

### Conciliation in unfair dismissal cases

A statutory conciliation scheme administered by ACAS operates before cases of unfair dismissal can be taken to an employment tribunal. ACAS conciliation officers talk to both sides with the aim of settling the dispute without a tribunal hearing; they are supposed to procure reinstatement of the employee where possible, but in practice most settlements are only for damages.

A conciliation officer contacts each party or their representatives to discuss the case and advise each side on the strength or weakness of their position. They may tell each side what the other has said, but if the case does eventually go to a tribunal, none of this information is admissible without the consent of the party who gave it.

#### Evaluation

The success of the scheme is sometimes measured by the fact that two-thirds of cases are either withdrawn or settled by the conciliation process. However, this ignores the imbalance in power between the employer and the employee, especially where the employee has no legal representation – the fact that there has been a settlement does not necessarily mean it is a fair one, when one party is under far more pressure to agree than the other. Dickens's 1985 study of unfair dismissal cases found that awards after a hearing were generally higher than those achieved by conciliation, implying that employees may feel under pressure to agree to any settlement. The study suggested that the scheme would be more effective in promoting fair settlements – rather than settlement at any price – if conciliation officers had a less neutral stance and instead tried to help enforce the worker's rights.

### Mediation in divorce cases

In many ways, the court system is an undesirable forum for divorce and its attendant disputes over property and children, since the adversarial nature of the system can aggravate the differences between the parties. This makes the whole process more traumatic for those involved, and clearly is especially harmful where there are children. Consequently conciliation has for some time been made available to divorcing couples, not necessarily to get them back together (though this can happen), but to try to ensure that any arrangements between them can be made as amicably as possible, reducing the strain on the parties themselves as well as their children.

The Family Law Act 1996 makes changes to the divorce laws and places a greater emphasis on mediation. The Act requires those seeking public funds for representation in family proceedings to attend a meeting with a mediator to consider whether mediation might be suitable in their case.

#### Evaluation

In divorce cases generally, success depends on the parties themselves and their willingness to cooperate. The parties may find that meeting in a neutral environment,

with the help of an experienced, impartial professional helps them communicate calmly, and can make the process of divorce less painful for the couple and their children, by avoiding the need for a court battle in which each feels obliged to accuse the other of being unfit to look after their children – a battle which can be as expensive as it is unpleasant, at a time when one or both parties may be under considerable financial strain.

A three-year study undertaken as a pilot scheme for the new reforms found that eight out of ten couples reached agreement on some issues through mediation, and four in ten reached a complete settlement. However, the Solicitors' Family Law Association point out that because men are usually the main earners in a family, and women's earning abilities may be limited by the demands of childcare, women may need lawyers to get a fair deal financially; in fact the Association says the reforms may well turn out to be 'a rogue's charter for unscrupulous husbands'.

### Trade association arbitration schemes

The Fair Trading Act 1973 provides that the Director-General of Fair Trading has a duty to promote codes of practice for trade associations, which include arrangements for handling complaints. So far, more than 20 codes have received approval from the Office of Fair Trading (OFT), and there are many other voluntary schemes not yet approved. Many include provisions for an initial conciliation procedure between consumers and retailers or suppliers in case of complaints, often followed by independent arbitration if conciliation fails.

One of the best-known examples is that set up by the Association of British Travel Agents (ABTA), which in the case of disputes between tour operators and consumers, offers impartial conciliation. If this fails, disputes may be referred to a special arbitration scheme – about half of all claims referred to it succeed, though not always winning the amount originally claimed.

A less well-known scheme is that run by the footwear industry, which offers an independent testing scheme for complaints involving faulty footwear. Where a retailer disputes that the product is faulty – blaming damage on inappropriate use by the consumer, for example – an expert opinion can be obtained from the independent Footwear Testing Centre in Kettering. A small test fee is shared by retailer and consumer, with the consumer's share (as well as the cost of the shoes) refunded if testing proves the complaint.

#### Evaluation

The best of the schemes offer quick, simple dispute resolution procedures, but standards do vary – the National Consumer Council has reported that some are very slow, and there is some concern about the impartiality of arbitrators. These problems could be addressed relatively easily, but the main drawback is the diversity of the codes, and widespread ignorance of their existence, not only among consumers but

even among some of the retailers covered by them! Tighter controls by the OFT and better publicity could make them much more useful mechanisms.

### Commercial arbitration

Many commercial contracts contain an arbitration agreement, requiring any dispute to be referred to arbitration before court proceedings are undertaken – the aim being to do away with the need for going to court. Arbitrators usually have some expertise in the relevant field, and lists of suitable individuals are kept by the Institute of Arbitration. The parties themselves choose their arbitrator, ensuring that the person has the necessary expertise in their area and is not connected to either of them. Once appointed, the arbitrator is required to act in an impartial, judicial manner just as a judge would, but the difference is that they will not usually need to have technical points explained to them, so there is less need for expert witnesses.

Disputes may involve disagreement over the quality of goods supplied, interpretation of a trade clause or point of law, or a mixture of the two. Where points of law are involved the arbitrator may be a lawyer. The Arbitration Act 1996 aims to promote commercial arbitration by providing a clear framework for its use. It sets out the powers of the parties to shape the process according to their needs, and provides that they must each do everything necessary to allow the arbitration to proceed properly and without delay. It also spells out the powers of arbitrators, which include limiting the costs to be recoverable by either party and making orders which are equivalent to High Court injunctions if the parties agree. Arbitrators are also authorised to play an inquisitorial role, investigating the facts of the case – many of them are, after all, experts in the relevant fields.

Arbitration hearings must be conducted in a judicial manner, in accordance with the rules of natural justice, but proceedings are informal and held in private, with the time and place decided by the parties. The arbitrator's decision, known as the award, is often delivered immediately, and is as binding on the parties as a High Court judgment would be, and if necessary can be enforced as one.

The award is usually to be considered as final, but appeal may be made to the High Court on a question of law, with the consent of all the parties, or with the permission of the court. Permission will only be given if the case could substantially affect the rights of one of the parties, and provided (with some exceptions) that they had not initially agreed to restrict rights of appeal. The High Court may confirm, vary or reverse the award, or send it back to the arbitrator for reconsideration.

### Evaluation

Arbitration fees can be high, but for companies this may be outweighed by the money they save through being able to get the problem solved as soon as it arises, rather than having to wait months for a court hearing. The arbitration hearing itself tends to be quicker than a court case, because of the expertise of the arbitrator – in a

court hearing time and therefore money can be wasted in explanation of technical points to the judge.

The ability of the parties to choose their arbitrator promotes mutual trust in and respect for the decision, and arbitration is conducted with a view to compromise rather than combat, which avoids destroying the business relationship between the parties. Privacy ensures that business secrets are not made known to competitors. Around 10,000 commercial cases a year go to arbitration, which tends to suggest that business people are fairly happy with the system and the more detailed framework set out by the 1996 Act is thought likely to increase use even further.

### Commercial Court ADR scheme

The Commercial Court has taken a robust approach to the use of ADR. Since 1993, it issues ADR orders for commercial disputes regarded as suitable for ADR. It requires each party to inform the court by letter what steps were taken to resolve the case by ADR and why those efforts failed. This has been the subject of research by the academic, Hazel Genn, which was published in 2002 – *Court-based ADR Initiators for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*. ADR was undertaken in a little over half of the cases in which an ADR order had been issued, though the research found that the take-up was increasing in recent years.

Of the cases in which ADR was attempted, 52 per cent settled through ADR, 5 per cent proceeded to trial following unsuccessful ADR, 20 per cent settled some time after the conclusion of the ADR procedure, and the case was still live or the outcome unknown in 23 per cent of cases. Among cases in which ADR was not attempted following an ADR order, about 63 per cent eventually settled. About one-fifth of these said that the settlement had been as a result of the ADR order being made. However the rate of trials among the group of cases not attempting ADR following an ADR order was 15 per cent, compared with only 5 per cent of cases proceeding to trial following unsuccessful ADR.

ADR orders were generally thought to have had a positive or neutral impact on settlement. Orders can have a positive effect in opening up communication between the parties, and may avoid the fear of one side showing weakness by being the first to suggest settlement.

Figure 25.2 Commercial Court mediation statistics

	Apr 98–Mar 99	Apr 99–Mar 00	Apr 00–Mar 01	Apr 01–Mar 02
Number of commercial mediations	190	462	467	338
% referred by courts	not known	19%	27%	31%

Source: Civil Justice Reform Evaluation Further Findings\* (2002) [Figure 8].