

**EMPLOYMENT DISPUTE RESOLUTION IN
GREAT BRITAIN**

THE CASE FOR CHANGE

AN INTERNATIONAL PERSPECTIVE

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Biographical Note

David Esplin is an Honorary Senior Research Fellow at the Centre for Research in Employment Studies in the University of Hertfordshire Business School. David Esplin obtained his MSc in Industrial Relations at the University of Stirling in 1999. From 1978 to 2006, he worked as an Industrial Relations Consultant to the BMA in Scotland where he also became BMA Assistant Secretary in 1995. David's BMA role was wide ranging and included representation at employment tribunals and the application of dispute resolution methods. More recently he worked as part of a national negotiating team which secured the new General Practitioner contract. In 2006, he was awarded a Winston Churchill Travelling Scholarship to study differing methods of alternative dispute resolution in Cambodia, Japan, New Zealand, Peru and the USA. A central point of David Esplin's research is the use of mediation methods in effective conflict resolution system design applied as an alternative to adversarial means of conflict resolution such as grievance and tribunal hearings.

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Abstract

This paper investigates the advantages and effectiveness of applying alternative dispute resolution systems (ADR) as part of the thinking and dynamics associated with the current review of employment dispute resolution in Great Britain. The paper draws on knowledge and information obtained from an international study of ADR methods in various countries including Japan, New Zealand, USA and Cambodia. The paper seeks to demonstrate that there is a compelling body evidence to justify a degree of prescription in the use of ADR methods in dealing with employment disputes and both organisational and legislative level in Great Britain.

Introduction and Aims

The purpose and aim of this working paper is to focus on current issues affecting the management of employment dispute resolution in Great Britain and inform the case for improvement and reform drawing on information and evidence obtained from an international study funded by the Winston Churchill Memorial Trust. The study, undertaken from July 2006 to March 2007, looked at alternative methods of dispute resolution in Cambodia, Japan, New Zealand, Peru and The United States of America. This paper seeks to use evidence obtained from this study to further develop some of the key recommendations set out in current review of employment dispute resolution in Great Britain published by the Department of Trade and Industry in March 2007 (Gibbons 2007).

The UK Context - Employment Dispute Resolution in the UK

The current employment dispute system in the UK is closely aligned with the creation of the Industrial Tribunal system and the statutory right to claim unfair dismissal introduced in the Industrial Relations Act 1971. The 1971 legislation flowed from the recommendations of the “Donovan Commission” set up to review the state of employment relations. Although primarily focused on collective bargaining and the part played by trade unions, Donovan’s concept of a Labour Tribunals system was one which was a type of people’s court, easily accessible, speedy, informal and inexpensive dispute resolution mechanism. In reality, Employment Tribunals (as they are now called) are specialist courts with a legally qualified Chair. Even the greatest supporter of the employment Tribunal system would probably concede that Employment Tribunals are now very far removed from any notion of a “people’s court”. The Tribunals of today deal with increasingly complex and expensive litigation.

In 1975, the Advisory Conciliation and Arbitration Service (ACAS) was set up as an independent, impartial body and now has a statutory duty to promote and undertake conciliation in individual rights cases. It does not, however, have powers to force parties to conciliate or mediate. ACAS is able to perform an effective role in helping to achieve conciliated settlements and has powers to ensure these are legally binding on both parties. For example in 2004/2005 ACAS claims to have settled 86,816 actual or potential tribunal applications. This accounts for 73% of potential tribunal hearing days, 48% through cases settled directly under ACAS and a further 25% through influencing the parties (Gibbons 2007). The last two decades have seen a significant rise in the number of applications and tribunal costs. There are many complicating factors, which have led to this. For example, the growth of domestic employment legislation individual rights and the diminution in collective bargaining with trade union membership now less than 20% in the private sector. Perhaps most significant has been the influence and impact of European laws over the last two decades. The costs to government for Tribunal funding and ACAS in 2005/2006 was 120 million pounds (Gibbons 2007). In October 2004 the UK Government implemented new dispute resolution regulations namely the Dispute Resolution Regulations 2002 (DRR 2002). These regulations were designed to filter out ineligible claims, including those that have not been dealt with through statutory discipline, dismissal and grievance procedures. This required employers to adopt a simple three-step process with each claim having its own statutory time line to ensure full compliance. The net effect of the new system is that employees who wish to undertake Employment Tribunal cases must exhaust statutory grievance or disciplinary procedures in respect of most but not all employing rights before a

legal claim can proceed. Critics argue that the new regulations have led to a defensive adherence to process focused on the protection of legal positions rather than a creative approach to problem solving. According to Gibbons current opinion from both employers and small business organisations indicate a serious flaw in the DRR 2002 Regulations and conclude that the “actual effect of the regulations has been to make everyone focus on process resulting in a draconian and bureaucratic system (Gibbons2007). The report’s key recommendations are as follows:

- ensure employment tribunals at their discretion take into account reasonableness of behaviour and procedure when making awards
- introduce a new simple process to settle monetary disputes without the need for tribunal hearings
- increase the quality of advice to potential claimants and respondents through an adequately resourced help line and the internet and
- offer free early dispute resolution service, including where appropriate mediation
- Repeal the statutory dispute resolution procedures set out in the Dispute Resolution Regulations
- Produce clear, simple, non prescriptive guidelines on grievances, discipline and dismissal in the workplace
- Challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e.g. through greater use of in-house mediation early neutral evaluation and provisions in contracts of employment
- Encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system and to increase user confidence in it
- Simplify employment law, recognising that its complexity creates uncertainty and costs for employers and employees (Gibbons 2007).

An International Perspective

Against this background what does the experience of the countries visited have to offer in terms of the issues highlighted in the Gibbons report? What evidence is there from these countries to support the notion that alternative dispute resolution (ADR) is effective and could help solve some of the challenges highlighted by the recommendations set out in the Gibbon’s report? The international study looked at differing approaches to ADR across a diverse range of cultures and legal systems by visiting key institutions/organisations, meeting with recognised experts combined with a review of available literature and research papers.

Why Cambodia, Japan, New Zealand, USA and Peru?

In Cambodia the International Labour Organisation, with support of US Aid and New Zealand Aid, had been instrumental in developing a new system of dispute management which at present is focussed mainly on collective disputes. Japan has recently reformed long standing employment laws with the introduction of a new employment tribunal system. In New Zealand significant changes to employee relations policies/laws have been introduced with the removal of industrial tribunals and imposition of prescribed mediation. The USA

provided an opportunity to look at the work of the long standing Federal Mediation and Conciliation Service and also the use of the Ombudsman function as an effective system in early dispute resolution processes.

Cambodia

The political and social upheaval of Cambodia's recent past has forced government to deal with the challenge of the industrial effects of moving away from a planned economy to one based on market forces. Despite relative new found economic prosperity this cultural and industrial transition has generated an increase in conflict and disputes between workers and employers. Cambodia is one of the poorest countries in Asia with a GDP per capita of around US\$300 in 2002 and around 35 to 40% of population living below the poverty line. Around 90% of the population are engaged in agricultural work with the balance of working in textiles or tourism. Currently, the textile sector accounts for 90-95% of overall export revenue (Sibbel 2005).

Since 2002 the ILO's Labour Dispute Resolution Project (LDRP) has helped the social partners in Cambodia to develop mechanisms and processes to deal with labour disputes effectively. In their analysis of the country's industrial relations problems, the ILO concluded that a combination of weak governance structures left Cambodia poorly equipped to deal with growing industrial conflict despite the existence of an appropriate, but ineffective, legal framework. In the light of this the ILO regard the establishment of the Arbitration Council (AC) as the LDRP project's greatest achievement (Sibbel 2005 and Noord, Adler et al. 2004).

Discussions with the ILO and officials and officers of the Arbitration Foundation in Phnom Penh revealed both an enthusiasm for and belief in the effectiveness of the AC which seems to have developed a reputation for fairness, transparency and independence. What then are the methods and system used by the Arbitration Council members to determine disputes and how has it managed to command so much respect and confidence?

Evidence suggests it is a combination of structure, composition and methods. The architecture of the Council is based on a tripartite structure with members drawn in equal measure from Unions, Government Ministries and Employers' groups (heavily influenced by an Australian model). The AC is able to deal with rights and interest based disputes. More significantly, Council members have been given a great deal of latitude in terms of both the use of conciliation and negotiation techniques before proceeding if necessary to an arbitrary determination. Discussions with AC officials and the ILO Regional Management indicated a strong preference amongst AC members towards the use of facilitation and conciliation. This appears to sit well with the cultural norms of the Khmer people who have a natural inclination towards conciliation and mediation. One perceived weakness in the system is the lack of separation between conciliation and arbitration processes, which may be the subject of further legal reforms. Another is the lack of systems for resolving individual rights disputes - currently under review. From the statistics available there is clear evidence that the current system with its imperfections has been successful in averting many strikes and lockouts as well as securing settlements in most cases. The following statistics from 2005 give some indication:

Outcome of cases referred to Arbitration Council May 2003 - February 2005

- Agreement pre-award - 36%
- Award - fully or substantially resolved cases - 23%
- Award - partially implemented - 8%
- Post award settlement - 9%
- Award not implemented - 23% (Sibbel 2005)

Overall, the above figures represent a total of 68% positive outcomes and 32% negative outcomes. Most significantly, the highest success ratio is in the pre- award phase where the use of conciliation is significant. Although this mirrors the cultural fit issue it also provides direct evidence of the appropriateness of conciliation/mediation methods and of an effective ADR system design. For example, there is an imposition of a mandatory process of conciliation in collective disputes requiring the appointment of a conciliator within 48 hours of dispute notification. Thereafter, a mandatory time line of 15 days is imposed to secure areas of agreement or to file a “non-conciliation report” with the Arbitration Council. Despite this, individual Arbiters still have latitude to reintroduce conciliation before final determination. The success of this appears to be highlighted in the above statistics.

The Arbitration Council is also permitted to adjudicate in interest based disputes based on the principles of fairness. Claimants with an interest case must provide sufficient evidence as to why they should succeed in their claim. An example of such a case is known as the “Advanced Industry case”. The Arbitration Council ordered the employer to pay seniority increments to its workers, even though there was no legal requirement to do so. In the circumstances of this case, the Council held that it was equitable for the employer to give seniority increments in similar amount to the increments received by workers in the garment, textile or footwear industry.

The Legal Framework

The Constitution of the Kingdom of Cambodia provides citizens with the right to form and be members of trade unions. In 1997 Cambodia introduced a new labour law to cover all situations where there is an employee/employer relationship. Although only 10% of the active population has formalised employment contracts, individuals are covered by comprehensive law that includes some aspects of labour protection, freedom of association, collective bargaining and dispute resolution. A series of laws called “Prakas” have further developed these rights culminating in the establishment of the Arbitration Council in April 2004. The pre arbitration stage in collective disputes requires the appointment of a conciliator within 48 hours with a prescribed conciliation activity taking place within 15 days. If conciliation is unsuccessful after this period then current Labour Law required the involvement of the Arbitration Council within three days of notification of a non conciliation report. A three member arbitration panel is then appointed to hear and decide the case. Individual disputes resolution systems do not appear to have been given the same weight in terms of process and structure although there is a right of enforcement through the Cambodian Court. This doubtless reflects current political priorities focussed on the need to maintain stability in an emerging economy. Currently with the ILO’s support

initiatives are underway to introduce a parallel system with the introduction of some form of tribunal system for individual disputes (Heron and Noord 2004).

What does the Cambodian system have to offer the UK?

Despite the obvious differences affecting the political, cultural and economic dynamics of Cambodia, there is evidence of effective dispute resolution methods at the core of the recently created Cambodian ADR system. The effectiveness of the Cambodian system should not simply be measured by the success of the architecture or composition of their Arbitration Council system or the impact of prescription in terms of mandatory time deadlines (although these factors are vitally important) but also the cultural drivers which put conciliation methods at the core of each stage of their dispute resolution system. This succeeds in creating circumstances and making arrangements where disagreements can be resolved peacefully, quickly and fairly. It also forms part of an integrated national strategy aimed at building a mature labour relations system (Herron and Noord 2004). This has some resonance with a number of the key findings and recommendation of the UK Department of Trade and Industry's 2007 report, for example:

employers should consider encouraging the use of mediation as a standard provision in contracts of employment ... both employer and employee organisations should improve understanding and awareness levels among their members of the value of third-party mediators to help resolve internal workplace disputes which they are not able to resolve themselves (Gibbons 2007)

These recommendations, if implemented, have the potential to create a significant cultural shift in the methods used to resolve disputes in the UK. The Cambodian model has much to offer in terms of the use of conciliation methods at every level of their dispute resolution process, both at an organisational/employer level and as an integral part of their statutory judicial process.

Cambodia Summary

- Cambodian Government with the support of the ILO have designed and established an effective ADR system
- The Arbitration Council has been successful in resolving collective disputes through the use of conciliation methods.
- Effective resolution of disputes through arbitral awards
- Legal clarity and precedent has been greatly assisted by issuing reasoned decisions
- The support of the Secretariat of the Arbitration Council has been significant in building capacity and promoting transparency
- The employee rights system is still very weak and in need of further development

Japan

Historical Context and Contemporary Situation

Japan's dramatic economic growth after World War Two is well known. Japan became the benchmark for economic prosperity and a system of industrial relations known for its

stability, infrequent employment disputes, job security, lifetime employment and seniority based pay. What is not commonly known is that, in the period immediately after 1945, many violent labour disputes arose in Japan. Consequently, Japan's labour law system attached great importance to collective bargaining disputes, which are in fact guaranteed by the Constitution and Trade Union law. Under this law Labour Relations Commissions were established as expert agencies to deal with collective labour disputes. In contrast, individual labour disputes were not regarded as significant or prevalent enough to require a specific system to achieve resolution. This left only the civil courts with lengthy delays for those who had the resources to pursue such actions (Kuwara in Bamber et al. 1998).

The economic collapse at the beginning of 1990 caused great difficulties for Japanese industries. The 1990's witnessed a huge rise in individual grievances, attributed to the restructuring and downsizing of enterprises. Other factors such as the feminisation of the work force and demands for part time and flexible forms of working combined with extravagant hiring practices all played a part. Also as a result of large ill-advised loans, the economy was paralysed and significant unemployment quickly followed (Sugeno 2004:524). Other factors fuelling instability in Japanese labour relations include the impact of the deregulation of the Japanese labour market which occurred in response to the bursting of the economic bubble. The result has been a move away from long-term job security and a loss of middle management posts. It also marks a cultural shift in the values of the deregulated workforce who now move from one short-term contract to another (Yagi 2007). Public and political awareness have driven the need to re-examine conventional economic, political administrative and legal systems. A key example has been the judicial reform process. In labour dispute terms this resulted in the creation of a new Labour Tribunal system. Prior to this the conventional dispute resolution system was characterised by a lack of specialist services to deal with individual labour conflicts comprehensively and expeditiously. Missing, for example was any form of nationwide counselling or advisory service and a legal framework with the capacity and structure to deal with the rapid increase in employment disputes (Sugeno 2004).

ADR – The New Tribunal System

Legislative reforms carried out after the collapse of the bubble economy encompassed a wide range of fields. Such reforms were combined and integrated at the highest levels of government as part of a movement to bring about fundamental structural changes in Japanese Society. This included a wide scale reform of the justice system which was driven by the formation of a Judicial Reform Council, Chaired by the Japanese Prime Minister. In the area of employee relations a study subgroup of the Council was formed which undertook a comparative study of employment disputes systems in foreign countries especially in Germany and Great Britain. The result was the introduction of a new employment tribunal system, modelled on the UK in terms of composition which became operative in April 2006 (Sugeno2004). Whilst the new system has distinct similarities to the UK system in terms of structure and composition, it is uniquely Japanese. The procedure is instituted in a district court and the Tribunal has jurisdiction over disputes arising from employment relationships. This includes most of the issues we are familiar with in the UK. The district court is then obliged to organise a labour tribunal composed of one career judge and two experts in labour relations. This is where the similarity with the UK system ends.

Hearings are held informally and are not open to the public. The law prescribes that the case has to be disposed of in three sessions and not last more than three to four months in total. In the first session the panel will clarify the issues and the evidence and assess the status of negotiations between the parties. In the second the panel will investigate the facts by interviewing key witnesses and examining documents and ascertain the parties' readiness to resolve the case through mediation. In the third and final stage the panel will make supplementary inquiries of both facts and desires for mediation and will make a mediation proposal. If both parties agree the case is disposed of and entered into the record of the court. If either party rejects the proposal the panel makes a judgment on the merits of the complaint. Either party then has two weeks, to accept or reject, the judgment and the case is automatically referred back to the civil court system.

This system is uniquely Japanese in that it is a formal part of the court system but unlike the UK, cases are held in private and tribunal members are required to use and apply mediation skills to achieve resolution. In essence Japan has managed to build an innovative and mandatory ADR system into their employment tribunal hearing process. It would however be misleading to suggest that the law and mediation in Japan are strangers. According to Nishikawa mediation and other alternative dispute resolution methods work well in Japan not least due to the historical context of mediation dating back to the Edo Period (1600-1868). The traditional Japanese culture tends to view litigation as shameful as it destroys human relationships and brings personal problems to the attention of public authorities (Nishiwaka 2000). However as previously stated there has been a significant cultural shift in behaviour and attitudes in many sections of the Japanese Labour force following the economic crisis of the early 1990's, with a sharp rise in individual disputes.

What does the new Japanese Labour Tribunal system have to offer Great Britain?

It is clear that the Japanese labour tribunal system has borrowed ideas from other countries notably the UK, but the system is uniquely Japanese. The three session hearing system described has at its core an integrated mediation procedure. One of the main criticisms of the current UK system is the unduly adversarial and legally complex processes which characterises UK Employment Tribunal hearings and the bureaucratic steps which precede them. UK Tribunal members have little room to manoeuvre in terms of the system of presentation, hearing and cross-examination which typifies the classic adversarial judicial hearing process, governed by complex and lengthy rules of procedure.

Japan on the other hand has created a system with legislative underpinning which actively promotes and prescribes the use of ADR techniques and seeks to make the system as informal as possible and easily accessible to ordinary workers. The latter has some resonance with the original concept of a 'people's court' envisaged by Donovan in 1970's and the former offers one option which could be adopted by Great Britain in response to the Gibbon's report recommendation to simplify UK domestic employment law and the Employment Tribunal application process. Even if the UK remains wedded to the current Tribunal hearing format there is still scope to amend current legislation to give tribunal members more powers to use ADR methods similar to the Japanese system as part of a mandatory pre hearing assessment. At the very least an element of prescribed ADR either at an organisational/employer or judicial level would be a desirable alternative to the current UK mandatory grievance processes and adversarial tribunal hearings.

Japan Summary

- Evidence of an effective and innovative judicial conflict resolution system
- Strong emphasis on the use and application of mediation in the Labour Tribunal system
- Encouraging early indications that mediation is proving to be effective in the resolution of tribunal cases
- Evidence of a significant increase in individual disputes
- Key influence on system design by UK and Germany but system uniquely Japanese
- The use of mediation in the Tribunal system fits the cultural norm for Japanese society

New Zealand

Of the countries visited in this study New Zealand offers one of the most useful and powerful comparisons with the UK in terms of its history, cultural similarities, employment law developments and industrial relations policies.

From 1894 until 1991 New Zealand's industrial relations system was one of compulsory conciliated bargaining underpinned by the availability of arbitration if required. According to Foster the period from the 1890's to the 1980's was known for its fairly patterned and predictable award negotiations, with pockets of robust negotiations and less predictable outcomes. The system required and attracted a cadre of talented conciliators and mediators, accomplished at guiding the parties towards agreements and putting brush fires out in the process (Foster 2003).

All this changed with the introduction in 1991 of the Employment Contracts Act which promoted individualism in the employment relationship at the expense of collective bargaining. This caused a dramatic decline in collective bargaining and not surprisingly individual disputes increased and opened the way for an expansion in legal representation. It is interesting to reflect on the similarities with the UK and Japan during this period in terms of the growth of individualism and the development of HR management ideology and systems designed to promote and reward individualism. The New Zealand Employment Contracts Act 1991 (ECA) produced a significant change in the industrial relations landscape of the country and the decade that followed dramatically shrunk and reshaped unionised collective bargaining with the loss of a whole generation of skilled negotiators and mediators (Foster 2003). Collective bargaining gave way to a new era of increased litigation. Lawyers took centre stage as individual disputes were prosecuted through New Zealand Industrial Tribunal system. According to McDuff in the 1990s employment law became the most oversubscribed course throughout New Zealand's Law Faculties (McDuff 2006).

In a dramatic change in 2000 New Zealand reversed their previous legislative philosophy and implemented the Employment Relations Act 2000 (ERA). The ERA philosophy once again focused on the promotion of collective bargaining and encouragement of union membership. At its core the ERA philosophy places an obligation on all parties engaged in employee relations to bargain in good faith. This is underpinned by a detailed government

Code, which sets out the values and behaviours expected of both parties. It applies to all forms of collective bargaining and is expressly incorporated into all individual employment contracts (Code of Good Faith 2005). A 2004 survey undertaken by the Centre for Research, Evaluation and Social Assessment (“CRESA”) of the University of Canterbury on behalf of the New Zealand Ministry of Justice clearly indicates that the use and application of ADR is growing:

The CRESA study of the Use and Provision of ADR in New Zealand found:

- 68.2% of lawyers surveyed who practiced in District Courts believed that ADR was effective in employment related disputes.
- 62% of disputing parties identify with mediation, 28% with arbitration and 18% direct negotiation.
- The use of ADR is increasing across a range of areas of dispute.
- Indications of a movement away from arbitration as an extra court or ADR mechanism towards mediation.
- A tendency amongst some lawyers to fail to inform their clients sufficiently about the availability of ADR and a concern that ADR might reduce the need for legal work. (CRESA 2004)

What are the ingredients of New Zealand’s ERA dispute resolution system?

The two pillars upon which the system operates flow from the Department of Labour Mediation Service (established by the ERA) with regard to the role and function of the Employment Relations Authority. Beyond this, provision exists to take cases to an Employment Court, which occurs in a small minority of cases. Most significantly despite substantial opposition from New Zealand’s legal establishment, Industrial Tribunals were revoked and replaced with new Mediation Service supported by a revised Employment Relations Authority.

The Role of the Mediation Service

Under the provisions of the ERA mediation services are provided through the Department of Labour and can be accessed by employers or employees with employee relations problems. The service is free and impartial. It is defined as:

the use of an independent person where a problem has emerged. That person has the role of encouraging those with a problem to explain what has occurred, to discuss the pros and cons of the difference that has arisen and to come to a resolution that is satisfactory to both parties (Using Mediation 2004)

Crucially in this process mediators are not advocates for either party but are committed to the process of problem resolution. The ERA’s emphasis on good faith bargaining combined with a mandatory provision, which requires all employment agreements to include a process for dealing with problems, reflects the cultural shift brought about by this legislation. It removes the adversarial tribunal system which characterized employment disputes of the 1990’s and replaces it with a process that seeks to promote an employment relations culture based on good faith and mutually acceptable solutions to conflict. The dynamics of the

process can vary in format and type but typically parties to a dispute will be invited to explain contentious issues to each other and identify points of agreement and work through the Mediator to find answers and solutions that allow both parties to move. The Mediator is also given legal powers to make a determination where both parties agree but this power is rarely exercised. According to the Department 86% of cases have been successfully settled by the Mediation Service (Department of Labour Annual Report 2006).

The Role of the Employment Relations Authority

The Employment Relations Authority is also charged with the responsibility of resolving employment disputes but acts as a powerful backstop to the Mediation Service. The Authority has adjudicative powers through a process of investigation. Typically formal hearings will be concluded in one day. Under New Zealand law reinstatement is legally enforceable and awards can include damages and legal costs. The Authority has significant powers to make such determinations, which are legally enforceable. The effect seems to suggest that all but the most complex and contentious of cases are resolved at the mediation stage. The Authority's investigative hearings are not trials and therefore the use of legal representation is restricted as it is for mediation. Unlike mediation, investigation hearings are open to the public (New Zealand Dept of Labour).

What does the New Zealand system have to offer Great Britain?

New Zealand enjoys many similarities with the UK with its system of government, close cultural, legal and historical ties. Unlike Cambodia and Japan it is less easy to dismiss the fairly radical reforms of the New Zealand's employment dispute resolution system as a product of cultural and/or legal differences. Clearly they are not. The success and effectiveness of New Zealand's mediation system is in fact acknowledged in the Gibbon's report but is regrettably rejected as a near mandatory option on two grounds namely: (a) New Zealand had no equivalent to ACAS prior to the introduction ERA reforms in 2000 and (b) UK's legislative background of EU and Human rights law is quite different. These assertions are challengeable in two fundamental respects. Firstly New Zealand Mediation's service provides a more advanced government funded dispute resolution service that incorporates many if not all of the functions currently undertaken by ACAS in the UK. Therefore the lack of a historical equivalent to ACAS should not be an impediment to the transferability of this type of ADR design to the UK. Secondly whilst it is true that EU and Human Rights law is not applicable to New Zealand, the use of prescribed mediation, as part of an integrated judicial system is not expressly prohibited by European or for that matter UK domestic law and in many areas of UK domestic law (for example family law) is actively encouraged and promoted. New Zealand's reforms when compared to the current UK Employment Tribunal system may seem radical, yet they represent a compelling argument for some degree of prescription in the use of ADR techniques given the success rate of this process. According to Gibbons in New Zealand there has been a fall of approximately 50% in the number of cases heard in judicial settings which suggests a near mandatory ADR approach with a Tribunal type backstop is a viable and realistic option worthy of being given much greater weight and consideration in examining potential UK reforms (Gibbons2007).

New Zealand Summary

- The Employment Relations Act 2000 (“the ERA”) reversed the provisions of the Employment Rights Act 1991, which promoted individualism in employment relationships.
- The ERA has created an effective ADR structure through the establishment of the Department of Labour’s Mediation Service and Employment Relations Authority.
- The system and method of Mediation is effective, flexible and accessible to all disputing parties.
- Early indications suggest that over 85% of cases are settled at the mediation stage (official statistics still awaited).
- The system and method of investigation and determination by the Employment Relations Authority is effective and easily accessible with a 70% + settlement rate.
- The ERA’s focus in giving legislative force to the introduction and application of good faith in collective bargaining and the employment relationship is the key to the legal underpinning of the ADR system and in its achieving a cultural shift from the individualistic and HR management practices of the 1990’s.

The United States of America

The USA has long history of applying mediation techniques in the resolution of employment disputes principally through the services provided by the Federal Service and Mediation Service. In more recent times there has been a growing trend towards organisationally based dispute resolution systems through the use of ADR methods and ombudsman structures. Both of these systems were examined in the study.

The Federal Mediation Service and Conciliation service (“FMCS”)

The FMCS was set up by President Roosevelt in 1935 against a background of Roosevelt’s new deal for unions and the subsequent 1935 National Labour Relations Act, which gave employees a federally protected right to organise and bargain collectively. The FMCS has grown from a body charged with assisting parties in conflict to an organisation positioned to provide a range of conflict resolution functions such as mediation, dispute system design and training and development. According to Flax FCMS Commissioners are currently charged with a range of responsibilities including capacity building within organisations combined with the use and application of a wide breadth of differing mediation techniques in what remains of the US organised labour market, mainly in the field of transport, car manufacturing and health care. This currently accounts for about 12% of the US workforce (Flax 2007). In 2005 the FCMS were involved in 6,640 disputes with a success rate of 75%. Only 1.5% of cases resulted in work stoppages (FMCS 2007). Mediators are available to all companies with collective bargaining agreements.

The FMCS role is clearly effective and important in many vital areas of the US labour market however the diminution of organised labour in the USA has created a significant workplace transformation including the adoption of new human resource management techniques, which continue to create new challenges within organisational structures. There has also been a significant growth in the introduction of major statutes regulating employment conditions which have generated new areas of litigation. An estimated 30 million civil cases, currently registered in federal, state and local courts, provide a clear indication of the

importance of devising effective forms of conflict management. In the year 2000 one in nine cases involving employment discrimination disputes received a median award of \$1,000,000 or more (SPIDR 2006). As a consequence many large organisations, institutions and corporations are looking at new and innovative conflict management system methods and design.

The Ombudsman Role

Unlike the UK system of ombudsman, which is mainly external to organisations, the US model is that of an internal ombudsman who is typically a neutral or impartial manager within an organisation, who can provide informal and confidential assistance to managers and employees in resolving work-related concerns. This form of internal ombudsman is able to apply a wide range of skills to achieve problem resolution, including counselling, mediation, facilitation and acts as an informal fact finder, upward feedback and change agent. Over the past thirty years hundreds of North American corporations have established organisational ombudsman offices to help manage and resolve workplace related conflict.

One of the most influential and early forms of this type of system stemmed from the Ombudsman function established over thirty years ago at the Massachusetts Institute of Technology (MIT) by Professor Mary Rowe who still remains the MIT Ombudsperson. According to Rowe the effectiveness of the ombudsman role is drawn from a range of dynamics which, when combined, create the right climate within which an ombudsman can function effectively. The following are some key standards

- Confidentiality of the office and system
- Neutrality of the ombudsman
- Relationships
- Trust and confidence
- Ease and safety of accessibility
- Moral authority
- Reputation for fairness
- Delivering respect
- Listening and counselling
- Providing and receiving information
- Creative problem solving
- Facilitating change (Rowe 2003)

Attempts to measure the cost effectiveness of the organisational ombudsman function was undertaken in the late 1980's using as a basic cost effectiveness equation of:

Value added + cost control-ombudsman mistakes

costs of ombudsman function

In assessing the value of the ombudsman function five benefits were ascribed to the equation namely productivity, management time, other personnel savings, legal staff salary

savings and other agency and law-related savings. Applying this formula to MIT in the late 1980's (adjusted to factor in some research funding) the estimated value was three times the ombudsman's office cost (i.e. US\$ 600,000) representing a significant saving in litigation costs, staff time and future conflict avoidance through mediation training and capacity building within the Institution (Rowe and Perneski1990). Further research on the effectiveness of the organisational Ombudsman/Mediator program at the National Naval Medical Centre (200 + bed hospital with 600 physicians) revealed that, between July 2001 and July 2003, 200 cases were directed to the Ombudsman without a single payment or the filing of a legal claim. The national average is 10 to 12 patient complaint episodes in every 100 ends in litigation with the average cost of 12 claims being \$4,800,000. This research also revealed an increase in patient and family satisfaction, a reduction in legal costs, a reduction in claims and evidence of improved patient safety (Houk2003).

The Ombudsman role has continued to develop throughout North America. More contemporaneous concepts use terms such as integrated conflict management design system to offers a more advanced structure which has multiple access points within organisations with fully trained mediators and sophisticated early warning systems focussed on conflict avoidance. This model, known as the "Lynch ICMS Model", appears to be at the cutting edge of the "beyond ADR" debate. It is regarded as simple effective method which has significantly transformed many public sector organizations across North America. These include the Transportation Security Administration of the United States Department of Homeland Security, the World Bank, Department of National Defence and Canadian Forces, Parks Canada, Public Works and Government Services Canada, the RCMP, Canada Customs and Revenue Agency, and the work of the Privy Council of Canada's Task Force on Modernization of Human Resources within the Public Service. Key ingredients of the system include:

- encourages employees and managers to give early indication of their concerns and constructive dissent.
- integrates a collaborative problem-solving approach into the culture of the organisation
- is flexible and user friendly.
- provides options for all types of problems and all people in the workplace including employers, supervisors, professionals, and managers.
- Creates a culture that welcomes dissent and encourages resolution of conflict at the lowest level through direct negotiation.
- provides multiple access points. Employees can readily identify and access a knowledgeable person whom they can trust for advice about the conflict management system.

Crucial to this success is the willingness of organisations to recognise the importance of developing an effective conflict management system that is fit for purpose and an acceptance that this can only be achieved by engaging and securing input from the users and decision makers at all levels of the organisation (Lynch in SPIDR).

What does the USA experience have to offer Great Britain?

Mediation as an effective conflict management tool is well established and embedded in to the US system of industrial relations. However, as discussed the role of the FCMS is limited in terms of the changes in organised labour in the USA. Nevertheless the use and application of mediation as part of a government funded services is a concept which could be applied to the UK in terms of an expanded and enhanced role for ACAS. Of equal importance and arguably of greater interest to the UK should be the innovative and effective methods of organisational conflict management prevalent throughout North America. The current UK Gibbons review specifically recommends that:

The Government should challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e.g through greater use of in-house mediation, early neutral evaluation and provisions in contracts of employment (Gibbons 2007)

Both the Ombudsman and ICMS system of conflict management have a great deal to offer UK employer organisations. The introduction of in house mediation as recommended by Gibbons is laudable but to build effective capacity within organisations greater attention will need to be paid to creating suitable structures, both contractual and organisational, that will actively promote and encourage the use of in house mediation methods. The success and effectiveness of the USA organisational Ombudsman model is built around the neutrality and independence of the role and (as in the more developed ICMS model) an organisational culture characterised by collaborative problem solving and a defence of the principles of free speech and dissent. In terms of UK traditional management structures some of the Gibbon's recommendations if implemented, will require a significant cultural shift to achieve this. UK organisations willing to embrace this change could derive great benefit from the systems and methods currently in use in the USA.

USA Summary

- Strong historical context to the development of dispute resolution systems
- Long established (1935) Federal system of dispute resolution still active and important but serving a dramatically reduced workforce sector.
- Evidence of a range of ADR methods present in the Federal system
- Evidence of new Federal ADR interventions in the form of grievance mediation
- Widespread changes in systems of work, management practices, organisational culture, new labour laws and enhanced individual rights are driving ever increasing forms of diverse employee relations conflicts.
- Ombudsman function is widely developed throughout many key USA and North American Corporations and Organisations.
- Evidence of the effectiveness of the Ombudsman role in conflict avoidance and dispute resolution through the use and application of multiple approaches and ADR techniques
- Evidence that the development of Healthcare ombudsman system is effective and of particular value in the management of medical malpractice cases

- Evidence that the development and application of integrated conflict management systems is creating a new and effective dynamic in the promotion of innovative conflict resolution system design
- Clear indication that traditional grievance systems lack the sophistication and capacity to address the complexity and diversity of existing and emerging workplace disputes

Conclusion and Recommendations

The purpose of this working paper is to use the information and knowledge gained from an international study of ADR systems and techniques to further inform the debate on the reform of employment dispute resolution in Great Britain. The context of this study was built around a number of perceived weakness and failures of the current UK Dispute Resolution Regulations (2002), introduced in October 2004. Whilst conceptually sound these regulations are increasingly being viewed as an impediment to more creative and flexible means of conflict resolution. For example the legislation's use of prescribed complex time lines (differentiated by various statutory provisions), financial penalties for elements of non-compliance and a mandatory requirement to raise and hear grievances before applications to Employment Tribunals can proceed, do not create the correct climate within which ADR systems can flourish.

The international systems and methods of ADR set out in this paper have canvassed a wide field of achievement across an equally wide and diverse range of cultures, legal systems and political contexts. Nevertheless, taken as whole, they all share the same capacity to demonstrate the potency of ADR methods as an effective alternative to adversarial means of conflict resolution in employment disputes. From Cambodia, with its ADR based Arbitration Council, Japan with its ADR focussed Tribunal system, New Zealand with its near mandatory mediation system to the USA with its established mediation system and new organisational systems, there is enough compelling evidence to demonstrate the need for change in Great Britain. The Gibbons review has set out a number of recommendations currently being considered by the UK government not least of which is the proposal to repeal the current Dispute Resolution Regulations. If accepted this will provide a suitable and rare opportunity to substantially reform the way employment dispute resolution is managed in Great Britain. The review appears to very reticent about recommending any element of prescription around ADR perhaps due to the loss of credibility associated with prescription in the current regulations. This is unfortunate because the experience from other countries tends to demonstrate that an element of prescription is the best way of producing the required momentum to drive the use of ADR methods. Relying purely on voluntarism in such processes is unlikely to achieve the necessary paradigm shift to make any new system effective. Gibbon's does however recommend that ADR methods should be encouraged by employers and reflected in individual employment contracts. This could be achieved by amending some of the provisions in the current Employment Relations Act. For example the current statutory provisions which require employers to set out their grievance policy in a statement of main terms could be replaced with a new contractual statement requiring employees to adhere to ADR methods (including the use of a neutral third part mediator) in resolving employment related disputes.

The Gibbons review also recommends the simplification of employment law and the processes involved in taking forward an Employment Tribunal application. This is clearly a welcome and laudable aim. The extent to which it is achievable in employment law is always going to be problematic given the strong influence and impact of European laws. The wide ranging impact and complexity of the European Working Time directive is a just one example. Given that UK domestic law will continue to some degree to be driven by European Directives the scope for simplification is likely to be restricted. Consequently, if Employment Tribunals as recommended by Gibbons are to be given more latitude in the evaluation of the reasonableness of the parties in dispute (having regard to how they have attempted to resolve their differences prior to a hearing), this could provide a sound case for judicial reform. For example Tribunal Chairs could be provided with similar latitude in using pre hearing assessment meetings to direct parties,(where appropriate) to mediation prior to a hearing. Such concepts are not new. For example in family law a judge will often direct parties to mediation in the case of custody disputes.

The fundamental conclusions of the Gibbon's review are a belief that the principles of better regulation will have the necessary impact to achieve the required reforms and recommendations. This paper, whilst fully supportive of the recommendations and findings of the Gibbons review, seeks to take the case for reform further by arguing for a degree of prescription in the use of ADR methods at both an organisational and judicial level. This is based on compelling evidence from the international study which has formed the basis of this paper and which demonstrates the effectiveness of mediation and other ADR methods when they are reinforced by some form of legislative provision. One of the most compelling and directly analogous examples of this is to be found in New Zealand where the introduction of near mandatory mediation system as a replacement for a Tribunal system almost identical to the UK has achieved excellent results. It is hoped the information and evidence set out in this paper will help inform the current review and create a better understanding of how other nations deal with the ever increasing challenges of modern day employment disputes.

Main Recommendations

- The current role of ACAS should be re-examined to assess the feasibility of developing a mediation service similar to that provided by the Department of Labour Mediation Service in New Zealand
- In line with the Gibbons recommendations, government should provide a free mediation service at the pre - tribunal stage but also consider the benefits of giving Tribunal Chairs greater powers of direction to require mediation reports, where appropriate, at a pre hearing assessment stage.
- In developing some of the key recommendations of the Gibbon's review, consideration should be given to creating some form of legislative provision to encourage employers to use mediation structures similar to the USA Ombudsman and ICMS systems as a replacement for grievance style hearings in the resolution of employment disputes.

- Consideration should be given to amend the current rules governing Employment Tribunal Procedures to allow tribunal members wider powers to deploy ADR methods in the resolution of Tribunal cases.
- In line with the recommendations of the Gibbons review government should actively promote ADR methods in the workplace but go further and remove the use of grievance terminology in legislation and government publications to help create the desired cultural and structural shift in resolution of employee relations disputes
- In repealing the current Dispute Resolution Regulations, government should consider promoting the use of ADR by deleting the reference to the redress of grievances contained in the basic particulars of employment set out in Section 2 (4) of the Employment Relations Act 1996 and replace it with the right of complaint redress through mediation.

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