

EMPLOYMENT  
LAWYERS  
ASSOCIATION



## ADR and Employment Disputes

An **ELA** report

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## A. INTRODUCTION

1. Alternative Dispute Resolution ("**ADR**") has great potential to resolve employment disputes in the UK. ADR, particularly mediation is routinely used to resolve large numbers of other types of disputes, for example, commercial and family disputes. And yet it does not appear to be much used to resolve employment disputes. Is this in fact the case and if so why? Are there potential misconceptions about ADR that are preventing its use? Are employment lawyers sufficiently familiar with the range of types of ADR to know what options are in fact at the client's disposal as an alternative to the traditional means of resolving their disputes, and their potential advantages?
2. It was to explore these and other questions that the Employment Lawyers Association (**ELA**) set up an Arbitration and ADR Group (**the Group**) in late 2015. Its terms of reference are as follows:
  - 2.1 To explore the scope for the greater use of arbitration and alternative dispute resolution (including early neutral evaluation and mediation) as a means of resolving employment disputes.
  - 2.2 To consider taking steps to facilitate greater use of arbitration and ADR in employment disputes (including drafting standard arbitration rules for employment claims).
  - 2.3 To liaise with other professional associations of lawyers regarding the use of arbitration and ADR in employment disputes (including the European Employment Lawyers Association, the International Bar Association, and the American Bar Association).
  - 2.4 To report to the Management Committee and membership of ELA on the work of the Arbitration and ADR Group, and recommend training and other steps to encourage and facilitate greater use of arbitration and ADR in employment disputes.
  - 2.5 The Group has been co-chaired by a solicitor and a barrister. Its membership comprises a broad cross-section of solicitors and barristers, in private practice and in-house, with experience of acting for individuals and institutions, employees and employers. A list of the members of the Group is found in **Appendix 1**.

3. This is the report on the ADR aspect of the Group's work. It seeks to analyse the use currently made within the UK of various forms of Alternative Dispute Resolution ("ADR") to resolve employment (including workplace) disputes, and the ways in which that use could be expanded. We posed the following questions in this regard:
  - 3.1 Which forms of ADR should be recommended as options for resolving employment disputes?
  - 3.2 Are particular forms of ADR more suitable to resolve certain types of employment disputes?
  - 3.3 Which forms of ADR are most suitable to resolve low-value employment disputes?
  - 3.4 What steps could be taken by the Government (legislative or otherwise) to encourage the greater use of ADR?
  - 3.5 Should training be provided to ELA members in relation to ADR, and if so what should the scope of that training be?
  - 3.6 What other steps could ELA take to promote the greater use of ADR to resolve employment disputes?

## B. EXECUTIVE SUMMARY

4. In order to answer these questions it is first necessary to describe the extent of the current use of ADR to resolve employment disputes.
5. We consider first the use of mediation, and specifically the following areas:
  - 5.1 How widespread is the use of private mediation as a way of resolving employment disputes and what are the factors that are holding back wider usage? (paras 8-18)
  - 5.2 How widespread is the use of workplace mediation as a way of resolving employment disputes, and, is its use concentrated in relation to particular types of disputes, and what are the factors that are holding back wider usage? (paras 19-36)

- 5.3 5.3 What is the extent of the current usage of judicial mediation, is it thought to be working well, and what are the factors that are holding back wider usage? (paras 37-48)
- 5.4 To what extent is or should mediation be evaluative? (paras 49-61)
- 5.5 What does it take to be seen as the best employment mediators? (paras 62-63)
- 5.6 What are the experiences of the usage of mediation (in any form) in other relevant jurisdictions? (paras 64-65)
- 6. We then consider the use of other forms of ADR, and specifically the following areas:
  - 6.1 What is Early Neutral Evaluation and how does it work? (paras 66-74)
  - 6.2 What practical experience is there of its use, both in relation to employment-related disputes and other relevant types of disputes? (paras 75-104)
  - 6.3 What other forms of ADR could sensibly be used as means of resolving employment disputes and what practical experience is there of their use? (paras 105-114)
- 7. We make a number of concluding comments and recommendations (paras 115-127)

## C. PRIVATE MEDIATION

- 8. We have taken this to mean any mediation process which is arranged on an ad hoc basis by the parties to an employment dispute and which does not take place either as part of a scheme facilitated by the Government (judicial mediation) or the employer in question (workplace mediation). As will be apparent from our report, there is considerable overlap between the scope of private mediation and workplace mediation and in relation to certain sectors the latter is used as much as the former.

9. There are a number of organisations which provide mediation services, including CEDR, ADR Group and Independent Mediators, and a few who appear to specialise in the the provision of mediation services to resolve employment disputes, including TCM. Byrne Dean also include employment mediation as part of their service offering as do Abbis Cadres. Evidence as to the extent of usage of private mediation is to some extent anecdotal although CEDR has reported that it handles around 100 mediations of workplace-related disputes a year.
10. In order to obtain some empirical evidence we conducted a survey of a number of law firms. Virtually all of the survey participants responded that they refer less than 25% of employment disputes to mediation. However, when it came to the rate of settlement of those disputes which had been mediated, about half of the participants stated that 75% or more of the disputes referred to mediation settled at or shortly after the mediation and about one third said that at least 50% of disputes did so. A list of the participating firms is at **Appendix 2**.
11. A striking feature of these results is a comparison of the success rates achieved compared with the low level of referrals to mediation which clearly begs the question as to the reasons for the mismatch in these statistics. We return to that topic below.
12. We also reviewed the position in higher education. In brief, within this sector there is a North/South divide, with Northern universities generally using their in-house mediation capacity to build fairly busy referral practices for mainly HR professionals trained in mediation. There is a very interesting scheme in Dundee where universities collaborate to share expertise with mediators from one university being deployed at other universities to mediate. This model was mooted by the colleges of the University of London a few years ago but has never proceeded mainly because of the organisational strain on individual colleges' HR departments if one or more of their HR managers were absent. The Southern universities seem to prefer using external paid mediators, but expressed reservations about the efficacy of mediation for disputes except in the early informal resolution stage of disputes, often before HR become involved. This echoes research evidence collated by the CIPD who first reported on the uptake of mediation in 2008 and have since issued further reports. The latest published survey appears to be dated 2013. They comment that smaller organisations generally use external mediators while larger employers prefer internal mediation. That helps to explain in part the North/South divide.
13. A summary of the responses from each University is attached as **Appendix 3**. As can be seen, it is not always clear to what extent these schemes should be seen as private mediation or workplace meditation.

14. A member of our working party is also aware that a number of NHS Trusts have set up internal mediation schemes. They, too, operate mediator sharing arrangements. These are probably best viewed as workplace mediation schemes and they generally deal with disputes covering non-junior members of the workforce. Doctors' disputes tend to involve private mediation.
15. We held discussions with ADR Group, one of the leading training organisations for mediators. They told us that the success rate for most of their mediations is about 80%.<sup>1</sup> They have recently launched a fixed fee scheme for mediations where the amounts involved are below £120,000 but where they expect the value to be much lower. As for the number of cases they were rather coy; it appeared that the volume of employment mediation they actually distribute through their referral system was low but they said they were developing their workplace panel.
16. There is a similar dearth of information as to the types of employment dispute resolved via private mediation. In principle virtually any type of employment dispute is amenable to resolution via private mediation (bar test cases and perhaps serious disciplinary matters). Anecdotally, the members of the working party have encountered its use chiefly in discrimination, whistle-blowing and bonus disputes but also in restrictive covenant disputes, both prior to and after the award of any interim injunction. It's fair to say that our experience is that it has generally been used in higher value cases or in disputes involving senior members of staff. Its use in lower value cases is comparatively rare.
17. As to the factors holding back the usage of private mediation, again the evidence is largely anecdotal. But in our survey the following factors emerged (albeit in no particular order):
  - 17.1 Strategic concerns. Parties and their lawyers can be reluctant to suggest mediation for fear of it being seen as a sign of weakness and showing their hand too early. Others are concerned that the other party will simply use the mediation to gather useful information helpful to their case or to impose psychological pressure on them pre-trial via using an "informal trial" approach.
  - 17.2 Cost. In a number of cases without prejudice discussions will already have taken place and parties, particularly claimants, are put off by the additional time and cost in preparing for and attending the mediation. The best mediators are considered to be expensive and, where London based, not always prepared to travel outside London.<sup>2</sup> A number of parties see mediation as a distraction from trial preparation. Smaller firms do not always have three rooms available and hiring outside venues can be expensive.

<sup>1</sup> In a recent article on "Employment Mediation – a new landscape in a decade" – CEDR claim a success rate of over 90% in employment and workplace cases

<sup>2</sup> It should be acknowledged that our survey was London-centric and that there is a wide network of trained mediators across the UK

- 17.3 Perceived lack of good mediators. Some lawyers alluded to the lack of mediators considered to be skilled at mediating employment disputes.
- 17.4 Stress of the process. Certain parties find the stress of being in the same room/building as the other party very stressful and don't want to have to risk under going that process more than once.
- 17.5 Entrenched positions. Often there comes a time where the parties' views are so entrenched that one or both parties wants their day in court and/or considers the chances of a mediated settlement to be remote.
- 17.6 Lack of sanctions. Unlike the High Court there are no sanctions imposed on a party which refuses to mediate. (This is a topic we return to below). In addition we learned via a CIPD survey and a study into universities in the US that in larger employers, managers are judged by their ability to manage people and therefore reluctant to hand over a problem to someone else. Similarly, in SME's business owners can take it personally if employees are in dispute with them and are unwilling to share power to resolve those disputes.

18. CEDR recently published a guide entitled "Model Mediation Clauses and Mediation in Employment Policies".

A link to this can be found here: [https://www.cedr.com/about\\_us/modeldocs/?id=19](https://www.cedr.com/about_us/modeldocs/?id=19)

CEDR's approach (which we would endorse) is for workplaces to develop mediation policies in the workplace so that they become a first resort rather than a last resort in the resolution of workplace issues. We therefore turn now to workplace mediation.

## D. WORKPLACE MEDIATION

19. While all of us are familiar with private mediation, few of us had previously had experience of advising clients in relation to workplace mediation. In the CEDR guide referred to above, workplace mediation is described as follows:

*"Workplace mediation is referred to as a conflict resolution procedure where the conflict principally concerns general work relationships and work arrangements rather than concerns about legal rights. It is often commissioned by the Human Resources department to resolve conflicts between employees. The process will focus on the existing*

19. *relationship, seek to avoid the escalation of the conflict to re-create sensible dialogue between the parties, and help them find lasting resolution by agreement and, if possible, repair the relationship."*
20. We discussed the current operation of workplace mediation with Noel Lambert and Nicole Clarke of Acas. Their wish is that all mediation should occur within rather than outside the workplace. They train a considerable number of mediators but observe a fair amount of failure at the same time. The reason is that many businesses regard the job as being done by paying for some training and then expecting the individual to cope with any issues as they are the mediators in the business. What they do not do is to put the necessary infrastructure in place (as for example has been done by East Sussex County Council – see below) or develop a general strategy for dispute resolution. They also reported incidents of Trade Union resistance to introducing mediation if the Unions are not made part of the process of its introduction and buy-in to the process.<sup>3</sup> In addition line managers are not given sufficient training to know how to make use of the mediation process that is available.
21. Acas run training courses at a similar price to that of ADR Group. The Acas course is cheaper than the ADR Group commercial mediation course but a similar price to their workplace mediation course. One idea that Acas were keen to encourage was for small employers to 'buddy-up' and support each other by forming mediation networks to support each other. This seems to be the model that was reported to us by the Dundee universities. Acas thought there was support for a more evaluative process than they currently adhere to in their courses which are traditional in their approach. (We address this point below). They also considered it important to put a process in place within larger organizations to select mediators from those who had an appropriate personality for the function. A large Police Authority apparently spends some time on this selection process. Naturally enough their focus is more or less entirely directed to workplace mediation. They are in favour of running a mediation programme in tandem with a traditional grievance process and they think that it can be made to appear more attractive than a normal grievance process by saying that there is a greater prospect of influencing the outcome in a mediation than in a classic grievance process.<sup>4</sup>
22. According to their latest Annual Report Acas carried out 248 mediations in 2016/17 and trained 272 people as in-house workplace mediators through their accredited Certificate in Internal Workplace Mediation (CIWM) course. (These are very similar statistics to the previous year).

<sup>3</sup> We are aware of one instance of one union instructing its members not to engage in a mediation scheme unless the union's role in it was formalised.

<sup>4</sup> This chimes with a recommendation made recently by Camilla Palmer QC in ELA Briefing that the Acas Code of Practice be amended to allow for the use of ADR (see below at paragraph 33). It also reflects the views of a leading provider of workplace mediation services, the TCM Group (see below at paragraph 28).

23. One example of the successful use of mediation in-house is provided by East Sussex County Council. For many years they have been using mediation in-house as an alternative to standard disciplinary and grievance processes. Mediation is the organisation's preferred route. The programme remains in place and since then the relative success rates are being maintained. It is worthy of comment that they have succeeded in bringing mediation into play at an early stage in workplace disputes which is very much in keeping with what is the Acas (and CEDR) preference. Their process includes a 'premediation conversation' where they seek to establish whether the parties are likely to be amenable to a mediation process.
24. It is also noteworthy that this programme has been introduced in an environment where there are recognised unions (Unison & GMB). Whilst they were initially sceptical and unsupportive this has changed. This may be a model that could successfully be adopted in many other workplaces to considerable advantage. We followed up with representatives of the TUC about reported resistance to mediation from Trade Unions. Generally they stressed to us the need for the introduction of the process to be 'transparent' and for the union to be involved from the outset. One possibility is to consider using union representatives as mediators, given appropriate training.
25. The reasons for these reservations by trade unions seem to include the following:
- A fear of being 'replaced' and of established processes being side-lined unilaterally
  - Dislike of closed procedures with secret outcomes
  - Issues surrounding who pays for the mediator and whether that threatens impartiality
  - Systemic problems are not addressed if process and outcome is unknown whereas workplace processes are more transparent.
26. Kent CC told us that they, too, had replaced a formal grievance procedure. They had managed to introduce their mediation programme by training 30 mediators for the remarkably low cost of £6,000. Most of those trained were already experienced 'coaches' so the transfer to mediation was not difficult for them. The system had been introduced in 2015 and is being reviewed at the moment. The Kent system does not permit any representation at the mediation. This is interesting as it was brought in with the agreement of the trade unions, but it illustrates the value of early engagement with the trade unions.
27. We also came across a number of other examples of workplace mediation schemes operating in the public sector. A summary of these can be found at **Appendix 4**.

28. We have found it difficult to obtain the same level of detail from employers in the private sector of their usage of workplace mediation schemes, perhaps because they see this as confidential to their business. Consequently it is difficult for us to assess how widespread its use is there. We did, however, discuss workplace mediation with David Liddle of the TCM Group. They see themselves as the largest workplace mediation provider and consultancy,<sup>5</sup> and provide support, training, coaching and mediation services. They consider that the traditional grievance framework is harmful to the resolution of workplace disputes (we consider this further below – see paragraph 33 below) because it only hardens positions and polarises the parties. They therefore offer a new Model Resolution Policy whose purposes are three-fold:

28.1 to provide a timely and effective alternative to the grievance process;

28.2 to promote the constructive resolution of workplace disputes;

28.3 to develop conflict resilient workplaces and conflict competent managers, leaders and HR professionals.

29. The Group appears to have gained considerable traction, in particular with the larger employers, and told us that they had set up mediation and ADR schemes in organisations including BT, Marks and Spencer, National Express, EDF Energy, Network Rail, HSBC, Lloyds Bank and the UN. At Royal Mail they had assisted in the development of an extensive mediation scheme. They also told us that they had set up similar schemes in the DWP and HMRC. They don't just set up the scheme; TCM provide a comprehensive package which is aimed at working with the business to develop the business case for investing in such a scheme. For reasons of commercial confidentiality they are currently precluded from providing us with details of how these schemes have operated and some of the key metrics to test their success. David Liddle has however just published in October 2017 a book (entitled *Managing Conflict; A Practical Guide to Resolution in the Workplace*) which includes case studies agreed with some of these organisations which provides further detail.<sup>6</sup> The book is a very useful resource for anyone wanting to learn more about the theory and the practice of workplace mediation.

30. We ourselves came across the following examples:

30.1 A leading airline has operated an internal mediation scheme for about 8 years and they now have 15 trained mediators. It covers all disputes save physical behaviour and they now have around 30 disputes per annum mediated under this scheme. All parties must agree to mediate and the employer will not put

<sup>5</sup> ELA is not able to verify this.

<sup>6</sup> We would also note that there are other providers of workplace mediation services to the private sector including Globis Mediation Group who claim a 90% success rate in 2016 in relation to their workplace mediations.

- 30 30.1 pressure on anyone to mediate. The employer has managed to secure the support of their trade unions for this initiative. This is because they have (like East Sussex) engaged with the unions, the mediations are all conducted on a face to face basis and are strictly non- judgmental. The mediation scheme does not prevent grievances from being raised but operates as an alternative means of resolving the issues.
- 30.2 A number of workplace mediation initiatives currently operate within the Church of England. Reflecting its devolved structure, these operate within the dioceses rather than being led by the National Church Institutions themselves although the Chief Executive of the Church Commissioners is a qualified mediator who himself mediates disputes. These dioceses currently include St Albans, Coventry and London although the Church would like to extend the use of workplace mediation. Typical matters covered by these initiatives would be disputes between vicars and other stakeholders in their parish. Specific initiatives include the Centre of Reconciliation in Coventry in which the current Archbishop of Canterbury was formerly involved; and twice yearly conflict resolution training provided for clergy in London. In addition the Church is supporting the development of two inter-faith conflict centres, one in St Ethelburgas in London and one in Carlisle, the Rose Foundation, which also covers international conflict resolution.
31. The comparative lack of use of workplace mediation outside the public sector has been noted both by Acas, in their discussions with us, and by certain commentators on workplace mediation. In a blog for the publication "Mediation Rescue", Tony Sendall, a barrister at Littleton Chambers and long-time champion of the benefits of workplace mediation, comments that "*..there has (as yet) been too little attention paid to this powerful tool in the private sector.*" The reasons he gives for this are slightly different from the factors given in our survey of lawyers as to what is holding back the use of mediation and appear to be more deep-seated:
- 31.1 The main factor he attributes as historical dependence upon grievance and disciplinary procedures combined with "an inherent distrust of what might appear to be radical change", the use of such procedures being seen as "*the default first step*". These are "*heavily dependent on fact-finding and attribution of fault/ blame which frequently leads to the escalation of conflict rather than its resolution*".
- 31.2 Mediation is "*perceived as either a last resort before litigation or at least a process that does not become relevant until the conflict has fully crystallised.*" This results from the fact that mediation is best known for its role in resolving current litigation whereas the whole point of workplace resolution is to nip the issue in the bud before it becomes polarised and to restore the employment relationship.
- 31.3 Some perceive mediation as a soft option – "*two parties locked in a room with a hippy*" whereas the reality is very different.
- 31.4 Finally he echoes our comments above that employees and unions can be suspicious of workplace mediation if it is seen as a process "owned and run by the employer" with some preferring either to let their members have their "day in court" or using more formal (and familiar) procedures.

32. However, it appears from our discussions with the TCM Group that considerable progress has been made in the development of workplace mediation among the larger employers. It may well be that this will lead to greater awareness of its benefits among a wider range of employers.
33. Proponents of workplace mediation generally consider that the requirement for an employee to lodge a grievance is harmful to effective dispute resolution. Arguably a hangover from the former discredited statutory dispute procedures legislation, there is a concern, articulated most persuasively by Camilla Palmer QC, that this requirement has forced employees to pursue an adversarial approach at the very time when the use of ADR should be the main objective, that grievance processes followed by employers are largely formulaic and defensive in nature, that they incur very considerable costs (particularly when combined with the use of data subject access requests) and result in the entrenchment of views. Both Ms Palmer and the TCM Group argue for a change in mindset. They argue that dispute resolution should give way simply to "resolution" through non-adversarial processes (particularly mediation).

## E. TRANSFORMATIVE MEDIATION

34. A further way of seeking to assist employers and employees (or employees and employees as the case may be) to resolve their differences prior to the initiation of any formal process, be it a claim or a formal grievance, has been developed in the USA and is described as "Transformative Mediation". This is described in a thought-provoking article in the 2009 Harvard Negotiation Law Review as follows:<sup>7</sup>

*"The transformative model best [gives] employees the opportunity to safely express themselves and to understand each other so that they could regain the capacity to work together effectively. Transformative mediation does not have settlement as its goal. Transformative mediation views the most important aspect of mediation as its potential to transform the people who are in the very midst of the conflict. It frames both conflict as a crisis in some human interaction that tends to destabilise parties' perception of self and other, leaving both more vulnerable and self-absorbed. The model views conflict as an interaction between parties and seeks to change its quality from negative and destructive to positive so that parties recapture their sense of competence and connection and re-establish a constructive or neutral interaction."*

<sup>7</sup> Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace by Lisa Bomgren Bingham, Cynthia J Hallberlin, Denise A Walker and Won-Tae Chung

35. Transformative mediation can therefore be seen as "ultra- facilitative" and compatible with the operation of a workplace mediation scheme. However, even where such a scheme exists—in which the employer will have paid for the services of the mediator—the article goes on to warn that if mediators assess the strengths and weaknesses of a legal case and share this with the parties;

*"...in an employment programme run by the employer, this may lead to a situation where mediators (paid for by the employer) are (truthfully and objectively) telling employees ... that they have no legitimate claim. Rather than hearing this as objective evaluation from a third party mediator, employees may perceive it as mediator bias. To avoid this result , some [employers] have adopted dispute resolution system designs requiring the transformative model of practice, in which evaluation is not an appropriate mediator behaviour."*

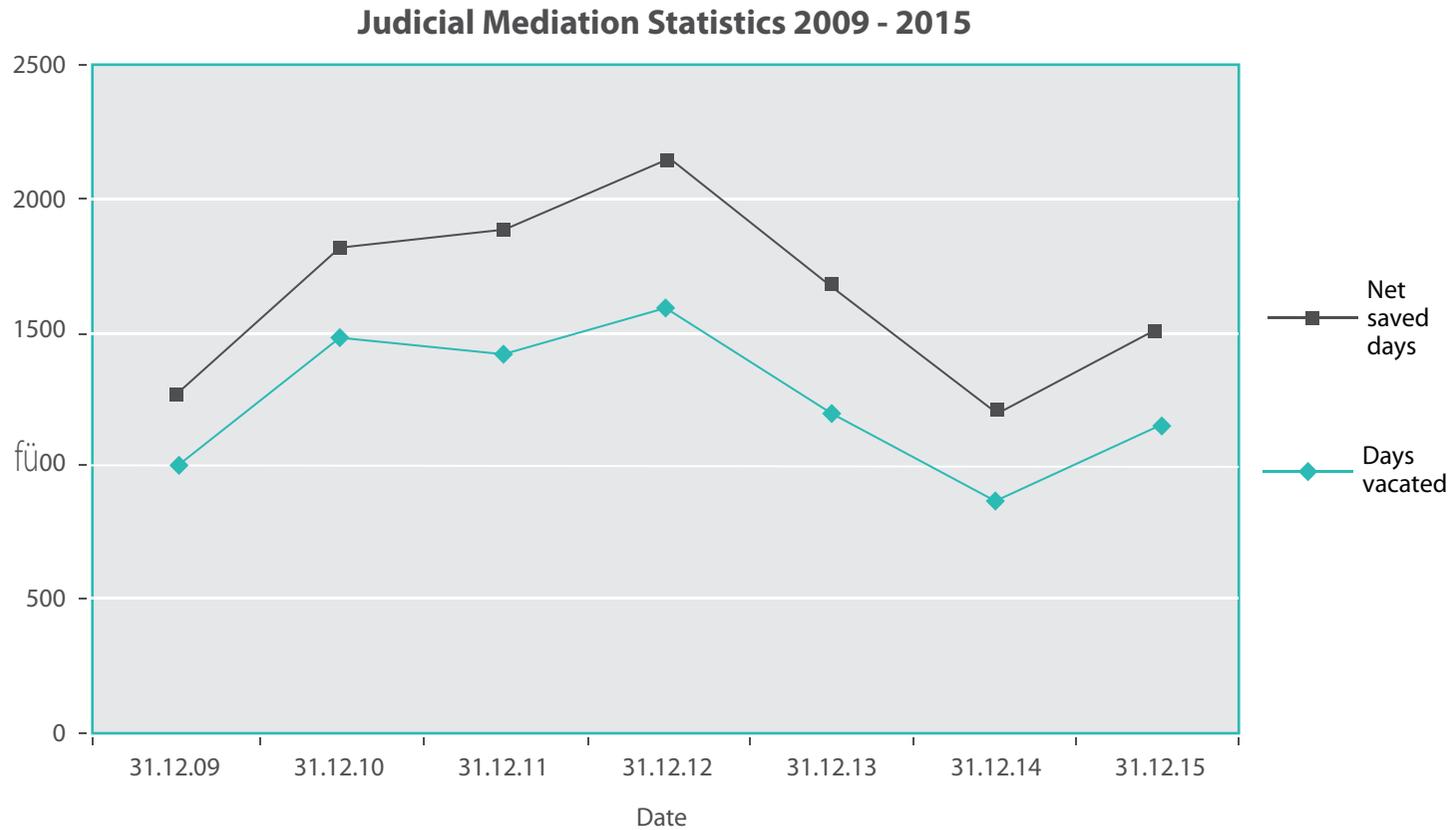
36. Our understanding is that workplace mediators would adopt an approach similar to that of Transformative Mediation, irrespective of whether they apply that particular label.

## F. JUDICIAL MEDIATION

37. Judicial mediation was introduced in 2009. A copy of the Protocol and Explanatory Notes is attached at Appendix 5 to our report. These are self-explanatory and available to the public.

38. We spoke with Alison Lewzey, a senior Employment Judge based at London Central Employment Tribunal who supervises the judicial mediation programme within employment tribunals. From statistics supplied we ascertained that between 2009 and 2015 a total of 11,492 hearing days were saved by judicial mediations. The annual success rate varied between 62% and 71%. After the first two years, the success rate has been just under 70% for the last five years.

39. The number of days vacated by year and the net saved days (i.e. the hearing days vacated less the number of days spent on judicial mediation) are set out in the chart that appears below.



40. There is considerable regional variation and, for example, very few, if any, mediations occurred in Wales in the past. It is understood however that since the appointment of a new Regional Judge the use of mediation in that region has increased. The administrators keep no record of judicial mediations so all statistics are collated internally and not all regions appear to keep accurate records.

41. Accordingly, to achieve as official account as is available we made a request under the Freedom of Information Act. The response we received in relation to 2014 and 2015 was as set out in the Table below. It should be kept in mind that for both years the figures must have been affected by the imposition of fees in July 2013.

Region	Number of mediation days	Number of mediation days
	2014	2015
Scotland	46	45
London Central	66	66
London East	16	32
London South	41	39
Midlands East	19	28
Midlands West	50	33
Newcastle	11	12
North West	33	20
South East	-	43
South West	24	11
Wales	1	7
Yorkshire & Humberside	35	26

Source: Internal ET manual records

42. It is important to note the following conclusions from the information received. The number of mediation days in 2014 provided in the reply to the request under the FOI is 367. The number of net saved days shown in 2014 by the chart is approximately 867 days. From these figures it appears that the average mediation day in 2014 saved the Tribunal Service just over two and a third hearing days. The number of mediation days in 2015 provided in the reply to the request under the FOI is 362. The number of net saved days shown in 2015 by the chart is approximately 1150 days. From these figures it appears that the average mediation day in 2015 saved the Tribunal Service just over three hearing days.

43. The administrative and financial appeal of these figures, even given the uncertainties of manual records, is obvious but it is not apparently widely appreciated. From what we have been told it appears that administrators are unaware of the economic advantage judicial mediation could provide if it was more widely used. It seems to be imperative to stress this fact and get the message across to both those who run tribunals and the profession. The benefit to parties is compelling. Advisers fully aware of this potential benefit would be failing in their professional duty to their clients if they ignored such a potential saving. It is also apparent that the savings would be even greater if the success rate of judicial mediation could catch up with that in commercial mediations as reported by the law firms and more encouragement was given by administrators to that process.
44. We also asked about the timing of mediations and it was agreed the earlier in the process the better. We asked if it would be a good idea to have a box on the ET forms enquiring if the parties were in favour of a mediation, Ms Lewzey thought this was a good idea but caveated that changing the forms was seen as a difficult process (as indeed we know it can be).
45. We also understand that a factor holding back wider usage of mediation is the difficulty that large public sector employers have in obtaining Treasury approval to the process. There is apparently a reticence about volunteering large sums from the public purse, to settle legal claims. Rightly or wrongly, some public sector employers (perhaps for audit purposes) would prefer to pay more as a result of a Tribunal order rather than pay out a lower figure by way of settlement following a mediation.
46. The last training exercise of judges was in 2011 and we understand that there are no funds available for more training at present. There is the possibility of a course in 2017 for those salaried judges who have not yet been ticketed. The apparent lack of enthusiasm for this training by administrators is regrettable. Their training course is a four day course. There was a steady increase in the use of judicial mediation before the fee was introduced in July 2013 (opposed by the then President of ETs) and use then fell off but is picking up again. This again is evident from the chart. Hopefully this will continue now that the £600 fee has been removed.
47. We were also told that some judges find the process of enquiring into the anxieties and concerns of the parties as part of the process of mediation rather difficult as it is so remote from their usual role. We were told that there is little support to encourage judicial mediation from the administrators (which is reflected by the lack of training). We expressed surprise but we were told that they thought it would simply increase costs. This seems both illogical and to demonstrate a lack of knowledge of the facts about the number of hearing days saved by judicial mediation.

48. We asked how judges are trained. All judges accredited to conduct judicial mediation will have participated in a 4 day internal judicial mediation course. This course involves role play, and it is a similar model to that used by CEDR. In 2015 an exception was made by the President to allow judges who already have CEDR or ADR accreditation to be allowed to conduct judicial mediations provided that certain criteria were met. Although this applied to both salaried and fee paid judges, few fee-paid judges are currently used for mediations because the budget for fee-paid sessions is so small relative to previous years. We were told that only four fee-paid judges were included under this exception.

## G. EVALUATIVE MEDIATION

49. Traditionally, mediators in the UK have practised what is known as 'facilitative' mediation. This means that the mediator takes an entirely neutral position and makes no attempt to evaluate the rights of the respective parties. Similarly the traditional position is that the parties "own" the dispute and that only they can decide how (if at all) to resolve it.
50. In recent years, there has been growing interest in "evaluative" mediations largely, but not exclusively, in the US. In evaluative mediation, the mediator may comment on the rights of the parties and speculate on what the outcome of a claim might be, at a tribunal or court hearing.
51. A US commentator, Zena Zumeta, describes evaluative mediation as follows:

*"An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. Evaluative mediators meet most often in separate meetings with the parties and their attorneys, practising "shuttle diplomacy". They help the parties and attorneys evaluate their legal position and the costs versus the benefits of pursuing a legal resolution rather than settling in mediation. The evaluative mediator structures the process, and directly influences the outcome of mediation.*

*Evaluative mediation emerged in court-mandated or court-referred mediation. Attorneys normally work with the court to choose the mediator, and are active*

51. *participants in the mediation. The parties are most often present in the mediation, but the mediator may meet with the attorneys alone as well as with the parties and their attorneys. There is an assumption in evaluative mediation that the mediator has substantive expertise or legal expertise in the substantive area of the dispute. Because of the connection between evaluative mediation and the courts, and because of their comfort level with settlement conferences, most evaluative mediators are attorneys."*

### **Pros and Cons of Evaluative Mediation**

52. As it is central to the role of a mediator that they remain neutral and impartial as between the parties, there is a risk with evaluative mediation that one party could view the mediator as biased if they express a negative view about the merits of either party's position. This could lead to a loss of credibility. Conversely a party may feel unfairly pressured to settle if the mediator tells them that they are not going to win their case.

53. However, these risks can be managed to some extent. For example:

53.1 Commentators point out that the manner in which the mediator expresses an opinion can be crucial. Legal positions can be tested by searching questions, by 'reality checking' and by asking a representative to provide clarity on some legal points.

53.2 There is a difference between expressing an opinion on the merits of a case, and recommending to the parties what they should do. The former may be acceptable where an evaluative approach has been sought. But the latter approach, which clearly challenges the concept that it is for the parties to 'own' the dispute, may well create tensions between at least one of the parties and the mediator.

53.3 Both representatives and mediators have identified the potential benefits of a mediation expressing an opinion where a discussion has reached deadlock, and where the parties are asking for 'guidance' from the mediator to take them forward. In pure facilitative mediation, this is not possible.

54. Our own experience is that some mediators use a 'blend' of facilitative and evaluative approaches, depending on the circumstances and the needs of the parties, and the style of the mediator. A mediation can start off as facilitative but become more evaluative if the parties support this and if it is done to encourage progress and reach a settlement. Arguably it should be part of the mediator's toolbox to be able to give an opinion on all or part of the dispute if (but only if) the parties want it. This could, however, have ramifications for non-lawyer mediators.

55. In particular, as noted by Clifford Chance in a briefing:

*"In a number of recent mediations, we have seen an increase in an interventionist tactic designed to bridge the gap between the parties. In these instances, when the mediation reached an unsuccessful conclusion, the mediator proposed a process whereby he or she would indicate a settlement deal and leave the parties to respond separately directly to the mediator as to whether or not they would accept the proposed deal. If both parties accepted it, the case could then proceed to settlement. However, if both parties did not accept, there would be no settlement but the mediator would not say why. Thus, if one party accepted and the other did not, the party that did not accept would not know whether or not the other party had accepted.*

*The advantage of this process is that, where there is a degree of intransigence or stubbornness on both sides, the mediator can seek to bridge the gap by making a proposal which may be acceptable to the parties if they can see that it requires both sides to make movement. The process of responding confidentially to the mediator leaves them free to accept without revealing their hand to a non-accepting opponent."*

56. One area in which mediators can, and should, be more directional is in finalizing the terms of settlement once heads of terms have been agreed. Too often, many hours are wasted arguing over relatively trivial points in a settlement agreement while the mediator appears to sit back. Indeed, in some cases it can take as long to finalise the settlement agreement as it does to agree the commercial terms, which is ludicrous, and a huge waste of client's money. There is something to be said for the mediator having their own form of agreement available as a starting point. Our understanding is that this is relatively common in the US. Conversely, it is vital that the mediator does not leave until the settlement is done and dusted.

57. We should, however, add that in workplace mediation our understanding from The TCM Group is that the mediators should remain strictly non-judgmental, particularly as that process specifically seeks to avoid discussion of the strengths or weaknesses of legal positions.

### **Judicial Mediation and Evaluation**

58. The style of mediation used within judicial mediation in the tribunals tends to be fairly facilitative. There is some anecdotal evidence that parties would like judges to be more 'directional' in judicial mediation, which has some logic given that an employment judge would be perceived by the parties being competent to offer a view on the merits of the case.

59. It might be argued that parties who elect to participate in judicial mediation are expecting a more evaluative approach: why else would they ask an employment judge to mediate, rather than a professional practitioner, or even a non-lawyer mediator who does not have specialist understanding of the legal issues? Indeed, if we read the description of evaluative mediation by Zumeta above, there already seem to be a number of similarities to the way in which judicial mediation is conducted such as the shuttle diplomacy process, the structure of the day and the presence of an expert evaluator.
60. Discussions with the employment tribunal judiciary suggest that judicial mediation is not required to be completely facilitative, and that judicial mediators are permitted to move from an indicative position to a more evaluative one where required. If this approach was adopted more readily, it raises interesting questions about whether the number of cases going to judicial mediation might increase, and whether outcomes (already running at around a 70% success rate) might be improved.
61. Given that employment tribunals have recently introduced a "Judicial Assessment", a form of early neutral evaluation (see further below at paragraphs 96-104) it also raises interesting questions about the possible interaction between some form of Early Neutral Evaluation and Judicial Mediation. As will be seen, the introduction of judicial assessments is rooted in rule 3 of the Tribunal Rules of Procedure, and can be seen as a method of encouraging ADR. It would take place at the case management stage and would be confidential and without prejudice. It could then be followed by a judicial mediation. The parties would therefore have had a preliminary indication of the strengths and weaknesses of their case, explored in a without prejudice setting, and could be informed by this in the judicial mediation.

## H. WHO ARE THE BEST EMPLOYMENT MEDIATORS AND WHAT QUALITIES DO THEY POSSESS

62. One of the factors identified as holding back the use of mediation was the perceived lack of mediators skilled at handling employment disputes. We therefore asked a number of solicitors and barristers to suggest the names of the most successful mediators of employment disputes they had used or heard about. It has to be stressed that this was not a detailed enquiry nor can it be described as scientific. We do not think that it would be appropriate to identify those recommended, owing to the nature of the exercise. But it was heartening that the list was a reasonably substantial one albeit it comprised virtually all barristers (and a couple of Employment Judges).

63. We also asked the solicitors and barristers we approached to identify key qualities that they considered a skilled employment mediator needed to possess. Those identified were as follows:

- a collaborative approach;
- patience;
- good listening skills;
- a neutral approach;
- the ability to create momentum;
- concentration on key issues;
- a willingness to express opinions when requested;
- ability to demonstrate empathy with each party

## I. USAGE OF MEDIATION OUTSIDE THE UK

64. We have considered the use of mediation in jurisdictions outside the UK to resolve employment disputes. There is a vast amount of material, particularly covering usage in the US, where mediation has been used more extensively and for considerably longer than it has in the UK. We are conscious of the dangers of assuming that what works (or does not work) in one jurisdiction will automatically work in the UK and decided that for the purposes of this paper we should concentrate on particular features of the use of mediation/ADR in those jurisdictions that may help inform the issues raised in our paper. A more detailed review of the litigation procedure in certain of these jurisdictions appears in Chapter 6 of ELA's response sent last year in relation to the proposed introduction of a Unified Employment and Equalities Court.

65. Specific features of the overseas experience are these:

65.1 Mediation is used to resolve employment disputes in various jurisdictions including the US, Ireland, Australia, and New Zealand.

65.2 In a number of jurisdictions it seems to be rarely used including Germany and South Africa. However, the reasons for this seem to be linked to the nature of the relevant local legislation and procedures, which largely obviate the need for it.

65. 65.2.1 In German labour court proceedings the first hearing will be a conciliatory court hearing where the judge encourages the parties to agree a settlement and only if that process does not produce a settlement (and it appears often to do so) will a further hearing be scheduled. Similarly in co-determination issues, if the works council and employer fail to agree on a particular topic either party may ask the competent labour court to establish a conciliation board which will be chaired by a judge and which will seek to reach a conciliated settlement. Mediation seemed to be confined to high value cases involving managerial level employees; in that situation a form of judicial mediation is offered.
- 65.2.2 Regarding South Africa we were informed by a QC equivalent, a leading academic and a senior attorney that for the most part it was considered too expensive to consider private mediation for all but the most senior staff issues. This is because South Africa established a Commission on Conciliation, Mediation and Arbitration ("CCMA") some 20 years or so ago which offers a free and robust conciliation service, and which has apparently resolved some 70% of disputes it has handled.
- 65.3 In a number of jurisdictions where the use of mediation is common, including Australia and New Zealand, its use is in effect institutionalised into the relevant legal processes and considerable resource has been invested by Government.
- 65.3.1 For example, in Australia there is a history of compulsory conciliation, in particular for unfair dismissal cases (low value claims) 90% of which were resolved in this way for the year ended 30 June 2015. Similarly, in relation to higher value/ more complex claims, it is common for parties to be ordered to attend a court appointed mediation before a Judicial Registrar. There is no charge for this mediation and it apparently has a high success rate.
- 65.3.2 In the US mediation is commonly used to resolve employment disputes. To some extent this is no doubt a result of particular aspects of the US legal process, in particular the costs, the length of time it can take for cases to reach trial and the unpredictability of (and potentially high damages awarded by) US juries. Mediation is seen as circumventing this while also giving the employee their "day in court". Mediation is particularly common in resolving disputes involving statutory claims and in relation to claims filed with the EEOC mediation is mandatory.
- 65.5.3 Conversely, in Ireland the Workplace Relations Act 2015, which introduced fundamental changes to the workplace dispute resolution machinery in Ireland, provided for a mediation service. However, the Employment Law Association of Ireland has expressed the view that the service could be under-resourced to meet demand; anecdotally, some parties have requested mediation but the relevant Governmental body has rejected this request.<sup>9</sup>

<sup>9</sup> The Irish Government has recently published a Mediation Bill which seeks to promote the use of mediation as an efficient alternative to dispute resolution and obliges solicitors specifically to advise clients to consider mediating prior to issuing proceedings. However this does not apply to proceedings under the Workplace Relations Act 2015.

65. 65.4 In a number of jurisdictions it is clear that there is an element of state mandated mediation whereas the policy of successive UK Governments has been (largely) to eschew any form of mandatory mediation. (The exception has been the potential for adverse cost consequences in the civil courts if an offer to mediate by one party is unreasonably refused by the other party). It is not for ELA to express a view on this particular issue – which is one of policy-but it is something that Government should clearly consider as part of any review. In the US, for instance, it is stated in the American Arbitration Association Handbook on Employment Arbitration and ADR (Second Edition) that there is some evidence (albeit in a survey which did not include employment disputes) that success rates in court mandated mediation have increased now that it is part of the culture there.

## J. EARLY NEUTRAL EVALUATION AND OTHER FORMS OF ADR

### Context

66. Early Neutral Evaluation ("ENE") is defined by PLC as  
*"a form of alternative dispute resolution in which an independent and impartial evaluator is appointed to give the parties an assessment of the merits of their case. The aim of an ENE is to provide the parties with an objective and realistic view of the strengths and weaknesses of their respective cases, and serve as a basis for negotiations".*
67. The process is voluntary, confidential, without prejudice and it will usually be non-binding. CEDR, ADR Group, RICS and the Chartered Institute of Arbitrators provide an ENE Service and have a list of evaluators who could conduct an ENE. Some barristers' chambers offer a similar service.
68. The independent evaluator will sometimes be a QC, or could be an experienced solicitor or a retired judge. In principle there is no reason why the evaluator has to be a lawyer. For example, the nature of the dispute could require specific technical expertise, although at present virtually all such disputes seem to involve the use of Expert Determination (see further below) rather than ENE, notwithstanding that this is a very different process, not least because it generally results in a binding outcome.
69. As ENE would take place by agreement between the parties and the evaluator, an ENE agreement would be drawn up. It could involve some sort of hearing and evidence, or simply a consideration of the papers. The scope of the ENE would be agreed in advance. A written evaluation would usually be produced. Whilst not binding, the outcome report could lead to settlement.

70. The opportunity to use ENE within court processes is now enshrined within a recent amendment to the Civil Procedure Rules. Part 3, which deals with the court's general case management powers, now provides at CPR 3.1(2)m that the court may:

*"take any other step or make any other order for the purpose of managing the case and for furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case".*

71. Note here the emphasis on 'hearing' an ENE as opposed to dealing with it as a paper exercise. ENE is also referred to in a number of the Pre-Action Protocols as one of the relevant forms of ADR to consider.

72. Prior to this, ENE was already being used in the Technology and Construction Court and the Commercial Court. The background to this amendment to the change to the CPR is set out below.

73. In a very short judgment in *Seals & Anor v Williams* [2015] EWHC 1829, Norris J considered his power to make a consent order for an ENE (by a judge) in Inheritance Act proceedings. He noted that, although the process was at that time already endorsed in the Chancery Modernisation Review and featured in the Guides both of the Commercial Court and the TCC, its precise foundation was unclear. He concluded that it fell within a judge's general judicial function and that, in the civil context, was covered by the courts' general case management powers under CPR 3.1(2)(m) (as worded at the time). In that case, he approved the orders, which made clear that:

73.1 a "Settlement Judge" would be appointed to hear the ENE

73.2 the Settlement Judge would make recommendations as to the outcome, giving short reasons but not in the nature of a full provisional judgment

73.3 the Settlement Judge would not be further involved in the proceedings; and

73.4 the recommendations would be non-binding - the parties would only be bound if they subsequently agreed to a Consent Order.

74. Probably prompted by that decision, the CPR Committee subsequently agreed to amend CPR 3.1(2)(m) to specifically refer to ENE. The minutes record the CPR Committee's discussion on this as follows:

**CPR (15)32 Early Neutral Evaluation (ENE)**

- i. The Chair asked the Committee whether it was sufficient for a reference to ENE to be included in the specialist court guides or whether it was appropriate to support the guidance with a reference to ENE in the rules.
- ii. Nicholas Bacon noted that the Professional Negligence [Pre-action Protocol] endorses ENE but that there is a concern that judges conducting ENE effectively knock themselves out of any further hearing, with a potential effect on docketing of cases. He felt the principle was sound but the resource element could not be ignored.
- iii. Judge Lethem agreed with the principle, which had been applied successfully in family cases, particularly where parties will take advice from a judge that they will not take from their lawyer. Mr Justice Coulson reported that ENE had been used in technology and construction cases for the past 15 years, but that it was not mediation, and it was only appropriate in the right type of case. On the downside it could be used tactically to knock out a judge. Andrew Underwood raised the issue of increased costs which may be significant, and judicial resources which may be taxed by another initiative on top of costs management. The Committee agreed that the number of ENEs was unlikely to change radically and that it provided a further opportunity for early settlement thus freeing up court resources.
- iv. The Committee supported the suggested amendment to CPR 3.1(2)(m) which was approved subject to minor amendment.

## Early Neutral Evaluation ("ENE") in commercial disputes

### ENE prior to CPR 3.1(2)(m)

75. It will be noted that the CPR Committee observed that ENE had been available for use in certain courts, albeit it was "*only appropriate in the right type of case*". The consensus on what this might mean seems to be that ENE would be potentially useful where the main barrier to settlement is the parties' diametrically opposed approach on how the law applied to the likely weight of the factual evidence (or perhaps had an inadequate understanding of the risks of litigation) and where the costs of the exercise could be controlled such that they were proportionate to the amount involved. In such circumstances it is thought that litigants might benefit from a judge's involvement as an authority figure. But has the usage of ENE reflected this?
76. Prior to the recent incorporation of an express reference to ENE in CPR 3.1(2)(m), the only UK reported cases we have found that refer to ENE are to judgments by Master Leslie.
77. In *W.J Hooker v Bayley* [2001] WL 1422849, where a Claimant sought summary judgment, Master Leslie refused and then went on to say that "*these are potentially ruinously expensive proceedings*" and that the Claimant's assessment of damages was "pie in the sky." Master Leslie said "*I have probably gone further than I ought to have done. But I think it is only right that an early neutral evaluation should be made in the interests of both parties*" and imposed a six week stay for settlement attempts.
78. In *John Arthur Kirkpatrick & David Tan v Snoozebox Ltd* [2014] WL 2530812, Master Leslie, again of his own volition, gave an early neutral evaluation. The purpose of the hearing was to consider the Defendant's application to strike out the claim, which was not granted. However, the Defendant had also threatened to apply for security for costs and
79. Further evidence of the existing use of ENE is as follows:
- 79.1 An ENE scheme was established for compensation claims arising from the acquisition of land for the construction for the Channel Tunnel Rail Link. A tribunal (chaired by leading counsel) was set up to assist the parties in their negotiations in terms of how valuation would be approached by the Lands Tribunal.
- 79.2 CEDR produced a Model Early Neutral Evaluation Agreement, with guidance notes, in around 2001: <https://www.cedr.com/about-us/modeldocs/?id=9>

80. **ENE since the introduction CPR 3.1(2)(m)**

In *Jack Wills Ltd v House of Fraser* [2016] EWHC 626 (Ch), the Judge commented that, by trial, the issues in dispute were limited and the sums involved were very small. The parties had agreed that the Judge should decide the issues of principle and the parties would then agree the financial consequences that followed from those conclusions. The Judge commented that *"it is greatly to be regretted that substantial commercial parties such as those involved in this dispute were unable to... resolve the issues between them by early neutral evaluation and/or facilitative mediation."*

81. In a presentation by Lord Justice Briggs dated 12 May 2016 on his Interim Report on the Civil Courts Structure, he commented:

*"I have always considered that ENE tends only to truly succeed where, broadly speaking, the evaluator is on the same level as the judge who would determine the case if it was not settled. It works well in family (FDR) cases, for example, where one district judge evaluates and then, if necessary, another adjudicates the dispute. It also works in some contested probate cases undertaken by the Chancery Masters..."*

82. It was put to Lord Justice Briggs that any initiative to place emphasis on the use of ENE in the context of commercial disputes, where it is much less prevalent, should be treated with scepticism because the process may push the parties further apart and make them more entrenched. The problem with ENE, it was suggested, is that it merely provides "just one view". Lord Justice Briggs replied:

*"I would agree that the use of ENE is not prevalent for commercial disputes, and I would not challenge your views on the use of ENE for commercial disputes (although I am aware of one example where it was very effective in a large commercial case).*

*I think that where it can be very effective, for example in the context of a financial dispute, is where the evaluator doesn't say "I think this is the answer", but, instead, suggests that "the range is between x and y" and asks the parties if that helps. In substance, that still amounts to ENE and can be quite effective, because it helps the parties to focus".*

83. ADR Group and CEDR appear to have had little take up of their ENE service. Similarly the London disputes practice of Herbert Smith Freehills has only used ENE once. Of those who have in fact used ENE, experience has been mixed. A barrister and an accountant did not find it useful but Ed Brown, a barrister at Essex Court Chambers, a leading commercial set, told us that he and others in his chambers had experience of ENE in the Mercantile Court. Whilst accepting that it would be difficult for an evaluation to assess points of fact, he had found ENE useful in narrowing the issues. Similarly, while accepting that there had to be enough material to assess, he considered the preparation for, and conduct of, an ENE to be relatively restricted. He described it as being similar to that for a summary judgment application in the High Court.
84. In addition, we have heard anecdotally that several judges provide what might informally be called "early neutral evaluation" when case managing a dispute, both in the High Court and the Tribunal.
85. Discussions with a variety of mediators and providers revealed that, in relation to employment issues, the term ENE is being used in two distinct ways, the traditional "legal" approach as summarised above, and a new, more flexible, approach termed, simply, "Neutral Evaluation".

### **Neutral Evaluation in the Workplace Context**

86. Some mediators and HR professionals are using a process they call 'Neutral Evaluation' as a way of signposting ways in which a dispute might be settled. In this context, Neutral Evaluation is a process that falls somewhere between a formal investigation on the one hand, and a mediation on the other.
87. An employer might ask an independent individual, or a member of the HR department, to carry out a neutral evaluation of a particular situation giving rise to employment issues with a view to making recommendations as to what steps should be taken to resolve the matter. The evaluator will speak to all those involved, but does not take formal statements and remarks are not attributed to particular individuals. The aim is for the evaluator to gain an understanding of the situation so that they are able to advise the organisation about the best possible course to follow.
88. Two mediators, Clare Ramos and Nicole Eisele, described to us how Neutral Evaluation can be seen as less threatening than a mediation process. They suggested that it is worth considering where mediation might not be desirable, for example where there is a team conflict involving a number of different parties, or where particular individuals do not want to participate in mediation. They suggest that use of Neutral Evaluation in this context is not yet common, but that when it is used participation

88. levels are good and results are positive. It might not solve the dispute but it may well offer a way forward to resolving it. For example, recommendations could include mediation, training, team building or a change in policy and procedure. It also gives people an opportunity to express their views without having to participate in the more intense process of mediation.

### **Early Neutral Evaluation of Employment Disputes**

89. Aside from the use of Neutral Evaluation in the workplace - which seems conceptually distinct from ENE – we have found little evidence that ENE is either used much to resolve employment disputes or considered to be of great potential in doing so.

90. At first sight this might seem surprising. One of the frequent criticisms made of mediation is that it is insufficiently evaluative, whereas ENE on the face of it provides an opportunity in a confidential setting, with a party-chosen evaluator, for a resolution to be made of that dispute which addresses the merits of the parties' respective arguments. And it has just been given an imprimatur by the High Court, which took into account its existing use in family cases and in technology and construction cases (albeit only 'in the right type of case').

91. However, there are clear potential disadvantages in its use. The main ones are as follows:

91.1 The process is voluntary and the evaluation is non-binding, so the parties can go through the process and take the evaluation or leave it without penalty;

91.2 Ironically, obtaining an evaluation risks making settlement harder than it would otherwise be because the "winner" may well just dig their heels in while the "loser" seeks either to discredit the evaluator or pick holes with the evaluation itself.

92. These disadvantages can be seen to be exacerbated in relation to many employment cases (particularly those conducted in the employment tribunal), in light of the following factors.

93. Our research into the use of mediation to resolve employment disputes suggests that a number of clients and practitioners feel that the overall cost of (private) mediation is already too expensive to justify its use in many employment cases. This is because the amounts of compensation involved in such cases can often be relatively modest and legal costs (including costs incurred in an ADR process) therefore need to be kept under a tight leash (all the more so following the introduction of fees in the Employment Tribunal and the increase of fees in the High Court).

94. However, many cases can involve a number of contested issues of fact. Obtaining a meaningful evaluation from an evaluator could therefore easily result in parties having to incur far higher costs than in a mediation in order to provide the evaluator with what they need; a mini trial here becomes a real risk. Conversely, seeking such an evaluation at an early stage or without sufficient evidence will still likely involve incurring costs at a level commensurate with a mediation but with a real risk of obtaining nothing of real value for those costs.
95. It follows from this that the types of employment-related cases where ENE is most likely to be a useful addition to mediation are ones which turn on a relatively discrete point or a handful of relatively discrete points, where the parties are seeking a confidential, authoritative and non-binding steer as to the right answer. There would seem to be a fair degree of cooperation required between the parties for this to succeed. An example might be disputes around the meaning of certain contractual provisions (whether in employment contracts or collective agreements) where the parties wished to preserve the underlying arrangement. (Indeed the one case in which Herbert Smith Freehills has used ENE involved just that scenario). In addition ENE could conceivably be used to provide an advance view in certain circumstances as to whether TUPE might apply in relation to a contracting situation and in relation to whom. (Indeed it might well be in the "client's" interest in that situation to encourage the use of ADR if a dispute arose between the two contractors).

### **The New Protocol on Judicial Assessments**

96. In light of this research one might have expected to see an encouragement towards greater use of judicial mediation. However, the chosen route ("judicial assessment") leans firmly towards ENE, albeit what might be called "ENE-Lite".
97. In a speech to the Employment Law Committee of the Law Society in June 2014, the outgoing President of the Employment Tribunal, David Latham, advocated greater use of alternative dispute resolution within the tribunal system. He raised the possibility of neutral evaluation being used within the context of an individual case, either by way of a formal and objective assessment of the merits of a claim or an 'early indication' of the respective strengths and weaknesses, and what the outcome might be. Another idea he floated was the presence of an Acas conciliator at case management hearings, to be available while both parties were present and to offer an opportunity for a settlement discussion at that time.

98. The current President of the Employment Tribunals, Brian Doyle, also expressed a desire that ADR be 'centre stage' in any reformed employment tribunal process and he, too, referred to the possibility of 'Judicial Early Neutral Evaluation' being available alongside judicial mediation.
99. On 3 October 2016 he followed this up by publishing Presidential Guidance which introduced a new concept termed "Judicial Assessments". A copy of the Guidance can be found at Appendix 6. Designed to give further effect to rules 2 and 3 of the Employment Tribunals Rules of Procedure, the President opted to allow Employment Judges to give an early indication of the strengths and weaknesses of the parties' claims and defences. This appears to be a form of ENE but the use of that term has not been adopted.
100. Judicial Assessments have the following notable features:
- 100.1 They will usually be offered "*at the first case management hearing...after the issues have been clarified and formal case management orders made...*" (paragraph 8);
  - 100.2 They are stated to be suitable for "*most cases of any complexity which are listed for a case management hearing*" but potentially unsuitable where:
    - 100.2.1 There are multiple claimants not all of whom agree to Judicial Assessment;
    - 100.2.2 A party is insolvent;
    - 100.2.3 Other proceedings are extant or intimated (paragraph 9).
  - 100.3 All parties must consent to a Judicial Assessment and no pressure will be placed on any party to give that consent (paragraph 14);
  - 100.4 The Judicial Assessment process is "without prejudice" and anything communicated in that process, including the views of the Employment Judge, must be kept strictly confidential (paragraph 16);
  - 100.5 Judicial Assessment is entirely distinct from Judicial Mediation which (interestingly) is described as "*facilitative [and] has the aim of assisting the parties to achieve a resolution of the issues between them without giving any indication of prospects of success*" (paragraph 18);
  - 100.6 An outcome of a Judicial Assessment may be that a case is listed for Judicial Mediation (paragraph 18);

100. 100.7 The Assessment will clearly be given on a provisional basis, could cover liability or remedy or both, will be given on "*the state of the allegations and does not evaluate evidence and will assess provisionally the risks as to liability and, typically, brackets of likely compensation on remedy*" (paragraph 21);
- 100.8 The Employment Judge who conducted the Judicial Assessment will not normally be involved in any subsequent part of the case entailing final determination of the parties' rights but may conduct a subsequent Judicial Mediation, and may be involved in subsequent day to day case management hearings (paragraph 25);
- 100.9 Each region will keep a record of the number of Judicial Assessments and settlements in cases where Judicial Assessments have been conducted and will provided a monthly report to the President (paragraph 28). Our enquiries revealed that there were not that many assessments taking place but we were reminded that this had also been the case with Judicial Mediation shortly after its introduction.
101. Clearly the new procedure must be given to a sensible period of time before judgment can properly be given as to its efficacy and the current chair of ELA is (of course!) right to urge employment advisors to give it a fair crack of a whip. However, like the operation of the process itself, a provisional assessment can be given as to its prospects, although without any evaluation of the evidence.
102. There are a number of positive features of the process:
- 102.1 It is (relatively) informal and designed to seek to avoid either party incurring heavy costs in the process;
- 102.2 It seeks to recognize its limitations and targets its ability to narrow the issues, administer some "reality checking" and provide ranges of outcomes. This can be seen to mirror some of the features of evaluative mediation but also the positive features of ENE when deployed in the right way as identified by Lord Justice Briggs (see paragraphs 81-82 above).
103. Crucially, we suspect, given the current environment, it is relatively resource-lite. Unlike judicial mediations, which usually require a full day and the use of three rooms at a tribunal building, a judicial assessment would expect to last (perhaps) half an hour and would require no additional resources given that it would form part of the case management hearing.

104. However, we have the following doubts as to the efficacy of this new procedure:
- 104.1 Knowing lawyers' penchant for change, we wonder how many advisers will actually embrace this scheme, at least pending firm evidence as to how it is operating. There is a danger of "chicken and egg" here;
  - 104.2 The scheme will only likely apply to relatively complex cases where a preliminary hearing is listed. In practice that will exclude a large number of cases;
  - 104.3 Judicial Assessments will not be able to assess evidence and will take place at an early stage. Even if some of the issues have been clarified there can still be key issues whose determination will require further particulars or disclosure. One wonders, in most cases, how much value the assessments will actually add;
  - 104.4 As noted above in relation to ENE (see paragraph 82), there is a danger that Judicial Assessments can be seen as merely the particular view of the evaluating judge (and a provisional one at that). Whereas that particular judge will not be the judge actually hearing the claims and the latter could well adopt a very different approach to the issues (perceptions of certain employment judges as "claimant-friendly" or "respondent-friendly", however ill-informed, will not go away);
  - 104.5 It is understood that the scheme is thought to have particular potential for "reality checking" in cases involving at least one litigant in person. That may be so but they must first agree to participate. Many will not do so, particularly if their (legally advised) opponent seems keen to do so.
  - 104.6 Finally, one wonders how many parties with a weak claim will risk being exposed by participating in the process, albeit a refusal to participate could be seen as a sign of weakness that some may wish to avoid.

## K. OTHER TYPES OF ADR

### **Early Conciliation**

105. In 2014 the Government introduced a new Pre-Action "Early Conciliation" scheme which requires employees/ex-employees intending to bring a claim in the Employment Tribunal first to notify Acas who would then try to reach a settlement of the claim with the employer/ex employer using their powers of conciliation. The latest figures from Acas (in its annual report for 2015/2016) suggest that this scheme has secured a settlement directly in 30% of claims they have dealt with and claim that user research shows that 71% of Early Conciliation users considered that they were helped by Acas to avoid an ET hearing. Clearly, therefore this scheme has had some success in reducing the number of claims that might otherwise have gone through the tribunal system. However, the scheme only operates at the stage when the employee/ex-employee is contemplating legal proceedings – which is pretty late in the day – and it is not clear how many of these claims represent successful conciliation by Acas as opposed to a decision not to proceed by the employee for whatever reason (including tribunal fees).

### **Expert Determination**

106. Expert Determination is defined in the leading textbook on the topic as:  
*"a means by which the parties to a dispute jointly instruct a third party to decide an issue between them. The third party is commonly known as an expert, and is a person who has usually been chosen for expertise in the issue between the parties."* (See Kendall on Expert Determination 5th edition).
107. Kendall goes on to state that *"[e]xpert determination is found in a wide range of commercial applications, from rent reviews to share valuations, from construction disputes to pension scheme transfers, and from computer disputes to oilfield exploration; it is simple, informal and contract-based. [It] had its origin in non-contentious valuations; it is increasingly being used for technical as well as valuation issues, and for general dispute resolution. It can be specially tailored to provide the most appropriate means to resolve many kinds of dispute. Expert determination is quick, cheap in comparison with other systems, and private."* It has been commended in a number of judicial decisions as a means of ADR.

108. Expert Determination has certain similarities to arbitration. Both are private systems of dispute resolution leading to a binding outcome. But there are important differences. Experts' activities are subject to little or no control by the court, there is generally no appeal from their decisions but they can be liable for negligence in performing their functions. The main difference lies in the procedure and the absence of remedies for procedural irregularity in Expert Determination. Decisions of experts require further court action to be enforced.
109. When seeking to use Expert Determination as a form of ADR the parties must take into account a number of factors including the following key ones:
- 109.1 whether, in the case of a contract containing an expert determination clause, they can choose whether to comply with the clause or disregard it;
  - 109.2 whether they are seeking a simple decision or a more detailed document resembling an arbitral award;
  - 109.3 the details of the process, its cost and how long it should take;
  - 109.4 the scope of the expert's jurisdiction (increasingly, such clauses are stated to apply only to certain types of dispute);
  - 109.5 what standard of fairness should be applied to the process;
  - 109.6 whether the decision is intended to be final and binding; and
  - 109.7 whether the expert can be sued.

110. Although experts are already deployed in relation to certain aspects of certain employment disputes such as Equal Pay, many employment issues do not turn upon a handful of factual or legal issues but upon a complicated factual matrix, and upon malleable concepts such as 'reasonableness', and "fairness" and "proportionality".
111. For these reasons Expert Determination in our view is likely to be of limited use in terms of resolving employment disputes. As with ENE, Expert Determination is likely to be most suited to those (relatively few) employment disputes where discrete points arise. However, the point would need to be well defined as the resolution sought would be usually a binding one, and the chosen expert would clearly need to be sufficiently authoritative for the parties to agree on their identity. Again, as with ENE, it would appear both from Kendall, and from the cases where the Herbert Smith Freehills London disputes practice has used Expert Determination, that it works best where there is an underlying relationship which both parties wish to preserve. Examples where Expert Determination could be utilised would therefore likely include contractual construction. Indeed, Kendall refers to a couple of judicial decisions where executive bonus disputes were resolved in this way. A further class of dispute where expert determination could be feasibly deployed would be certain disputes relating to restrictive covenants where there was a mutual need for a swift, confidential and binding outcome.
112. To the extent that the matters covered by Expert Determination covered the potential exercise of statutory rights by employees/ex-employees, the same issues restricting the ability to contract out would apply as referred to in the separate ELA report examining the use of Arbitration as a means of resolving employment disputes.
113. Other than the use of Expert Determination to resolve a couple of bonus disputes our working party has not encountered its use in the resolution of employment disputes. However, in principle it could be considered as a form of "Arbitration-lite" process to resolve specific, discrete issues in what would be a cheaper and quicker process than arbitration (or any other form of legal process resulting in a binding determination).
114. **Adjudication**  
This is a form of (binding) dispute resolution currently used in certain specific sectors such as construction. In our view it does not add anything to the resolution of employment disputes not already provided by expert determination or arbitration.

## L. CONCLUSIONS AND RECOMMENDATIONS

### 1. Which forms of ADR should be recommended as options for resolving employment disputes?

115. As will be apparent from our report, ADR (in particular, mediation) is considerably more widely used within and by employers than might have been appreciated. The reports of the apparent success of **workplace mediation** within higher education and parts of the public sector are notable and there is almost certainly more use of workplace mediation within the private sector, probably by the larger employers, than has come to light via our researches as much of the available evidence appears to be anecdotal. Similarly, the use of **neutral evaluation** was something none of us had previously encountered. This appears to be used both in the public and private sectors and again, is workplace based.
116. The key advantages of both initiatives are as follows:
- 116.1 They can be used for all types of employment disputes-both low value and higher value;
  - 116.2 They constitute the best chance of “nipping the dispute in the bud” before attitudes get entrenched, legal costs mount and the victimisation risk increases;
  - 116.3 Because they are voluntary and non-binding, they are not the only opportunity to resolve the issues and so, to an extent, stakeholders have little to lose (and much to gain) by giving them a go.
117. Their key challenges appear to be these:
- 117.1 Employers will need to invest in training relevant personnel as to how to get the best out of these processes; internal mediators need to be identified and trained, managers will need to be trained and employee representatives-in particular any workplace trade union-will need to be engaged and “brought inside”. Sometimes it will be necessary to involve an external mediator/facilitator-that too will come at a cost. As noted by both ACAS and TCM, the necessary infrastructure needs to be put in place. Each business will need to conduct an appropriate cost/benefit analysis to determine the level of investment that can be justified.

117. 117.2 Both employees with workplace issues and managers will need to be able to trust these processes to be able to deliver an outcome that each, respectively, consider to be fair. The process is highly facilitative with the parties assisted in working out an agreed outcome and in practice they will not sign up to an outcome that they do not perceive to be fair.
- 117.3 Relevant policies, in particular grievance processes, will need to be updated to refer to the use of these new procedures.
118. There is clearly a central role for in-house advisers in the development and operation of these processes. External advisers often advise on aspects of dispute avoidance strategy; and in our experience they could play a valuable role in the following ways:
- 118.1 Advising on the best way to structure and operate the processes, using their knowledge of the client's business and its key stakeholders;
- 118.2 Advising on best practice in that regard;
- 118.3 Overseeing the operation of such processes in relation to a potentially sensitive dispute while advising in tandem on appropriate steps to be taken to guard against the possibility that the dispute is not resolved at this stage.
119. We acknowledge that employment lawyers, particularly those with large dispute caseloads, may have mixed feelings about assisting the development of workplace mediation. However, in our view it would be unwise for us to ignore this development. It appears from the apparent comparative lack of knowledge amongst employment lawyers of the extent of the operation of these schemes that employers may have simply proceeded on the basis that their external advisers could not add anything of value. And yet advice on the wider strategy for dispute avoidance is something that should be firmly part of employment lawyers' practices.
120. Realistically, the wider development of workplace ADR schemes will take some time. Similarly, by no means all disputes will prove capable of being resolved via those processes. It would therefore in our view be desirable to develop an "ADR toolkit" in which suitable forms of ADR are available at various points both prior to, and in the course of, the litigation process. It is understood that the current President of the Employment Tribunals shares that view. The additional forms of ADR that we see as being the principal options in this regard are these:

120. 120.1 **Private mediation.** Although we recognise that further efforts need to be made to develop lower cost mediation options to allow greater use for lower value claims. There is a current debate as to the extent to which mediators should be more evaluative; in our view this should be party-driven. In other words, it should be for the parties to decide how evaluative the mediator should be but mediators should be prepared to be more proactive in suggesting this as an option during the mediation. Similarly they should be more proactive in assisting the parties to finalise a legally binding settlement agreement. We recommend that, in addition to producing a mediation agreement, the mediator has available a standard settlement agreement in order to expedite finalising a legally binding agreement. ELA should consider whether it could produce such a template.
- 120.2 **Acas conciliation.** Initial statistics suggest that this is successful in resolving a large number of claims which may well otherwise have gone into the tribunal system. One option would be to allow Acas to provide a (free) mediation service, perhaps on a trial basis. However, that would come at a cost to Government.
- 120.3 **Judicial mediation.** We consider that this is a sadly underused resource and that there is cogent evidence that further investment by Government would reap rich rewards. Again, however, this will depend on policy decisions by Government as to how it wishes to deploy resources.
121. We can see a potential role for **ENE**, but probably only in high value cases where there is a considerable gulf between the views of the merits by the parties (and/ or their advisers) and where there are limited contested issues of fact. It is clearly far too early to pass any judgment on the new Judicial Assessment scheme but the level of take-up should be monitored. If a binding resolution is required on a discrete issue (with no contested issues or fact) then **Expert Determination** could be considered instead of (say) the Part 8 procedure in the High Court.

## **2. Are particular forms of ADR more suitable to resolve certain types of Employment dispute?**

122. Certain types of dispute are unlikely to be amenable to any form of ADR, for example test cases where the application of a principle or principles of law needs to be tested (the recent Uber proceedings being a paradigm example). That aside, our thinking is as follows:
- 122.1 In principle there is no reason why workplace mediation or neutral evaluation could not be used for virtually any form of employment dispute but the likelihood is that this will be best suited to lower value disputes (including cases where the financial value is low but the emotional stakes and potential impact on the workforce are high) or more “run of the mill” ones. Proponents of neutral evaluation claim that this method of resolution is particularly well suited to multi-party disputes.

122. 122.2 Similarly Acas Conciliation has proved adept at dealing with a number of employment disputes. We are not aware of any publically available analysis of the types of disputes that have been thereby resolved but we suspect that they, too, would for the most part be lower value or more “run of the mill”.
- 122.3 In relation to disputes where there are serious allegations (e.g. discrimination) and/or complex factual or legal issues involved we suspect that the most likely way of achieving a settlement will be through a mediation process handled by an experienced mediator, whether arranged on an ad hoc basis or, if proceedings have been commenced, via judicial mediation. Clearly privately arranged mediation is more flexible as it can be used to resolve disputes at the pre-action stage as well as following the issuing of proceedings – which can be particularly valuable in helping to preserve the employment relationship. Although judicial mediation will only be available to resolve disputes which are a fair way down the procedural track, it has in practice only been available to certain types of dispute and would in principle be suitable to resolve any case where there has been a preliminary case management hearing listed.
- 122.4 The consensus seems to be that ENE can be an additional option for “the right type of case”. Identifying the right type of employment dispute for ENE, however, is not obvious. Because of the extra costs involved in preparing for an ENE, instinctively it feels more suitable for higher value cases. Moreover, in light of the difficulties in resolving contested issues of fact the case would need to be one wholly or mainly turning on the application of legal principles – e.g. points of construction. Finally, because the outcome will be non-binding, there would need to be something motivating both parties to use it; perhaps they might be poles apart and need an authoritative “steer” and/or there may be an underlying relationship that they both wish to preserve.
- 122.5 As noted above, it remains to be seen how successful the new Judicial Assessment process will be and for which types of dispute it will work best.

### **3. Which forms of ADR are most suitable to resolve low-value employment disputes?**

123. As noted above we consider that the following forms of ADR would be most suitable to resolve low-value employment disputes:
- 123.1 Workplace mediation or neutral evaluation;
- 123.2 Conciliation by Acas (albeit this presupposes that the dispute has reached the stage where the employee is contemplating issuing proceedings);
- 123.3 Private mediation involving an external mediator, provided that suitable low cost schemes could be developed.

#### 4. What steps could be taken by the government (legislative or otherwise) to encourage greater use of ADR?

124. The principal steps that could be taken by the Government would be as follows:
- 124.1 Lead by example. Ensure that all Government Departments and public bodies were publically mandated to make the greatest possible use of ADR in its various forms. At present that does not seem to be the case and we have identified at least one real obstacle to its use in the public sector (see paragraph 45 above);
  - 124.2 Issue a consultation paper which:
    - 124.2.1 showcased the various forms of ADR that are currently being used in the UK;
    - 124.2.2 stressed/restated the particular benefits that flow both to employers and employees from the use of ADR;
    - 124.2.3 reaffirmed the Government's commitment to see greater use of ADR to resolve employment disputes;
    - 124.2.4 confirmed that appropriate additional resources would be made available for this purpose in recognition of the saved costs to the public purse from more disputes settling at an earlier stage; and
    - 124.2.5 proposed a number of potential legislative changes which could encourage the greater use of ADR both at the pre-action stage and post issue of proceedings.
125. Potential legislative changes could include the following:
- 125.1 Amending the Acas Code to remove the expectation that an employee lodge a grievance as a precursor to issuing proceedings (see above).

125. 125.2 Extend the limitation period to, say, six months in all cases or to allow the parties to enter into standstill agreements, as used in the High Court (and where of course certain statutory rights can also be enforced), for the purpose of pursuing an ADR process.<sup>10</sup> In many cases the issuing of proceedings can constitute something of a Rubicon the crossing of which can make settlement considerably harder to achieve. Because limitation periods for making claims to enforce statutory employment protection rights are considerably shorter than for most other claims, there can sometimes be insufficient time for the parties to engage in worthwhile discussions before proceedings have to be issued. It should be acknowledged that the new pre-action conciliation rules in effect allow an ad hoc extension of the limitation period. But this is limited in operation and operates against the backdrop of the employee having first to initiate the “hostile” step of intimating a claim via Acas.
- 125.3 The operation of judicial mediation could be extended to cover any case which is listed for a preliminary case management hearing. We acknowledge that this would require investment by Government, particularly in providing further mediation training for employment judges.
- 125.4 Allow an Employment Judge to treat any unreasonable refusal to participate in ADR as evidence of unreasonable behaviour which could trigger a costs award. The current contrast between the sanctions potentially applicable to parties in the High Court who unreasonably fail to participate in ADR and the complete lack of sanctions applicable to cases in the Employment Tribunal could be seen to be anomalous and to contribute to the relative lack of use of ADR for the resolution of statutory claims (as confirmed by our survey-see paragraph 17.6 above). Given the recent confirmation in the various discussions surrounding the introduction of a Unified Employment Court that there is no appetite to make it a cost shifting jurisdiction, any such sanction would have to be broadly consistent with the current rules.
- 125.5 Consider whether any degree of compulsion should be introduced in the tribunal process in relation to the use of ADR. One initial step could be to make the conduct of Judicial Assessments mandatory, rather than voluntary, particularly if the initial take-up is low.

##### **5. Should training be provided to ELA members in relation to ADR, and if so, what should the scope of that training be?**

126. Our recommendations are that ELA provides the following training to its members:
- 126.1 An Introductory course to explain the different types of ADR, how typically each process works and when best to propose ADR;

<sup>10</sup> A potential precedent for such a change can be found in sections 140A-140AA of the Equality Act 2010 which extend the limitation period in relation to disputes covered by the EU Mediation Directive (which covers certain cross border disputes) and the EU ADR Directive (covering certain consumer disputes) until eight weeks after the end of a mediation process provided that that process starts before the expiry of the original limitation period.

- 126. 126.2 A course aimed at in-house lawyers focusing on establishing and operating workplace mediation schemes
- 126.3 A more in-depth course to explain the (private) mediation process, and how to get the most out of it for your client as their representative;
- 126.4 Staging a mock mediation (truncated to cut out the “sitting around time”);
- 126.5 A course to explain the qualities expected of a mediator and containing some role play exercises (aimed at aspiring mediators).

**6. What other steps could ELA take to promote the greater use of ADR to resolve employment steps?**

- 127. We recommend the following:
  - 127.1 Production of a standard template settlement agreement which could form the starting point for a legally binding agreement at the end of an employment mediation;
  - 127.2 Maintain a list of mediators who claim to have a reasonable degree of expertise in conducting employment mediations-perhaps minimum of 5 mediations – this will need to avoid any express or implied recommendation or accreditation by ELA;<sup>11</sup>
  - 127.3 Encourage newly qualified mediators who wish to gain experience of employment mediations to put themselves forward for inclusion in a list of mediators at either nil or very modest cost to mediate low value claims.

<sup>11</sup> We understand that in anticipation of receiving this report ELA is in fact in the process of establishing this list.

## APPENDIX 1

### MEMBERS OF THE ELA ARBITRATION AND ADR GROUP

Peter Frost, Herbert Smith Freehills LLP (Co-Chair)

Paul Goulding QC, Blackstone Chambers (Co-Chair)

Ivor Adair, Slater & Gordon (UK) LLP

Michael Anderson, Lewis Silkin LLP

Joanna Blackburn, Mishcon de Reya LLP

Charles Ciumei QC, Essex Court Chambers

Maya Cronly-Dillon, Arthur J Gallagher International

Peter De Maria, Doyle Clayton Solicitors Ltd

Peter Finding, Withers LLP

David Green, Charles Russell Speechlys LLP

Shobana Iyer, Swan Chambers

Jenni Jenkins, Memery Crystal LLP

Susan Kelly, Winckworth Sherwood LLP

Esther Langdon, Vedder Price LLP

Stephen Levinson, Keystone Law

Jane McCafferty, 11 KBW

Ken Morrison, Kingston University London and St George's, University of London

Malcolm Pike, Addleshaw Goddard LLP

Mary Siddall, University of Southampton

David Widdowson, Abbiss Cadres LLP

Max Winthrop, Short Richardson & Forth LLP

## APPENDIX 2

### LAW FIRMS AND CHAMBERS WHO RESPONDED TO THE SURVEY

11 Kings Bench Walk

Addleshaw Goddard LLP

Cloisters Chambers

DAC Beachcroft LLP

Doyle Clayton Solicitors

Essex Court Chambers

Eversheds LLP

Herbert Smith Freehills LLP

Keystone Law Limited

Lewis Silkin LLP

Littleton Chambers

Memery Crystal LLP

Mishcon de Reya LLP

Old Square Chambers

Short Richardson & Forth LLP

Slater and Gordon (UK) LLP

Swan Chambers

Travers Smith LLP

Vedder Price LLP

Winkworth Sherwood LLP

Withers LLP

## APPENDIX 3

### SUMMARY OF RESPONSES FROM UNIVERSITIES

1. **University of Gloucestershire**, *"We have used mediation quite a lot to resolve disputes between employees before they reach a formal stage. In the last 6 months, we have had in the region of 5 mediation activities take place, all of which have helped move a difficult situation on. The key in my view is to effect the mediation at the earliest opportunity, although in one of these cases it occurred sometime into a dispute, but the outcome was successful. We always use qualified mediators, and have taken the view that even though there is internal capacity with a trained mediator, it is better to have an external person to ensure independence."*
2. **University of South Wales**, *"We have recently trained internal mediators to deal with student and staff mediation conciliation. Our aim is to use this group for all mediation except where it's very complex or difficult and we need to draw on other skills. My view is the same as yours in that it needs to be at early stages rather than as an outcome of a grievance, which seems to be the norm. We've recently updated our policies to reflect this but need to reinforce it in practice if it's going to have any impact or at least a positive impact."*
3. **Leeds Art**, *"I'm a trained mediator and have used informal mediation as a way of resolving issues over the past 2 years. I have made 2 formal referrals to an external mediator in the last 24 months where there had been breakdown in relationships between managers and their staff. One was on the back of a grievance which wasn't upheld; and whilst by no means perfect there is now a productive working relationship; the other was due to an ongoing low level issue and again the working relationship is better. My personal view is that the second scenario is the better for mediation; in the first case I am aware that there is still an ongoing low level issue and the mediation has been no more than a sticking plaster. I would certainly agree that mediation is better as part of an informal process."*
4. **Goldsmiths, University of London**, *"We have used private mediation on a small number of occasions, where the parties have been relatively senior or there has been a contentious issue, but both parties have been amenable to this as a way forward. We also have a section on mediation in all our ER policies and guidance to promote informal mediation. To my knowledge, we have not used workplace mediation in this context, but I think we would consider this as an option if it arose."*

## SUMMARY OF RESPONSES FROM UNIVERSITIES

5. **Anglia Ruskin University**, "At Anglia Ruskin, in the last 2 years or so, a small number of staff have been trained as Internal Mediators. This is to provide a pool of support for managers who may feel that a mediator from outside their immediate work area may assist although there's still a clear expectation that local managers are best placed to informally resolve a reasonable amount of conflict situations suitable for informal resolution at a local level. I'm not aware of using private mediation services, certainly not within the last 6 years. In relation to workplace mediation, over the last two years we've had discussions around 5 incidences of conflict considered for mediation, three of which were deemed appropriate to be handled by local managers rather than move directly to using internal mediators. Of the remaining incidences one was dealt with as a facilitated meeting with some use of mediation techniques and the other a full mediation process, both of which were work and role related. Both outcomes were apparently successful. As one of the internal mediators I fully agree that the informal stage is the right time to try to resolve conflict before the parties become positional/entrenched. Our Grievance Policy offers mediation as an option but moving to mediation is quite rare for us."

6. **The North West University Mediation network** "are pleased to announce that they will be joining the HE/FE mediator's network for future meetings. This link will enhance the opportunities for colleagues to join one network, available across the United Kingdom and which will continue to support learning and experiences of mediation across the HE/FE sector. To celebrate our alliance, we are holding a mediation conference on the 22nd September at the University of Central Lancashire. This event will enable mediation practitioners, as well as those interested in developing mediation skills, to hear from academic colleagues specialising in mediation and conflict resolution, listen to practical case studies, participate in mediation activities and generally network with other colleagues to support their own learning and development".

Further information about the HE.FE Forum and its remit can be found at <http://www.dundee.ac.uk/academic/edr/hefeforum.htm> or by contacting Fiona O'Donnell [f.b.odonnell@dundee.ac.uk](mailto:f.b.odonnell@dundee.ac.uk) or Karen Stulka [k.f.stulka@dundee.ac.uk](mailto:k.f.stulka@dundee.ac.uk)

## SUMMARY OF RESPONSES FROM UNIVERSITIES

7. **Bangor University**, *"We have recently reviewed our mediation Policy and I attach the link for your information:*

**[https://www.bangor.ac.uk/humanresources/policies/employment/Mediation\\_EN.pdf](https://www.bangor.ac.uk/humanresources/policies/employment/Mediation_EN.pdf)**

**[https://www.bangor.ac.uk/humanresources/policies/employment/Dignity\\_Appendix3\\_EN.pdf](https://www.bangor.ac.uk/humanresources/policies/employment/Dignity_Appendix3_EN.pdf)**.

*We have had approximately 6 cases in the last 5 years where we have used mediation as an intervention. These are always at the informal stage and are built into our policies and I attach the link to the Dignity at Work and Study (currently under review) as an example. I would suggest that 50% are successful. We originally trained a team of in-house mediators but realized that they were not being used enough to warrant the cost of re-training and keeping up to date so we use external mediators now in all circumstances. As well as a cost saving, it has a quicker response time and staff are generally happier with the externality."*

8. **Brunel**, *"We have an in-house mediation team. We do use an external agency for more complex or time consuming matters (group mediation etc.) but this has only been for around half a dozen cases. We have now incorporated the use of mediation within our grievance procedure and whilst not compulsory workplace mediation would be seen as an avenue that should be explored provided obviously that it had the consent of both/all parties."*

9. **University of London (central HR department)**, *"We do use mediation here for employment disputes both between individuals (and between a manager and his entire team once). Generally we use a reputable firm such as TCM but we also have links with independent mediators in the sector. Among local institutions we have sometimes been able to use trained staff from another college to do mediation, although logistically it can be challenging to get people available quickly. Mediation can work if everyone is committed to it, but often attitudes are so entrenched by the time a mediator arrives that there is little practical progress that can be made. It is worth pointing out too that some TU officials view it with suspicion as undermining their roles. But I am sure we will go on using it in the future."*

10. **Exeter**, *"It is occasionally used here, in an attempt to resolve difficult situations between employees (e.g. personality clash issues). It forms part of the Dignity and Respect procedure (harassment and bullying allegations), and can be used as the first part of the formal grievance procedure. It is voluntary"*.

## APPENDIX 3 *cont.*

### SUMMARY OF RESPONSES FROM UNIVERSITIES

11. **Hertfordshire**, *"We don't really use private mediation at UH - we do use workplace mediation as explained below. However our Law School did offer private mediation for non-workplace disputes but I think that may have stopped now. We are using at UH and have trained up a number of staff as mediators within the HR department but also in other departments. We have a mediation policy and we strongly advocate mediation as an alternative dispute resolution. Individuals can request this or our team of HR Business Partners can suggest this in the event that a problem cannot be resolved between the two parties informally. Typically it is used for breakdowns in working relationships or where a specific complaint has been made by one party against another. We don't always follow the traditional Acas model although in the most intransigent cases we do. Often a facilitated conversation can work effectively."*

12. **Kingston**, *"At Kingston we have used private mediation twice in the past five years and then unsuccessfully in the sense that in one case the problems were not solved and led to compromising staff out of the organisation and in the second case while the problems persisted the employee concerned still works for us. The HR view is that for mediation to have a chance of success it should form part of the informal stage of procedures when there is still the possibility of saving the working relationship, and then only if parties are satisfied, with HR guidance, that the matters in dispute are apt to be settled by mediation."*

13. **St. George's, University of London**, *"We have two trained mediators in our HR team. The push to mediation is part of our efforts to tackle workplace bullying and harassment through our dignity at work policy and procedure. However, to date we have not had any mediations because by the time HR are involved it is often too late as staff are by that stage not interested in working on saving working relations and want someone to be punished. It would only work very early on as part of the informal stage of a grievance and then only in certain circumstances."*

## APPENDIX 4

### CASE STUDIES ABOUT INTERNAL MEDIATION SCHEMES IN THE PUBLIC SECTOR

#### **University of Southampton**

UoS have trained two cohorts of mediators since their scheme was re-launched in 2008. Since 2012, a part-time Mediation Co-ordinator has been employed to manage the service. To date this year they have had 33 referrals- from both staff and students, but mainly staff. As ever some of these are not suitable for mediation and are signposted on to more suitable resources, in some cases the other party won't agree to mediate, some people leave the UoS, some get sorted out after talking it through with the Mediation Co-ordinator at the triage stage. 16 cases have gone to mediation this academic year. All 16 reached agreement, but 2 of them were only partial agreement.

#### **Royal Navy**

The Royal Navy uses mediation to resolve workplace issues. They have two RN Police officers who are trained mediators as well as carrying out a role as investigators, although one of the chaplains has himself just done ADR Group training and believes that other RN personnel have also been trained. He describes challenges to mediation in this context including mediating between (and by) different ranks, the difficulty of accessing an internal complaints process and the particular types of conflict that can be produced during a life at sea.

#### **London Borough of Newham**

London Borough of Newham introduced internal mediation in 2012. Nine mediators were trained initially (there are now five still in post) and as part of a pilot scheme, all complaints and grievances were referred to mediation co-ordinators in the first instance. Over a period of six months, out of 28 referrals, 18 were resolved using either mediation, conflict coaching or facilitated meetings. In total, around 60 mediations have now been completed with all but a handful resulting in some sort of agreed outcome. Newham now want to replace their Grievance and Bullying policies with a Resolution policy under which any 'request for resolution' from a member of staff will be subject to a 'triage' process to decide how it might best be resolved. There are also plans to roll out the mediation service to neighbouring councils Bexley and Havering.

## APPENDIX 4 *cont.*

### CASE STUDIES ABOUT INTERNAL MEDIATION SCHEMES IN THE PUBLIC SECTOR

#### **Kent County Council**

KCC operates a Resolution Policy which allows members of staff to 'seek a resolution' rather than raise a complaint. It is interesting that the council was also the first local authority in the country to be approved by Trading Standards to offer ADR for consumer disputes.

#### **Department of Work and Pensions**

DWP has introduced an Issue Resolution policy to replace its previous policies on grievances, harassment and bullying. By raising an issue, members of staff can seek to have a complaint resolved informally and there is access to an internal mediation service.

#### **Further and Higher Education**

The University of Dundee convenes a Further and Higher Education sector group, the HE.FE Mediation Forum, to share best practice in the sector. This has a membership across England and Scotland, mainly of universities who run mediation schemes either workplace or for student services. There are around 80 members and so active in mediation work.

## APPENDIX 5

### JUDICIAL MEDIATION - AN EXPLANATION FOR THE PARTIES

#### **Introduction to judicial mediation**

It is often better for everyone involved to settle their legal dispute by agreement rather than by going through a possibly stressful, risky, expensive and time-consuming hearing. The process of judicial mediation is one method for achieving settlement. It is entirely voluntary and it is private. It incurs a fee, payable by the respondent, which is presently fixed at £600.

## APPENDIX 5

### JUDICIAL MEDIATION - AN EXPLANATION FOR THE PARTIES *cont.*

Judicial mediation has several potential advantages over a hearing: the parties remain in control of their own agreement, rather than having the tribunal impose outcomes; the parties may include practical solutions which would not be open to the tribunal at a hearing (for example an agreed reference, an apology and/or confidentiality); it provides a certain, speedier outcome which cannot be appealed.

#### **Is your case suitable for mediation?**

Cases with complaints under any jurisdiction are potentially suitable for mediation although it is not likely to be cost-effective – and therefore not available – in short cases. A working guide is that the hearing has been listed for at least three days. Discrimination complaints and those where a claimant is still employed by the respondent may be particularly suitable. Multiple respondents may diminish suitability. Particular features in an individual case may make mediation desirable. Mediation will not be offered unless both parties actively want it. Even if both are willing, mediation may not be offered. The decision whether or not to offer judicial mediation is made by the Regional Employment Judge.

#### **How is your case identified as suitable?**

At a preliminary hearing an employment judge may ask you if you consider your case suitable for mediation. If both parties are keen to enter mediation the judge will refer the file to the Regional Employment Judge who will decide whether the case may qualify for an offer of judicial mediation. This may include consideration of how reasonably the litigation is being conducted. An up-to-date schedule of loss/statement of remedy will assist the Regional Employment Judge.

#### **Telephone preliminary hearing**

If satisfied, the Regional Employment Judge will hold a preliminary hearing with the parties (or their representatives) by telephone. It is likely that judicial mediation will be offered in this hearing if both parties persuade the Regional Employment Judge that it has a high prospect of success. This means, in large part, that they must demonstrate a real willingness to compromise.

Where judicial mediation is offered and accepted by both parties, the Regional Employment Judge will list a date for the mediation, usually within the next three weeks,

## JUDICIAL MEDIATION - AN EXPLANATION FOR THE PARTIES

and make any necessary orders and directions. The Regional Employment Judge will need to know that decision-makers with authority to make decisions on the day will be at the mediation in person, so parties should be able to provide names and job titles during the telephone hearing.

### **What happens in judicial mediation?**

The parties to a judicial mediation come to the tribunal office for what is listed as a private preliminary hearing. They receive the assistance of a judge trained in mediation for a day, very occasionally two days. The judge will not make decisions for the parties, impose solutions, give advice or hear evidence although, if requested and subject to mutual agreement, the judge may give an indication as to the strength of a particular point. The judge will help the parties to reach their own solution by managing the process in a fair and constructive manner, making sure that they understand what is going on and helping them to focus on areas of agreement and common interest.

The mediation day starts relatively early. On arrival, the parties are provided with separate consultation rooms which they may occupy for the duration of the mediation. At 9.30am the parties are invited to meet the judge and each other around a table in a private room. The judge will outline what the parties should expect to happen and remind them of the vital confidentiality of the mediation process. The judge will emphasise that if the mediation fails, no mention may be made of it at all in the further stages of the case or at any hearing. The judge who conducts the mediation will not hear the case if the mediation fails. The parties need not contribute anything at this initial meeting: but they do have an opportunity to ask questions if they are at all unclear about what is to happen.

Occasionally one party may not wish to meet the other in this way. Although the initial meeting is intended as a helpful part of the process, it is not compulsory. If a party has concerns about the meeting, they should tell the tribunal clerk at the start of the day.

After the round-table meeting, the parties withdraw to their own rooms. The judge then visits the parties in their separate rooms. The judge will seek to understand what each side wishes to achieve and, sometimes, to manage their expectations. The judge will use that understanding to help the parties move to a position where they have reached a solution which they both agree.

## APPENDIX 5 *cont.*

### JUDICIAL MEDIATION - AN EXPLANATION FOR THE PARTIES

If lawyers are involved, they will often be able to record the agreement in writing. So it is likely to be useful if they bring laptops with internet access, memory sticks and template compromise agreements.

After the initial meeting, the parties need not meet up again, but often do if they (perhaps more realistically, their lawyers) wish to discuss matters directly or at the end when agreement is reached.

When agreement is reached the judge and/or the parties will usually contact Acas which is independent of the judiciary. To this end, the parties are requested to bring the name and contact details of their Acas conciliation officer, having notified the officer in advance of the mediation date. The Acas officer may be sent any written agreement and/or a telephone conference call may be set up to speak to the officer to establish that there is a binding legal agreement. It is advisable for any draft settlement agreement to be copied to the other party in advance of the judicial mediation.

A successful mediation is one which concludes with a signed agreement. The hearing will then be vacated and the dispute will be over.

### JUDICIAL MEDIATION - GENERAL PROTOCOL

1. All Regions in England and Wales now operate the judicial mediation Scheme following a pilot scheme in 2007. The Pilot Scheme was shown to be very successful. The scheme was rolled out nationally from 1 January 2009.
2. Judicial mediation is in principle available for any type of case. If the employment relationship still exists, that may provide an additional reason for holding a judicial mediation. Given that one of the reasons for holding a judicial mediation is to save Tribunal time, it is unlikely to be proportionate to hold a judicial mediation for a case likely to take less than 3 days at a full merits hearing

## APPENDIX 5 *cont.*

### JUDICIAL MEDIATION - GENERAL PROTOCOL

3. The information leaflet on judicial mediation should be sent out with the preliminary hearing agenda when a preliminary hearing is (automatically) ordered. This is so the parties will already be informed about judicial mediation when attending the preliminary hearing. If for any reason this has not happened, the information leaflet should be made available at the preliminary hearing or sent out on request.
4. All relevant parties have to agree to judicial mediation if one is to be held. Agreeing to judicial mediation must involve a commitment held in good faith to use best endeavours to bring about a settlement of the case.
5. If all parties and the Employment Judge agree at a preliminary hearing that a judicial mediation is appropriate, a date for the judicial mediation can be agreed in consultation with listing and orders in respect of preparation for the judicial mediation are to be made at the preliminary hearing.
6. In all other circumstances, requests for a judicial mediation need to be made to the Regional Employment Judge in writing. The request needs to be agreed by the parties. The Regional Employment Judge will need sight of the Claimant's statement of remedy/schedule of loss. It is likely that the Regional Employment Judge will hold a brief telephone preliminary hearing with the parties to ascertain the suitability of judicial mediation and make appropriate orders setting up the case.
7. A sensible time for holding the judicial mediation is before the bulk of case management orders for the full merits hearing need to be complied with. That said, in many cases it will be desirable for disclosure to take place prior to the judicial mediation so that no relevant but unknown documents are hidden from the parties' attention.
8. That a judicial mediation is to take place does not mean that a preliminary hearing should not perform its usual functions. Issues should still be identified. A full merits hearing should be fixed. This latter point means that days saved by a successful judicial mediation can be calculated. This is a statistic needed to support the facility of judicial mediations.

APPENDIX 5 *cont.*

## JUDICIAL MEDIATION - GENERAL PROTOCOL

9. Judicial mediations will be conducted by ticketed mediation judges in accordance with their mediation training. A mediation judge will not make determinations and will not give advice. A mediation judge may give guidance along the lines of reality-checks and is often expected to do so by the parties. Matters for such guidance could include, by way of example, the structure of a cause of action or the appropriate compensation brackets for injury to feelings.
10. A typical bundle for a judicial mediation would include the pleadings, case management orders, statement of remedy/schedule of loss, counter-schedule of loss (where appropriate), and any pivotal liability or remedy documents selected by the parties. It is not envisaged that the bundle for the full merits hearing needs to be replicated.
11. What happens at a judicial mediation, save the settlement agreement where concluded, is confidential to the judicial mediation and may not be referred to in any subsequent proceedings. Judicial mediations are held in private.
12. Procedures for maintaining that confidentiality must be adhered to. The paperwork for judicial mediations must be kept separate from the usual Tribunal file.
13. There may well be issues to be resolved at a judicial mediation which are not part of the claim. In the same way, the outcomes of a judicial mediation need not be limited to the remedies available to a tribunal.
14. A fully authorised decision-maker needs to attend the judicial mediation on behalf of each party.

APPENDIX 5 *cont.*

## JUDICIAL MEDIATION - GENERAL PROTOCOL

15. The parties will be at liberty to conclude whatever legal agreement they think appropriate in order to resolve the dispute. A successful judicial mediation will be concluded by:-
  - 15.1 Acas conciliated settlement (normally recorded by way of an ACAS COT3);
  - 15.2 Legally-binding settlement agreement;
  - 15.3 Consent judgment by the Tribunal; or
  - 15.4 Private settlement.
16. At the end of the judicial mediation, successful or otherwise, a report should be provided by the Mediator Employment Judge to the Regional Employment Judge. The Regional Employment Judge should not only keep a record of these reports within the Region but also send the same to the central record of all the judicial mediations. The report should be dated, identify the parties, the case number, and the outcome and signed by the Mediator Employment Judge.
17. In the case of a successful judicial mediation, the number of Hearing Days saved must be recorded in the report.
18. Many salaried judges are ticketed to conduct judicial mediations, but not all. Training budget constraints have prevented all Judges being ticketed. This will be reviewed in due course. Consideration will also be given as to whether ADR/CEDR trained Employment Judges should by virtue of their accreditation be ticketed to conduct judicial mediations.



## EMPLOYMENT TRIBUNALS

### England & Wales

#### **Presidential Guidance – Rule 3 – Protocol on Judicial Assessments**

1. This Presidential Guidance is issued on 3 October 2016 under the provisions of Rule 7 of the First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Employment Tribunals Rules of Procedure”).
2. The Employment Tribunals in England and Wales must have regard to such Presidential Guidance, but they shall not be bound by it.
3. Rule 2 of the Employment Tribunals Rules of Procedure provides that the overriding objective of the Rules is to enable Employment Tribunals to deal with cases fairly and justly.
4. Dealing with a case fairly and justly includes, so far as practicable - (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.
5. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, the Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

## APPENDIX 6 *cont.*

### **Presidential Guidance – Rule 3 – Protocol on Judicial Assessments**

6. Rule 3 of the Employment Tribunals Rules of Procedure provides that a Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of Acas, judicial or other mediation, or ***other means of resolving their disputes by agreement.***
7. Having regard to Rule 2 and Rule 3, this Presidential Guidance adopts a Protocol for an Employment Judge conducting a Judicial Assessment of a claim and a response as part of a preliminary hearing (case management) held under Rule 53(1)(a) of the Employment Tribunals Rules of Procedure.
8. The Protocol is appended to this Presidential Guidance (together with some Questions and Answers for the parties). It provides a formal framework for the preliminary consideration of the claim and response with the parties that is already often an important part of a preliminary hearing (case management) in defining the issues to be determined at a final hearing.
9. It is not anticipated that it will lead to longer preliminary hearings or to an increase in the number of preliminary hearings conducted by electronic communications under Rule 46. It will be particularly helpful, but not exclusively so, where a party to a claim is not professionally represented at the preliminary hearing (case management).

A handwritten signature in black ink that reads "Brian Doyle". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Judge Brian Doyle

President

Employment Tribunals (England & Wales)

3 October 2016

## APPENDIX TO THE PRESIDENTIAL GUIDANCE - PROTOCOL FOR JUDICIAL ASSESSMENT *cont.*

### **Introduction**

1. This protocol sets out the basis on which the Employment Tribunals will offer to parties the facility of Judicial Assessment of their cases.

### **The aims and purpose of Judicial Assessment**

2. Judicial Assessment is an impartial and confidential assessment by an Employment Judge, at an early stage in the proceedings, of the strengths, weaknesses and risks of the parties' respective claims, allegations and contentions.
3. The statutory basis for the offer is Rule 3 of the Employment Tribunals Rules of Procedure 2013, which provides that "A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of Acas, judicial or other mediation, or other means of resolving their disputes by agreement."
4. Although the purpose of Judicial Assessment is to encourage parties to resolve their dispute by agreement, it is not envisaged that settlement discussions will necessarily occur during the Judicial Assessment itself.
5. Employment Tribunal proceedings are costly of parties' time and resources. They are stressful for parties and witnesses. Almost every case entails risks for both parties.
6. An early assessment of the case by an Employment Judge may assist the parties in identifying what the case is really about, what is at stake, and may clarify and narrow the issues and encourage settlement. This may lead to resolution of the case by agreement between the parties before positions become entrenched and costs excessive, or may shorten and simplify the scope of hearings.
7. This reflects the overriding objective of the Employment Tribunals to deal with cases justly, speedily and cost-effectively (Rule 2). Judicial Assessment is particularly valuable in view of the lack of information and advice available to parties in Employment Tribunal cases, many of whom are unrepresented.

## APPENDIX TO THE PRESIDENTIAL GUIDANCE - PROTOCOL FOR JUDICIAL ASSESSMENT *cont.*

8. Judicial Assessment will generally be offered at the first case management hearing in the proceedings. It will take place after the issues have been clarified and formal case management orders made in the first part of the case management hearing.
9. Most cases of any complexity which are listed for a case management hearing on service of proceedings will be suitable for Judicial Assessment. However, the following (non-exclusive) factors may render the case unsuitable for an offer of Judicial Assessment:
  - there are multiple claimants not all of whom request Judicial Assessment
  - a party is insolvent
  - High Court or other proceedings exist or are intimated

### **Initial formalities**

10. Written information about Judicial Assessment will be available to parties in all cases listed for an initial case management hearing.
11. The parties are encouraged to inform the Tribunal in advance of the case management hearing that they wish to have Judicial Assessment in their case. This will enable the Employment Judge to prepare for the process and to make sure that sufficient time is available on the day. However, even if the parties have made no request in advance, the Employment Judge, in suitable cases, may offer Judicial Assessment during the case management hearing.
12. Judicial Assessment will almost invariably take place at the initial case management hearing. This reflects the need for it to happen at an early stage in the proceedings. It will not generally be offered later in the proceedings.
13. If Judicial Assessment is expected to take place, the case management hearing may be listed in person rather than by telephone conference call if it is envisaged that the necessary in-depth discussion could not take place in a telephone conference call. However, the Employment Judge will have the discretion to conduct a Judicial Assessment by telephone or other electronic communication means in appropriate cases. Sufficient time will be allocated to the case management hearing (generally up to two hours, depending always on the nature of the case).

## APPENDIX TO THE PRESIDENTIAL GUIDANCE - PROTOCOL FOR JUDICIAL ASSESSMENT *cont.*

14. It is a requirement for Judicial Assessment that the parties freely consent to it. Whilst the Employment Judge will explain the advantages of Judicial Assessment, no pressure should ever be placed on any party to agree to it.
15. The information provided to the parties in advance will make clear that Judicial Assessment is strictly confidential. This will be repeated by the Employment Judge before the Judicial Assessment takes place.
16. Although anything said in the Judicial Assessment might be used in subsequent “without prejudice” discussions between the parties, or in a Judicial Mediation, the views expressed by the Employment Judge are non-attributable and must be kept strictly confidential. They must not be disclosed to third parties, other than advisers, as having been expressed by the Employment Judge, or attributed or identified as the views of the Employment Judge in subsequent proceedings, including the final hearing. Unless the parties agree to these conditions, Judicial Assessment will not take place.

### **The conduct of the Judicial Assessment**

17. Judicial Assessment involves evaluating the strength of the parties’ cases. Employment Judges will use their skill and experience in doing this, whilst remaining wholly impartial. Whilst recognising that evidence will not have been heard, Employment Judges may, when appropriate, give indications about the possible outcome of the case.
18. Judicial Assessment is not the same as Judicial Mediation. An outcome of Judicial Assessment may be that a case is listed for Judicial Mediation. Judicial Assessment is indicative in nature and will involve a practical assessment of the case by the Employment Judge. Judicial Mediation is facilitative; has the aim of assisting the parties to achieve a resolution of the issues between them without giving any indication of prospects of success; and is usually allocated a full day of the Employment Tribunal’s time.

## APPENDIX TO THE PRESIDENTIAL GUIDANCE - PROTOCOL FOR JUDICIAL ASSESSMENT *cont.*

19. It is possible that the Judicial Assessment process will lead to immediate settlement negotiations between the parties. This is not the primary purpose of Judicial Assessment, but will be encouraged if it occurs, and time will be made available for it.
20. The Judicial Assessment must only be conducted after the issues between the parties have been fully clarified and case management orders made in the usual way at the case management hearing. The Judicial Assessment is not a way of avoiding the discipline of a properly conducted case management hearing and indeed is dependent upon the process.
21. If the parties consent, the Employment Judge may then give an assessment of the liability and/or remedy aspects of the case. It will be made clear that the assessment is provisional and that the Employment Tribunal hearing the case may come to a different view. In conducting the assessment the Employment Judge must make it clear that they are assessing the case on the state of the allegations and not evaluating the evidence, which has not been heard or seen, and assessing provisionally the risks as to liability and, typically, brackets of likely compensation on remedy. The Employment Judge will encourage parties to approach the process with an open mind and to be prepared to enter into the assessment pragmatically and to be receptive and listen to the Employment Judge's views.
22. The Judicial Assessment will be conducted with a view to assisting eventual settlement of all or part of the claim. If the parties express the wish to enter into immediate settlement negotiations, this may be encouraged but care must be taken to make sure that unrepresented parties have time to think and to consider any offer, and are advised that if an offer is made, they should take time to reflect upon it.
23. Judicial Assessment of parties' cases must be provisionally and guardedly expressed because no evidence will have been heard. Employment Judges must recognise that parties may not fully understand the distinction between a provisional indication and the eventual result of the case.
24. The Employment Judge may make their own notes of the Judicial Assessment. These will not be placed on the case file and the parties will be informed that such notes are kept only as the Employment Judge's record and will not be distributed to them or to any third parties.

## APPENDIX TO THE PRESIDENTIAL GUIDANCE - PROTOCOL FOR JUDICIAL ASSESSMENT *cont.*

25. The Employment Judge who conducted the Judicial Assessment will normally not then be involved in any part of the proceedings which may entail final determination of the parties' rights (except that they may conduct any subsequent Judicial Mediation). This is to encourage full and frank assessment of the claim and ensure public trust in the confidentiality and impartiality of the evaluation. This does not preclude involvement in day to day case management of the proceedings, including, in particular, case management hearings.

### **Action following the Judicial Assessment**

26. In some cases, a settlement may be reached at the Judicial Assessment. Any settlement will be recorded by one of the following means:
- ACAS COT3;
  - Formal settlement agreement between the parties;
  - Consent judgment by the Tribunal;
  - Conditional withdrawal and dismissal of the claim upon payment within an agreed period.
27. More usually, the parties will wish to consider their positions following the Judicial Assessment. If the parties agree, a Judicial Mediation may be listed. Otherwise the Employment Judge will remind the parties of the availability of the conciliation services of Acas.

### **Records**

28. Each Employment Tribunal region will keep a record of the number of Judicial Assessments and settlements in cases where Judicial Assessments have been conducted and will provide a report monthly to the President as evidence of the use and effectiveness of the facility and for judicial training and development.

## JUDICIAL ASSESSMENT - Questions and Answers for the parties

**Not every case is suitable for Judicial Assessment. It is in the discretion of the Employment Judge whether to offer Judicial Assessment**

### **What is Judicial Assessment?**

Judicial Assessment is a service offered by the Employment Tribunals to assess the strengths, weaknesses and risks of the parties' respective claims, allegations and contentions on liability and remedy, at an early stage on an impartial and confidential basis. If all parties and the Employment Judge agree, the Judicial Assessment will take place at the end of the private case management hearing. The service is optional and the Employment Judge cannot decide anything about your case at a Judicial Assessment.

### **Why might I want to consider taking part in a Judicial Assessment?**

Judicial Assessment may save time and expense if it leads to a settlement.

The first part of your case management hearing will clarify the issues between the parties and set a timetable to ensure that the case is ready for a full hearing. This involves a great deal of work over the coming weeks and months (organising documents and witness statements and having other evidence ready such as medical reports). Preparation for a hearing is expensive and time consuming for all parties. The Employment Judge will normally arrange a full hearing, which may be in several months' time. It may involve several days or weeks in Tribunal depending on the complexity of the case.

Judicial Assessment may lead to an early settlement of the proceedings.

### **How is the Judicial Assessment different from the first part of the private preliminary hearing?**

Judicial Assessment is strictly confidential and will involve the Judge giving a provisional assessment of the case.

## JUDICIAL ASSESSMENT - Questions and Answers for the parties *cont.*

### **What does “Confidential” mean?**

The parties cannot give details of the assessment to anyone other than advisers.

Although anything said in the Judicial Assessment might be used in subsequent “without prejudice” discussions between the parties or in a Judicial Mediation, the views expressed by the Employment Judge are non-attributable and must be kept strictly confidential. They must not be disclosed to third parties, other than advisers, as having been expressed by the Employment Judge, or attributed or identified as the views of the Employment Judge in subsequent proceedings, including the final full merits hearing. Unless the parties agree to these conditions, Judicial Assessment will not take place.

The Judge’s notes will be kept separate from the case file and if the case proceeds to a full hearing the Tribunal will not see those notes.

### **What does “without prejudice” mean?**

Anything said during the Judicial Assessment may not be referred to in correspondence or at subsequent hearings.

Such statements are inadmissible evidence. They include offers of settlement and what is said leading up to and to explain such offers. They are made with view to settling the case and are without prejudice to the parties’ position at a full merits hearing. They include anything said by the Employment Judge during the Judicial Assessment.

### **What is an assessment?**

The Employment Judge in the Judicial Assessment may express a provisional view on the strengths and weaknesses of parts of the case without having heard any evidence, but by considering the law and what parties say about their cases. The Employment Judge will use his or her skill and experience in the assessment, whilst remaining wholly impartial. The assessment may identify possible ranges of compensation for remedy if liability is established. The purpose of the provisional assessment is to help the parties to resolve their differences by way of settlement. The eventual outcome at the hearing may be different from the Employment Judge’s assessment. An assessment is not legal advice nor does it relieve a party from the need to take legal advice.

## JUDICIAL ASSESSMENT - Questions and Answers for the parties *cont.*

### **Will the Judge always offer a Judicial Assessment?**

There is no presumption that an Employment Judge will offer a Judicial Assessment. The Employment Judge will take into account the time available and matters that might mean settlement is difficult or impossible. These might include where a party is insolvent or bankrupt, other proceedings exist or the parties indicate an intention to commence other proceedings, or the parties express a view that the case cannot be settled.

### **Is there any fee payable for a Judicial Assessment?**

No.

### **What do I have to do if I want a Judicial Assessment?**

You should indicate your interest in the box on the case management agenda for the case management hearing and bring it to the case management hearing or send it in advance to the Tribunal. A Judicial Assessment will only take place if all parties agree.

### **How can a case settle at a Judicial Assessment?**

There are four ways in which this can happen:

- Acas may be contacted to produce a conciliated settlement (normally recorded by way of an ACAS COT3 agreement).
- There may be a formal settlement agreement between the parties (often called a compromise agreement).
- There may be a consent judgment by the Employment Judge.
- There may be conditional withdrawal and dismissal of the claim upon payment within an agreed period.

### **What if the case does not settle at a Judicial Assessment?**

The case will proceed as ordered at the case management hearing. The Employment Judge will not normally be involved in any part of the proceedings which may entail a final determination of the parties' rights, but the Employment Judge may conduct any subsequent judicial mediation and is not precluded from day to day case management including any further case management hearing.

It is still open to the parties to agree to Judicial Mediation, if offered. The services of Acas are available to the parties at any time.

EMPLOYMENT  
LAWYERS  
ASSOCIATION



## ADR and Employment Disputes

An **ELA** report

November **2017**



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