

# Research Paper

Report of the Employment Tribunal/Acas pilot on attendance of Acas individual conciliators at Case Management Discussions

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Prepared by Acas Research and Evaluation Section

Based on research conducted by independent researchers Chris Farrell and Robin Legard

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**March 2010**

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## SUMMARY

This report provides a qualitative evaluation of the Employment Tribunal/Acas pilot on post-Case management Discussion (CMD) conciliation. It suggests that:

- The offer of conciliation immediately after a CMD has the potential in a minority of cases to lead to immediate Acas settlement or to speed progress towards such a settlement.
- This arrangement appeared to have least success in cases where parties were represented and were not present at the Hearing.
- In many cases this stage in the process of complex Employment Tribunal (ET) cases is too early for parties to be ready to conciliate – although this may in part be a reflection of the fact that a number of those being offered conciliation at CMD were unprepared for this offer.

The following emerged as considerations for any roll-out of this service:

- Parties need to be given advance warning that they may be offered face-to-face conciliation following their CMD.
- Conciliators need access to Tribunal case papers prior to the CMD hearing date as they need time consider case files and to decide which cases look most likely to benefit from conciliation at this stage and so which hearings to attend. This record-sharing process could well be facilitated by the early roll-out of Caseflow.
- The demands on conciliators involved in the delivery of face-to-face conciliation following a CMD are slightly different from those they face with the bulk of their conciliation case load. In particular they have to make face-to-face approaches to parties and need a detailed understanding of tribunal processes.
- Given the case load that the conciliation team were facing during the pilot (at that time as much as 30 or 40 per cent above the standard level) it proved very difficult for conciliators to combine work on the pilot with handling their main work load. Under the model used in the pilot, conciliators had very little spare time between attending hearings, reading case files and seeing parties to undertake work on their other cases.
- Clear communication is required to avoid confusion between the roles of CMD conciliator and the conciliator designated in the initial Acas contact letter, so that the parties are clear who they should be speaking to; and so that there is effective follow-up to post-CMD discussions.

The rest of this report:

- Provides background to the pilot
- Explains the role of CMDs and provides information on the pilot and what it aimed to achieve
- Sets out the pilot evaluation methodology
- Outlines how the pilot was resourced and how it was understood by those taking part
- Explores take-up and outcomes of the offer of conciliation following a CMD hearing
- Reviews participants' experiences of the pilot
- Provides pointers for any roll-out of a similar service.

# 1. BACKGROUND

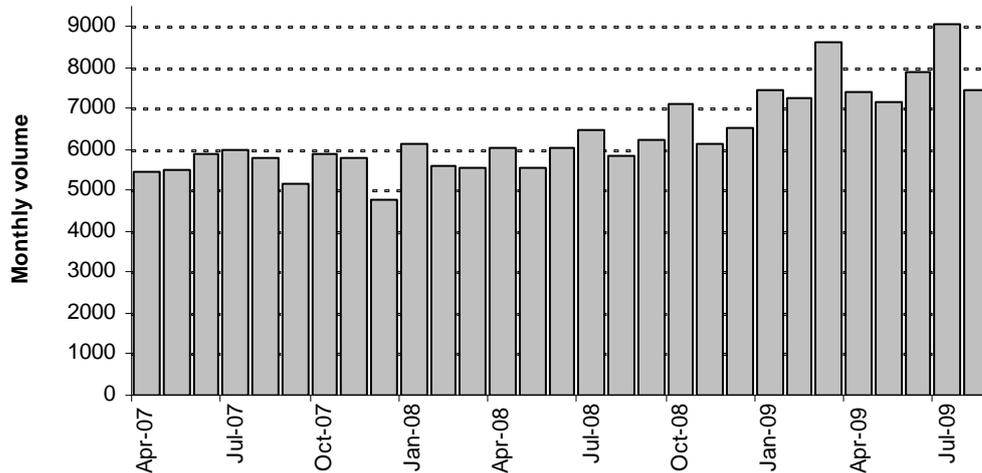
## 1.1 Context for the pilot

In evaluating this pilot exercise it is important to understand the context in which it took place. Over the period of the pilot the Acas conciliation in employment tribunal cases service was under acute resourcing pressure as a result of two key factors:

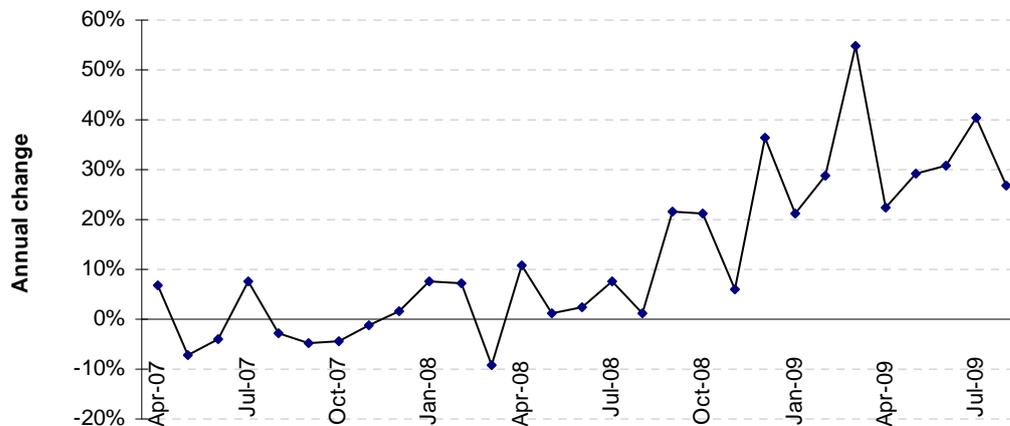
### *Rapidly escalating case load*

The volume of conciliation cases, which was fairly stable during 2007 and most of 2008, increased markedly at the end of 2008 and early parts of 2009 (see figure a). Over the period of the pilot the number of cases received each month was consistently over 20% greater than that recorded in the same period one year earlier (figure b).

(a) Monthly volumes of ET conciliation cases



(b) Annual percentage change in the volumes of conciliation cases



### ***The introduction of Pre-Claim Conciliation***

April 2009 saw the roll-out of the pre-claim conciliation service. In the lead-up to this period and the first six months of the new service resourcing of conciliation in ET cases was stretched because:

- the most experienced conciliators were being trained to take on this additional role; and
- new conciliation staff recruited to “back-fill” the service were not yet in a position to take on board a full case load and required time out to undertake training.

As a result the timing of the pilot in London coincided with exceptionally high conciliation caseloads in the Region as well as a restricted number of conciliators who were able to deal with the full range ET jurisdictions. The Acas conciliators, who had volunteered to take part in the pilot, although offered a reduction in the number of conciliation cases being allocated to them on a weekly basis, expressed a wish to continue to receive their normal workloads rather than ask their colleagues who were not involved in the CMD to take on additional work. In practice, it became clear that attendance at CMDs not only took up a day at Tribunal but also a further day for conciliators to take any action emanating from the CMD and to bring case notes up to date, in effect reducing their ability to handle a normal caseload by some 40% over the week in which they attended the Tribunal.

### **1.2 Description of the pilot**

Following the receipt of an Employment Tribunal claim (ET1) and response (ET3) an Employment Tribunal judge makes an assessment as to whether a Case Management Discussion (CMD) is needed in respect of the case. CMDs are conducted in more complex cases (for example involving several claims and/or including a discrimination jurisdiction) where the Judge considers that matters of procedure and and/or management of the case can best be addressed via a meeting of this kind.

At the CMD an Employment Judge meets with the parties in the case or their representatives in order to:

- clarify the legal claims and issues in the case;
- give any necessary directions for further preparation towards the full hearing;
- agree the number of witnesses required;
- estimate the length of the full hearing; and
- establish the remedy being sought by the Claimant.

In early 2009, Acas and the Employment Tribunal conducted a pilot exercise to explore the possibility that the attendance of an Acas conciliator at a CMD would facilitate the process of conciliation and so increase the chances of case resolution without recourse to a full hearing. Many cases which have a CMD are ones which would be expected to require a relatively lengthy full tribunal hearing - should they reach this stage - so successful conciliation following a CMD could be particularly beneficial in terms of costs to the parties and the Exchequer.

The hypotheses which the pilot set to test were:

- if an Acas officer could attend the CMD as an observer it would give him or her a better understanding of the issues in the case and the areas of dispute between the parties and also enable an earlier assessment as to the prospects for a successful conciliation.
- The understanding derived from attendance at the hearing would put the conciliator in a strong position to speak to parties immediately after the CMD and to offer the opportunity for *early* settlement in some of these cases.

The pilot ran from 11 February to 10 July 2009. The pilot was originally staffed by six of Acas London Region's most experienced individual conciliators who volunteered to take part. It was intended that they would handle CMD attendance on a rota basis. However following the retirement of one of these staff, who had in a previous post worked in Employment Tribunal Service (ETS), it was agreed that she would then become the prime source of Acas attendance at future CMDs.

Acas staff attended the London Central Region Employment Tribunal offices on 1 or 2 days a week over the six month period. On the days when Acas conciliators were due to attend, the Regional Chair aimed to identify two salaried judges each of whom would handle five or six CMDs during the day, giving a maximum of 10-12 cases per day where conciliation could be offered, with the aim that the conciliator would be able to offer intervention in around half of this number<sup>1</sup>. In addition, on most occasions conciliators met with the Employment Judge on the day of the hearing and he or she advised on those cases which - in the Judge's view - seemed to have most potential for settlement. The following table provides summary data relating to the pilot.

|  | <b>Number of CMDs</b> |
|--|-----------------------|
| CMDs held in London Central Region Employment Tribunal during pilot period | 1,087                 |
| CMDs on days that Acas staff were in attendance                            | 192                   |
| CMDs attended by Acas conciliators   | 109                   |
| Conciliation meetings on day of CMD  | 21                    |
| Conciliation meetings resulting in settlement on day of CMD                | 2                     |

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<sup>1</sup> At the design stage it had been noted that not all cases would be suitable for this Pilot. In the event ETS administrative staff put through all cases that did not involve multiple claimants and where the CMD hearing was a new one.

## 2. PILOT EVALUATION STRATEGY

Management information was used to provide the sample frame for this evaluation. However, the small number of cases involved, together with the particular characteristics of cases selected for CMDs, meant that it was not possible to use this data to compare the outcomes with similar cases not included in the pilot (i.e. to undertake an assessment of what would have happened without the offer of conciliation at the CMD). Instead a qualitative evaluation approach was chosen to assess this pilot. This was to enable a detailed understanding of the different participants' experiences of the service.

The aims of the evaluation were to:

- Collect the views of parties, judges and conciliators involved in the pilot
- Explore factors encouraging and inhibiting the take up of Acas conciliation via this route
- Draw out lessons to inform any future roll-out of this or a similar service.

The fieldwork and preliminary analysis of the data was undertaken by independent researchers Christopher Farrell and Robin Legard, who applied the following methods:

- A focus group of four conciliators involved in the pilot
- A group interview with three judges from the Tribunal Service London Region
- 18 in-depth interviews with parties – 8 were conducted face-to-face and 10 by telephone. The sample selected to participate were chosen to include:
  - a mixture of claimants, respondents and representatives
  - parties who had taken up the offer of conciliation and those who had refused the offer
  - a range of case outcomes.

In depth interviews were achieved with:

- Four Claimants
  - Three not represented at CMD, although they may have used representation at an earlier or later date
  - One represented by barrister at CMD
- One Respondent, represented at CMD by an "advisor"
- Seven claimant representatives
  - Three employment case workers, based in a CAB, a law centre and a racial equality organisation
  - Three solicitors, including one trainee and one attached to a law centre
  - One lay representative with a law degree, who represented friends on a strictly ad hoc basis and was not a professional lawyer
- Six respondent representatives
  - Three solicitors specialising in employment law (one worked for respondents only, two worked for either side)
  - One in-house employment lawyer
  - Two barristers from chambers who worked for both claimants and respondents.

The researchers used topic guides which had been agreed in advance with Acas. The interviews and focus group were recorded and then analysed using a "charting" approach which categorised interview responses into emergent themes. The researchers then presented preliminary findings to Acas researchers

who used the presentation together with the analysis charts to produce this report.

## **2.1 1995 study**

This experiment has some similarities with another exercise conducted in 1995, when Acas conciliation staff (then known as IROs) were present at tribunal offices to provide conciliation when requested by parties who came to the office to attend a Full Hearing<sup>2</sup>. Apart from the timing of the intervention there are some other important differences between the earlier and current pilot: in the 1995 experiment the initiative for conciliation was expected to come from the tribunal Chair/ Judge or the parties, rather than the conciliator; any kind of case could potentially have been included (rather than just those complex enough to warrant a CMD); and the intention was that the conciliation would be offered prior to the hearing. Nonetheless, there is resonance between findings of the 1995 pilot and the CMD exercise. This is summarised in section 10 below.

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<sup>2</sup> *Acas conciliation at Industrial Tribunals; an evaluation of an experimental scheme*, Jane Lewis, Andrew Thomas and Kit Ward, SCPR

### **3. DESCRIPTION OF THE PILOT PROCESS**

#### **3.1 Staffing the pilot**

The focus group involved four of the six conciliators who were involved in the pilot. Three of these were full-time Acas employees who also had to handle a standard conciliation case load on top of their work on the pilot. The fourth was a retired conciliator contracted specifically to work on the pilot. All were experienced conciliators who had volunteered to take on this role.

Three of the conciliators did not have any advance information on the cases until the morning that they went to the Tribunal when the Judge in attendance would usually offer views of how the cases were progressing and those which were more likely to settle. However, one did receive case notes in advance meaning that she was able to be more proactive in deciding which case she should observe at CMD and which parties to approach. She also attended more than twice as many hearing days as any of the other conciliators giving her the time to develop an effective way of introducing herself to the parties. The approach that she found to work best was to wait in the ETS reception area and introduce herself to the parties before they went into the CMD, explaining that she would be available after the meeting if they felt that there was prospect of a settlement. Also, as the pilot progressed, some of the counsel came to anticipate her attendance and so be more prepared to put the offer of conciliation to their clients. The conciliator concerned would target cases where these representatives were involved: it was easier to be "bold" with representatives that already knew her and this continuity proved beneficial in opening the door to conciliation.

## 4. PARTICIPANTS' UNDERSTANDING OF THE PILOT

Conciliation staff involved in the pilot saw the objectives as being to settle cases earlier with help of Acas; and so:

- avoid full hearings
- and save costs to the taxpayer (and parties).

Parties involved often had less clarity as to the aims of the pilot. Parties tended not to be able to remember any advance notification of Acas' role prior to their attendance at the CMD. Representatives spoke of receiving notification together with CMD papers or being told about the pilot by ETS staff on the day of the hearing. Claimants heard that Acas would be available from their representative, from ETS staff, the judge or the conciliator themselves. Where an interviewee could remember advance notification there was evidence that the manner in which this was done could cause confusion:

*One claimant reported that she knew in advance about the pilot. She recalled a letter telling her about the pilot as well as one from another (the designated) conciliator.*

*In another example a claimant said that she did recall notification, but it became apparent to the interviewer that what she had actually received was the standard Acas letter and that when she attended the hearing and Acas was in attendance, she assumed this was standard practice.*

Those parties whose first awareness of the potential Acas involvement in their case was on the day of the hearing also had varying recollections of when during the day they had been informed of that involvement. In some cases the conciliator had introduced him or herself whilst the parties were in the waiting room. As reported by interviewees, Judges usually said something at the hearing itself about potential Acas assistance to resolve the case. However this did not appear to have happened in all cases. There were also some differences as reported by conciliators in the extent to which Judges explained the potential role of Acas. In some cases, any reference to Acas was limited to a confirmation that the parties gave permission for Acas to be in attendance.

Claimants and respondents were often unclear that the involvement of Acas at this stage was on an experimental basis, with some assuming that it was standard practice.

As would have been anticipated, some though not all representatives, once introduced to the pilot, whether in advance or on the hearing day, tended to have a reasonable understanding of the status of the pilot and how this differed from standard conciliation arrangements. For example one respondent representative saw the pilot as a way for Acas to become involved in an Employment Tribunal case in a way which could promote earlier settlement. He also saw the face-to-face aspect of the offer as an important element. However, when asked about the objectives of the pilot another representative saw its key aim as providing a way for conciliators to gain a better understanding of the CMD process.

## 5. PARTIES' TAKE-UP OF PILOT OFFER

A decision was made at the point at which the pilot was designed that conciliators should not attend any CMD unless their presence had been cleared with the parties. This is because in CMDs are technically private discussions so the presence of any third party should be checked with those involved in the case. In the event this did not emerge from the pilot as an issue. No party or judge reported any incidence of parties deciding to refuse consent for the conciliator to attend. In fact some representatives said that they saw the CMD as a public hearing so there should be no need for permission.

However although Acas attendance at the CMD Hearing was universally accepted by the parties, take up of the conciliation offer was a more problematic aspect of the pilot. A review of Acas management information on the pilot suggests that Acas conciliators were present to offer conciliation in 109 cases over the life of the pilot and was able to speak to at least one of the parties in the large majority of these (100). However, in only one-fifth of cases where the conciliator made this initial contact (21) did the parties take up the offer of a conciliation meeting.

Looking first at those cases where parties *were* prepared to enter into conciliation, one central theme that emerges is that this provided a way forward for some unrepresented claimants. In these cases a particular benefit was that face-to-face access to a conciliator provided the claimant with a way of understanding and exploring their options.

*In one case a respondent representative reported that the Acas officer had been able to explain points made by judge to the unrepresented claimant in a way that they would not have accepted from the respondent representative. This meant that the claimant felt able to agree a settlement on the day.*

*In another case the availability of conciliation helped to start negotiations between claimant and respondent representative. As they were leaving the CMD the claimant reported that she and the conciliator started to speak. The claimant wanted to find out more about the process so she was taken to a meeting room by the conciliator. Following this initial discussion the conciliator went to speak to the respondent representative and came back saying there was an opportunity to discuss settlement. The claimant agreed to a discussion but asked the conciliator to make it clear to the respondent that this was not because she felt her case was weak. The parties were kept separate with the conciliator going between the two, which the claimant liked. Settlement was not finalised at the CMD but the claimant felt that it took the Acas intervention to "get the ball rolling".*

Conciliation was also accepted in some instances where both sides were represented. In one case this was seen by an interviewee as a way of speeding up the process towards settlement – although in practice the process was felt by this representative to have been as long as it would have been without the involvement of Acas at the CMD stage. On the other hand another representative reported that they would probably have met with the other party just on the basis of the judge's recommendation (i.e. without the presence of Acas). However, the presence of Acas was seen to have produced a less heated and more reasoned discussion, which might not have been the case without the conciliator's "mediating" role.

In all the above cases the conciliator was seen to have been proactive by initiating discussions of meetings with the parties – often by introducing themselves to the parties prior to the CMD. However in some other instances it was the interviewee's perception that the conciliator had simply joined in with a meeting that was happening anyway. In these cases the interviewees reported that the conciliator had no input in the discussions. One interviewee felt this may have been because the conciliator was not leading the discussion and therefore felt it was not his place to comment. The only perceived benefits of Acas presence in these cases were that it was a means of reminding those concerned of the availability of Acas should it be required in the future, or that it was an opportunity for the conciliator to learn more about the case.

## 5.1 Outcomes

To move on to explore the outcomes of those cases where the parties took up the offer of conciliation: the overall picture was that where the conciliator had taken what was seen by those interviewed as a proactive role in setting up the conciliation meeting – for example by introducing him or herself prior to the hearing and then approaching the parties again once the hearing was completed - there was generally a positive impact on case progress.

In two of the cases in the sample a settlement was achieved on the day. In both cases these involved an un-represented claimant and represented respondent. In one case the respondent representative reported that the case would not have settled without Acas being involved on the day and so providing a “window of opportunity” at the point that the claimant was absorbing the content of the CMD. In the other the availability of Acas following the CMD produced an early settlement in a case which would probably have settled in due course.

*In the first case, it was the representative's view that the independence of Acas had “had a huge impact”. It distanced the respondent from the claimant so that the claimant did not feel that he was being pressurised. The Conciliator as an independent person was able to “give it to the claimant straight”. The interviewee was impressed by the conciliator's knowledge of the law, but also felt that the conciliator was able to understand the emotional aspects of the case from the claimant's point of view, which, this representative felt, lawyers tend to overlook. This was a complex case which would have had a 10-day hearing, and so would have been highly expensive in both legal costs and PR terms, so the representative was very relieved to have settled so early in the case.*

*The respondent representative in the second case talked about how they would not have been able to achieve a settlement on the day of the CMD had it not been for Acas' presence. The interviewee also commented that the conciliator was able to help the unrepresented claimant make sense of the points highlighted by the judge during the CMD. In this second case, however, the representative felt that there would, eventually, have been a settlement without an Acas presence at the CMD as his client was keen to settle the case if possible.*

In other cases no settlement was reached at the time, but the case did go on to settle and the pilot intervention was seen as having laid the ground work for the eventual settlement.

*A claimant representative, not himself present at the CMD in question, reported that a meeting between his client and the conciliator on the day of the CMD meant that the claimant was informed of his rights and made aware of what he could expect from a tribunal hearing. The representative's view was that this was what led the claimant to decide to settle, which would not have happened without the contact with the conciliator.*

*In another instance (cited above) an unrepresented claimant felt that the conciliation that took place at the CMD "got the ball rolling with settlement discussions" and so speeded up the resolution of the case. This interviewee also said that without the conciliator's advice she would not have known what sort of figures she could suggest when asking for compensation.*

*In a third example the main advantage of the conciliator beginning to conciliate after the CMD was that this meant that each side knew that in principle at least the other was open to discussing a settlement. Although this did not speed up the passage of the case - which was determined by issues such as the time taken to produce a Schedule of Loss - it may have made it easier to eventually reach agreement.*

In a third group of cases conciliator involvement in post-CMD discussion was felt by interviewees to have had little impact on the outcome of the case. Here the typical picture was of the conciliator being seen to have a relatively passive role in meetings between two represented parties, who would have met regardless of third party intervention.

## 6. REASONS FOR NOT TAKING UP CONCILIATION AT THE TIME OF THE CMD

As already indicated, in the majority of cases in the pilot where the parties were offered conciliation, this option was not taken up. Parties and conciliators interviewed for this evaluation offered a range of reasons for this including:

- the offer came too early in the progress of the case
- representatives and/or parties were unprepared for the offer of conciliation at this stage
- representatives did not have client instructions to move to a settlement
- representatives felt that they could deal with the issue without Acas' assistance
- there was no interest in settlement as one or other party was determined to go to a full tribunal hearing

Looking at these points in more detail one of the strongest themes emerging from interviews with parties was that the offer of conciliation following the CMD was too early in the progress of the case. In some cases either or both sides were too entrenched at this point to consider conciliation. As one claimant representative reported their view of the offer of conciliation following the CMD was "not now thank you". They did not speak to the conciliator as the parties were too far apart to be ready to agree a COT3. Offers were going "to and fro" between the parties and they felt at this stage they could negotiate it between them.

An associated issue was that where the CMD was attended by representatives some were unable to proceed to conciliate because their client was absent and they needed their instructions. In such circumstances, it might have been possible to have more detailed discussions if the claimant had been unrepresented. On other occasions, it may be that the claimant representatives are not inclined to consider conciliation at this stage in the case, as demonstrated in the next example:

*A claimant's representative was disinclined to consider conciliation, even though the claimant was present at the CMD. This claimant reported that her barrister seemed to want the conciliator to "hurry up and leave" as he was rushing and wanted to get back to chambers. She got the impression that her legal team were not interested in working with Acas. However when interviewed for this research the claimant indicated that she would have liked a proper discussion about settlement options, particularly as she reported that she had been trying to get in touch with her designated conciliator for some time without success.*

However not all claimants were interested in the offer of conciliation. In one case this was because the CMD had been emotionally bruising for the claimant concerned, who felt dubious and angry following the hearing and so "really not in the mood to talk to anyone at this point".

There was also a suggestion among some of the representatives interviewed that take-up of a post-CMD discussion with Acas might have been lower where both parties were represented because the representatives involved would see themselves as able to handle a settlement discussion without the need for third party intervention. There were also suggestions that solicitors less experienced in employment law and busy barristers were less likely to want to talk to Acas, and that some parties may feel that talking to Acas so soon in the process could be seen as a sign of weakness.

Finally, in one case both parties were firm in the strength of their case and determined following the CMD to proceed to tribunal, which was what happened.

Exploring reasons for the level of take up of conciliation the Acas staff identified similar issues to those which emerged in the above analysis of interviews with parties. First, at the beginning of the pilot parties were often unaware until the actual day of the CMD that there would be a conciliator available. This meant that they did not come prepared to think about conciliation and representatives were sometimes not equipped with the necessary instructions to enable them to progress the case via the conciliation route. This lack of advance information meant that the conciliators felt it was left to them to "chase" the parties, who might be in a rush to leave the building following the CMD hearing. This was an uncomfortable role and one that differs from the usual delivery of conciliation.

The timing of the intervention was seen as too early by some of the conciliators who pointed out that under the usual ET process the CMD process can help to crystallise matters and so lead to withdrawal of a case or encourage the parties to seek settlement. Seeking to engage parties in conciliation before they had had time to review the significance of the CMD was too soon.

A further inhibiting factor from the point of view of conciliators was a lack of convenient office space in which to do work between cases and where they could meet the parties. For example one conciliator said that she had been allocated some office space but that this was a long way from the Hearing rooms which meant that it was not practical to use this facility.

## 7. CONCILIATORS' EXPERIENCES OF THE PILOT

Acas conciliators reported mixed experiences of the pilot. It is apparent that one of the premises on which the pilot was based – that attendance at a CMD hearing would in itself equip conciliators to approach parties after that hearing and secure agreement to conciliation – was not found to hold entirely true: they also needed advance access to case information in order to decide which hearings to attend and to feel properly briefed on the case.

As set out above three of the four who took part in the focus group only attended the ET on four different days; while one – a retired conciliator - was called back in specifically to work on this project. She attended the Tribunal offices on 10 occasions and also had the advantage of not having a standard conciliation case load to manage alongside her CMD role. In addition she was able to obtain advance access to the relevant case files. These factors combined to make it easier for her than for her colleagues (all employed in full-time roles) to prepare for cases, to develop relationships with representatives and ETS staff and to develop strategies for introducing herself to the parties. As a result she had a relatively high success rate in persuading parties to take up the conciliation offer.

Conciliators who combined the work on the pilot with their usual caseload felt that they would have benefited from more time to spend on the pilot cases. They reported that they usually did not have enough preparation time prior to going into a CMD. They felt that having an hour at the beginning of the day was not enough time to absorb the relevant documentation for ten cases. This was made more of an issue when the case files were not waiting for them when they arrived at the ETS but instead were delivered later. In addition although in most cases Judges met the conciliator at the beginning of the day to discuss the upcoming cases this did not always happen, so that in some instances conciliators knew very little about the case at the point at which they entered the CMD. Furthermore, where they had not met the Judge in advance, they could feel like an "intruder" in the CMD as the Judge would not introduce them.

The full-time conciliators spoke of a conflict between their standard case load and the CMD conciliation. At the outset it had been anticipated that they would be able to use a laptop computer to work on other cases whilst waiting for the pilot cases to be heard. In the event this did not prove possible; partly because they were not provided with adequate office facilities at the Tribunal building, but largely because being available for the CMD cases did they did not leave free time for other work. One conciliator also pointed out the since all the CMD cases already had a nominated Acas conciliator, there was a need to keep the paperwork for CMD cases up to date so that the nominated conciliator was aware of case progress.

For some conciliators the pilot experience was a demoralising one. For example one of those taking part in the focus group said that they had only been able to persuade parties in two out of a total of 40 CMDs taking place on the days that she was available to take-up the offer of conciliation. This lack of success meant that conciliators questioned whether this was an effective use of their time, especially given their "normal" conciliation case load which they still needed to deal with when they returned to the office.

However, even with these negative views conciliators did see positive benefits from their involvement. In particular they valued the insight that it had provided into the operation of the ETS in general and into CMDs in particular.

## **8. PARTIES' VIEWS OF THE PILOT**

Generally parties, and especially unrepresented claimants, welcomed the presence of Acas at the CMD as someone independent who could provide an explanation of process and help them to understand their options. Both claimants and respondent reps reported that Acas conciliators were seen to understand the claimant's position and provide some protection to unrepresented claimants who could feel vulnerable. In addition the mediation skills of conciliators were seen as useful in calming discussions between the parties which were heated following an acrimonious CMD.

For some representatives the presence of a conciliator provided a welcome opportunity to settle "on the spot" with unrepresented claimants; however others felt that this was rather early in the process and that having a conciliator in attendance prior to full hearings would have been more useful.

### **8.1 Parties' views of Acas following pilot**

The research also explored how the pilot had impacted on parties' views of Acas. The results did not suggest a clear impact of either a positive or negative nature. While some representatives said it had not affected their view of Acas, which was based on extensive past experience, some concern was expressed that having Acas present in the ET building had the *potential* to undermine Acas' perceived independence from the ETS, particularly in the eyes of un-represented claimants. However, there was no evidence that this had actually happened. An alternative view presented by other representatives was that this service had the potential to boost the profile of Acas, which was seen a beneficial.

Individual claimants expressed positive views of Acas following their contact as part of the pilot. However there was one dissenting voice from a claimant who had expected more proactive support from Acas following the CMD. The conciliator's explanation of the pilot led the claimant to believe that the conciliator would be more involved in her case from now on, whereas the conciliator was no doubt referring to greater involvement at the CMD stage, which in this case did not happen. So, as has already been described, the claimant tried to contact the CMD conciliator after the hearing, but was unsuccessful. She eventually heard from her designated conciliator who did not seem to have been updated about the CMD or the other conciliator's role. She felt that it was "too late" for a settlement by this stage. As a result she had a much less positive view of Acas than she did prior to her CMD experience. She said that she would now advise anyone else submitting an ET case "to plan to go to the tribunal".

## 9. RECOMMENDATIONS FOR FURTHER DEVELOPMENT OF THE SERVICE

Research participants from all of three groups (Parties, Judges and conciliators) drew out lessons from their experience of the CMD pilot which they felt would need to inform any wider roll-out of the service of this kind. Issues that were identified as requiring consideration were:

- Notifying parties of the service
- How conciliation in these circumstance can best be resourced
- The kinds of cases most likely to benefit from intervention at the CMD stage
- The effective sharing of case information between employment tribunals, CMD conciliators and the designated case conciliator
- The kinds of outcome which this intervention could realistically achieve (actual settlement or progress towards settlement)

### 9.1 Judges

Judges felt that the pilot showed most potential for success when the service was being offered by a conciliator who:

- handled a large number of cases in the pilot and so was able to develop skills to deliver conciliation in this way
- had time to devote to the project and to develop relationships with representatives
- had prior understanding of the ETS

The ETS were “sorry to lose her presence” at the end of the pilot. One of the judges also reported that representatives had started to ask “is this not an Acas day or “we were hoping that there would be an Acas officer here today”, which shows how representatives were becoming familiar with Acas’ presence at ETS and how they seemed to welcome it. In the light of this and of their experience of Judicial Mediation which, they felt, took 18 months to “bed in” there was a feeling that the Pilot had not lasted long enough to properly test this model for delivery of conciliation.

The following emerged as ideas from the Judges as to how the project could be taken forward:

- It would be helpful to provide parties with access to Acas not only at the initial CMD but also at subsequent hearings.
- The service would best be delivered by a dedicated conciliator, perhaps based part of the time in the ETS.
- There was potential for the ETS to take a more proactive role – for example managing case lists to ensure the “Acas friendly” cases were heard on the same day.
- Alternatively the conciliator could be available by telephone to be contacted and brought in where judges identified a case that had the potential to settle at this stage.
- Judges also felt that there would need to be a more effective way of sharing case information with the conciliator than had been the case for most of the pilot.

## 9.2 Parties' views

Parties gave some similar and some additional views on the way the service might be effectively rolled-out

- Representatives tended to see this service as particularly useful where the claimant was unrepresented.
- There was awareness amongst representatives that conciliators involved in the pilot often had an existing conciliation case load. One view expressed was that it would be important to ensure that the service was adequately resourced in a way that did not impact on the standard delivery of the service. This could be done by providing a designated conciliator. On the other hand some representatives felt that the number of cases where Acas could actively promote settlement would be limited, so raising the issue as to whether supplying the appropriate resource could be justified.
- Parties also suggested that it would be easier to decide to take up the conciliation offer if they had had better prior warning of what this might involve. One representative suggested that early settlement was unlikely until the claimant had produced their Schedule of Loss. So introducing a means by which a provisional Schedule could be produced in advance of the CMD would increase the chances of settlement at this stage.
- An additional view was that the focus on settlement at this stage in the process was overly ambitious. One representative said the most useful role for Acas following the CMD was to facilitate a face-to-face meeting between the parties away from the adversarial environment of the hearing. The view was that this would allow "people to see the other as human. Just getting people together in the same room is a big thing."
- Representatives as well as others felt that the service should be more actively promoted. One suggestion was that the Judiciary should take a more proactive role in this respect; another that the letter sent by the ETS to parties advising them of the presence of a conciliator at the CMD, should introduce the individual conciliator by name which would help to "give them more of a foot in the door".

## 9.3 Conciliators

The conciliators interviewed as part of the evaluation, also made recommendations as to how such a service could be rolled out, which broadly chimed with what both parties and the judges had suggested. They agreed with the judges' view that the pilot had not been long enough to thoroughly assess its success. In terms of more specific recommendations, they too felt that there should be a dedicated conciliator for the ETS, one who works exclusively on cases going to CMD, without any additional workload and with adequate preparation time. The conciliators also felt that the judges should be involved in promoting the service.

## 10. FINDINGS OF THE 1995 PILOT

The 1995 experiment offered conciliation at what could be seen as the “11<sup>th</sup> hour” of a claim process – i.e. just before the full hearing. In addition, the way that Acas conciliation was resourced and conducted changed considerably between 1995 and 2009 and as set out in section 2 of this report the range of potential cases included in the 2009 pilot was narrower than in the 1995 exercise. Hence a striking difference between the evaluation findings is that while in the 2009 pilot conciliators were required to take more initiative in making face-to-face approaches to parties than was the case in their normal role; conciliators involved in the 1995 pilot saw their role at the Tribunal as a more passive one than when they were providing conciliation under usual circumstances.

Nonetheless some of the findings from 1995 chime surprisingly closely with the CMD pilot experience:

- Take-up of conciliation in the 1995 full hearing experiment was also considerably lower than expected: in this case conciliation was estimated to have taken place in under 5% of the cases where parties could have taken advantage of the scheme. Two of the reasons identified for low take-up were: lack of promotion of the scheme by some Tribunal Chairs; and some parties were thought to resistant to settlement in principle or as a result of their personality type. In addition Acas resourcing of the pilot was another potential factor.
- In common with the recent pilot the evaluation of the 1995 experiment found that Acas presence was more influential and had greater impact on settlements when either party was unrepresented. However, generally the impact on settlement levels was felt to be marginal.
- Parties generally supported the 1995 scheme and would have liked to have seen it become a permanent addition to employment tribunals (then known as industrial tribunals), as long as this was in addition to the offer of conciliation at earlier stages of the case.
- Conciliators found it difficult to combine offering conciliation from within the Tribunal, with their normal workload. They also felt inhibited by lack of suitable office space in which to conduct conciliation
- Conciliators and tribunal Chairs had concerns about how such an arrangement could be efficiently resourced if rolled out more widely.

## 11. CONCLUSIONS

To conclude, the pilot evaluation findings suggest that having a conciliator present at a CMD has the potential in some circumstances to lead to a conciliated settlement on the same day. In other cases, while this arrangement may not produce an immediate settlement it could lay the ground work for later conciliation and potentially speed-up case resolution. Nonetheless take up of the conciliation offer was generally quite low. Some similar themes emerged from all the participants in the pilot (judges; conciliators and the parties themselves) as to why this might be:

- Parties were often unaware that they would be offered conciliation following the CMD. This meant that they were unprepared to consider this as a way forward.
- Offering conciliation immediately after a CMD Hearing was seen by some participants as too early in the process, especially where one or both parties were represented and the representatives needed instructions from their client in order to proceed.
- Most of the conciliators involved in the pilot did not have adequate time to devote to the process, due to their ongoing conciliation case load. In addition, since most were given little information on cases prior to the day of the Hearing, they were unable to prepare in advance.
- This offer required a different approach from conciliators than was needed for most of their case load. In particular, they were engaging with parties face-to-face rather than on the telephone. Most officers involved in the pilot only took part on a small number of days giving little opportunity to develop skills in approaching parties "cold" on a face-to-face basis.

Despite the fairly low take-up there was support amongst participants for extending this service, especially in cases where either party is unrepresented and would benefit from the input of an independent and trusted third party. The successful conciliators in some cases of this nature helped the claimants to understand the points made by the Judge and also set out options and the implications of these. However, interviewees with a pre-existing understanding of the Employment Tribunal process and the role of conciliation in this process, recognised that rolling-out such a service would present resourcing challenges.

The following are some of the factors which participants felt could lead to an effective roll-out:

- Success should be seen to include "getting the conciliation ball rolling" rather than simply promoting a settlement on the day.
- Parties need to be given advance warning of the offer so that they can come prepared to discuss settlement.
- Conciliators need access to Tribunal case papers in advance of the Hearing day.
- Conciliators involved in offering the service need time to develop the appropriate skills and contact strategies for this form of conciliation.
- They also need the necessary time to devote to these cases.
- On the other hand, the pilot indicates that cases most appropriate for conciliation at this stage are those where the CMD is attended by an unrepresented claimant and where the respondent representative knows that their client would be prepared to settle. Hence, volume of the cases that will be suitable for this form of intervention is relatively small so devoting full-time conciliation resource to delivery of this service would not seem appropriate.

- There needs to be greater clarification between the role of the CMD conciliator and the designated conciliator together with an effective liaison to ensure that the designated conciliator follows-up the case in a timely manner.



