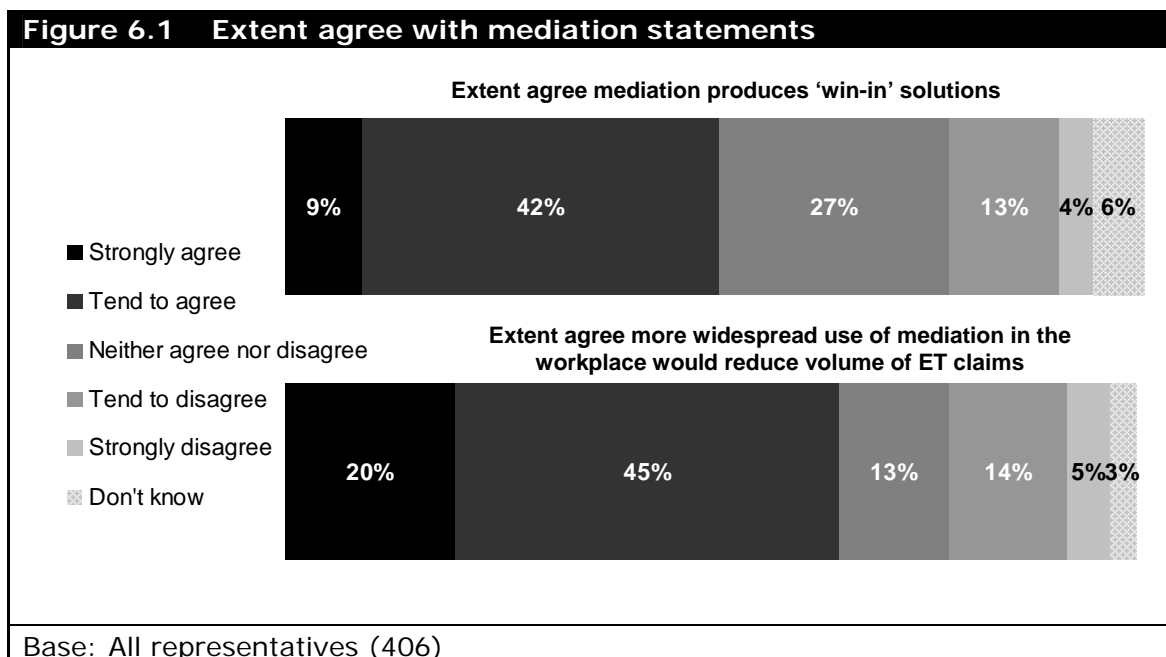
¹⁸ Some respondents in SETA 2008 were also found to be thinking of conciliation rather than mediation so were subsequently removed from the relevant questions

would consider using mediation in the future (88 per cent of employers and 80 per cent of claimants).

All representatives were asked whether they thought the outcomes at mediation were in general better or worse for employees than pursuing the claim to a hearing. The majority of respondents felt outcomes were better (37 per cent) or that it depended on other factors (39 per cent). Six per cent thought outcomes would be worse and three per cent thought it would make no difference.

As shown in Figure 6.1, representatives were asked the extent to which they agreed that mediation produces 'win-win' solutions and the extent to which they agreed that more widespread use of mediation in the workplace would reduce the volume of ET claims.

As can be seen, half (50 per cent) of representatives agreed that mediation produces 'win-win' solutions, whilst two-thirds (65 per cent) agreed that more widespread use of mediation in the workplace would reduce the volume of ET claims.



All representatives were asked whether they had heard of 'Pre-Claim Conciliation', and if so whether they had used it:

- 39 per cent of representatives had not heard of 'Pre-Claim Conciliation';
- 42 per cent of representatives had heard of 'Pre-Claim Conciliation' but had not used it; and
- 18 per cent of representatives had both heard of and used 'Pre-Claim Conciliation'.

Representatives who had heard of 'Pre-Claim Conciliation' were further asked whether it was something that they would consider using (again) in a suitable case to which 86 per cent responded that they would.

7 Conclusion

Since the 1990s the number of ET cases has grown rapidly, as has their complexity. One of the main indicators of complexity is the increase in the number of multiple jurisdiction cases. However, a further indicator is the increase in the use of representatives, which has grown since the mid 1980s. Currently representatives are an important feature of the ET system.

7.1 Representation of the Other Party

Representatives were generally positive about representation of the other party. In both the surveyed case, and in ET cases more generally the majority of representatives felt that it was easier to resolve the case when the other party was represented. Solicitors in particular were most likely to favour 'balanced' representation. Representatives may favour 'balanced' representation as in these cases they will be more likely to deal with someone who has experience of the ET system rather than with a claimant or employer for whom it may be their first experience of the system.

7.2 Advice and Outcomes

One of the most important aspects of a representative's role is the advice that they give to their client. The majority of representatives interviewed (84 per cent) gave advice to the client about their chances of winning the case and a recommended course of action. This is in line with the findings from the 1998 survey and Latreille et al (2004) suggested that this high level may reflect the fact that the majority of the representatives (68 per cent) rated the case as 'simple' (in terms of the facts of the case, and how the law applied to the case). In the 2009 survey, however, the ratings of complexity have increased, but the number of representatives giving such advice has not decreased. This suggests that there are other factors which may influence whether the representative gives advice to their client about how to proceed.

In general, the recommended course of action reflected the representative's anticipated outcome. The exception to this was representatives who thought their client would win at a tribunal hearing. These representatives were most likely to recommend that their client seek a settlement. The reasons for this are unclear and may be related to other factors, such as the time and costs associated with attending a tribunal hearing.

Overall, representatives generally reported that their advice was very influential to their client, and that their clients did follow their recommendations. These accounts are however, very subjective and are only based on representatives' own recall. A more accurate measure of whether clients followed their representative's advice is to look at actual case outcomes. This analysis suggests that clients' tending to follow advice is related to what the course of action is, with clients more likely to follow some recommendations than others; namely proposals to settle and to withdraw the case.

7.3 The Role and Use of Acas

Acas conciliators were involved in seven in ten cases. In the majority of instances contact occurred several times (the modal value was two to five contacts) suggesting that substantial time and effort may have been spent by Acas attempting to promote settlement. When looking at direct efforts to promote a settlement, the majority of representatives (71 per cent) reported that Acas did try hard to promote a settlement. However, similarly to the 1998 survey in around one in six cases (15 per cent) it was reported that no effort was made. This may at first glance be a cause for concern, but as reported by Latreille et al (2004) these parties may have already been significantly close to settlement and therefore Acas involvement may have been unnecessary. Limited base sizes in the current survey prevent further examination of this.

Looking at ET cases more generally it is encouraging to see that that around nine in ten representatives (92 per cent) feel that Acas conciliators are effective in bringing parties closer to a settlement. Additionally virtually all representatives (96 per cent) reported that Acas put no pressure on either themselves or their client to resolve the case. This suggests that Acas conciliators are maintaining the appropriate level of balance between promoting a settlement and not exerting undue pressure on representatives or their clients.

In addition to promoting a settlement, one of Acas' further roles is to explain the strengths and weakness of the case, and it was found that this did not happen in six in ten cases (58 per cent). However, it is important to bear in mind that this element of Acas' role is likely to be much more important when dealing with claimants and employers directly, than representatives. In cases where there are no representatives, without this involvement from Acas there may be an absence of an external, objective perspective. However, it is encouraging to see that when thinking about ET cases more generally representatives reported that they felt Acas was effective in helping parties see the strengths and weaknesses of their cases (80 per cent).

Representatives often have substantial and repeat experience of the ET system and therefore feedback about their satisfaction with Acas is important. Overall satisfaction levels with Acas were high, with virtually all representatives (97 per cent) satisfied with the service provided in general, and nine in ten (89 per cent) with the conciliation service provided. In terms of areas for improvements, one of the main areas that emerged was one of resource; with representatives suggesting that there should be more conciliators / more Acas resource in general, and the current work load / case number of the Acas Conciliators was too great.

7.4 Mediation

The use of mediation in ET cases was a recommendation of the Gibbon's Review and is a relatively new initiative within the ET system. The findings around its use in this survey (along with those in SETA 2008) can be treated as a benchmark for future surveys in this area.

Relatively few representatives (11 per cent) discussed mediation with their client. In terms of the use of mediation, only two per cent of representatives reported that mediation was used. Given the very small numbers involved in mediation it is therefore difficult to draw any firm conclusions around its use. However, in line with SETA 2008, the current survey did highlight the difficulty in asking questions about the concepts of 'mediation' and 'conciliation', with some misinterpretation of these concepts. Further surveys into this area will need careful development and testing to ensure respondents correctly interpret these concepts.

Representatives' views of the use of mediation more widely within the ET system were largely positive; with nine in ten (90 per cent) of representatives who had not used mediation in the case on which the interview focused mentioning that they would consider using it in the future. Half of representatives (50 per cent) agreed that mediation produced 'win-win' solutions, and 65 per cent felt the more widespread use of mediation could reduce the number of ET claims.

Representatives can play a key role in increasing the use of mediation in the future. As discussed earlier, representatives are already a large and important part of the ET system and have been shown to be influential in terms of how a client proceeds with their case. This ability and their positive views on mediation could be valuable at promoting and encouraging the future use of mediation.

8 Bibliography

Dix G., Forth F. and Sisson K. (2008) *Conflict at work: The pattern of disputes in Britain since 1980*: Acas Research Paper 2008

Latreille P.L., Latreille J.A, and Knight K.G. (2004) *Findings from the 1998 survey of representatives in Employment Tribunal cases*: DTI Employment Relations Series No. 35

Peters M., Seeds K., Harding C., Garnett, E. (2010) *Findings from the Survey of Employment Tribunal Applications 2009*: BIS Employment Relations Series No. 107

White, P.J. (1989) '*Acas and the Lawyers – Some Survey Evidence*', *Industrial Relations Journal*, Vol 20, 4:280-285

