CHAPTER ELEVEN

ADMINISTERED MEDIATION

This Chapter examines the role performed by the various bodies and organisations that provide mediation services in the United Kingdom. The emphasis is on commercial as opposed to social mediation.

Mediation and Professionalism

Most professions in the United Kingdom are governed by organisations of long standing. Membership of such professional bodies becomes compulsory if the government supports that organisation by passing laws making practice subject to membership. It is a form of legal monopoly. The justification for the monopoly is to ensure that everyone within the profession is subject to the same rules, regulations and codes of best practice. Most countries provide similar legal support for the traditionally recognised professional bodies. Whether or not mediation practice has matured into or every will mature into a profession is questionable. Whilst the basic concept of mediation is identifiable, those that engage in it are at present drawn from a wide range of other professions. Hence there are legally, medically, socially or technically qualified practitioners who act as mediators. Many mediators are thus members of professional bodies in their principal discipline. Mediators are also drawn from non-professional vocations as well. For most mediators, mediation is an adjunct to, rather than, their primary source of income.

The market for mediation in the United Kingdom owes a great deal to the charitable bodies and commercial organisations that have sprung up over the years promoting mediation, training mediators and subsequently appointing them. To complicate matters further, many professional and non-professional bodies and organisations have also promoted mediation and act as co-ordinators for the supply of mediation services by their members. The British Government, as have many other governments, has encouraged and supported the development and growth of mediation. The development, growth and organisation of mediation globally has followed a similar pattern, with more or less government support. Some governments have legislated for standards in mediation training. In some jurisdictions court related mediation services are subject to a degree of state control and regulation. State mandated mediation exists in some jurisdictions. Mediation services in specific areas of practice may be totally under state control. However, at present there is no example of mediation being promoted to professional status and placed under the control of a professional body. This of course may change in the future.

There is no reason in principle, why an individual cannot be a member of two professions. The main barriers to dual qualification are time, dedication and inclination, but otherwise there is nothing to prevent an individual from acquiring professional status as for instance an engineer and a medical practitioner or lawyer. For understandable economic reasons few individuals aspire to dual qualifications.

Arbitration differs from the above in that whilst there are many chartered professionals in the United Kingdom who are also chartered arbitrators, there are no laws that require an arbitrator to be professionally qualified or to attain chartered status before serving as an arbitrator. Thus chartered status for arbitrators is merely a mark of quality rather than a prerequisite to practice. Consequently, arbitrators are often members of a wide range of arbitration service provider organisations and not just of the Chartered Institute of Arbitrators.[1] It would therefore be possible for mediation to emulate arbitration if the government were minded to establish the concept of chartered mediator. The Chartered Institute of Arbitrators applied to the Privy Council to amend its royal charter to embrace mediation but this application failed following protests from other mediation providers. CEDR was the primary objector[2] together with the ADR Group.[3]

[1] **http://www.arbitrators.org :** By contrast the medical profession may work within the public or private sector but all must maintain membership of the General Medical Council. The same applies to lawyers, be they members of the Law Society or the Bar.

[2] **The Centre for Effective Dispute Resolution**. http://www.cedr.co.uk/

Whilst the doyens of any profession could attract commissions on the basis of their reputation and standing in the field, and might thus resent being under the control of a ruling body, the majority of professionals rely on the stamp of quality that membership of such a body provides. It enables them to set up shop and promote their services without having to do more to assure their clients that they are up to the job. However, these professional organisations do little or nothing to promote the services of their members. They are not advertising agencies or job recruitment agencies.

The Chartered Institute of Arbitrators, whilst acting as a quality assurance mark, also acts as a promoter of arbitration and more recently of mediation in general and further acts as a provider of dispute resolution services. The Institute maintains panels of dispute resolution practitioners and will appoint or nominate practitioners for a fee. The attraction of these services for the client lies in that the Institute vouches for the qualifications of its listed practitioners, maintains systems to maintain professional standards including disciplinary processes to deal with allegations of incompetence and un-professionalism and provides rules for the conduct of the process.

The Chartered Institute of Arbitrators may be crudely described as a professional recruitment agency, a sort of Blue Arrow of dispute resolution practitioners, though of course it also trains and accredits mediators. It is not alone in this market. Indeed, as far as mediation is concerned it was a late comer to the mediation market, only embracing mediation after it had been pioneered by others and it became clear that mediation was likely to become a significant force in the alternative dispute resolution market.

Appointing bodies and access to the Mediation Market

Whilst there is no requirement for a mediator to belong to any organisation and freelance mediating is perfectly permissible, this is an option only available to the doyens of mediation with the ability to attract direct appointments by clients on the basis of their reputation and standing. For the rest, appointment in the UK will be dependent upon a business or other organisation that has established a reputation as a mediator appointing body. Mediation has become a significant market in the UK with more and more organisations entering the field, assisted to a great extent by the marketing opportunities provided by the internet. The standing of mediation providers is variable. They include those of long standing who pioneered mediation such as CEDR and the ADR group, to in house mediation services from industry and trade bodies, accounting and legal firms etc and other commercial enterprises. The mediation market is becoming increasingly fragmented, with many mediators being attached to a wide range of appointing bodies. This poses problems for the future in that a mediator may have to re-qualify several times over in order to become a member of multiple appointing bodies, often being required to retrain and take replica examinations with each body, and having to pay multiple membership fees. This in turn impacts upon the cost of mediation services, since mediators will seek to charge sufficiently high levels of fees to recover these investments. Thus, despite what is an increasingly competitive market, mediation is proving to be less cost effective than was originally anticipated.

The nature of the services provided by mediation organisations differ in range and extent. At the most basic level, an organisation may simply compile a panel of mediators and appoint on request, leaving all the arrangements for the conduct of the mediation and the remuneration of the mediator to the mediator and the parties. Others may, to a greater or lesser extent involve themselves in the administration of the process, fee collection and remuneration of the mediator and / or with the provision of support services such as accommodation and supporting documentation, together with rules of engagement and supervisory backup.

The economics of acting as a mediation service provider are complex. Clearly, there is minimal initial expense involved in a pre-existing organisation inviting otherwise qualified mediators to join a panel and promoting mediation services to its own constituency alongside its other communications and in any in-house journals that that organisation already issues. This has proved a popular model for many professional organisations that have relied upon their underlying professional quality assurance mechanisms to underpin the new service. This has been a natural progression since many of these bodies already provided arbitration appointment services, assisted by the inclusion in standard form contracts, provided for use by members, with dispute

[3] **The ADR Group**. http://www.adrgroup.co.uk/

settlement clauses.[4] Once the service has been established many of these bodies have then set about reinforcing membership of the panels with entry examinations, thus consolidating their quality assurance mechanisms for the future, having avoided the cost and expense of training and examination in the early stages of the development of the service. Where a professional body provides mediation services, it limits the range and scope of work available to the general mediation community, further fragmenting the market.

As the paper chain to demonstrate quality assurance has developed there are many models available for those that aspire to enter into the mediation business. It is not too difficult today to compile a set of rules and regulations, cloned from those of established providers, and to set up shop as a mediation service provider. However, what the new comers may well lack is any track record in operating such mechanisms and at the initial stages at least, the manpower to provide the asserted backup if and when required. If one takes a closer look at many of the smaller providers in the market it is apparent that their panel consists of a sole practitioner or a very small number of mediators. The quality assurance mechanism may look good on paper but may not work in practice. It is however difficult for the general public to discern the actual level and quality of service on offer. Whether or not this matters is a different issue. It may be that mediation is simply a service industry and that providers will in time live and die on their reputation in the market place and subject to the market forces of supply and demand. This is the general model in the US which boasts several hundred thousand independent mediators competing in the open market for work, though it must be accepted that the mediation environment in the US is quite different from that in the UK, which is a much smaller and tighter community.

A recent trend has been for established mediators to break free from the costs and constraints of membership of mediation appointing bodies, in particular from bodies that charge administrative fees which are deducted from the mediator's fees.[5] A number of leading mediators have questioned the value of administered mediation. They can offer a more competitive fee through direct appointment, which is fine providing they can attract the commissions in the first place, though the client loses any quality assurance mechanism that might otherwise have been available to them. Whether or not clients actually value this assurance mechanism, is questionable. They will have made their choice on the basis of reputation in any case, with an expectation that the mediator will act in an honourable manner, often in the knowledge that the mediator is also bound by the professional rules of another body such as the Law Society.

The response to this from ADR appointing bodies, be it adjudicators, arbitrators, conciliators, experts or mediators has been to introduce continuing professional development programs and re-qualification mechanisms to ensure that practitioners keep up to date in a changing environment. All this of course costs money and is likely to push the costs of ADR services up even higher in future, but there is a ceiling to this in that if ADR becomes as costly as litigation it may cease to be an attractive alternative. This was a problem that had to be faced by arbitration and was partially addressed by the introduction of the Arbitration Act 1996 which helped to streamline the process and make it more cost effective. However, with the courts becoming more cost effective themselves, driven forward by the Civil Procedure Rules 1998 reforms and an actively competitive commercial court scene today, the ADR industry has to play a very careful balancing act between quality assurance and cost effectiveness.

The Civil Mediation Council[6]

The Civil Mediation Council was established in 2003. This self appointed body is likely to become a significant force in the regulation of mediation services in the UK over time, particularly with regard to court appointed and government supported mediation services, and hence deserves closer examination. The Civil Mediation Council works closely with Her Majesties Court Services and whilst at the present time its objects do not include regulation of the private sector, this may change with the passage of time. Already it is the mediation service gate keeper for court annexed mediation services, particularly since HMCS has now taken over exclusive central control of mediation appointments for court annexed mediation. In order to be on the HMCS appointment list an organisation has to be accredited by the Civil Mediation Council. Extracts from the Constitution are set out below.

4 Eg. Institutes of Building, Architecture, Civil Engineering etc

5 Mathew Rushton. "***Mackie does the maths***". **Legal Business,** December 2005/January 2006 p46.

6 www.civilmediation.org

ELEVEN

The Constitution of the Civil Mediation Council

Definitions

2. For the purposes of this Constitution:

2.1 "mediation" means mediation and related dispute resolution techniques applied in the areas of law set out in Article 60 below;

2.2 a "Mediation Provider" is defined as an organisation based in the United Kingdom whose primary purpose or purposes include the provision of mediation services or training, or the promotion of mediation;

2.3 an "Accredited Mediation Provider" is defined as an organisation which has been accredited by the Council in accordance with the procedures set out at Article 24 below; and

2.4 a "Mediator" is defined as an individual ordinarily resident in the United Kingdom, who has been accredited by an Accredited Mediation Provider or by one of the bodies in Article 5.3 below, who remains so accredited, and who conducts a professional mediation practice, whether solely or in conjunction with other business or professional pursuits.

Purpose

3. The Purpose of the Council ("the Purpose") is to represent the common interests of Mediation Providers and Mediators in promoting mediation; to do so through the performance of the Council's objects; and, generally, by improving the understanding of the uses and applications of mediation.

Objects

4. The specific objects for which the Council is established are as follows ("the Objects"):

4.1 to be a neutral and independent body to represent and promote civil and commercial mediation and other dispute resolution options as alternatives to litigation and thereby to further law reform and access to justice for the general public;

4.2 to create a culture of best practice by encouraging research, continuing education and quality standards in the field; by issuing codes of good practice; and by conducting accreditation of mediation providers and through them individual mediators;

4.3 to be a focal point for the impartial and learned consideration of issues surrounding mediation and other dispute resolution options;

4.4 to foster, and be a commissioning body for, research into the use and application of mediation and other dispute resolution options;

4.5 to be a forum for debating issues surrounding mediation including through an annual series of conferences and seminars;

4.6 to be a portal for access by potential users of and referrers to mediation and other dispute resolution options including judges, lawyers and the general public;

4.7 to establish and foster the fullest understanding amongst the judiciary, lawyers and the general public of mediation and other dispute resolution options, including means of access, cost-benefits and the simplicity of mediation procedure;

4.8 to identify and lobby for effective legal and regulatory provisions to support mediation and its effective use; and to offer to government and others access to the considered views of the mediation community as a whole;

4.9 to collate and offer appropriate information on and about mediation and other dispute resolution options including the means of access to services and practitioners;

4.10 to assemble and make generally available an impartial online library of information about mediation and other dispute resolution options including practice methods, accrediting bodies, providers and practitioners; and

4.11 to liaise with all other relevant bodies, persons and departments for the achievement of its purposes.

Membership of the Council

5. Membership of the Council ("Members") shall be open to:

5.1 Mediation Providers

5.2 Mediators

5.3 The Law Society, and the Bar Council

5.4 Academic bodies with an interest in mediation ("Academic Members")

5.5 The Department for Constitutional Affairs ("DCA") and the Department of Trade and Industry ("DTI") or their successors in title …….

Accreditation of Mediation Providers

24. Mediation Providers shall be accredited by the Board on behalf of the Council if they:

24.1 satisfy the Board that they have reached the standards required by the Board as determined from time to time; and

24.2 have paid the annual membership fee for an Accredited Mediation Provider due to the Council

25. Such Mediation Providers who meet the criteria set by the Board under Article 24 above shall be entitled to describe themselves as "Accredited by the Civil Mediation Council".

26. Accreditation shall be carried out annually using such systems and methodology as the Board may consider appropriate. The Secretary to the Council shall maintain a list of all current Accredited Mediation Providers which shall be open to public inspection.

27. Mediators are not accredited by the Council. Mediators are accredited by Accredited Mediation Providers, or the professional bodies in Article 5.3 above who shall apply the same standards in accrediting mediators as those required by the Board of Accredited Mediation Providers.

Information

30. The Council shall be entitled to establish and maintain a comprehensive information centre in such format and ways as it shall deem appropriate. As part of this process, the Council is empowered to create and maintain a website.

Areas of law

60. The areas of law for the purposes of Article 2.1 are:

60.1 Civil law (other than family law);

60.2 Commercial law;

60.3 Employment law;

60.4 Sports law;

60.5 Public and administrative law;

60.6 Regulatory law;

60.7 Consumer law; and

60.8 any other area that the Members of the Council shall, pursuant to Article 47 above, add from time to time.

The Civil Mediation Council Board

The Board includes:

Chairman -	Lord Slynn of Hadley	Vice Chairman -	Karl Mackie (CEDR)
Treasurer -	Richard Schiffer (ADR Group)	Secretary -	Jonathan Dingle
Bar Council :	Michel Kallipetis QC	Law Society :	Rosemary Carter
DCA :	Robert Nicholas		
Other providers :	Frances Burton (ADR Chambers)	Mark Jackson-Stops (In Place of Strife)	
	Allan Connarty (Chartered Institute)		
Independent members	Heather Allen	Judith Kelbie	
	Philip Naughton QC	David Richbell	
	Tony Willis		
National Mediation Helpline		Harry Hodgkin	

Civil Mediation Council Accredited Providers

The Civil Mediation Council operates a pilot scheme for the accreditation of mediation providers. This is a voluntary scheme although the DCA and the National Mediation Helpline require accreditation. It relates to the standards, quality, and characteristics of the provider and not to its individual mediators but sets basic standards of training, CPD, and administration. The CMC welcomes comments on the scheme.

ELEVEN

The following mediation providers have been formally accredited under its pilot scheme which began in mid-December 2005:

* Clerksroom	(www.clerksroom.com)
* Solent Mediation	(www.solentmediation.com)
* Specialist Mediators LLP	(www.specialistmediators.org)
* UK Mediation	(www.UKmediation.net)
* LADR (LambBuilding ADR)	(www.ladr.co.uk)
* Intermediation/InterResolve	(www.inter-resolve.com)
* ADR Group	(www.adrgroup.co.uk)
* Talk Mediation	(www.talkmediation.co.uk)
* Littleton Dispute Resolution Services	(www.littletonchambers.com)
* ADR Chambers	(www.adrchambers.co.uk)
* Academy of Experts	(www.academy-experts.org)
* In Place of Strife	(www.mediate.co.uk)
* Association of Northern Mediators	(www.northernmediators.co.uk)
* Chartered Institute of Arbitrators	(www.arbitrators.org)
* Association of Midlands Mediators	(www.ammediators.co.uk)
* CEDR (Centre for Effective Dispute Resolution)	(www.cedr.co.uk)
* Northern Dispute Resolution	(www.ndr-northernmediations.co.uk)
* Maritime Solicitors Mediation	(website)
* Global Mediation	(www.globalmediation.co.uk
* Wandsworth Mediation Service	(www.wandsworthmediation.co.uk)
* Consensus Mediation	(www.consensusmediation.co.uk)
* Core Mediation	(www.core-mediation.com)
* Law Works Mediation	(www.lawworks.org.uk)
* Sports Dispute Resolution Panel	(www.sportsdisputes.co.uk)
* Association of Cambridge Mediators	(www.cambridgemediators.co.uk)
* Oxfordshire Mediation Group	
* ResoLex	(www.resolex.com)
* MTV Mediators (Middlesex & Thames Valley Mediators)	
* Commercial Mediation West Wales	(www.CMWW.co.uk)
* Immediation	(www.immediation.co.uk)

More than 10 other applications from mediation providers have been received or are expected as of 31st January 2007 and are being assessed under the scheme and will be listed here once they have been approved, a process that involves up to six weeks of work by the CMC using the criteria it has adopted.

Further details of how to access mediation are available from the DCA's funded website at www.nationalmediationhelpline.com

IMPORTANT NOTICE - The CMC Scheme is a pilot scheme and depends on the accuracy of the information provided to the CMC by applicants for its effectiveness. Whilst reasonable steps are taken to ensure that the information is likely to be correct the responsibility for accuracy lies with the provider to whom all questions should be addressed. The CMC can accept no liability for any loss or error caused by innaccurate information having been provided to it and makes no warranty as to the effectiveness or otherwise of individual mediators provided by an Accredited Provider.

Users should also note that the CMC does not accredit individual mediators and that membership of the CMC as an individual does not imply, infer, or confer any status or guarantee of quality upon such a person. Users should make their own checks of any mediator that they intend to instruct and are recommended to do so through the offices of an accredited mediation provider where possible.

Her Majesties Court Service Mediation Service[7]

Her Majesty's Courts Service (HMCS) is an executive agency of the Department for Constitutional Affairs (DCA) with the remit is to deliver justice effectively and efficiently to the public. Her Majesty's Courts Service provides administrative support for the Court of Appeal, the High Court, the Crown Court, the magistrates'

[7] See also Chapter Four above regarding Court Annexed Mediation.

courts, the county courts and the Probate Service. The third of its business plan objectives is to enable people to resolve their problems better by promoting and delivering faster and more effective dispute resolution. Her Majesty's Courts Service was launched on the 1st April 2005, linking the administration of Magistrates', Crown, County and Supreme Courts together for the first time, pursuant to the Courts Act 2003. HMCS established the National Mediation Helpline in October 2005.

What is the National Mediation Helpline?

In conjunction with the Civil Mediation Helpline, HMCS set up a telephone helpline),[8] which provides civil court users in England and Wales with information and advice on mediation. If requested, the Helpline can put callers in contact with a Civil Mediation Council accredited mediation provider who in turn can provide low cost mediations.

The scheme is primarily advertised by leaflets, which are distributed by county courts to parties at Allocation stage, and by posters, which have been placed in public areas within the courts.

A number of civil courts are now using the Helpline as their preferred method of providing low cost mediation services to their customers.

The Helpline can be accessed by phoning 0845 603 0809 (local rate) between 8.30am and 6.00pm. The Helpline advisers provide callers with information on the potential benefits of mediation and they will talk parties through the mediation process. The Helpline does not provide advice on individual cases or mediators. If the call is a request for a mediator then the Helpline adviser will ask a series of questions and pass the enquiry to a mediation provider accredited by the Civil Mediation Council.

The mediation provider will then contact the parties to discuss the suitability of the dispute for mediation. If all parties agree to proceed a mediator will be appointed and a date and time of mediation will be set.

Mediation fees charged by the National Mediation Helpline.

Amount of dispute	Fees	Time allowed	Additional time
£5,000 or less Small Claim*	£50 + VAT £100 + VAT	1 hour 2 hours	£50 + VAT per hour
£5,001 to £15,000 Fast Track	£250 + VAT	3 hours	£84 + VAT per hour
£15,001 to £50,000 Multi Track	£375 + VAT	4 hours	£93.50 + VAT per hour

* The mediator/mediation provider should agree in advance whether the Small Claim should be dealt with in one or two hours. For the one-hour rate the option is available to facilitate settlement over the telephone if appropriate, and if the parties agree.

If the claim is for more than £50,000, the fees will need to be agreed with the organisation providing the mediation.

COMMENT :

The role and function of both the CMC and its relationship with HMCS are likely to develop as time goes by. Both are relatively young organisation, neither of which can truly be said to have as yet found their feet. HMCS is actively restructuring and rationalising mediation service provision within the court system, and is currently rolling out a program of small claim mediation by HMCS employees within 10 of the larger regionally based courts taking the Manchester trial program as it model. The CMC may yet become the overarching quality assurance body for civil mediation in the UK.

[8] http://www.nationalmediationhelpline.com

ELEVEN

Employment Dispute Settlement.

Advisory, Conciliation and Arbitration Service (ACAS)[9]

ACAS, founded in 1975 states that it aims are to improve organisations and working life through better employment relations. ACAS provides up-to-date information, independent advice, high quality training and works with employers and employees to solve problems and improve performance. It is a publicly funded body, governed by a council made up of leading figures from business, unions, the independent sectors through to academics. The ACAS Council is responsible for determining the strategic direction, policies and priorities of ACAS and for ensuring that its statutory duties are carried out effectively.

ACAS history

The ACAS story begins over a hundred years ago when the government set up a voluntary conciliation and arbitration service in 1896. Apart from a name change or two, to the Industrial Relations Service in 1960 and the Conciliation and Advisory Service in 1972 the basic service was much the same and remained firmly under the government's wing.

Then in 1974 the modern organisation was born. Renamed the Conciliation and Arbitration Service it was moved away from government and set up with an independent council to direct it. 'Advisory' was added to the name in 1975 to reflect the full range of services on offer. Finally in 1976 the new organisation was put on a statutory footing.

During the turbulent days of industrial unrest from the late 1970s to the mid 1980s ACAS became a household name. ACAS meant high-profile delegations coming and going, in the full glare of the media, for talks behind closed doors and the inevitable beer and sandwiches. During the miners' strike of 1984, for example, the National Coal Board and the National Union of Miners were regular visitors for over a year. In the same year ACAS was involved in the Battle of Wapping when Rupert Murdoch dramatically changed working practices in the newspaper printing industry. 24/7 is not a new concept for ACAS.

ACAS still helps solve high profile labour disputes such as the London tube strikes. But the employment world has changed and people have more rights in the workplace. Since the early 1990s much of our work has focused on individual complaints to employment tribunals. These are passed to ACAS and at present 75% are settled or withdrawn at the ACAS stage so never reach a tribunal hearing. Another growth area is in solving employment issues before they become problems at all.

Our message is *'prevention is better than cure*' and is becoming an increasingly important part of our work. We give advice and guidance to 800,000 callers a year via our telephone helplines, promote good practice at the training sessions we run each year, last year we provided training to 35,000 delegates. We also work in individual companies with employer/ employee/ trade union groups in partnership to find lasting solutions in their workplace.

Key milestones:

1896 - a voluntary conciliation and arbitration service launched by the government. This also gave free advice to employers and unions on industrial relations and personnel problems.

1960 - the service became known as the Industrial Relations Service.

1972 - the service became known as the Conciliation and Advisory Service.

1974 - the Conciliation and Arbitration Service set up as an independent service directed by an independent council.

1975 - renamed the Advisory, Conciliation and Arbitration Service.

1976 - January 1976 ACAS became a statutory body under the terms of the Employment Protection Act 1975.

[9] http://www.acas.org.uk – extracts from web site.

ACAS and disputes involving an employment tribunal claim

ACAS conciliation

As part of that job we have a legal duty to offer conciliation in most cases when someone has a complaint about their employment rights. We can do this even if no formal complaint has been made to an employment tribunal.

Our role is to help find a solution that both sides find acceptable instead of going to a tribunal hearing. We don't impose solutions, but will try to help you settle your differences on your own terms. This process is known as conciliation.

Key features of our conciliation service

- **Voluntary** - you only take part if you want to and you can stop at any time.
- **Free** - there is no charge for our service.
- **Impartial** - we won't take sides or judge who is right or wrong.
- **Independent** - we are not part of the Employment Tribunal Service. Conciliation does not delay the tribunal process. What you say during conciliation can't be used as evidence against you at a tribunal hearing.
- **Confidential** - nothing you tell us will be passed on to anyone else unless you want it to be.
- **May be available for a limited period only** - the conciliation period may be limited for certain types of complaint to an employment tribunal. If this applies in your case, the employment tribunal will write and tell you the date that the conciliation period will end. If the employment tribunal do not write to you about this, conciliation may continue until the case is heard by the employment tribunal.

What are your options?

If someone has a complaint about their employment rights, there are a number of possible options

Settling the complaint through ACAS - we conciliate in most claims about individual employment rights, and the majority are settled (or withdrawn). We can do this even if no complaint has yet been made to a tribunal.

Settling the complaint privately - you can settle the complaint privately in certain circumstances.

Withdrawing the complaint - if someone has made a claim to a tribunal but no longer wishes to continue with it, they should withdraw it by writing to the tribunal. This should be done without delay, as the tribunal may award costs if they think someone has acted unreasonably.

Having the complaint decided by an arbitrator - if someone believes they have been unfairly dismissed, or that they have a complaint under the flexible working regulations, the complaint can be heard by an independent arbitrator appointed by Acas, if that is what both sides want. For more details ask your conciliator.

Having the complaint decided by an employment tribunal - you can get booklets explaining tribunal procedures from the Employment Tribunal Service or from Employment Service offices, Citizens Advice Bureaux and Law Centres.

Why choose conciliation?

- You can get a clearer idea about the strengths and weaknesses of your case, and ways of resolving it.
- You can avoid the time, expense, risk and stress of going to a hearing.
- Any settlement will be on terms agreed by you, not imposed by a tribunal.
- Everything can be kept confidential - tribunal hearings are public.
- The settlement can include things not available at tribunals (for example, a reference).

When can we get involved?

We can get involved as soon as someone has a complaint about their employment rights, even if they haven't yet complained to an employment tribunal. Either party may request assistance by contacting their nearest ACAS office.

ELEVEN

If someone makes a complaint to an employment tribunal, the tribunal copies the papers to us, so that we can contact both sides to offer conciliation. If you are involved in a tribunal case, you can contact your conciliator by telephoning the number given in the introductory letter from ACAS.

What will the conciliator do?

In order to help you reach a settlement, the conciliator will talk through the issues with both sides to see if a solution can be found.

Where appropriate, the conciliator will also:

- explain the conciliation process
- explain the way tribunals operate, and what they will take into account in deciding the case
- discuss the options open to you, including arbitration where appropriate
- help you to understand how the other side views the case, and explore with you how it might be resolved without a hearing
- tell you about any proposals the other side has for a settlement.

The conciliator will not:

- make a judgement on the case, or the likely outcome of a hearing
- advise you whether to accept any proposals for settlement or not
- act as your representative, take sides, or help you prepare your case.

What happens if I settle the complaint through Acas?

If you settle the complaint through Acas, the agreement will be legally binding. Although agreements do not have to be in writing to be legally binding, the terms of the agreement will be recorded on an ACAS form to be signed by both sides as proof of the agreement.

ACAS brokered settlements in 'short period' cases are restricted to the matter(s) set out in the original tribunal claim.

If a complaint has been made to a tribunal, we will notify the tribunal office that settlement has been agreed and they will close the case.

What happens if we can't reach agreement?

If you can't reach agreement on a tribunal complaint, and the complaint is not withdrawn, it will be decided by a tribunal. If the claim is of unfair dismissal, or is under the flexible working regulations, it can be decided by an arbitrator if both sides prefer.

What if I have a representative?

If you appoint a representative to act for you, we will conciliate through them, and will not deal with you direct. Your representative may agree a settlement on your behalf. As such a settlement would be legally binding, it is important to ensure that your representative fully understands your requirements.

Will talking to ACAS affect the tribunal process?

No. It is important to comply with all instructions from the tribunal as they will continue to process the case while conciliation is taking place, and will list the case for a hearing unless they hear it has been settled or withdrawn. Conciliation is completely separate from the tribunal process.

If conciliation fails, ACAS also provides an optional follow on arbitration service.

ACAS Mediation : FAQS

What kind of problems can mediation help with?

Most kinds of dispute can be mediated provided that those involved want to find a way forward. Mediation is especially suitable when the aim is to maintain the employment relationship. It can be used at any stage in a dispute but is often most effective if used early on.

Mediation may not be suitable if you want to enforce a legal right or want someone to decide the 'rights and wrongs' of an issue for you.

MEDIATION METHODS FOR MEDIATORS AND PARTY REPRESENTATIVES

What can I expect to happen in mediation?

The mediator will decide the best way to carry out the mediation.

They start by talking separately to the people involved in the dispute to find out about the situation, how you feel about it and the effects it is having. They will then help you to start thinking about what you want, what the other person might want, and how things might be improved.

The mediator won't take sides or judge who is right or wrong. Because mediation is about repairing your working relationship with the person you are in conflict with, the mediator will help you focus on the future, not the past.

Later on when the time is right the mediator will bring you together in a joint meeting. At that meeting you will have a chance to say exactly how you feel without being interrupted and to listen to how the other person feels without interrupting them.

The mediator will ask questions, help you to look at the situation realistically and help you come up with ways to improve things.

What does the mediator do?

The mediator decides the best way to carry out the mediation. They guide you through and help you to identify the real issues and come up with ideas to improve things. They do this mainly by asking questions but if you find it helpful, they can use their experience in similar situations before to make suggestions. It is up to you to decide if you want to take up these ideas.

Both sides can talk to the mediator openly because the mediator will not pass on anything said without the agreement of the person who said it.

Those involved in the mediation will be given a written copy of anything that is agreed.

We want the mediator to make formal recommendations. How does this work?

If you want a mediator to make formal recommendations you need to tell us when arranging the mediation. We will then appoint a mediator from our independent panel. The mediator will decide how best to carry out the mediation, usually in the way outlined above. If you are unable to reach agreement, the mediator will write to you with their formal written recommendations within six working days. They will not give you their recommendations on the day of the mediation.

What if I don't want to be in the same room as the person I am having the Disagreement or dispute with?

The mediator will take this into account and will not make you meet with the person if you do not agree. They will agree some rules with both sides about how everyone will behave in any joint meeting and help everyone to stick to them.

An open and frank discussion of the issues, which is controlled by the mediator to ensure fairness and appropriate behaviour can be key to sorting out conflict.

Anyone can ask for the joint meeting to be stopped for a while to take 'time out' or to speak on their own to the mediator.

I don't want to come to the mediation on my own. Can I bring a representative or friend?

Mediation often works best when those actually in conflict work directly with the mediator to resolve it, especially if you will need to work together in the future. Experience shows that you are the best person to explain how you feel. An open and frank discussion of the issues, which is controlled by the mediator to ensure fairness and appropriate behaviour, can be key to sorting out conflict.

You can choose to bring a representative to the mediation, but you must talk to ACAS about this before the day that the mediation takes place as all those involved in the mediation must know who will be attending.

My employer has asked me to take part in mediation. Do I have to agree?

Mediation is entirely voluntary. The mediator will explain all about mediation to you so you can decide if it is for you. If you decide you do not want to mediate the mediator will tell your employer that it is not possible for the mediation to go ahead.

ELEVEN

I'm a supervisor and one of my team has complained about me. My boss wants me and the team member to go to mediation. I don't want to. Do I have any choice?

It is true that employers will often think that a professional supervisor or manager should be prepared to try mediation as a way of resolving a problem but mediation is entirely voluntary. The mediator will explain all about it so you can decide if it is for you. If you decide you do not want to mediate, the mediator will tell your employer that it is not possible for the mediation to go ahead.

Why should I go to mediation? It's all the other persons fault and they should be sacked.

If you really think this then mediation may not be for you because it is not about deciding who is right or wrong. Still nearly everyone who uses mediation says it helps them in some way even if total agreement is not reached. If mediation doesn't work you can still use your organisation's grievance procedure so what have you got to lose? Try it and see.

Where will the mediation be held?

Mediation meetings are usually held on the employer's premises. There will need to be at least two private rooms for the mediation - one for each side in the dispute. If rooms have to be hired or refreshments arranged, ACAS cannot pay for this.

Can I be made to keep to an agreement made in mediation?

You will not be forced into making an agreement against your wishes so you must be committed to sticking to what is finally agreed. Those in dispute with will be asked to stick to what is finally agreed - otherwise there is no point in going ahead.

Agreements reached in mediation are not normally legally binding unless both sides specifically ask for this. You will be given the opportunity to take legal advice before a legally binding agreement is made.

What happens if we don't reach agreement?

If agreement cannot be reached, you can still use any workplace procedures or, in some cases, legal procedures but you cannot bring up what has been said in mediation.

Why should I choose ACAS mediation?

Acas has an excellent reputation for professional integrity and a high standing with bodies representing employees and employers.

Our mediators have a large and unique body of practical experience delivering employment-related mediation.

Our services are quality assured through a programme of externally conducted customer satisfaction research.

What does it cost and who pays?

Where someone has a complaint about their employment rights which they have or could take to an employment tribunal, help is offered free of charge.

If the conflict or dispute has not got that far, a charge is made for mediation.

The charge is frequently met by the employer although the employees may pay the cost or it can be shared.

The mediator will be neutral in their handling of the mediation regardless of who makes the payment to Acas.

I am going to mediation. What should I do to prepare?

You will be given more information about this when the mediation is arranged. Sometimes you and the person you have the disagreement with will each be asked to write down:

- what the problem is that you want the mediator to help with and
- a short list of the main things that have happened. This is to help the mediator understand what the issue is and to save time on the day of the mediation.

Non-Commercial Mediation in the UK.

Community and social mediation has developed quite independently, with charitable groups working with local government to develop mediation services within different social contexts from the community, to education, housing and health care. There has been a tendency for these bodies to create their own training and accreditation programs and to act as exclusive appointing bodies, providing facilities for their mediation services. Regional networks of social mediation providers have developed in England, Ireland, Scotland and in Wales, though not all social mediation providers are affiliated to the networks. Recently, there has been a cross over between the community / social mediation providers and the commercial mediation service providers. It is not surprising that many who have become qualified and experienced in social mediation, which tends to be very poorly remunerated, if at all, aspire to commercial practice and to gain some return for their investment in mediation training and practice and wish to turn it into a vocation.

Family mediation is quite distinct from either of the above in that it has become an integral part of family law practice. As such, Her Majesties Court Services through the Children and Family Court Advisory and Support Service (CAFCASS) regulates the provision of family mediation services through the auspices of the College of Family Mediators and other selected providers.

Global development of domestic mediation

Mediation has exploded onto the global scene over the last 25 years, being adopted and adapted in an extra-ordinarily wide range of jurisdictions, each with distinctive peculiarities, methodologies, accreditation processes and regulatory systems. Some bear a working resemblance to mediation practice in the UK. Other models are barely recognisable. The diversity of provision with Europe confounded even the European Commission, which has established a very basic minimum set of requirements in its 2005 Directive.

A number of US States have adopted Court Ordered Mediation, as has Canada and mediation in Australia benefits from significant statutory regulation and support. The model appears to be popular with a number of the new members of the EU and may well gain legislative support, since it provides an alternative to judicial settlement in states where the court system is underdeveloped at the present time.

Mediation however has encountered problems in the Lebanon where judges routinely set aside settlements and rule on otherwise settled disputes. In China the courts have likewise been reluctant to accept mediated commercial / private settlements. Whilst Mediation has been a long standing method of settling disputes in the People's Republic of China, the mediation process practices there bears little resemblance to commercial mediation, with significant deference being paid to government officials. Similarly, ancient traditions of mediation practice in many parts of the world owe more to conciliation by elders than to modern commercial mediation concepts of practice and procedure.

International conciliation and mediation

As with arbitration, it is possible for the parties to an international trading transaction to contract for mediation subject to the laws and jurisdiction of a country of choice. International mediation services are widely available today. London in particular operates a very active international mediation sector. With one caveat, international mediation here differs little from domestic mediation. The crucial difference lies in enforcement. It is essential that as an integral part of the settlement contract, the parties consider where and how the contract is to be enforced. Since it will be enforced as a simple contract, the key where the dispute involves non-EU parties, is to make the settlement agreement subject to the law and jurisdiction of the state where enforcement is most likely to be sought.

Note that this may be quite distinct and separate from the law of the dispute giving rise to the settlement.

Within the EU this is less important since an enforcement judgement from any European Member State court can be enforced throughout the Union.

Though less than successful and unlike the MODEL LAW rarely used, the UNCITRAL MODEL RULES OF CONCILIATION, which are open for adoption by contracting parties, are set out below.

ELEVEN

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

RESOLUTION 35/52 ADOPTED BY THE GENERAL ASSEMBLY ON 4 DECEMBER 1980

35/52. Conciliation Rules of the United Nations Commission on International Trade Law[10]

The General Assembly,

Recognizing the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations, *Convinced* that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations, *Noting* that the Conciliation Rules of the United Nations Commission on International Trade Law were adopted by the Commission at its thirteenth session1 after consideration of the observations of Governments and interested organizations,

1. ***Recommends*** the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

2. ***Requests*** the Secretary-General to arrange for the widest possible distribution of the Conciliation Rules.

UNCITRAL CONCILIATION RULES

APPLICATION OF THE RULES

Article 1

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATORS

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATORS

Article 4

(1) *(a)* In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator.

The parties shall endeavour to reach agreement on the name of the third conciliator.

[10] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), paras. 105 and 106

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

SUBMISSION OF STATEMENTS TO CONCILIATOR

Article 5

(1) The conciliator,[11] upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

[11] In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

CO-OPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.[12] If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

CONFIDENTIALITY

Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

[12] The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

COSTS

Article 17

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:
(a) The fee of the conciliator which shall be reasonable in amount;
(b) The travel and other expenses of the conciliator;
(c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;
(d) The cost of any expert advice requested by the conciliator with the consent of the parties;
(e) The cost of any assistance provided pursuant to articles 4, paragraph (2)*(b)*, and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
(b) Admissions made by the other party in the course of the conciliation proceedings;
(c) Proposals made by the conciliator;
(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force. (The parties may agree on other conciliation clauses.)

Self Assessment Exercise No 11

1. To what extent, if at all, is it desirable for mediation to be subject to state regulation.

   If so, what should the minimum standards be for training?

   If so, what should the minimum requirements be for practice?

2. Should mediation be subject to professional regulations and if so in what circumstances might a mediator be subject to disciplinary proceedings and what penalties should be available to the disciplinary panel?

   What role should a complainant be able to play in the disciplinary process, if any?

3. To what extent, if at all, could and should the methodologies of mediation be prescribed by regulation?

4. If mediation were to be state regulated, should a distinction be drawn between social and commercial mediation?

5. To what extent, if at all, do you consider conciliation to provide a viable alternative to

   a) Mediation, and

   b) Arbitration?

6. "Mediation is the black art of the improbable and the impossible."

   Discuss.

ADDITIONAL READING