

# Research Paper

Social Dialogue and the changing role of Conciliation, Arbitration and Mediation Services in Europe (CAMS): A five country study of third party dispute resolution

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Industrial Relations and Social Dialogue project

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**Social Dialogue and the changing role of Conciliation,  
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## **ACKNOWLEDGEMENTS**

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## **FOREWORD FROM KEITH MIZON, Director of Individual Dispute Resolution, Acas**

The past half century has seen a rapid and far reaching expansion of employment law in Britain with some areas of legislation, in the past decade in particular, touching upon the heart of the employment relationship. Against such a backdrop, the importance of ensuring fair and effective methods for resolving workplace disputes has increased in significance.

For Acas, the programme of events and subsequent report on the changing role of Conciliation, Arbitration and Mediation Services in Europe (CAMS) study has been especially welcome. One common shared experience across all five countries which emerged early in the study was the growth in recent decades of the growing number of employees pursuing individual grievances through the employment courts, or tribunals. This coupled with the increase in rights now guaranteed at the European level made a European comparative study particularly timely.

But beyond the bald statistics there was much more to be learned in terms of context and much potential in terms of sharing custom and practice. The CAMS study has highlighted some fundamental differences in the arenas in which the respective countries operate – not least the legal infrastructure and the ‘place of the law’ in respect of conflict handling and approaches to dispute resolution outside the courts. In spite of this, participants also identified similarities in the challenges we face. The importance of securing third party intervention whilst managing increasing volumes of claims in order to ensure a speedy resolution of conflict was a common challenge faced by all. Equally, the value for all parties, including the state, of early resolution was recognised – with four out of five of the participants having introduced pre-claim conciliation arrangements. This is an approach which Acas has implemented over recent years with a high degree of success. A goal for Acas, and one shared by other CAMS participants, is to seek strategies to encourage use of such arrangements by employers and employees alike.

How the impact of such arrangements might be maximised is clearly a question for further research. Other areas for enquiry suggested by the CAMS study include the role and place of enforcement of rights, as well as the impact of legal costs on all parties involved in conflict.

A central feature of engaging in such comparative exercise is the opportunity to learn from others, but equally important has been the learning opportunity the project provided to turn the lens back on ourselves – to more dispassionately reflect on our own infrastructure and practice in relation to others.

## **FOREWORD from PETER HARWOOD, Acas Chief Conciliator**

As the Acas Chief Conciliator I am very pleased to welcome the publication of this report on the changing role of Conciliation, Arbitration and Mediation Services in Europe (CAMS). In 2009/10, Acas conciliated in 87,000 individual rights disputes, over 900 collective disputes, 40 collective arbitrations and a number of individual and collective mediations. Collective conciliation is my main area of responsibility. Employers and trade unions enter the conciliation process on a completely voluntary basis and Acas conciliators seek to help the parties to find a mutually acceptable way forward in resolving their dispute. There is no attempt to impose an outcome on parties and, in common with collective agreements in Britain more generally, there are no legal protections to ensure than the parties comply with the terms of their agreement. Parties, again, do so voluntarily. In 2009/10 we were able to resolve the issue or help parties return to direct negotiations in 94% of collective cases.

Participating in the CAMS project gave conciliation staff in Acas the chance to reflect on the way we deliver our service by learning how dispute resolution operates in other EU States – albeit that in some cases the State has a far more active and directive role than is the case in Britain. The project also showed that across Europe agencies involved in promoting the resolution of collective industrial disputes are delivering their services in the context of declining or static levels of trade union membership and reduced reported incidences of strike action. Yet at the same time there is evidence that other manifestations of collective unrest - such as mass use of legal redress – are on the increase. I see this report as providing a valuable resource to all dispute resolution agencies that are seeking to adapt their services to meet the demands of a changing employment relations environment.

# **SOCIAL DIALOGUE AND THE CHANGING ROLE OF CONCILIATION, ARBITRATION AND MEDIATION SERVICES IN EUROPE (CAMS)**

## **INTRODUCTION**

In a period when alternative dispute resolution processes are becoming more common in Europe (Purcell 2010), researchers from France, Italy, Poland, Portugal and the UK<sup>1</sup> initiated a study that involved social partners, public authorities, lawyers and industrial relations experts exchanging information about the development of conciliation, arbitration and mediation services<sup>2</sup> in Europe. The project was funded by the Social Dialogue section of DG Employment of the EU Commission. Its aim was to improve knowledge of industrial relations developments among the social partners against the background of changing national trends in individual and collective conflicts at work. The CAMS project hoped to increase European understanding of the processes for resolving employment relations disputes involving third parties.

From the outset the project agreed to limit its scope to the role of all state-supported or government court agencies that involve third parties in either collective or individual dispute resolution. This limitation clearly excluded other areas of dispute resolution: private conciliation organisations or internal (to the workplace) arrangements. However, given the wealth of material available just on the work of state agencies in this area we effectively had to go still further in limiting the project's scope. Thus although arbitration does occur in collective disputes in all five countries studied, apart from acknowledging its presence as an end-stage in a quite small number of conflicts, we could not focus on it. Rather we targeted the resources we had available on trying to improve understanding of the ways in which the social partners and individual employees experience what is generally defined as third party conciliation or mediation.

We did not wish to get tangled up in definitions and their translations in different languages, but they clearly were and are important. In some countries the terms 'mediation' and 'conciliation' have nearly interchangeable meanings. In others they represent distinctly different processes with conciliation being 'the provision of help in reconciling two different positions', and mediation being the articulation by a third party of a solution whose aim is to get the agreement of the two opposed parties. In some countries 'mediators' can impose legally-binding settlements while in others this can only be done by 'arbitrators'; in other countries 'arbitrators' can only recommend agreements. Finally, in some countries third party interventions in conflicts are entirely voluntary: both conflicting parties must agree to them; in others only one party to the conflict is needed to start such a third party intervention; and in others the law may insist that third party interventions take place.

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<sup>1</sup> This report could not have been written without the voluntary contributions of the very large number of industrial relations and conciliation specialists from these five countries whose names are listed in Appendix One. Additional thanks must go to the experts who supported the project's national advisory boards. None of these, however, are responsible for any errors or omissions in this report which are the responsibility of the author(s) alone.

<sup>2</sup> This was not a project comparing the law on third party interventions. This was done for all EU15 countries by Valdés Dal-Ré (ed.) (2003), *Labour Conciliation, Mediation and Arbitration in European Union countries*. Madrid : Ministry of Labour, and more recently in comparing two countries by Evelyne Severin (2007), 'Le traitement des litiges du travail en droit français et britannique: deux modèles d'intégration des procédés amiables', *Revue de Droit du Travail*, March pp 202-6.

The countries chosen for the study represent different industrial relation systems with different forms and traditions of third party conflict resolution. One of the countries (UK) has an industrial relations system rooted in voluntary agreements between workers' trade unions and their employers, where until the reforms of the 1980s and 1990s the law had very little to say about how industrial conflicts should be conducted. Three of the countries (France, Italy and Portugal) have industrial relations systems that are essentially built upon codified legal frameworks that prescribe more or less detailed procedures for the employer-employee interface, and assume a major role for the courts in monitoring and enforcing the law. Yet here too there are differences: the French labour code has an almost continuous history dating back in conciliation to the early 19<sup>th</sup> century; the Italian social partner employment framework dates back to the end of the Second World War; while the Portuguese social dialogue framework only to the democratic revolution of the mid-1970s. Another country, Poland, blended a new legal framework with several elements favouring trade unionism onto its pre-transition highly rigid code in the 1990s. But this occurred, paradoxically, within an economic and political context where the state saw its role primarily in terms of supporting managerial prerogatives in order to promote the free market.

Third party conflict resolution would not be necessary without disputes taking place at work between employers and employees. So this report starts by asking why do work conflicts arise and how often, and what do third party interventions involve? It then turns to some examples of third party employment conflict resolution interventions in the 'public interest' in collective disputes, and next provides examples of their 'safety valve' role in relation to individual conflicts. The fourth section of the report presents the main similarities and differences between the five national systems of third party intervention in collective dispute resolution, while section five compares third party interventions in individual conflicts. Finally, the report concludes with a call for greater understanding among social partners of the roles that third parties can play in conflict resolution.

This report brings together findings from all five of the States that were involved in the study. More detailed country-level reports are also available on the project website<sup>3</sup> and are referenced at relevant stages in this document.

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<sup>3</sup> <http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm>



## 1. EMPLOYMENT CONFLICT AND THIRD PARTY INTERVENTIONS

Conflict over the terms of employee subordination is always present, overtly or covertly, since employers cannot fix in advance all the precise requirements of any particular task. An employer contracts for an individual's labour power at a certain price, and then must negotiate or impose their actual requirements on the employee. Once the initial terms of subordination are accepted they are generally not challenged until external or internal changes occur, although conflicts do regularly occur over interpretations and managerial behaviours. Thus price inflation can create a situation where employees consider that the price paid for their labour is no longer fair; or greater awareness of normal working conditions in the sector or area can make some employees feel that elements in their working environment (training, tools, health and safety provisions) are not at the required societal level; or the work volume may rise; or external legislation may mean that the way an individual or a group of workers is treated is now perceived as unfair or discriminatory.

Employee views as to which changes are legitimate or fair and which are not are influenced by a wide range of factors. For example, if the employee has no other choice (or no other employment opportunities) and lacks collective voice, then the employer can make changes to job requirements and regulations unilaterally without consultation or negotiation. But if employees do have a choice, then employers often have to consult on or negotiate change. This can be done by respecting substantive and procedural law and regulations that govern employment relations, through consulting with employees or holding collective bargaining over work organisation and employment contracts, by ensuring the skills required are commensurate with those available, and so on.

Most employment-related conflicts are resolved at workplace or organisational level, although only a little is known in most countries about the number and intensity of these internal conflicts. Less still is known about the resolution of these local conflicts. In many cases there are formal dispute procedures within workplaces where individuals or groups can make a case to 'higher' levels of management who can then 'resolve' the conflict. But most conflicts are 'resolved' informally – by some local accommodation that re-establishes the legitimacy of the terms of employment.

Where conflicts are not resolved internally they either linger on, or, in an effort by one or both parties to the conflict to reach a resolution, they may lead to absenteeism, higher quit rates, various forms of industrial action including strikes, or legal action, or to all or a combination of these. Such actions render the conflicts visible outside the specific workplace and make them measurable through regular counts of sickness, labour turnover, claims going through employment courts and through strike statistics. Some countries also conduct occasional surveys to try and track the changing volumes of industrial action that do not involve strikes, as in France and the UK.

There were two fairly common trends in visible conflict data across the five countries. The numbers of striker days recorded in official strike statistics declined markedly over the last 30 years in France, Italy, Portugal and the UK and over the last 20 years in Poland; and against a background of the spread of a general discourse of 'individual rights' during the 1980s and 1990s, there were also rises in the numbers of workers pursuing individual grievances through employment courts.<sup>4</sup>

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<sup>4</sup> See the national reports for the details (<http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm> ).

We cannot, however, draw from these two sets of data the inference that collective conflict in employment is generally on the decline and/or giving way to purely individual conflicts. There was evidence that workers in some countries are using means other than externally-visible strike action in conflict situations. These may include action short of collective strike action (such as work to rules, overtime bans and petitions) and threats to take strike action; collective publicity drawn to the issues in dispute through newspapers or internet campaigns; or individualised voicing of group discontent through raising grievances within the company's own procedures. Collective conflict may also be reflected in responses such as high absenteeism or quitting. In some countries there is also evidence of collective conflicts being expressed through external individual rights systems, with the instigation of joint, multiple individual claims being taken to the country's employment courts.

By the 21<sup>st</sup> century employment courts that permit individuals to seek legal redress concerning conflicts with their employer exist everywhere in Europe; and nearly everywhere they include a conciliation phase or process, where a more or less serious attempt is made by a third party to secure an agreement before the court has to adjudicate. Although the employment courts we studied were all established to provide access to *individual* litigants (usually but not always the employee), it is clear that large numbers of 'individual' workplace conflicts that go to the employment courts actually involve issues that affect many more workers as well. In some cases the trade unions encourage individual workers to individually submit the same 'multiple' claim. In a few cases the employment courts may recognise the 'multiple' nature of a conflict and deal with them together, but more generally each claim is kept strictly 'individual' and the collective issues and lessons are kept in the background. This is one reason why although trade unions in the five countries researched offer individual members support in pursuing personal claims, they do not often see this as the most effective way of improving working conditions for those who remain in work. The trade unions, of course, prefer to win a satisfactory agreement on all individual and collective employment conflicts through mainstream rather than 'alternative' methods. But while the contexts of national, sector and company-level collective bargaining and collective mobilisation are clearly preferred ones, increasingly over the last 30 years either many employers have been less ready to conduct such bargaining or workers have become more cautious about mobilising, forcing unions to look at other ways of promoting their members' interests.

Recognising that externally-visible levels of employment conflict posed a challenge to the social and labour market stability that governments are expected to maintain, most European countries, beginning in the 19<sup>th</sup> but particularly in the second half of the 20<sup>th</sup> century, adopted various forms of third party collective dispute resolution. Introduced largely in response to, or in the aftermath of, considerable levels of social unrest, their main purpose was to try and ensure that the 'public interest' of 'industrial peace' is re-established. To achieve this goal the state (and occasionally the social partner organisations themselves) has sponsored employment relations institutions or arrangements that involve third parties (people with legal and/or practical experience) to conciliate, mediate and/or arbitrate over collective conflicts. These procedures permit the government (central or local), or, occasionally, the employers and the trade unions, to justify attempts to resolve on-going conflicts in the name of the 'public interest'. This, of course, is a contested term: who the 'public' is can change over time and its 'interests' may be viewed differently by different governments.

## 2. COLLECTIVE THIRD PARTY CONFLICT RESOLUTION IN PRACTICE

The 'public interest' in collective conflict resolution can be defined as an intention to reduce those manifestations of conflict over the employment contract which become visible or have an external impact beyond the workplace. The issues at stake in the examples given here relate to job losses, perceived threats to legally established procedures, and potential disruptions to the delivery of goods or services. The 'public interest', then, is both about preserving stable employee-employer relations across the whole labour market, and about ensuring that the 'public' as consumer of the relevant goods or services is not inconvenienced.

In 2009, in the Italian Province of Bologna within the Emilia Romagna Region, two factory closure announcements by a Swiss multinational company involving job losses of 81 workers provoked a trade union legal action against the firm for not properly consulting its workforce. This was followed by third party conciliation by the local Ministry of Labour, and when that failed, by a mediation involving local regional officials, two local mayors and the local employers' association. Finally, an agreement reached in mediation was signed at the national office of the Labour Ministry. The result was that the Swiss multinational did close its factories, but also applied for public wage protection for the workers who had lost their jobs, while the two local mayors agreed to find jobs for a third of those dismissed.

An American multinational was involved in the French example, where 283 job losses were declared in Villemur-sur-Tarn in the Haute-Garonne region of France in October 2008, with the company proposing to relocate to China and back to the US. Legal action was also taken by the unions here, and six months' later mediation was initiated at regional level, this time by the regional Ministry of Labour and the Departmental Prefect. However the company continued to prepare for the closure, provoking strikes and then a partial occupation and seizure of two managers by the workers. This was followed by management announcing the immediate shutdown of the factory and, in turn, by a new government intervention. The French Industry Minister appointed a new mediator and then in September 2009 announced a partial reopening of the factory with a new owner, saving 60-70 of the jobs, but with all the redundant workers receiving nine months' full salary.

In these two examples, the role of government in seeking to facilitate the continuation of employment was clear. The 'public interest' was about local or national politicians appearing to 'do something' in contexts where the political stakes were quite high.

The next three examples of third party collective conflict resolution confirm the different ways in which the 'public interest' can shape settlements. In the first of these the function of the intervention appears to be more about the preservation of procedural commitments than in actually producing a substantive result.

In Poland in July 2007, shortly after signing a collective agreement promising consultation and negotiation with the unions, a company with ten branches across Poland decided unilaterally to restructure its operations by outsourcing some of its front office operations to a new company. The unions protested that these actions were taken without proper consultation as laid down in the collective agreement and in January 2008 a record of differences was signed, as is required in Polish law. A mediator was then jointly selected from the Labour Ministry's list. In the absence of any progress through the first mediations the unions organised a two hour warning strike. But at the next mediation meeting the employer refused to sign the agreement proposed by the mediator and the unions took the

dispute up to the Labour Law Arbitration section of the Supreme Court. In October 2008 the binding arbitration that ended the dispute was that the employer had not made sufficient efforts to involve the unions in the initial restructuring, but that since this had now taken place, in any future restructuring the employer would be required to make special efforts to consult properly.

Here, the 'public interest' is defined narrowly by the court as being about preserving the property rights of the employer to take unilateral action, while at the same time acknowledging the constitutional right of workers to be fully consulted. In this example no jobs were being removed from the country by foreign multinationals, so the 'compromise' provided by the third party left restructuring and the right to manage unchallenged, while simultaneously it upheld the procedural argument that agreements to consult the unions should be fully applied in future.

Yet the function of third party intervention in collective disputes is often more banal: the 'public interest' can be defined as securing 'industrial peace' in high profile conflicts by finding a satisfactory mid-point between two mobilised parties neither of which can afford to demobilise its constituency by directly calling for a compromise.

In Portugal in September 2006 a dispute over a new collective agreement establishing terms and conditions broke out between a union and a major employer within the aviation industry. After four negotiating meetings broke down the trade union issued a three-day strike notice to take effect in June 2007, at the start of the peak summer season. At this point both sides agreed to commence conciliation under the auspices of the national office of the Ministry of Labour. This led to the adoption of a transitional agreement on salaries in July 2007, but many of the major issues remained. A year later, with stalemate reached in the continuing conciliation process, the conciliator ended the process and the parties jointly requested Mediation. This effectively put the responsibility for drafting a new agreement in the hands of the Labour Ministry conciliator – who then became the mediator. After a series of separate meetings with the two parties at the end of July 2008 the mediator then proposed a final agreement that was accepted by both parties.<sup>5</sup>

In the UK a large formerly publicly-owned company entered a dispute with its trade unions when it proposed major changes to working patterns in July 2008. The union recognition agreement included a clause indicating that in the event of a dispute the two parties would use the UK conciliation machinery. Talks before an Advisory Conciliation and Arbitration Service (Acas) conciliator began quite quickly, but without any progress. So the trade union then organised a strike ballot and held a three-day strike in September, which was followed by a second lengthy period of conciliation talks. Sometimes these were held separately, sometimes together. Eventually, just as further industrial action was about to take place, the two lead negotiators for each side met with the Acas conciliator in a coffee bar and worked out an agreement that satisfied both sides. Finally, in December 2008 the union members voted to accept the new agreement that essentially permitted the opening of local negotiations on working hours but within a much more flexible framework.

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<sup>5</sup> It should be noted that this successful mediation is an exception. It is the only successful one on record in Portugal. More frequently collective conflicts of a similar character in Portugal are resolved through a test of strength, or are not resolved at all.

These last two examples show third party interventions in collective conflicts operating successfully. In both countries the institutional presence of an 'independent' body allowed management and unions to move from their more polarised bargaining positions without losing face. The 'public interest' of limiting open conflict in the labour market and of not inconveniencing the public became a kind of moral force that the lead negotiators could refer to when justifying to their own constituencies the compromises they made that took them to a compromise. In these examples the 'public interest' outcome aimed for is quite straightforward: to ensure that visible conflict is kept at the lowest possible level.

### 3. INDIVIDUAL THIRD PARTY CONFLICT RESOLUTION IN PRACTICE

The function of third party interventions in individual conflicts is somewhat different. It appears to be less about ensuring that a specific 'public interest' is taken into account, and more about making a pressure valve available to convey explosions of discontent about unfairness within work to a 'neutral' site outside the workplace. In all the five countries researched here, this pressure valve operated through the parts of the national legal court system that specialise in employment cases. The principal functions of these employment courts appear to be to allow expressions of angry employee voice to be heard outside the workplace, and in the decisions they reach to reinforce country norms of good employment practice. Where the employment courts do find that an employer has violated a country's employment rules, regulations and practices, they will award (usually quite limited) damages to the claimant. But only exceptionally will they require the employer to take the worker back, or keep an employee who has raised a grievance on.

The third parties involved in the employment courts and their associated conciliation machinery have to be in some ways 'independent' of the 'two sides' of the employment relationship. A form of structural 'neutrality' is needed for the procedures to have legitimacy in the eyes of the claimants. It is provided in France by an equal number of court 'judges' being elected by both the trade unions or the employers; in the UK the employment tribunal panel involves a professional lawyer sitting with two people who have had employment experience from the two sides of the relationship; and in Poland and Portugal by professional employment lawyers acting as the 'judges'. In Italy there is a requirement before entering the employment court process to present the case before other 'independent' third-party conciliators.<sup>6</sup>

The examples discussed here focus on third party interventions following claims of discrimination on the grounds of trade union activity, age and disability. These examples all arose from the reactions of 'individuals' to their dismissal or to the imposition of unacceptable working conditions. However, although these grievances were articulated as individual, each of them also reflected issues concerning the collective terms of employment. It is often difficult to separate 'individual' from 'collective' issues.

A French example of workers taking claims to the Prud'hommes employment court for damages for lost benefits over their dismissals directly demonstrates how individual claims can be about a collective grievance and the limits of conciliation and mediation processes. In this case ex-miners who had been dismissed for strike action as far back as 1948 and had never been reinstated, were subsequently covered by a 1981 amnesty and by two further laws in 1984 and 2004. The latter recognised that former employees of mining companies that had ceased to exist could still make claims for un-recovered occupational benefits and set up a mechanism to decide how much that should be. When the average compensation amount was announced it was one tenth of what the sacked miners (and their families) had thought were reasonable. So in 2005 18 ex-miners or their families (where the miner had died) took their case collectively as an Ad Hoc Association to the newly-created French equality body, the High Authority Against Discrimination and for Equality (HALDE). The grounds were that the way they had been treated since being fired was discriminatory. The HALDE appointed a

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<sup>6</sup> See section 5 below and the national reports for a more detailed account (<http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm> )

mediator, but the French Coal Company resisted any new settlement, so in March 2007 the HALDE made an official recommendation that the company should make good the damages endured and asked the government to take responsibility to ensure this happened. In October 2007 when the employer still continued to refuse to increase the compensation, the Association lodged a complaint to the Prud'hommes in conjunction with some of the individual ex-miners who were granted legal aid. In January 2008 when the conciliation hearing of the employment court took place the Coal Company declared that it had just been wound up, so no conciliation could take place. The claim then went forward to full court hearings and eventually a decision was given by the court in June 2009, against which the miners are still appealing at the time of writing.

In this case the miners were able to access conciliation through both a new equality body, the HALDE, and an employment court. This enabled them to attest publicly to the life-long discriminations they had experienced for participating actively in the 1948 strike. But in the absence of any remaining French coal industry or body of miners to exert pressure on the company, the moral case alone could not secure a material result. Despite the ex-miners' readiness to compromise on settlements of about half of their original claim, the employer used delaying tactics to avoid its responsibilities. Neither mediation by the HALDE nor conciliation at the Prud'hommes could be effective when the employer was not ready to shift its position and had no reputational or human resource gain to show from such a compromise.

In Poland another example of discrimination against a dismissed active trade unionist had a quite different outcome. In this case two union activists working for a housing cooperative with about 150 workers were dismissed by the Director in May 2008 after a lengthy dispute about non-payment of promised bonuses (although one was reinstated after an intervention by the state Labour Inspector). In June the union appealed against the remaining activist's dismissal to the local employment court, but the first hearing only took place five months later, on October 1. In this case, the cooperative's board had already met in September and dismissed the Director (who had been charged with some criminal offences). So when the employment court asked the employer to agree to conciliation, the new Director agreed. The outcome was the reinstatement of the trade unionist with full remuneration and a small compensation for wrongful dismissal.

Here the employment court concluded with a conciliation outcome favourable to the claimant: a rare case of a dismissed worker getting their job back. But some of the conditions were exceptional. Not only were the current workers highly mobilised on the issues their representative was dismissed over – 100 had been on the May demonstration that had triggered the sacking – but the Director had lost so much legitimacy that he had been fired and replaced. Two other aspects were not quite so exceptional: on the one hand the blurring of the line between an individual and a collective dispute, for this was an individual who was dismissed for his collective activities; on the other, the length of time the whole process took. Despite supposedly being a 'protected' employee representative (whose dismissal under Polish employment law should have been approved both by his union and by the Labour Inspectorate), he was actually given no such protection, and had to live without a job or income for five months before the employment court met.

An Italian example confirms that winning reinstatement is a possibility through third party intervention involving discrimination law, although in this case it took six months. In May 2007 a 52-year-old worker in a very small metal-working company was told she was being fired. She was the oldest employee and the only one to be dismissed in a 'work re-organisation'. Her union challenged the sacking

under the Italian anti-discrimination law (Decree 216) and when the employer did not respond, she formally applied for conciliation – the first stage in accessing the employment court. The conciliation before a three-person commission at the local Ministry of Labour offices failed since the employer would only give her a lump sum payment and refused to agree to reinstatement, so the case went to trial. At the first employment court hearing the judge was required to attempt a second mandatory conciliation. In this process he persuaded the employer to make concessions under the threat of having all the claimants' legal costs charged to them if – as the judge hinted appeared likely – the employer eventually lost the case. Without withdrawing the original dismissal notice the employer then agreed to re-hire the worker on a temporary basis, and to find her a permanent job after that. After a final conciliation meeting under the auspices of a trade union conciliator a detailed legally binding settlement was reached and signed in November 2007.

The outcome of this case confirms the importance of EU anti-discrimination law, since its transposition in Italy allows the courts to order the reinstatement of dismissed workers in all firms, regardless of size, while in the rest of Italian employment law this is not possible in firms with fewer than 15 workers. It also suggests that conciliation is more effective when the employer is under a legal threat of incurring extra costs.

A UK example also shows how discrimination law helped play a significant role in legitimating an individual's expression of anger about the employment relationship, and is even rarer, since it was not initiated by a dismissal. A grievance was submitted to the ACAS's individual pre-court hearing conciliation procedure while the worker involved still had her job. The employer was a public sector health care trust charity with 1,200 workers, but only a minority of them are trade union members and the unions are not recognised for collective bargaining. An employee who had been on long-term sickness leave and was unhappy about the conditions of her return to work contacted the ACAS helpline by telephone for advice on submitting a claim of discrimination on the grounds of disability to an Employment Tribunal. The helpline contacted an experienced ACAS conciliator who telephoned both the employee and management who then agreed to a conciliation attempt, since both parties wished the employee to stay at work and, if possible, avoid going to an Employment Tribunal. After meeting both sides separately and then together on the same day, a second meeting was held in September 2009. This then led to the conciliator drawing up the terms of an agreement on an ACAS COT3 form, which was signed by both sides: in return for the claimant agreeing not to pursue the employer to an Employment Tribunal the company agreed to make a few more adjustments to her working conditions (including putting her under a different line manager).

This outcome was a classic compromise between the two parties. The conciliation allowed the claimant to air her grievance publicly before a legitimate 'third party' (she had rejected internal dispute resolution by a company mediator), who could then negotiate a 'compromise' solution that both parties could accept. This was exceptional because more commonly, workers expressing 'individual' grievances against an employer in an employment court have already either been dismissed or have found the employment situation so difficult that they felt compelled to quit.

The examples discussed in sections two and three of third party interventions in collective and individual conflicts point to a certain commonality of purposes across the five countries: third party interventions in collective disputes that have entered public visibility are generally aimed at producing a resolution in the public interest (defined as either securing a substantive 'public good' such as job



retention and/or as restoring industrial peace in the labour market); third party interventions in individual conflicts, on the other hand, directly serve the same industrial peace public interest through advocating common standards across labour markets. Conflicts that are 'invisible' to the outside observer are permitted a carefully controlled degree of visibility in a court and/or conciliation setting outside the workplace. However, as we shall see in the following two sections, the implementation of this functionality occurs within quite distinct national industrial relations systems

#### 4. COMPARING THIRD PARTY INTERVENTION MECHANISMS IN COLLECTIVE CONFLICTS

Third party intervention mechanisms in relation to collective conflicts may be compared along several different axes. The first, and possibly the most important, is about the degree to which third party intervention is the direct responsibility of the state: is it compulsory or is it voluntary? The second is about the extent of independence of the third parties from the employers, trade unions and from the state itself: who chooses the 'third parties' who will make the intervention? A third, linked to the second, is about who bears the costs of such intervention: are the costs born by the state or by the parties in dispute? The fourth is about the extent of the powers given to the third parties: are the outcomes of their interventions binding on the parties or are they non-binding? In this section we summarise the regulatory situations in each of the five countries as regards third party interventions in collective conflicts.

In Poland, where the law specifies in the greatest detail the involvement of third parties in the prevention of strikes, the two parties to a conflict must attempt negotiations and if these fail, then draw up a written statement of their differences and present it to an individual mediator. The mediator chosen by the parties will either be jointly agreed by the parties or, if they do not agree within five days, the mediator will be nominated by the Ministry of Labour from a list that includes nominations by both the employers and the trade unions. The costs of the mediator will be covered by the parties to the dispute. Strike action is only legal if this mediation fails, but if it is successful the settlement signed carries the same weight in law as a collective agreement.<sup>7</sup> But it is also possible at the request of the union for a new protocol of differences drawn up by the mediator to go forward to a quasi-legal arbitration court. There, a second third party arbitration of the dispute will be carried out by a panel of three employer and three employee nominees who are not directly involved in the dispute chaired by a professional judge from the district employment court.<sup>8</sup> Unless one of the parties dissents before the arbitration occurs,<sup>9</sup> the outcome, which is usually determined by the presiding lawyer, is binding on the parties.

In Portugal, if there is a breakdown in collective bargaining then both parties can request conciliation or just one of them can. The third party intervention is carried out by agreed private conciliators or by the Ministry of Labour's own Public Conciliation service. In either case the conciliator has no authority to propose solutions. In a handful of cases unsuccessful conciliation continues to mediation, where the mediator will then actively make proposals to arrive at an agreement.

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<sup>7</sup> In none of the other countries is there a legal requirement to go to a third party prior to strike action. In Portugal the Ministry of Labour has power to impose compulsory arbitration in certain very limited circumstances. In both France and Italy some legally-binding collective agreements stipulate that the parties should go to conciliation. In Italy this concerns the public sector. In France, although once a collective conflict is underway the law stipulates that 'conciliation procedures... must be initiated' by one or the parties or by the Prefect or the Ministry of Labour, in practice this happens very rarely. In the UK it is up to the parties to decide whether they wish to use the third party conciliation mechanisms available.

<sup>8</sup> See a diagrammatic representation of this process in Appendix 4 and in the Polish national report. (<http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm>)

<sup>9</sup> This is very common. Between 1992 and 2004, out of the 60 collective conflicts that went to arbitration, in only six cases did both parties agree in advance to accept the outcome (see Polish national report). (<http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm>)

In cases where collective bargaining has broken down for at least a year and there is no collective agreement coverage of at least half the workforce, either party can request the Minister of Labour to impose 'necessary arbitration'. Equally, if significant numbers of workers are involved, and all other means of resolving the conflict have failed, and after having consulted the national tripartite Permanent Social Concertation Commission, the Minister can impose mandatory arbitration.

In France, despite the little use made of compulsory conciliation procedures in collective conflicts, third party interventions are, nonetheless, quite common. They occur in two main ways: through conciliation before a judge in chambers where either party may be seeking a summary injunction, and through mediation.<sup>10</sup> In court interventions, the judges, knowing that any judgement they make is only temporary and can be appealed, often make real efforts to conciliate the parties and reach a settlement. The legal mediation procedure can be requested by one of the parties, or be imposed directly by the Ministry of Labour or the departmental Prefect if they consider the conflict can have a wider effect than on the directly engaged parties. The mediator has extensive enquiry powers to probe the company's financial and administrative records but can only make recommendations, so the mediations are rarely successful.

In Italy it is quite common for private sector collective agreements to include a requirement to go to conciliation before strike action takes place, while all collective agreements in the public sector are required to have conciliation procedures and cooling off periods before strikes. In these circumstances conciliation is quite a frequent occurrence. Depending on the agreement the conciliators named may be local government agencies, the Ministry of Labour or representatives of the employers and trade unions. However, national labour law also contains detailed provisions for the proper conduct of industrial relations and this permits the unions to take companies to court if they consider the procedures have been abused. Thus all employers are effectively obliged to consult fully with the unions on a specified range of changes including issues concerning shorter working or lay-offs in times of crisis, collective redundancies and transfer of undertakings, and conflicts on these issues are all referred to conciliation.

In the UK, as a result of a long history of voluntarism in industrial relations and with only a relatively recent increase in the volume of labour law detailing appropriate conduct of the employer-employee interface, there are virtually no legal requirements for parties in dispute to undergo conciliation or arbitration processes. Instead, since the 1976 establishment of a government-funded, but operating at arms-length, independent service, Acas (Advisory, Conciliation and Arbitration Service), a purely voluntary conciliation, mediation and arbitration mechanism can be accessed when collective negotiations have broken down. Acas is governed by a tripartite Council whose members are nominated by the Secretary of State, who consults over four nominations each with both of the UK's national-level employer and trade union organisations. Acas conciliators are civil servants employed directly by the agency and the process will only begin once both parties have agreed to participate. Their prime aim is to facilitate an agreement. If conciliation by its own officials has been unsuccessful, or not requested, but the parties then request mediation or arbitration Acas will propose a choice from a panel of independent experts who have to be agreed by the parties. The mediators and arbitrators are paid a fee by Acas on a case by case

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<sup>10</sup> French law permits judges to intervene very widely in collective disputes where it can be shown there is 'manifestly illegal conduct' or the prospect of 'imminent damage'. See the French national report. (<http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm> )

basis. The decisions reached in both mediation and arbitration are binding in honour only. There is no legal recourse, but in the case of arbitration, the parties agree before hand to accept the arbitrators' decision and thus settle their dispute. Alongside Acas, however, there is a separate Central Arbitration Committee which, although it only deals with a small number of cases each year, can make binding decisions on trade union recognition and the disclosure of information for collective bargaining, as well as on disputes related to the law introduced through EU directives on information and consultation, European Works Councils and other aspects of employee involvement.

We can see from these descriptions that although it is only in Poland that third party intervention is required before a strike can be legal, the industrial relations systems in all four other countries provide judicial or non-judicial third party intervention mechanisms once a conflict becomes visible to 'the public'. The person or persons who act as the third party conciliator, mediator or arbitrator are either determined by chance according to which judge or civil servant is available on the day, or they are selected by the two parties in dispute from an official list in whose composition the trade unions and employers have been consulted. In most cases, except where pre-strike conciliation or private conciliators are concerned, the costs of the third party's time are covered by the state. Finally, whenever the courts are involved the decisions reached are legally-binding on the parties, but this is not true of the non-judicial third party interventions. These findings are summarised in Tables 1 and 2.

**TABLE 1 THIRD PARTY INTERVENTIONS IN COLLECTIVE DISPUTES IN FIVE COUNTRIES**

|                 | <b>Status</b>  | <b>Choice</b>   | <b>Costs</b>   | <b>Powers</b>   |
|-----------------|--|---|--|---|
| <b>Poland</b>   | Compulsory mediation before strike action  | By agreement or from Ministry list  | First mediation aid by agreement between the parties; second covered by the state              | Recommendation only at first and second mediation stages                                |
| <b>Portugal</b> | Voluntary conciliation, but either party is entitled to request it; necessary or mandatory arbitration in specific cases | Where agreement or Ministry conciliation official                                     | If private conciliation, paid by agreement between the parties; otherwise covered by the state | Conciliation and mediation are recommendations; arbitration decisions are binding       |
| <b>France</b>   | Judicial conciliation and official mediation occur only after strike action  | Limited choice of judge, but consultation occurs on mediator list                     | Judge and mediator costs covered by the state  | Temporary binding injunction by judge; recommendations by mediators                     |
| <b>Italy</b>    | Voluntary except in the public sector  | By agreement  | Conciliators work voluntarily; judge in court covered by state                                 | Recommendations by conciliators; force of law when in court                             |
| <b>UK</b>       | Voluntary except in a very small number of jurisdictions over employee representation                                    | No choice of Acas official in conciliation; by agreement in mediation and arbitration | Conciliators are civil servants; the fees of mediators and arbitrators are covered by Acas     | Non-binding recommendations at all stages except concerning decisions on representation |

**TABLE 2 COLLECTIVE DISPUTE PROCESSES IN FIVE COUNTRIES**

|                 | <b>Official strike data</b>   | <b>Conciliation</b>   | <b>Mediation</b>   | <b>Arbitration</b>                   |  |                                     |
|-----------------|---|---|--|--------------------------------------|--|-------------------------------------|
| <b>France</b>   | Strikes of 2+ days excludes public sector and state-owned firms   | Occurs before judge in chambers or (rarely) when required by government intervention at local or national level | Government (rarely) may appoint a mediator from consultative lists | Voluntary                            | Magistrate courts or High courts or via injunctions (' <i>le référé</i> ') | Outcomes carry force of law         |
| <b>Italy</b>    | Strike data exclude political strikes   | By Provincial or Regional Labour Ministry or via procedures in collective agreements                            | No legal provisions but may occur where trade unions are strong    | Voluntary (rarely used)              | Committees of arbitrators are provided for in collective agreement         | Outcomes usually carry force of law |
| <b>Poland</b>   | Count all work stoppages by employees for the purpose of settling a collective dispute  | -   | Compulsory before strike action                                    | Voluntary                            | Arbitration ordered by the courts  | Carry force of law                  |
| <b>Portugal</b> | No size restriction.  | Voluntary and rare by Labour Ministry (DGERT) official  | Voluntary and very rare  | Depends on case – it can be required | Govt ministry DGERT  | Carry force of law                  |
| <b>UK</b>       | Exclude political strikes and those with less than ten workers or lasting less than one day (unless they total 100+ striker days) | Offer is compulsory, take up is voluntary. By independent state agency (Acas) officials                         | Voluntary but rare   | Voluntary                            | Special agency (Acas panel of Arbitrators, or CAC)                         | Binding in honour recommendations   |

## 5. COMPARING THIRD PARTY INTERVENTION MECHANISMS IN 'INDIVIDUAL' CONFLICTS

While the jurisdictions of different employment courts vary between countries, the principal kinds of conflicts taken by individuals outside the workplace concern such issues as: industrial accidents and workplace safety, breaches of contractual terms through failure to pay the terms agreed or for overtime, unfair dismissal, redundancy pay, and working time and holidays. In recent years there have been a growing number of claims concerning rights that are now guaranteed at European level, such as parental rights and the right not to be discriminated against on the grounds of gender, race, religion, age, disability or sexual orientation, or because of their trade union activities.

What are the main ways of comparing third party interventions on these issues between the five countries? One major area of interest concerns the extent to which any third party intervention is required before legal proceedings can take place and whether it is a compulsory part of the legal proceedings? Two other key areas are who is the third party and how are they selected? These are essentially about how the legitimacy and independence of the third parties in the eyes of the complainants are guaranteed. Finally, there is the area of what happens after conciliation. If the dispute is not resolved, or not withdrawn, how lengthy are the employment court proceedings on average, what are the common outcomes and what financial costs are born by the individual worker?

Only in Italy out of the five countries, and there only since 1998, does a legal obligation on an individual exist to undergo conciliation prior to suing their employer in an employment court. The initial conciliation currently happens in one of three ways.<sup>11</sup> If there is a collective agreement covering the worker and employer that includes a Union Conciliation procedure, then the individual can apply for such a conciliation attempt by a trade unionist who has been nominated a conciliator. Alternatively an individual with a complaint is required to apply to their provincial Labour Ministry for an 'Administrative Conciliation' attempt before a three-person Public Commission comprising one representative from the employers' associations and one from the trade unions and a civil servant from the Ministry. This conciliation attempt should take place within three months, but if it does not take place, or if the employer does not appear (as occurs in half the cases in the Bologna area<sup>12</sup>), then the individual is legally allowed to immediately go to court. If an Administrative Conciliation fails, then the minutes of the attempt including statements made at that stage may be used by the judge in court in eventually deciding who should pay the legal costs of the action at court. If it is successful, then the agreement reached in an Administrative Conciliation takes on the legal weight of a court judgement, so that any subsequent breach of it by the employer gives the worker the right to get an enforcement order without having to have another hearing. The outcomes of the Union Conciliation procedures are reported to the provincial Labour Ministry and have the same status as Administrative Conciliation attempts. A third form of pre-hearing conciliation was introduced in 2004. This 'Monocratic Conciliation' only concerns cases related to cases of breach of salary and welfare payments, and allows a

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<sup>11</sup> New legislation that has just gone through the Italian parliament permits the government to introduce new rules for conciliation and mediation in civil and commercial matters, and it is not currently clear whether the Italian government will remove this initial conciliation requirement.

<sup>12</sup> The reason for employers not appearing could be that there are no penalties for non-appearance. See the Italian national report. (<http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm> )

single Labour Ministry official to determine the outcome and if it is against the employer (for refusing to appear or to allow workplace inspections) to empower Labour Inspectors to impose fines.

If an Italian individual conflict claimant is forced to go to court then the first hearing of the legal process comprises another conciliation attempt in front of an individual employment judge. 'Judicial Conciliation' is often more effective than the pre-hearing conciliation since the parties are aware of the judge's power to settle the dispute. Any successful agreement reached at this stage also has legal weight enabling the worker to apply for immediate enforcement. The advantages of reaching a conciliated outcome are considerable, since the average length of time taken between a court case first being heard and being settled was 26 months in Italy, and although the court's own costs are born by the state, the legal costs of both sides may be attributed to the losing party.

In Poland two forms of voluntary pre-claim conciliation are provided for in the Labour and Legal Codes. Within the Labour Code there is a legal obligation on the employer to establish a 'Conciliation Commission' of three or more people if an employee requests it concerning a specific grievance. However, suspicion about the 'independence' of these commissions, and the likelihood that they do not resolve the issue anyway, means that most claims are filed directly with the Labour Court, a separate branch of the district court system. Within the Legal Code there is also a voluntary provision for the parties to agree on mediation, either before the first Labour Court hearing or during the course of the proceedings. There is no charge for filing a claim or securing a hearing. In cases concerning accidents at work or payment issues a professional judge sits alone in the Labour Court. But on all other issues (such as dismissals and discrimination) the judge will sit with two lay judges. Their independence is assured by their being elected through a vote at the local municipal council from names recommended by the employers and the trade unions. Although there is no formal conciliation stage at the Labour Court, the judges encourage the parties to reach a settlement. The pressure on the employee to do so is because if they lose they will have some of the legal costs incurred by the employer awarded against them. The time taken by the Labour Court to reach decisions varies from six months to two years with the complexity of the case and whether it is in a smaller (shorter time) or larger (longer time) area.

In Portugal a form of voluntary pre-claim conciliation was introduced in 2007 by an agreement between the Ministry of Justice, the employers and the trade unions. This established a Labour Mediation Service that offered the services of a professional mediator to workers and employers without having to go to court. Each party would have to agree to pay €50 and would get a result within three months that would not rule out their rights to go to court. However, take-up has been minimal with the employers generally refusing to participate, and the success rate of the service in its first year was only one in four. Rather most workers still go directly to the Labour Court where, before the 2009 revision of the Labour Code, there was no requirement for conciliation at the first judicial court hearing in relation to employment-related claims made by individuals.<sup>13</sup> The Labour Court proceedings take place before a single professional judge. Some 40 per cent of the claims made to the Labour Courts in 2007 concerned work accidents and collective redundancies (which are rarely negotiated over), while

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<sup>13</sup> The revised Labour Code places a stronger emphasis on conciliation, and permits trade unions to initiate proceedings, but it is too soon to detect any significant changes in practices.



individual dismissals made up 25 per cent of the total.<sup>14</sup> The average length of time taken by the proceedings is around 10-11 months, although in Lisbon it is much longer.

In Britain, where there is a requirement on the parties to consider participating in voluntary conciliation by Acas whenever a claim is filed at an Employment Tribunal, a new pre-claim opportunity for conciliation was introduced in 2009. However, like the Acas conciliation process, this is not mandatory. Both pre-claim or post-claim conciliations are carried out by a conciliator employed by Acas, who will only do so if both the employer and the claimant are in agreement to participate. There is no charge either for lodging a claim, or for participating in conciliation before or after making the formal complaint. However, although the court's own costs are met by the state, if there is no settlement and if the case is not withdrawn - and it is one of the 25% of claims that go forward to a hearing - only a handful of special cases will receive state-funded legal support.<sup>15</sup> The Employment Tribunal is made up of a legally-qualified employment judge, usually sitting with two lay members drawn from nominations made by the trade unions and the employers. The judge claims a fee for his services and lay members may claim expenses and loss of earnings. While an Employment Tribunal can require the reinstatement of a dismissed employer in the 60% of unfair dismissal claims that go forward to a full hearing where the employee is successful, in practice this occurs in only 0.5% of dismissal cases. And even in these successful cases, 35% do not receive any of the monetary award from the employers, who simply do not comply.<sup>16</sup> From start to finish the average duration of the Employment Tribunal process is 7.5 months.

In France, although there is no pre-claim conciliation process, there is a compulsory conciliation requirement similar to the second-stage one that exists in Italy: the first hearing of the French employment court system for private sector workers who make a simple declaration about the infringement of their rights must be a conciliation attempt. The conciliation hearing often functions as a stage in the negotiation process which can, in effect, extend all the way up to the trial stage. Some of the conciliation hearing may take place in private to try and encourage the parties to settle. But unfortunately, in some areas of France, the high volume of cases means that this conciliation hearing is often very perfunctory, without allowing a genuine attempt at conflict resolution. Nonetheless, the unique character of the French Prud'hommes (literally 'wise men') employment courts is demonstrated by the way in which the two lay judges at this initial hearing are selected: one comes from a list elected by the employers and the other from a list elected by the employees. These elections, for a total of nearly 15,000 employment court councillors across France, take place in specially-organised elections that are held every five years. It is the only judicial institution to function on the basis of co-management, and the lay judges have the same status as professional magistrates sitting in other courts. The employee lay judges are paid their normal salaries by their employer for their time on court duty, and their employer is then reimbursed in full by the state. The employer lay judges are given a flat fee for the number of sessions they attend.

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<sup>14</sup> See Portuguese national report. (<http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm>)

<sup>15</sup> In Scotland, however, support to cover the full costs of legal representation remains available.

<sup>16</sup> Adams, Moore, Gore and Browne (2009), *Research into enforcement of employment tribunal awards in England and Wales*, Ministry of Justice, Research Series 9/09. The figure of 35% non-payment for unfair dismissal awards was close to the average non-payment across all jurisdictions of 39% (p.32).

The outcomes of the French conciliation process can be an agreement (23 per cent), or a decision that the claim is ineligible (14 per cent), or the claimant may simply not take the case further after having had their 'day in court'. The most common grievances that do not go forward are about dismissal, while the most common that do continue are about payments owed to the worker (Munoz-Perez and Serverin 2005). For the half of all cases that go forward the next stage is a Judgement (Adjudication) hearing. At this hearing there are two employer judges and two employee judges. These are also chosen by the court administrators from the elected court councillors. Where there is no majority decision at this stage and the case is pursued, it then goes on to a 'trial', where the issue is settled by a single professional employment judge. This Settlement stage is a Court of First Instance where legal rules and procedures fully apply, and its decisions are appealed in roughly 60 per cent of cases to the Court of Cassation's Labour Chamber. In most cases if the settlement is favourable to the workers, the outcome is compensation, but it is possible for the employee to win reinstatement. In 2006 the average length of time that proceedings took from the submission of the complaint, excluding the appeal stage, was 10 months.<sup>17</sup>

As well as demonstrating some significant differences, this comparative discussion of the frameworks of individual conflict resolution has also demonstrated some common features in the experiences of the five countries. In the last fifteen years in four of the five countries voluntary pre-claim conciliation processes have either been introduced or made compulsory, and in the fifth (France) a debate has been initiated as to the advisability of a conciliation intervention preceding claims going to the employment court. The main argument in favour of such initiatives, in the face of the growth in numbers of claims since the 1980s, is that it would 'save court time', often a proxy for 'costing less', and encourage speedier conflict resolution. The two main arguments against are first, that on the evidence of Italy and Poland, where pre-claim third party intervention procedures have been in force the longest, it appears that if there is no legal compulsion on the employers to participate genuinely, many do not do so; and second, that a court decision compelling an employer to pay damages is more likely to be honoured in full than is an agreement that does not follow the submission of a formal claim to an employment tribunal or other court.

A second common feature is the insistence of the importance of third party interventions early on in the individual grievance handling process. They are only compulsory in Italy, but they may take place either before an official claim has been filed (Italy, Poland, UK), or after a claim has been failed and before it gets to court (UK, Portugal), or at the initial court hearing (France, Poland, Italy).

A third common feature is the use of tripartite or bipartite institutional structures aimed at guaranteeing the independence of the conciliation and/or judicial processes. Nearly everywhere it is clear that to achieve legitimacy in the eyes of the workers, the processes have to be seen to be independent of the employer and often of the government as well. There is thus clear tripartism present in Italy, Poland and the UK. In the UK, where both pre-claim and post-claim voluntary conciliation are attempted by Acas officials, this is on the basis that Acas is an independent state agency managed by a tripartite Council. In France this logic goes further with a bipartite system of co-management of employment courts by the trade unions and employers. Only in Portugal does a single mediator or judge formally handle the initial individual claim. Our findings are summarised in Tables 3 and 4.

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<sup>17</sup> Infostat justice No. 105, February 2009. *"Les affaires prud'homales en 2007"*. See French national report. (<http://www.workinglives.org/research-themes/wlri-project-websites/cams/reports--publications.cfm> )

**TABLE 3 THIRD PARTY INTERVENTIONS IN INDIVIDUAL DISPUTES IN FIVE COUNTRIES**

|                 | <b>Pre-claim intervention</b>                       | <b>Pre-hearing intervention</b>                                       | <b>Court conciliation</b>                        | <b>Third party legitimacy</b>  |
|-----------------|---|---|--|--|
| <b>Poland</b>   | Voluntary conciliation commissions in the workplace | Voluntary mediation option after filing a claim                       | Yes - informal conciliation by judges encouraged | Little for employer-appointed Conciliation Commissions; but professional plus lay indirectly - elected bipartite judges in Labour Courts |
| <b>Portugal</b> | Voluntary mediation option introduced in 2006       | No  | No   | Single mediator or professional judge  |
| <b>France</b>   | No  |   | Yes – at first hearing of the Labour Court       | Bipartite elected lay judges in employment courts  |
| <b>Italy</b>    | Compulsory conciliation before claim accepted       |   | Yes – at first hearing of Labour Court           | Tripartite Administrative Conciliation; Trade union conciliation; Civil servant Monocratic Conciliation; single professional judge       |
| <b>UK</b>       | Voluntary pre-claim conciliation option             | Conciliation offered to all, but dependent upon both parties agreeing | No   | Tripartite-led Acas supplies civil servants; professional plus bipartite judges in Employment Tribunals                                  |

**TABLE 4 INDIVIDUAL DISPUTE PROCESSES IN FIVE COUNTRIES**

|                 | Employment court data |   |  | Employment courts   |   | Conciliation                                     |   |
|-----------------|-----------------------|---|--|---|---|--|---|
|                 | Multiple cases        | Average duration                                | Legal costs born by the state  | Compensation or reinstatement   | Tripartite or bipartite status                          | Compulsory or voluntary                          | Special agency or court   |
| <b>France</b>   | YES                   | 10 months                                       | Court costs covered by the state, but the only some claimants receive legal aid to pursue cases              | Reinstatement or compensation   | Bipartite (elected judges)                              | Compulsory at first court hearing                | Employment court  |
| <b>Italy</b>    | YES                   | 26 months average with North (12) vs South (31) | Court costs covered by the state, but the losing party may have legal costs of both sides attributed to them | Reinstatement (compensation only in workplaces with under 15 employees) | Single judge  | Compulsory before claim enters court system      | Local Ministry of Labour or procedures provided for by collective agreement |
| <b>Poland</b>   | YES                   | Between 6 and 12 months                         | Court costs covered by the state, but almost all claimants have to pay their representation costs            | Compensation or reinstatement   | Bipartite professional judge + in some cases lay judges | Voluntary  | Labour Court  |
| <b>Portugal</b> | YES                   | Between 12 and 36 months                        | Individuals and employers pay for voluntary mediation  | Compensation or reinstatement   | Single judge  | Voluntary mediation                              | Labour Mediation System   |
| <b>UK</b>       | YES                   | 7.5 months                                      | Court costs are paid by the state, but almost all claimants have to pay their own legal costs                | Compensation and (very rarely) reinstatement                            | Tripartite (nominated panels) for most hearings         | Conciliation offer required before court hearing | Special agency (ACAS)   |

## 6. CONCLUSIONS

This research and engagement of experts has confirmed the continued presence in the five European countries studied, of conflicts over the terms and character of the employee-employer relationship. It has also confirmed the importance of third party interventions in collective and individual employment conflict resolution. While strike actions are at a lower level today in the countries researched than they were 20, 30 or 40 years ago, this does not mean that other forms of collective action do not remain important; conversely, it is clear that while the reported levels of 'individual' grievances through the employment courts are much higher today than two, three or four decades ago this also partly reflects a rising number of 'collective' claims progressed in this way.

In the face of the evolving forms of expression of employment conflict how have governments responded? What is clear is that processes for alternative dispute resolution (ADR) now exist for individual grievances in all 27 EU member states;<sup>18</sup> in the five countries we examined such ADR mechanisms also exist in relation to collective dispute resolution. We also found that in the five countries these individual and collective ADR mechanisms are being regularly reviewed by national policy-makers and debated among social partners and that quite major changes have either been enacted or proposed in recent years.

It appears clear that the right of employees to hold to account an employer whom they consider has breached employment law constitutes a significant component of the European Social Model. Marginson and Sisson (2006: 1), for example, define this model as being 'predicated upon upholding fundamental principles' including 'the right to civilised standards in the workplace, covering issues of employment governance or regulation'. This right to express employee voice outside the workplace within a non-judicial or judicial framework is usually provided as a public service free of charge to the complainant, although the legal costs incurred in such cases are only rarely assumed by the state. The 'public interest' in employment law-compliance is thus expressed through awarding damages to individuals whose employers have infringed their rights.

In the five countries we researched there is also a more or less explicit commitment by the state to either offer access to third party intervention or to intervene directly in collective disputes involving the 'public interest'. These interventions can be interpreted as being about maintaining jobs or ensuring fairness and preserving peace in the labour market, but also, on occasion, as about preserving the social partners. After all, the European Foundation's dictionary definition (Eurofound 2007) of the term states: 'A further defining feature of the European social model, when contrasted with that of the US, is the important role attributed to organisations of workers (trade unions) and employers'. Finding a mid-point between two parties in conflict can permit the protagonists to pull back from a situation that might otherwise be fatal to one or other of them.

The employers appear generally ambiguous about the presence of third party intervention mechanisms in both individual and collective conflicts. In those countries where their participation is voluntary they may decline to participate until it becomes compulsory. They sometimes appear only ready to cooperate fully with third party intervention when it is backed by the force of law. This generalisation must be qualified: larger employers and those that have well-

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<sup>18</sup> Purcell (2010) confirms this for the EU26; our French national report confirms it for France, the one country not covered by Purcell.

embedded trade unions to reflect employee voice tend to be more cooperative than the smaller ones. But there is even some evidence that court decisions are commonly ignored. A UK study found that in individual conflicts when the employment court has come to a judgement in favour of the (former) employee, as high a proportion as 40 per cent of employers do not implement the court outcome (Adams et al, 2009).

From the trade union perspective, when third party intervention in collective disputes takes place it is generally welcomed. This is partly because it usually arises in circumstances where neither collective bargaining processes nor any local mobilisation have yielded what are considered satisfactory outcomes; and such interventions are also welcome because they may permit the union to 'demobilise' its own members through securing a settlement with some improvement on the previous status quo but without losing face.

The unions tend to be somewhat more ambiguous concerning the resolution of individual conflicts through third party intervention. This is partly because they would much rather resolve these conflicts collectively within the workplace. However, in the face of a declining union presence in many workplaces, either because they are simply not present or because they lack the membership numbers to influence management methods, trade unions very frequently offer support to individuals taking claims through to the third party employment court system.

A broad concern for trade unions here, particularly in relation to individual conflicts, but also in some instances in relation to collective conflicts is one of an ideological shift in terms of the workplace source of legitimacy over what Goodrich (1920: 27) described as 'How the worker is treated – what sort of authority he is under, how much freedom he is allowed'. While the extension throughout Europe of many employment rights is to be welcomed, to a greater or lesser degree in the countries studied, there has been a weakening of the idea that social justice in employment is guaranteed by workers collectively organising to ensure that their rights are respected, and a strengthening of the idea that rights can be defended and improved through the actions of a conciliator or judge 'outside' the workplace.

Our principal findings may be summarised as follows:

1. Both individual and/or collective conflicts persist, confirming that the workplace remains a contested terrain between employers and employees.
2. Third party interventions require popular legitimacy in order to be accepted by workers. This usually comes through some form of joint employer and trade union involvement within the judicial or non-judicial processes, but in a country, like Portugal, where social partnership has few historical roots it is provided through using state mediators and/or professional judges.
3. In all five countries it appears that many employers consider that allowing third parties to conciliate or mediate on an 'internal' conflict, whether individual or collective, constitutes a potential threat to their managerial prerogatives, making such interventions often a less-preferred solution in on-going employment conflicts.
4. Third party alternative dispute resolution tends to be favoured by the trade unions in circumstances where their mobilising capacity is reduced, and where they are less able to achieve a satisfactory settlement through direct negotiations and/or industrial action.

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## APPENDIX 1

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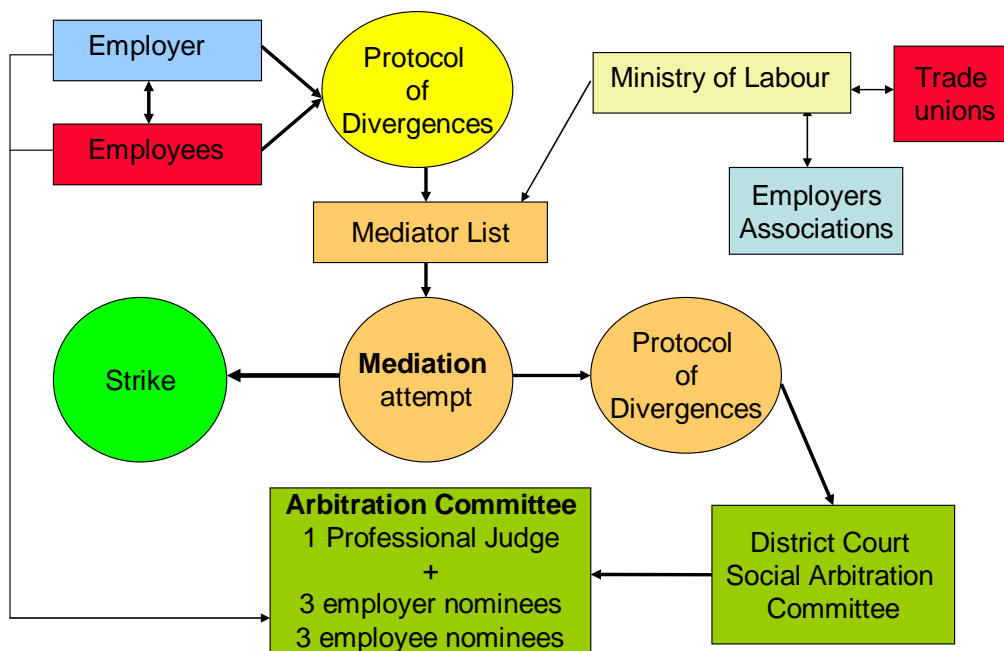


## APPENDIX 2

Diagrammatic representations of third party interventions in collective disputes

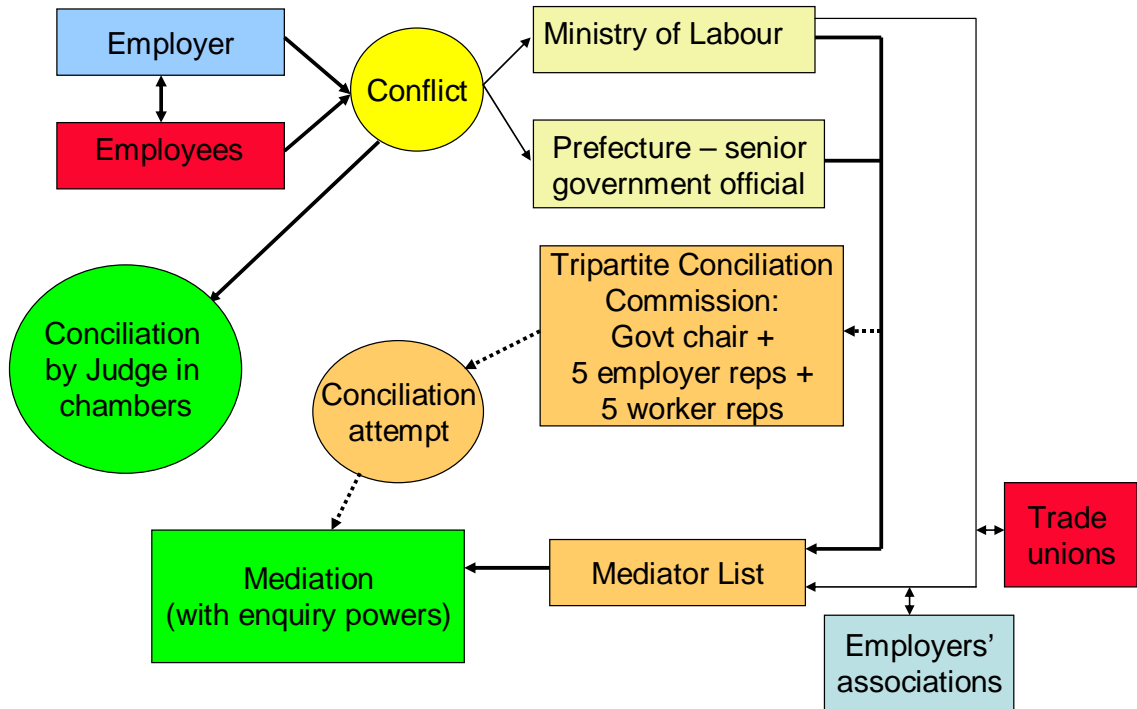
### 2.1 Poland

## Polish collective 3<sup>rd</sup> party interventions

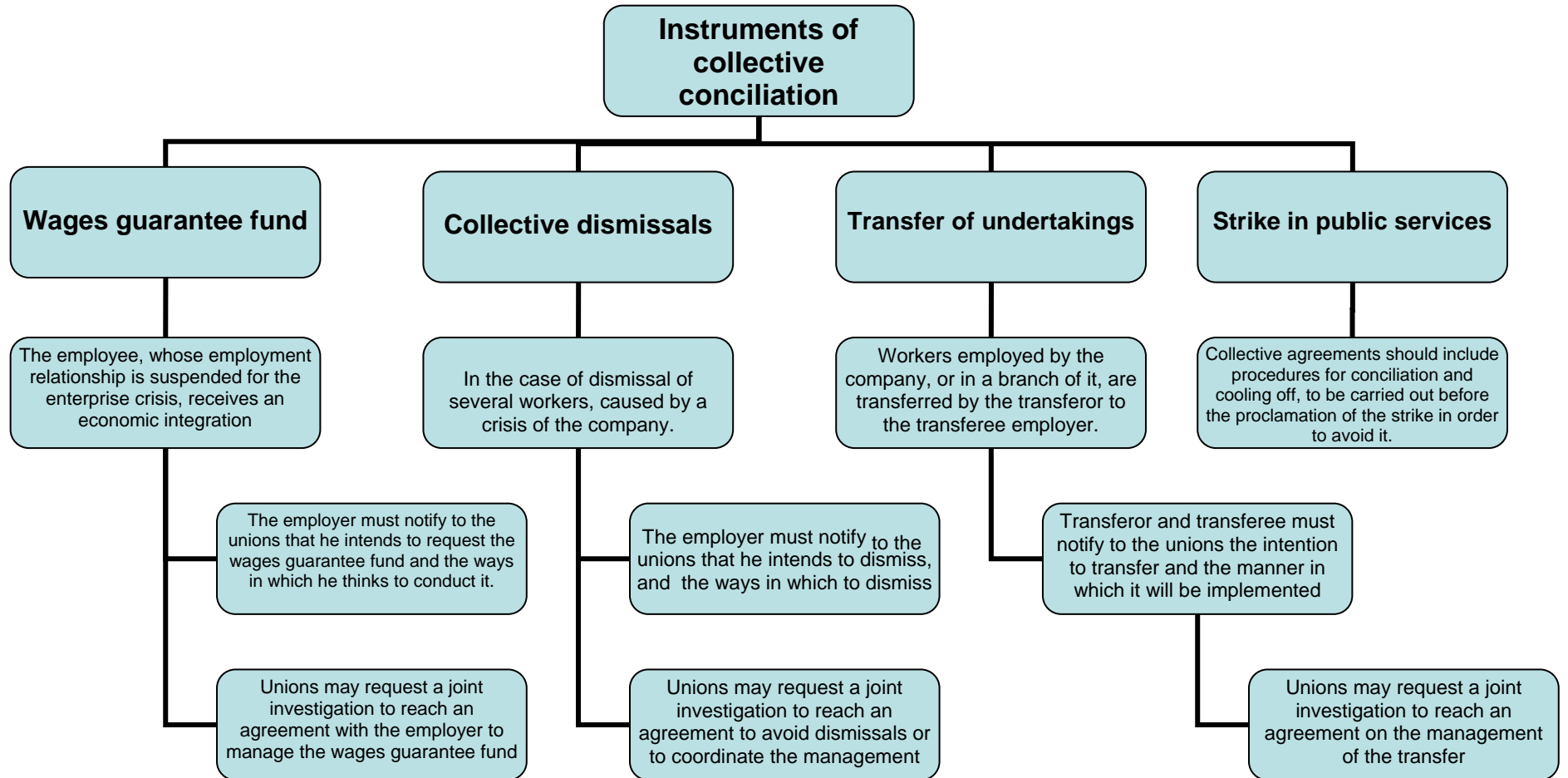


## 2.2 France

### French collective 3<sup>rd</sup> party interventions



## 2.3 Italy

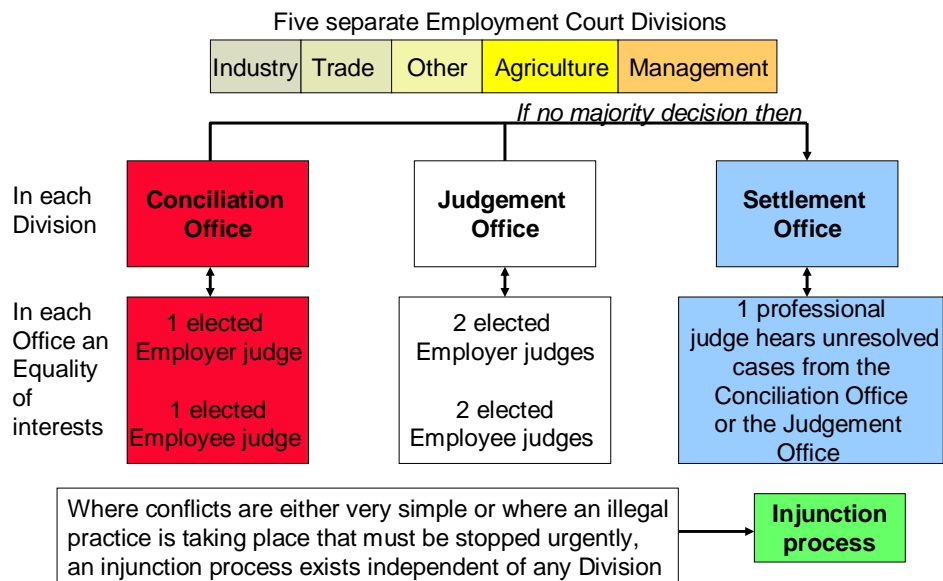


## APPENDIX 3

### Diagrammatic representations of third party interventions in individual disputes

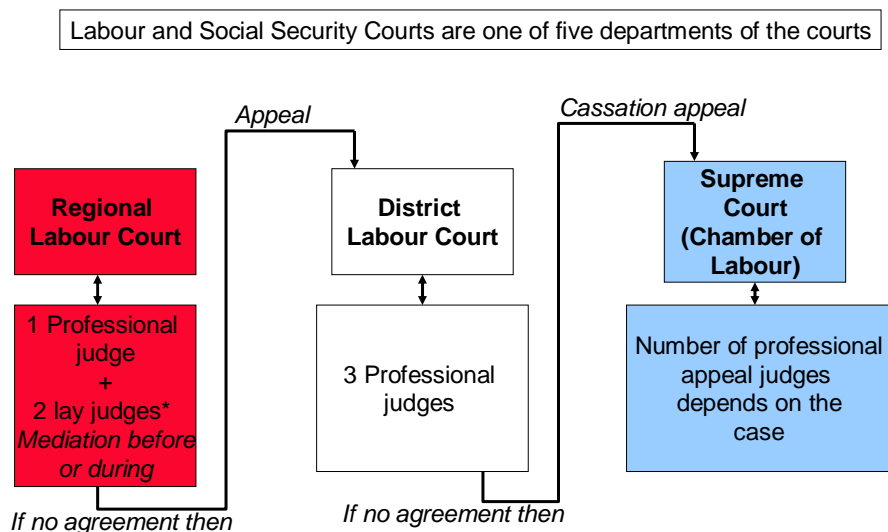
#### 3.1 France

## Individual conciliation in France



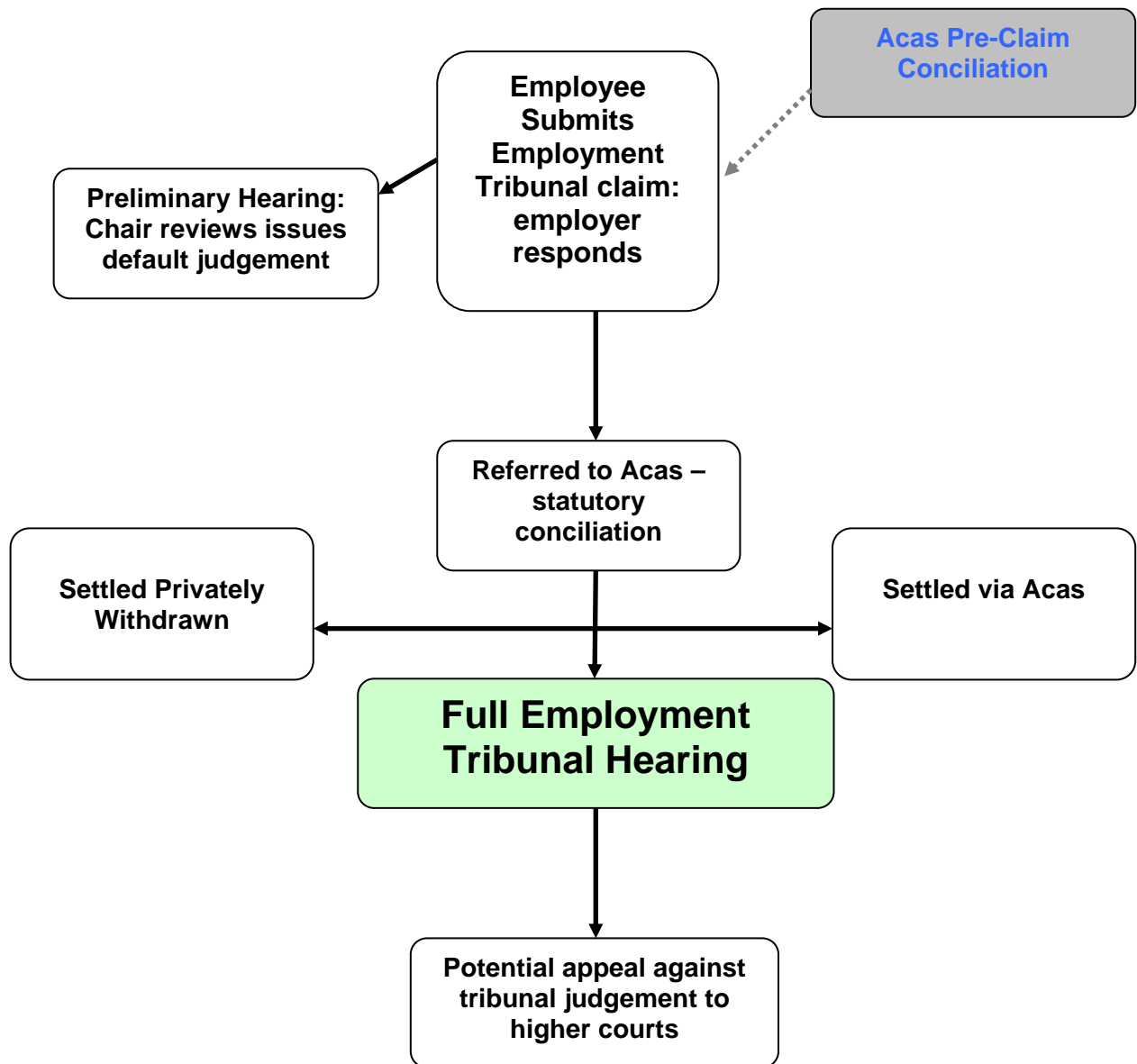
#### 3.2 Poland

## Individual mediation in Poland



\*Lay judges are voted in by Town Councils from lists recommended by trade unions and employers – they sit on cases involving unfair dismissals, labour relations etc

### 3.3 British Employment Tribunal Application process



### 3.4 Italy

