

**RESOLVING WHISTLEBLOWING DISPUTES IN THE PUBLIC
INTEREST: IS TRIBUNAL ADJUDICATION THE BEST THAT CAN
BE OFFERED?**

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INTRODUCTION

Empirical research consistently shows that the two main reasons why people do not report perceived wrongdoing are fear of retaliation and a belief that, even if they did so, the matter would not be rectified.² Thus if legislation is to promote whistleblowing in the public interest it should provide mechanisms for investigating and dealing with allegations of wrongdoing as well as protect those who make them. Although many countries go further, the sole aim of Part IVA of the Employment Rights Act 1996 (ERA 1996) is to protect workers in specified circumstances. Employers are not obliged by this statute to have whistleblowing procedures and, even if they have them, there is no specific requirement to investigate allegations let alone deal with any proven

¹ The author would like to thank Estelle Feldman whose paper at the International Whistleblowing Research Network conference in Seattle in March 2012 inspired him to explore this topic further.

² See Miceli, M., Near, J and Dworkin, T: *Whistleblowing in Organizations*, New York: Routledge.2008. & Brown, A. (Ed.) 2008.' *Whistleblowing in the Australian Public Sector*'. Canberra: ANU E Press 2008.http://epress.anu.edu.au/anzsog/whistleblowing/pdf_instructions.html

wrongdoing. The same is true of regulators (prescribed persons under Section 43D ERA 1996), although a recipient of a concern may be in breach of their duty of care if they choose simply to disregard it.

This article argues that employment tribunal (ET) adjudication may be both a difficult and ineffective mechanism for resolving whistleblowing disputes and that alternatives need to be considered. Perhaps the most obvious problem is that tribunals are neither empowered to investigate protected disclosures nor to recommend/order rectification where wrongdoing is established. The author believes that, if disclosures of serious wrongdoing are to be encouraged, both the law³ and dispute resolution mechanisms need to be improved. Ideally, employers should be required by statute to maintain whistleblowing policies and procedures which meet the standards laid down in the PAS Code of Practice 2008.⁴ Such procedures should provide for conciliation, mediation and arbitration as alternative forms of redress for those who feel that their disclosures have not been dealt with properly or have allegedly suffered retaliation.⁵ Recognising that a legal

³ For a general critique of Part IVA ERA 1996 see: Lewis, D. "Ten years of public interest disclosure legislation in the UK: are whistleblowers adequately protected?". (2008) *Journal of Business Ethics*. Vol 82. Pages 497-507

⁴ Publicly Available Specification: *Whistleblowing arrangements: Code of Practice*. 2008 (available via British Standards Institute at <http://shop.bsigroup.com/forms/PASs/PAS-1998/>)

⁵ It is not unusual for employers to provide for alternative dispute resolution (ADR) as the final stage in a range of workplace procedures and sometimes access to it is provided for in individual contracts of

obligation to have effective whistleblowing arrangements is unlikely to be imposed by law, it is recommended that alternative dispute resolution mechanisms should be made available where whistleblowing claims are lodged with ET's.

For the purposes of this article it is convenient to adopt the Gibbons' report definition of ADR as: "the collective term used to describe ways in which parties can settle disputes without recourse to litigation".⁶ Arbitration is a form of adjudication in that an impartial person⁷ hears both sides and decides between them. However, like other types of ADR, it is less procedurally formal than the ET process and inquisitorial rather than adversarial. Thus there is no examination or cross-examination of witnesses, the doctrine of precedent does not apply and there is no right of appeal.

In theory, it is possible to distinguish conciliation from mediation but this is frequently not the case in practice. According to the Advisory, Conciliation and Arbitration Service (ACAS), a conciliator discusses the issues with both parties in order to help them reach a better understanding of each other's position and underlying

employment. See generally: Dickens, L. "Employment Tribunals and Alternative Dispute Resolution" in Dickens, L. *Making employment rights effective*. Oxford, Hart. 2012.

⁶ *Better Dispute Resolution: A review of employment dispute resolution in Great Britain*. Michael Gibbons. March 2007. Department of Trade and Industry.

⁷ Many organisations use arbitrators as part of their internal procedures. However, the fact that they are paid by the employer may be thought by some to affect their independence.

interests. He or she tries to encourage the parties in dispute to come to an agreement between themselves. On paper, mediation is slightly more interventionist in that “mediators ask questions that help to uncover underlying problems, assist the parties to understand the issues and help them to clarify the options for resolving their difference or dispute.”⁸

Sometimes the line between arbitration and mediation also gets blurred and so-called “med/arb” takes place. In this situation the parties agree that a mediator should determine some issues that are referred to him or her.⁹ In reality it may be sensible to treat all ADR processes as part of a continuum. Thus conciliators who see the parties struggling to reach a settlement may suggest the basis on which a negotiated agreement might be achieved. Equally, a mediator may be willing to arbitrate on issues that the parties want determined for them. (More details about how ADR mechanisms work in practice are set out below).

In addition to the benefits to the Exchequer of avoiding costly hearings, ADR may offer much to the parties. Hearings in whistleblowing cases may be unattractive to both employers and workers for a variety of reasons. For example, the former will want to avoid washing any dirty linen in public and the latter may believe that being visible as a

⁸ See <http://www.acas.org.uk/index.aspx?articleid=1680>

⁹ Henceforward, where appropriate, I use the word “mediation” broadly so as to include “med/arb”.

whistleblower could inhibit their future job prospects.¹⁰ More positively, workers may have a better chance of achieving their objectives by open discussion or negotiation. Many whistleblowers are ethically driven and are determined to get an investigation of their concerns and ensure that any proven wrongdoing is rectified. These outcomes are unlikely to be achievable via tribunal adjudication but might form the basis of an amicable settlement. In addition, re-employment is almost never awarded by tribunals so it could hardly be less likely to emerge from ADR!¹¹

EARLY DISPUTE RESOLUTION IN WHISTLEBLOWING CASES

One objective of Government policy on employment relations is the early resolution of disputes because this provides tangible benefits “not only in terms of financial savings through the avoidance of formal procedures, and potentially an ET claim, but also in terms of continued productivity, enhanced morale and employee engagement.”¹² Delays increase the likelihood of positions becoming entrenched and this may harm both public and private interests if an employer has failed to respond adequately to a disclosure of information about alleged serious wrongdoing.

¹⁰ Some would argue that, while private settlements may suit the parties, the public interest may not be served by concealing the fact that serious wrongdoing has occurred.

¹¹ Reinstatement or reengagement was awarded in only five cases according to the statistics for April 2011 –March 2012 published by the ET and EAT Statistics. Ministry of Justice. 2012. Table 3

¹² See Resolving Workplace Disputes: A consultation. January 2011. BIS and Tribunals Service. page 18. Available at www.bis.gov.uk.

Generally speaking, it might be expected that the early resolution of disputes will be promoted if employers have skilled human resource and line managers available as well as effective union representatives at the workplace.¹³ Arguably, speedy intervention is particularly important in whistleblowing situations where a prompt investigation could either reassure the person raising the concern that there is nothing wrong or lead to swift rectification if there is a problem. Empirical research suggests that many employers have whistleblowing procedures¹⁴ but less information is available about the extent to which these provide for the internal resolution of disputes.¹⁵

In his 2007 review, Gibbons identified a number of factors which inhibited early dispute resolution.¹⁶ In addition to the point that the parties frequently do not fully appreciate the time, cost and stress involved in bringing or

¹³ Gibbons suggested that employers' organisations should "promote early resolution as a management tool and provide advice, guidance and training to empower managers to resolve disputes in the workplace" . *Better Dispute Resolution: A review of employment dispute resolution in Great Britain*. Michael Gibbons. March 2007. Department of Trade and Industry page 30.

¹⁴ See Lewis, D. 'The contents of whistleblowing/confidential reporting procedures in the UK: some lessons from empirical research'. (2006) *Employee Relations*, 28: 1, 76 - 86; Lewis, D. & Kender, M. 'A Survey of Whistleblowing /Confidential Reporting Procedures in the Top 250 FTSE Firms'. SAI Global. 2010.

¹⁵ It is interesting that the PAS Code of Practice 2008 (note 4 above) does not appear to deal with dispute resolution.

¹⁶ See *Better Dispute Resolution: A review of employment dispute resolution in Great Britain*. Michael Gibbons. March 2007. Department of Trade and Industry page 34.

defending a claim,¹⁷ an argument that is particularly relevant in whistleblowing cases is that a determination of legal rights alone may not be sufficient. For example, in addition to judicial vindication, the worker may be seeking an acknowledgement by the employer that wrongdoing was taking place and that steps should be taken to deal with it. In such circumstances, even if a claim for compensation succeeds the worker may feel that the tribunal process has not provided a satisfactory solution. It may well be that if whistleblowers get good advice about which dispute resolution mechanism is most likely to deliver their desired outcome, many actual and potential claimants will prefer ADR instead of fighting their case at tribunal.

Before assessing the merits of tribunal adjudication it is worth noting two general criticisms of ADR – that, by virtue of its private and confidential nature, it lacks accountability and is non-normative i.e. other organizations cannot learn from its outcomes. By way of contrast, Sturm and Gadlin argue that, through the the linkage of individual and systemic conflict resolution: “ADR can play a significant role in developing legitimate and effective solutions to common

¹⁷ A literature review for BIS noted the differences between perceived chances of success and actual ET outcomes. See Lucy, D and Broughton, A: *Understanding the behaviour and decision-making of employees in conflicts and disputes at work*. 2011. Available at www.bis.gov.uk.

problems and, in the process, produce generalisable norms".¹⁸ Accountability and the promotion of norms are clearly desirable yet what is crucial in whistleblowing cases is that there are public and/or private dispute resolution mechanisms available which reassure workers that their disclosures about wrongdoing and allegations of retaliation will be taken seriously.

TRIBUNAL ADJUDICATION

It is well known among industrial relations specialists that, in advocating the creation of labour tribunals, the Donovan Royal Commission aimed to make available a procedure which is "easily accessible, informal, speedy and inexpensive".¹⁹ What are less frequently recalled are the words which followed immediately afterwards: "and which gives ... (employers and employees) the best possible opportunities of arriving at an amicable settlement of their differences". Indeed, the Commission went on to state that bringing about such a settlement should be "a primary duty of the tribunal" and that "each hearing should be preceded by a 'round table' meeting in private between the parties and the tribunal, or one or two of its members , in order to settle

¹⁸ See Sturm, S and Gadlin, H "Conflict Resolution and Systemic Change" (2007) *Journal of Dispute Resolution* 1-63.

¹⁹ Report of the Royal Commission on Trade Unions and Employers' Associations. HMSO. 1968. Cmnd 3623 page 156.

the case".²⁰ We return later to the issue of judicial mediation but will now describe how the tribunal system works in whistleblowing cases.

In the most recent four years for which statistics are available (2008-12), 8461 applications were lodged under Part IVA ERA 1996.²¹ 43.7% of the cases disposed of during this period were through an ACAS conciliated settled; 31.2 were withdrawn or settled privately; 5.9% were successful and 11.6 % were unsuccessful at a hearing.²² Information is not made public about the nature of ACAS settlements or the cases that are withdrawn or settled privately. Thus a whole range of outcomes is possible - from the worker simply dropping the case to the employer conceding that a detriment/dismissal has occurred, agreeing to rectify the wrongdoing, compensate the worker and stop treating him/her unfavourably for making the disclosure.²³

It is unsurprising that such a small proportion of whistleblowing cases reach a tribunal hearing. In addition to the general problems of costs, fees,

²⁰ Ibid page 159

²¹ Whether one regards the number of whistleblowing claims as high or low, it should be noted that successive Governments have failed to publicise both the existence and implications of the protected disclosure provisions.

²² This information is from the Employment Tribunal Service and the Department for Business, Innovation and Skills (BIS).

²³ In the latest survey of ET applicants, it was found that 93% of cases that were settled involved some kind of payment. Claimants withdrew their cases were for a variety of reasons but 19% did so because it was too expensive to continue. See Peters, M. et al: *Findings from the survey of employment tribunal applications 2008*. Employment Relations Research Series 107.London, BIS.(2010)

representation, delay, fear, stress²⁴ and inadequate remedies that face all claimants (which are discussed further below), whistleblowers have to overcome a number of statutory hurdles if a disclosure is to be protected under Part IVA ERA 1996. Indeed, it seems reasonable to suggest that some cases will be settled or withdrawn because the worker realizes that continuing might be legally hazardous and costly in both financial and non-financial terms. Not only will there be the potential problem of demonstrating “public interest”²⁵ but the good faith requirement for a qualifying disclosure has been in place since the legislation came into force in 1999.²⁶ In addition, case law has demonstrated that there are other uncertainties, for example, about the meaning of “substantial truth”,²⁷ the difference between a disclosure and an allegation²⁸ and the need to prove causation of harm.²⁹

It is important to note that, although it is often difficult to obtain an appropriate remedy in other tribunal jurisdictions, whistleblowing cases have distinctive

²⁴ In the latest survey of ET applicants, 36% of claimants stated that the case had caused them stress and depression. See Peters, M et al: *Findings from the survey of employment tribunal applications 2008*. Employment Relations Research Series 107. London, BIS.(2010)

²⁵ It almost goes without saying that internal whistleblowing policies and procedures do not have to include a public interest test. Indeed, such arrangements are put in place to serve the private interests of the employer and worker.

²⁶ See *Street v Derbyshire Unemployed Worker Centre* [2004] IRLR 687

²⁷ See *Korashi v Abertawe University Health Board* [2012] IRLR 4

²⁸ See *Cavendish Munro Ltd v Geduld* [2010] IRLR 38

²⁹ See *Fecitt v NHS Manchester* [2012] IRLR 64

features. Most claimants will have chosen to disclose³⁰ and, by definition, will have suffered a detriment for putting their head above the parapet in an attempt to get perceived wrongdoing rectified. Tribunal adjudication does not enable workers to achieve this objective because there is currently no power to order an investigation. Tribunal documentation can be referred, with the worker's consent, to appropriate prescribed persons (regulators)³¹ but this provides no guarantee that action will be taken. Even though whistleblowing claims are often treated as a form of discrimination,³² tribunals who find in favour of the complainant lack the power to make a recommendation that is contained in the Section 124 of the Equality Act 2010. Thus the fundamental problem with tribunal hearings is that they are highly unlikely to satisfy a whistleblower's desire for his or her concerns to be examined because that is simply not the purpose of the adjudication. Nevertheless, the deliberations and outcome of a hearing could serve the public interest by disseminating best practice in a way that is not so directly achievable through private dispute resolution mechanisms.

³⁰ Although some will have had a contractual, fiduciary or statutory obligation to do so. Statutory duties are imposed in relation to money laundering, terrorism as well as health and safety. See, for example, Regulation 14 of the Management of Health and Safety at Work Regs 1999 SI No 3242

³¹ The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010. S.I No. 131. Regulation 2

³² See *Virgo Fidelis School v Boyle* [2004] IRLR 268

Having discussed some special characteristics of whistleblowing cases, it is appropriate to briefly discuss some general problems faced by actual and potential tribunal claimants. In 2011 the Department for Business Innovation and Skills (BIS) estimated that the average cost of an ET hearing to an employer was £4200, to a claimant £1500 and to the Exchequer £4450.³³ In relation to representation, the most recent survey of tribunal applicants revealed 46% of claimants³⁴ and 60% of employers had a representative to “help with their case on a day- to- day basis.” At a full hearing, 34% of claimants were represented and 73% of employers.³⁵ Of those who received advice and representation, the mean amount paid for professional services was £4123 for claimants and £8009 for employers. The latest SETA survey reveals that 18% of those who settled privately and 25% of those who were involved in an ACAS settlement indicated that “the risk of having pay to pay costs had made them more likely to do so.” Of the claimants who withdrew, 37% stated that this risk had influenced their decision.

By way of contrast, the average cost of individual conciliation to an employer was £3300, to a claimant £1100 and

³³ BIS Resolving Workplace Disputes: Final Impact Assessment. November 2011. Available at www.bis.gov.uk. Legal aid is unavailable for tribunal hearings.

³⁴ This figure is 9% lower than in the 2003 survey.

³⁵ See Peters, M et al: *Findings from the survey of employment tribunal applications 2008*. Employment Relations Research Series 107. London, BIS. (2010)

to the Exchequer £640.³⁶ Thus, although conciliation is cheaper than a hearing for both parties, the biggest saving is made by the Exchequer. Although the cost of tribunal hearings has been the main driver for recent proposals for reform,³⁷ it is argued here that ADR may be attractive to whistleblowers for other reasons. Indeed, to the extent that one aim of tribunal reform is to refocus the dispute resolution process on dealing with the issues raised,³⁸ it is important to remember that the problem raised by whistleblowers is that wrongdoing may be occurring that needs to be investigated. In addition to the 'normal' fear and personal distress that results from invoking the tribunal system, whistleblowers may experience serious anxiety about whether or not the alleged wrongdoing will ever be investigated or dealt with. Given this extra dimension, it might be sensible to acknowledge that not all ET claims can be most effectively processed in the same way and that dispute resolution processes which address both the perceptions and actions of the parties may be particularly important in whistleblowing cases. It is not being asserted that discrimination or other issues are less amenable to non-

³⁶ BIS Resolving Workplace Disputes: Final Impact Assessment . November 2011. Available at www.bis.gov.uk

³⁷ See Resolving Workplace Disputes: A consultation. January 2011. BIS and Tribunals Service. Available at www.bis.gov.uk. It goes without saying that no figures can be given to reflect non-financial costs e.g. emotional ones.

³⁸ See *Better Dispute Resolution: A review of employment dispute resolution in Great Britain*. Michael Gibbons. March 2007. Department of Trade and Industry.

adversarial techniques ³⁹. However, in prioritizing resources the number of anticipated cases might be borne in mind as well as the fact that there is a direct public interest in encouraging whistleblowers to report serious wrongdoing.

ARBITRATION

Arbitration enables the parties to select an independent person to adjudicate in their dispute. Although there is no long history of Governments promoting arbitration as a means to resolve individual disputes, employers in both the public and private sector use it as the final stage of an internal procedure. Until relatively recently employees have been unable to waive their right to bring statutory claims. However, ACAS arbitration is now available as an alternative to a tribunal hearing in both unfair dismissal ⁴⁰ and flexible working cases claims.⁴¹ The unfair dismissal scheme commenced in 2001 and the panel of arbitrators consists of people with knowledge and experience of workplace discipline. The arbitration is voluntary but the parties are obliged to waive their right to go to an ET by entering into conciliated

³⁹ Indeed, a CIPD report suggests that mediation may have its biggest impact in the areas of discrimination, bullying and harassment. See: CIPD. *Workplace Mediation: How employers do it*. CIPD, London. 2008.

⁴⁰ The ACAS Arbitration Scheme (Great Britain) Order 2004. S.I. 2004/753. Up to 2011, only 64 cases have been disposed of in this way.

⁴¹ The ACAS (Flexible Working) Arbitration (Great Britain) Scheme (Great Britain) Order 2004. S.I. 2004/233. At the time of writing there have been only 3 cases under this scheme.

settlements or compromise agreements.⁴² The procedure is intended to be more informal than ET's but the arbitration focuses solely on the issue of whether or not the dismissal was fair. Awards are confidential to the parties and cannot normally be appealed.

Perhaps the main attraction of arbitration in whistleblowing cases is that it is conducted in private. This may encourage employers to allow an investigation of the wrongdoing alleged rather than just the detriment suffered by the claimant. However, the current unfair dismissal scheme does not allow arbitrators to make broad recommendations and cases where action short of dismissal is complained about fall outside their remit. One potential disadvantage of arbitration generally as a form of dispute resolution is that those who opt for it voluntarily relinquish their legal rights. In this respect it compares unfavourably with mediation, which might allow for adjudication (subject to time limits in launching proceedings) if a settlement is not reached.

CONCILIATION

The Employment Tribunal Service sends ET claims and associated documentation to ACAS. Under Section 18 of the Employment Tribunals Act 1996 (ETA 1996) a conciliation

⁴² See para 26 of the Schedule of the unfair dismissal Scheme (note 37 above). Compromise agreements will be known as 'settlement agreements' when Section 17 of the Enterprise and Regulatory Reform Bill 2012 comes into force.

officer must, if requested to do so by either party or the officer considers that there is a reasonable prospect of success, endeavour to promote a settlement.⁴³ It is important to remember that the purpose of conciliation is not to ensure that a settlement is fair or reasonable but "that the parties are reaching unforced agreements."⁴⁴ Thus it is perfectly possible that a settlement will be achieved of a whistleblowing claim that does not lead to either the investigation of wrongdoing or its rectification.⁴⁵ If this is the case, it might be contended that 'privatised justice' is less acceptable in whistleblowing than other types of dispute. On the other hand it might be argued that it is less important that justice is seen to be done than that potential whistleblowers are confident that appropriate dispute resolution mechanisms are available if they run into trouble.

Historically, ACAS' duty to offer conciliation⁴⁶ has related both to 'post-claim' (those that have already been made to an ET) and 'pre-claim' complaints (where requested by at least one party to a dispute that has not yet been referred to an ET). Because 'post -claim' cases are easier to handle

⁴³ Although it is ACAS policy not to advise the parties, the latest SETA survey revealed that 65% of claimants and 66% of employer thought conciliation officers "were good at helping them to consider the pros and cons of settling their case without going to a full tribunal hearing." See Peters, M et al: *Findings from the survey of employment tribunal applications 2008*. Employment Relations Research Series 107. London, BIS. (2010) page xxiv.

⁴⁴ Dickens, L. *Making employment rights effective*. Oxford, Hart. 2012 page 38

⁴⁵ On the need to strive for justice rather than peace see : Fiss, O. "On settlement". (1984) *Yale Law Journal* Vol. 93(6) 1073-90

⁴⁶ This service is confidential, free, impartial and voluntary.

and, if settled, tribunal costs are more obviously saved, most of ACAS' conciliation resources have been allocated to them. Indeed, performance targets encourage this body to focus on claims that are likely to take the most time at tribunal.⁴⁷ In 2009, ACAS began offering pre-claim conciliation to callers to its Helpline⁴⁸ and the evaluation evidence⁴⁹ led the Government to conclude that such a service could reduce the number of claims going to ET's significantly. Part 2 of the Enterprise and Regulatory Reform Bill 2012 deals with conciliation before the institution of tribunal proceedings.⁵⁰ According to the new Section 18A of the ETA 1996, before such proceedings can be commenced a claimant must normally provide ACAS with "prescribed information, in the prescribed manner" and conciliation officers must "endeavour to promote a settlement" during a prescribed period. If the officer concludes that a settlement is impossible or one is not achieved during the prescribed period a certificate will be

⁴⁷ The ACAS Annual Reports record the number of potential hearing days saved as a result of individual conciliation.

⁴⁸ According to one study, 23% of callers to the Helpline who were considering an ET claim decided it against it as a result of this contact. See: Davey, B and Dix, G. *The Dispute Resolution Regulations Two Years On: the ACAS experience*. Research Paper 07/'11. London; ACAS. 2011.

⁴⁹ *Evaluation of the first year of ACAS' Pre-Claim Conciliation Service*. ACAS. 2010. <http://www.acas.org.uk/>

⁵⁰ It is estimated that this will result in a reduction of about 12,000 ET claims. See *Resolving Workplace Disputes: A consultation*. January 2011. BIS and Tribunals Service. page 22. Available at www.bis.gov.uk. A cynic might suggest that Governments tend to be more interested in cost savings to the Exchequer than that the parties to disputes are satisfied. It is estimated that the net benefits to employers will be £32, 507, 719, to the Exchequer £19, 598, 551 and to claimants £16, 710, 314. See *BIS Resolving Workplace Disputes: Final Impact Assessment*. November 2011. page 48. Available at www.bis.gov.uk

issued. Tribunal proceedings cannot be commenced without a certificate where one is required.

Since the new statutory provisions are not yet in force we can only speculate about their impact. However, given that the Government is planning to introduce an ET fee regime, it does not seem unreasonable to suppose that potential claimants will be keen to avail themselves of the free services being offered by a tried and trusted specialist agency. No doubt many claimants will make considerable efforts to resolve their disputes in order to avoid further stress and expense. Unfortunately, some Machiavellian employers may be tempted to resist early conciliation if they believe that the complainant is unwilling or unable to pay ET fees and the other costs that will be incurred if there is a hearing.

MEDIATION

In addition to questions about its effectiveness, there are many policy and practical issues raised by the use of mediation: "the denial of formal justice to powerless groups, the risk of annexation to court processes and the ethics of mandatory participation and regulation of the field...what works well in one situation may work less well in another".⁵¹ The Gibbons Review concluded that mediation could

⁵¹ Boon, A. et al [2011] ILJ 45, pages 46-7. See generally: Bingham, L. "Employment Dispute Resolution: The case for mediation". (2004. *Conflict Resolution Quarterly* 145-174

be particularly effective in employment disputes because it enables the parties to discuss their issues openly and in confidence: "It is a pragmatic, flexible and informal way of providing both parties with positive outcomes". This is especially important in whistleblowing cases where the claimant may be seeking remedies that an ET cannot deliver, for example, an apology or reference and a commitment to behave differently in the future. However, Gibbons did not suggest the introduction of either a mandatory⁵² or near-mandatory approach to ADR, largely because of the views expressed by employer and employee representatives and a worry about the potential costs. Nevertheless, it was recommended that appropriate mediation should be offered in "disputes likely to benefit from it"⁵³ and that a pilot study should be conducted.⁵⁴

In fact an evaluation of a pilot judicial mediation service offered by ET's was commissioned by the Ministry of Justice in 2006 and, building on its perceived success, judicial mediation was made available for discrimination cases at English and Welsh ET regional offices

⁵² On mandatory mediation in New Zealand see Corby, S. *Resolving Employment Rights Through Mediation: The New Zealand Experience*. Institute of Employment Rights, London. 1999.

⁵³ The ability to interrupt the process to allow for further investigations may be particularly valuable in whistleblowing cases.

⁵⁴ See *Better Dispute Resolution: A review of employment dispute resolution in Great Britain*. Michael Gibbons. March 2007. Department of Trade and Industry. page 41

from 2009.⁵⁵ According to Boon et al, the quantitative results “found no discernible or statistically significant impact of early resolution attributable to judicial mediation”.⁵⁶

However, there are some important features of the process that can only be assessed qualitatively. For example, the extent to which the parties have moved from their original positions, the fairness of the outcome and the extent of compliance with it, the state of employment relationships after the mediation and the general satisfaction of the parties with the process.

In its 2011 consultation paper the Government was effusive about mediation and described the process as delivering “a ‘win-win’ outcome that benefits parties not only in terms of the direct savings from avoiding the tribunal route, but also in terms of preserving the employment relationship, maintaining productivity, reducing sickness absence and increasing employee engagement”.⁵⁷ It referred to the costs of bringing a tribunal claim (see above) and the fact that many cases took at least 26 weeks to determine. By way of comparison, it pointed out that mediation could be completed in one day at a cost of about £1200 if the

⁵⁵ It is important to note that judicial mediation was provided here by employment judges. It is argued below that non-legal ET members could play a valuable role if mediation was promoted as a dispute resolution mechanism.

⁵⁶ Boon, A et al [2011] ILJ 45, pages 46-7. See also Urwin, P, Latreille, P and Karuk, V “Quantitative evidence in the evaluation of ADR: the case of judicial mediation in UK Employment Tribunals”. (2012) *International Journal of Human Resource Management* 567-589.

⁵⁷ See Resolving Workplace Disputes: A consultation. January 2011. BIS and Tribunals Service. page 21. Available at www.bis.gov.uk

problem is dealt with early.⁵⁸ Significantly, there is nothing to prevent the parties reaching their own agreement on costs.⁵⁹

Given that mediation can be faster, cheaper and promote agreement between the parties, what evidence is there about its recent application to individual employment disputes? A 2008 CIPD survey of employers reported that fewer than half of respondents were in organizations that had used mediation. However, in a repeat survey in 2011 the equivalent figure was 57.3%. Whereas 47.9% of private organisations in the subsequent survey used mediation, 82% of public sector employers did so. 42.4% of respondents stated that they relied on internal mediation only and 18.6% used external mediation only. Interestingly, more use was made of employment consultants than other suppliers of mediation.⁶⁰ According to the 2008 SETA survey, 23% of claimants reported that before they lodged an ET application someone had suggested that they should use mediation and 9% of claimants stated that they had done so. Perhaps more important is that, irrespective of

⁵⁸ In the most recent survey of ET applicants, 9% of claimants and 7% of employers reported that mediation had been used. See Peters, M et al: *Findings from the survey of employment tribunal applications 2008*. Employment Relations Research Series 107. London, BIS. (2010)

⁵⁹ ET's can only award costs if it is shown that "the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.": Rule 40. Schedule 1. Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004. S.I. 1861. In 2011-12, costs were awarded to claimants in 116 cases and to respondents in 1295 cases. In his review of the ET Rules, Mr Justice Underhill noted that the current costs arrangements unfairly penalised parties who were not represented by a lawyer or who represented themselves. It is more likely to be workers who are affected by this.

⁶⁰ CIPD. *Conflict Management*. Survey Report. CIPD, London. 2011.

whether they had done so previously, 80% of claimants and 88% of employers said they would consider using mediation in a future dispute. More recent research reveals that 71% of participants were either very or fairly satisfied and that 88% of those who commissione mediation were satisfied with the ACAS Mediation service. Unsurprisingly, there was a strong link between participants overall satisfaction and whether the underlying issues had been resolved.⁶¹

As this article suggests that mediation may be particularly appropriate in whistleblowing cases, we need to discuss how it might operate in practice. There is no consensus about the precise ingredients of the process and it has been observed that the words conciliation and mediation are “interchangeable in many contexts”.⁶² Indeed, Dickens asserts that the definition of conciliation in the Gibbons Report “could easily be exchanged with that given for mediation.”⁶³ Nevertheless, we will attempt to distinguish the main approaches to mediation.⁶⁴ Facilitative mediation promotes

⁶¹ ACAS Research and Evaluation Section. *ACAS Individual Mediation 2011/12: Responses from participants and commissioners*. Ref 16/12. ACAS.London. 2012.

⁶² Dolder, C. [2004] ILJ 320, at 325

⁶³ Dickens, L. *Making employment rights effective*. Oxford, Hart. 2012. page 38

⁶⁴ Neither transformative mediation nor early neutral evaluation will be referred to as separate models in this article. In theory, transformative mediation aims to encourage the parties to control the situation they find themselves in. Early neutral evaluation involves an impartial person with specialist knowledge and skills being invited to evaluate a case. Dolder (note 62) identifies facilitative mediation as lying between transformative and evaluative mediation (page 332). For further discussion about the possible forms of mediation see: Boulle, A and Nesic, M: *Mediation: Principles, Process, Practice*. London, Butterworths. 2001.

the parties' communication and understanding but does not provide them with guidance or solutions. By way of contrast, evaluative (or problem -solving) mediation is more active in getting the parties to contemplate the possible outcomes of their dispute.⁶⁵ In theory, the mediator controls the process and the parties determine the outcome. However, if the parties are pushed too firmly towards a settlement they may feel that they have lost control and experience the process as being more like arbitration.

It seems sensible to acknowledge that the facilitative and evaluative approaches often merge in practice. As Boon et al explain: "Mediators and mediation codes often have a rhetorical commitment to a purely facilitative model of mediation, while experienced mediators actually use evaluative techniques as circumstances demand".⁶⁶ For example, in whistleblowing cases, the open questioning associated with facilitative mediation may be useful in determining whether or not there is a mutual interest in investigating and dealing with any wrongdoing. A more evaluative approach might be appropriate to get the parties to explore whether or not detrimental treatment has occurred. Thus, if the parties agree on some issues, for example that wrongdoing has occurred and that it will be rectified, they

⁶⁵ Traditionally, the role of collective mediation has been to direct the parties towards a resolution of their dispute.

⁶⁶ Boon, A. et al [2011] ILJ 45, at page 78

may consent to "med/arb" on the question of whether or not the whistleblower was victimized and what remedy might be appropriate.

Whatever form mediation takes, it might be especially valuable to dismissed whistleblowers who are seeking re-employment. One possible reason why ET's hardly ever recommend this remedy in any type of case is that they have no real evidence about its practicability.⁶⁷ Mediation could be helpful in this respect as it might result in an employer taking measures that could secure a return to work. For example, in the light of the worker's disclosures, the employer might be prepared to: review work practices, move the discloser away from any person about whom wrongdoing was alleged, and take steps to minimize the risk of the whistleblower suffering retaliation. Such action may make claimants more willing to return to work and, presumably, would only be taken if the employer was persuaded that a valuable relationship could be restored.

Mediation may also be appropriate in whistleblowing cases if the employer is anxious to avoid publicity but the worker is unwilling to settle without their allegations of wrongdoing being investigated. In addition to the cost of a hearing, mediation might save the claimant from

⁶⁷ Section 116 ERA 1996 spells out the need for practicability.

having to experience the stresses of the adversarial process⁶⁸ and calling witnesses to a public hearing to give evidence that might damage their employment prospects. More positively, mediation provides opportunities for workers to vent their feelings as well as express their opinions and allows those they are in conflict with to understand and empathise with their actions. An opportunity for catharsis may be especially important in whistleblowing cases where the worker may have experienced shock and outrage at the employer's negative reaction to the disclosure.⁶⁹

The potential for creative solutions offered by mediation might also be valuable where a whistleblower's allegations are shown to be unfounded. If they have been honestly made on reasonable grounds, it will be important that any resulting damage to the employment relationship is repaired. Indeed, if the whistleblower appears to have suffered by disclosing, others who subsequently acquire a reasonable belief about the occurrence of wrongdoing might be deterred from reporting it. This may not serve either the employer's or the public interest. To the extent that mediation can promote the reconciliation of diverse interests it is to be welcomed. However, it should be acknowledged that

⁶⁸ Including cross-examination about his or her motives if the issue of good faith arises.

⁶⁹ On the experiences of whistleblowers generally see Alford, C. *Whistleblowers: Broken Lives and Organisation Power*. Cornell University Press, Ithaca. 2001.

unequal power relationships at the workplace may prevent this coming to fruition. Normally, employers can use their superior resources and bargaining power to ensure that their interests prevail. The effect of Section 43J ERA 1996 cannot be ignored in this context. This states that "any provision in an agreement to which the section applies is void in so far as it purports to preclude the worker from making a protected disclosure."⁷⁰ It is impossible to know how many whistleblowers realize that gagging clauses cannot be enforced and how many would agree to them anyway as part of a satisfactory settlement. One consequence of Section 43J ERA 1996 may be that some employers will opt for an arbitrator's decision rather than mediation because the former will be fully binding on both parties whereas all the provisions of a settlement agreement may not be.

CONCLUSIONS AND RECOMMENDATIONS

It has been observed that ADR should stand for "appropriate" rather than alternative dispute resolution and that the form of intervention should reflect "the nature of the dispute and the level of severity and entrenchment that the disagreement has reached".⁷¹ This article has suggested

⁷⁰ According to Section 43J(2) ERA 1996: "This section applies to any agreement between a worker and his employer...including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract".

⁷¹ ACAS Policy Discussion Papers. *Making more of alternative dispute resolution*. ACAS, London. 2005

that adjudication in whistleblowing cases may not be the best method of serving either private or public interests. For example, workers might be aiming for understanding and reconciliation rather retribution and compensation.⁷² Thus mediation could be attractive to them because it can result in an apology. This may not be offered at an ET hearing because it could be construed as evidence of liability.⁷³ Indeed, it is in an important feature of mediation that it has the potential to create an environment in which the parties can explicitly consider forgiveness.

On other hand the parties may have good or bad reasons for not wanting to engage in mediation. For example, although workers may feel that they can participate more in the process, they may also view mediators as authority figures who are favourably inclined towards an employer. Nevertheless, the cost of an ET hearing if mediation fails will put pressure on claimants to compromise.⁷⁴ Conversely, an employer may not want to get involved in mediation on the grounds that, if they refuse to do so, the matter may be dropped because the worker

⁷² On the reputation of restorative justice and mediation for effectiveness in complex and emotional situations see: Roche, D. "Gluttons for restorative justice". (2003) *Economy and Society*. Vol. 32. 630-644

⁷³ In the author's opinion disputants would benefit if the following words contained in Section 2 of the Compensation Act 2006 were generally applied to employment rights cases: "an apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty."

⁷⁴ See Genn, H. et al: *Twisting arms: Court Referral and Court Linked Mediation under Judicial Pressure*. London, Ministry of Justice. 2007.

cannot afford to continue with their case. One way of exerting pressure on an organisation to take mediation seriously might be to give ACAS officers (in addition to ET's) the power to refer documentation to prescribed persons.⁷⁵ Thus conciliation officers might hint that a refusal to explore the issues raised via mediation might influence their decision about whether or not to send the paperwork to a regulator.

More drastically, the parties' objections to mediation might be overcome by making it a compulsory part of the tribunal process in whistleblowing cases. Thus ACAS officers would be encouraged to hold face- to -face meetings with the parties instead of the current practice of making telephone contact. Where appropriate, employers might be referred to specialist advisors that could assist with longer term issues. For example, how to devise, implement and monitor effective whistleblowing policies and procedures.

Arguably mediation can succeed even if the parties do not initially enter the process willingly. What is crucial is that the mediator has the requisite skills to deal with the difficult aspects of whistleblowing disputes and can deploy the techniques that best suit the problems that arise. There is little point in recommending subsequent judicial mediation if it simply replicates the role of ACAS officers. However, if facilitative mediation proved unsuccessful, the parties might

⁷⁵ See note 31 above

still find more evaluative judicial mediation preferable to a tribunal hearing. In this context, I suggest that the term judicial mediation should include mediation by an employment judge, a non-legal member or both. Apart from increasing the number of personnel available, non-legal members are appointed on the basis of their employment experience and may be particularly attractive to the parties as co-mediators.

The most obvious criterion for determining the success of mediation is the rate of settlement but I would argue that there are other measures which are important in whistleblowing cases. Apart from speed and the reduction in cost, the number of issues resolved, the nature of agreements and their durability and the satisfaction of the parties are critical where wrongdoing has been disclosed and the worker has suffered for it. Currently ACAS mediation is voluntary but there is a cost to users. Given its particular relevance in whistleblowing cases, mediation could be made either mandatory or 'near mandatory'. The former sounds draconian but there is still an element of voluntariness in that some participation in the process would be required but the parties could withdraw from it if and when they choose. What is envisaged in a 'near mandatory' system is that the parties would have to explain to ACAS and/or an employment judge why they thought mediation would not be productive. Although it would seem politically implausible at the moment, another possibility

would be to make mediation compulsory for employers but optional for workers.⁷⁶

Recognising that mediation is likely to have the most beneficial impact if it is used at an early stage of a disagreement, it is envisaged that ACAS would offer both pre- and post -claim mediation. If ACAS or other mediation failed,⁷⁷ ACAS would then certify that fact. At this stage arbitration might become more attractive to the parties so it might be worth extending and adapting the ACAS Arbitration Scheme to whistleblowing cases.⁷⁸ For example, the Scheme might be amended to allow arbitrators to make recommendations. If arbitration is not taken up, the case could proceed to an ET where judicial mediation might be offered as the final private and confidential step before a public hearing.

It is also suggested that in future mediation should be free in whistleblowing cases. A number of arguments can be made for this. First, such a service would clearly promote access to justice for workers and send a message to

⁷⁶ This was the position under the US REDRESS programme. See: Ridley-Duff, R & Bennett, A "Towards mediation: developing a theoretical framework to understand alternative dispute resolution". (2011) *Industrial Relations Journal*.Vol.42. pages 106-123

⁷⁷ There are a wide range of private providers of mediation services, for example, the Centre for Effective Dispute Resolution, Mediation UK and the ADR Group. See generally: Colling, T. "No claim, no pain? The privatization of dispute resolution in Britain".(2004) *Economic and Industrial Democracy*. Vol 25(4),555 -579

⁷⁸ The requirement to waive the right to expose an employer to a public hearing may be a barrier to some whistleblowers using the Scheme in its current format. Conversely, for employers this may be their last chance to avoid potentially damaging information being aired at a tribunal.

employers that the Government understands the importance of resolving whistleblowing disputes constructively and amicably whenever possible. Second, since ACAS or privately -led mediation would be offered in the first instance, the cost should be less to the Exchequer than either judicial mediation or a tribunal hearing.⁷⁹ Third, it has been argued above that whistleblowing cases have features that justify special treatment. Tribunal hearings focus on detriment and dismissal and cannot investigate or rectify proven wrongdoing. To the extent that mediation is better able to explore and deal with the underlying issues in a dispute it might save the public having to bear the cost of wrongdoing continuing.⁸⁰

Undoubtedly the provision of free mediation would test the Government's resolve both to encourage whistleblowing in the public interest. Recent research demonstrates that employers have made little use of mediation in the past and seem quite ignorant about it.⁸¹ Thus time and effort would be

⁷⁹ It goes without saying that the potential benefits of saving employment relationships and improved psychological well-being are hard to measure.

⁸⁰ The author accepts that, where a corrupt organisation intends to carry on behaving in the same way, all dispute resolution mechanisms are likely to be frustrated. Such organisations may simply pay damages and fines on the occasions they get caught out so financial penalties for breaching employment rights are likely to have little impact on their behaviour (see Section 14 of the Enterprise and Regulatory Reform Act 2013). In such circumstances, it may be appropriate to impose custodial sentences on senior executives who are shown to have condoned wrongdoing in order to gain competitive advantage.

⁸¹ Interviews in 2011 with managers in private sector organisations with a turnover of £50,000 + revealed that 5% had used mediation in the past, 60% had heard of it but not used it and 36% had not heard of it. Williams, M "Workplace conflict management: awareness and use of the ACAS Code of Practice and workplace mediation - a poll of business" *ACAS Research Paper*. 2011. Ref.08/11

required to communicate its aims and benefits to employers, workers and their representatives. People will need to be trained in how to use mediation effectively and employers must ensure that the mediators themselves provide a quality service.⁸² Equally, the trade union movement will need to be persuaded about the merits of the extended use of mediation. Although it is frequently suggested that mediation is most successful where no representatives are present, unions will need to sell the idea that it is not a replacement for representation. Indeed, union representatives may well be appropriate as supporters and advisers where a whistleblowing member is particularly fragile and asks to have an official present. Given that smaller organization might be particularly resistant to face -face-face mediation,⁸³ it is recommended that there should be a trial to test the value of mediation in whistleblowing cases involving medium -sized and large organizations.⁸⁴

⁸² It might be useful to provide that external mediators are registered with the Civil Mediation Council or Scottish Mediation Register. Equally, internal mediators may be required to have the ACAS Certificate in Internal Workplace Mediation. See generally ACAS/TUC "Mediation: a guide for trade union representatives". 2010. Available on the TUC and ACAS websites.

⁸³ Smaller firms, especially family businesses, may resent the intervention of an outsider in rather personal employment disputes.

⁸⁴ The Williams Research Paper (note 81) found that most interviewees thought that mediation was only suited to large organisations.