



# Promoting access to injustice? Alternative dispute resolution and employment relations in the UK

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## About ETHOS

*ETHOS - Towards a European Theory Of Justice and fairness* is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening knowledge on the European foundations of justice - both historically based and contemporarily envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reverse inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal that is universal and worth striving for. Rather, justice is understood as a re-enacted and re-constructed lived experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and their practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinates the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019.

## EXECUTIVE SUMMARY

In the United Kingdom, workers and employers are increasingly being encouraged to use alternative dispute resolution (ADR) mechanisms rather than Employment Tribunals (ETs) to resolve conflicts. Like adjudication, ADR involves the intervention of an independent third party in the dispute, but its aim is to help them reach a settlement rather than to apply legal rules and sanctions. It is generally praised for its comparative affordability, speediness and informality. As part of ETHOS WP6 on struggles for justice, this report unpacks the implications of the shift from judicial to extra-judicial dispute resolution for workers' capacity to contest power inequalities and exercise their rights. It focuses on the activities of the Advisory, Conciliation and Arbitration Service (Acas), a large state-sponsored agency which wields unparalleled influence on the overall landscape of employment-related ADR in Great Britain.

The report moves from theoretical reflections on the relationship between ADR and justice to the description of Acas policy, the mapping of social partners' perceptions of ADR and the experience of workers who resort to it. Perceptions are assessed through four semi-structured interviews, two of them with union representatives and the other two with employer representatives. The description of worker experiences draws on a large-scale quantitative study conducted with Acas users in 2015 and six in-depth ethnographies with precarious workers who interacted with Acas in the course of an employment dispute. The ethnographies took place between 2011 and 2014 as part of an ERC-funded project examining how the law is mobilised by workers who cannot easily afford to pay for legal advice.

Acas' main intervention in employment ADR takes place through a conciliation service which intervenes rapidly in ET claims, entails no direct financial cost for parties and seems to be positively evaluated by most of its users as well as (other) employers. However, unions have been more critical of its capacity to deliver fair outcomes, and both legal theory and available data suggest important pitfalls in terms of procedural and substantive justice. When it does not conclude in a settlement, conciliation may lengthen the dispute resolution process in a way that imposes disproportionate burdens on workers. Whatever its outcomes, it also offers employers an opportunity to shape workers' expectations through the authoritative voice of conciliators, whose impartial position may be confused with that of a judge despite the fact that they have no mandate to interpret legal rights and standards. The ambiguity is compounded by Acas' multiple roles, including a helpline on employment rights which many employees contact prior to conciliation. High rates of satisfaction with Acas services may thus conceal that conciliation can result in workers accepting unfair settlements in which their legal rights are compromised. Also of concern is the prevalence of confidentiality agreements which can make further claims by other employees difficult to pursue, and which keep employer abuses of rights out of the public domain. The tension between ADR and justice is signalled in Acas' own Codes of Practice of mediation, which list the types of cases where it may not be suitable. While these cases seem to overlap with those likely to give rise to a Tribunal claim, the conciliation system puts the onus on claimants to decide whether to litigate or not. In this context, it seemingly encourages them to go through a process which leaves them in a weaker position than judicial proceedings. Since worker vulnerability partly reflects the overall inequality of bargaining power created by a long-standing decline in union representation, collective ADR (designed to prevent strikes rather than court cases) may be more likely to deliver fair outcomes than individualised interventions.

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## **ABBREVIATIONS**

Acas	Advisory, Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
CAB	Citizens Advice Bureau
EC	Early Conciliation
ET	Employment Tribunal
UK	United Kingdom

## 1. INTRODUCTION

Since the 1990s and especially post the 2007-2008 financial crisis, UK policymakers have voiced concern at the rising number of cases reaching Employment Tribunals (ETs). A series of official reports have characterised this long-standing trend as increasing burdens for taxpayers and the British economy as a whole,<sup>1</sup> based on neoclassical economics perspectives on the determinants of productivity<sup>2</sup> and the related ideology of austerity.<sup>3</sup> The result has been a raft of measures aimed at reducing the number of claims lodged.<sup>4</sup> In 2012, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 restricted state-funded legal aid (provided before hearing) and civil representation (provided during hearing) to discrimination cases.<sup>5</sup> The Enterprise and Regulatory Reform Act 2013 and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 introduced fees ranging from £400 to £1200 (depending on the type of case) for a hearing at first instance and appellate levels.<sup>6</sup> The Supreme Court quashed them in July 2017 on access to justice grounds, following a protracted legal battle by a large trade union.<sup>7</sup> The government subsequently announced

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<sup>1</sup> Michael Gibbons (2007), *Better Dispute Resolution: A review of employment dispute resolution in Great Britain* [accessed via <https://thetcmgroup.com/wp-content/uploads/2015/01/A-review-of-employment-dispute-resolution.pdf>]; Department for Business Innovation & Skills (2011), *Resolving Workplace Disputes: Government response to the consultation* [accessed via [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229952/1-1365-resolving-workplace-disputes-government-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229952/1-1365-resolving-workplace-disputes-government-response.pdf)]; Adrian Beecroft (2011), *Report on Employment Law* [accessed via [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31583/12-825-report-on-employment-law-beecroft.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31583/12-825-report-on-employment-law-beecroft.pdf)].

<sup>2</sup> Anne Davies (2009), *Perspectives on Labour Law*, Cambridge: Cambridge University Press.

<sup>3</sup> Maria Paula Meneses, Sara Araujo, Silvia Ferreira and Barbara Safradin (2018), *Comparative report on the types of distributive claims, interests and capabilities of various groups of the population evoked in the political and economic debates at the EU and at the nation state level*, ETHOS Deliverable 6.2 [accessed via [https://www.ethos-europe.eu/sites/default/files//docs/d6.2\\_complete.pdf](https://www.ethos-europe.eu/sites/default/files//docs/d6.2_complete.pdf)].

<sup>4</sup> For overviews, see Nicole Busby and Morag McDermont (2016), 'Access to justice in the Employment Tribunal: Private disputes or public concerns?' in Ellie Palmer, Tom Cornford, Audrey Guinchard and Yseult Marique (eds), *Access to Justice: Beyond the policies and politics of austerity*, Oxford: Hart, 175-196; Eleanor Kirk (2017), 'The "problem" with the Employment Tribunal System: Reform, rhetoric and realities for the clients of Citizens' Advice Bureaux', *Work, Employment and Society*, 1-6.

<sup>5</sup> Susan Corby and Pete Burgess (2014), *Adjudicating Employment Rights: A cross-national approach*. London: Palgrave, 90; Helen Anthony and Charlotte Crilly (2014), *Equality, Human Rights and Access to Civil Law Justice: A literature review*, Equality and Human Rights Commission [accessed via <https://www.equalityhumanrights.com/sites/default/files/research-report-99-equality-human-rights-and-access-to-civil-law-justice.pdf>].

<sup>6</sup> David Mangan (2013), 'Employment Tribunal reforms to boost the economy', *Industrial Law Journal* 42(4), 414; Ministry of Justice (2017), *Review of the introduction of fees in the Employment Tribunals: Consultation on proposals for reform* [accessed via [https://consult.justice.gov.uk/digital-communications/review-of-fees-in-employment-tribunals/supporting\\_documents/Reviewofintroductionoffeesinemploymenttribunals.pdf](https://consult.justice.gov.uk/digital-communications/review-of-fees-in-employment-tribunals/supporting_documents/Reviewofintroductionoffeesinemploymenttribunals.pdf)].

<sup>7</sup> R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51.

a reimbursement scheme for claimants who had paid fees under the annulled order.<sup>8</sup> In 2012, the maximum costs to be paid by the losing party in a ‘misconceived’ claim doubled from £10 000 to £20 000<sup>9</sup> and pre-hearing deposits for cases deemed to have little chances of success went from £500 to £1000, adding to the ‘chilling effect’ on precarious claimants considering whether to bring a case.

In addition to saving costs for employers and the state, one of these measures’ purported aims was to encourage workers’ recourse to alternative, non-judicial ways to resolve disputes with their employers. In fact, a key means for the British state to divert disputes away from the courts has been to promote alternative dispute resolution (ADR), either by reducing awards up to 25% in the event of ‘unreasonably’ failing to try and resolve the dispute informally,<sup>10</sup> by facilitating confidential settlements which make related claims inadmissible in unfair dismissal proceedings<sup>11</sup> or by obliging claimants to contact a state-sponsored conciliation service before filing a claim.<sup>12</sup>

Justice considerations rarely figure in ADR advocacy, which seems rooted in an intellectual paradigm that ‘economises on justice’.<sup>13</sup> However ADR is regularly portrayed as beneficial for all parties since it is normally faster, less formal and less expensive than the courts. At a time where cutbacks in substantive employment and social security rights are threatening the livelihoods of a growing segment of the UK population, particularly those already subjected to various forms of exploitation, domination and discrimination,<sup>14</sup> state attempts to substitute judicial litigation with ADR raise the question of whether ADR indeed fares better than litigation in terms of promoting just employment relations and reversing economic inequalities. In other words, is it an instrument that

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<sup>8</sup> Doug Pyper, Feargal McGuinness and Jennifer Brown (2017), *Employment Tribunal Fees*. House of Commons Briefing Paper 7081 [accessed via <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07081>].

<sup>9</sup> Employment tribunals (constitution and rules of Procedure) (Amendment) regulations 2012. See Susan Corby and Paul Latreille (2012), ‘Employment Tribunals and the Civil Courts: Isomorphism exemplified’, *Industrial Law Journal* 41(4), 401.

<sup>10</sup> Gillian Morris (2012), ‘The development of statutory employment rights in Britain and enforcement mechanisms’ in Linda Dickens (ed) (2012), *Making Employment Rights Effective: Issues of enforcement and compliance*, Oxford: Hart, 16-17. Between 2004 and 2008 going through an informal grievance procedure was a mandatory requirement for workers to lodge a claim, a measure that was heavily criticised for creating unnecessary legal complexity. See Astrid Sanders (2009), ‘Part One of the Employment Act 2008: ‘Better’ dispute resolution?’, *Industrial Law Journal* 38 (1), 30-49.

<sup>11</sup> Unless the employer has behaved ‘improperly’ during discussions. Bob Hepple (2013), ‘Back to the future: Employment Law under the Coalition Government’, *Industrial Law Journal* 42 (3), 217; Linda Dickens (2014), ‘The Coalition government’s reforms to employment tribunals and statutory employment rights – echoes of the past’, *Industrial Relations Journal* 45 (3), 237.

<sup>12</sup> Mangan, ‘Employment Tribunal reforms’, op. cit., 413.

<sup>13</sup> José Castro Caldas (2018), *Report on economizing on justice*, ETHOS Deliverable 6.1 [accessed via [https://www.ethos-europe.eu/sites/default/files//docs/d6.1\\_website\\_report\\_complete.pdf](https://www.ethos-europe.eu/sites/default/files//docs/d6.1_website_report_complete.pdf)].

<sup>14</sup> TUC (2016), *Living on the Edge: The rise of job insecurity in modern Britain* [accessed via <https://www.tuc.org.uk/sites/default/files/Living%20on%20the%20Edge%202016.pdf>]; Pier-Luc Dupont & Bridget Anderson (2018), *UK report on the economic struggles of young mothers and migrant domestic workers*, ETHOS working paper 6.2 [accessed via <https://cpb-eu-w2.wpmucdn.com/blogs.bristol.ac.uk/dist/e/505/files/2019/01/6.2-UK-report-19-02-11-1136udm.pdf>].

improves access to justice or, conversely, that entrenches the vicious circle of unequal access to justice and unequal power relations between workers and employers?

This report, elaborated as part of ETHOS WP6 which explores institutional and extra-institutional struggles for justice, attempts to answer this question by investigating workers' experience with measures promoted by the Advisory, Conciliation and Arbitration Service (Acas). Acas is a public agency mandated to provide conciliation, arbitration and advice to workers and employers in England, Scotland and Wales.<sup>15</sup> It is governed by a council of employer and union representatives as well as independents.<sup>16</sup> The focus on Acas at the expense of other, smaller-scale ADR mechanisms is due to the unparalleled influence it wields on UK industrial relations as a result of its regulatory powers (see Section 4) and sizeable resources (726 permanent employees in 2016-2017<sup>17</sup>). Among other things, these give the agency the capacity to shape the opportunity structure for the dispute resolution activities of other actors, such as trade unions, employer associations, charities, law firms and consultancies. Acas interventions take a number of forms, mainly designed to address individual rather than collective disputes. This individualising approach, which also permeates the academic ADR literature consulted, can be understood as part of a broader shift toward the de-collectivisation of employment relations,<sup>18</sup> itself partly stemming from legal restrictions on union activities.<sup>19</sup> While such a trend would deserve to be critically scrutinised rather than taken for granted, the report circumscribes itself to the analysis of individual disputes. In keeping with the ETHOS mandate, it also focuses on disputes which concern the exercise of employment rights and the mitigation of economic inequalities.

The next section explains the methodology used to conceptualise, describe and evaluate employment-related ADR in the UK. Section 3 sets out an analytical framework to compare ADR and judicial litigation from a justice perspective. Section 4 describes Acas' contribution to the development of mediation, conciliation and (to a much lesser extent) arbitration mechanisms to resolve employment disputes. Section 5 conveys the perceptions of Acas itself, employers and unions on the benefits and pitfalls of these mechanisms. Section 6, which makes up the core of the report, examines workers' experience of Acas conciliation through a quantitative study and six ethnographies with precarious workers. The conclusion assesses the implications of ADR for employment justice in the British context.

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<sup>15</sup> The Labour Relations Authority plays this role in Northern Ireland.

<sup>16</sup> Trade Union and Labour Relations (Consolidation) Act 1992, Art. 209-213.

<sup>17</sup> Acas (2017), *Annual report and accounts 2016-2017*, 59 [accessed via <http://www.Acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf>].

<sup>18</sup> Trevor Colling (2004), 'No claim, no pain? The privatization of dispute resolution in Britain', *Economic and Industrial Democracy* 25 (4), 555-579; Gill Dix, Keith Sisson & John Forth (2009), 'Conflict at work: The changing pattern of disputes', in William Brown, Alex Bryson, John Forth and Keith Whitfield (eds), *The Evolution of the Modern Workplace*, Cambridge: Cambridge University Press, 176-200.

<sup>19</sup> Tonia Novitz (2002), 'A revised role for trade union as designed by New Labour: The representation pyramid and "partnership"', *Journal of Law and Society* 29 (3), 487-509; Alan Bogg (2012), 'The death of statutory union recognition in the United Kingdom', *Journal of Industrial Relations* 54 (3), 409-425; Jane Elgar and Bob Simpson (2017), 'The impact of the law on industrial disputes revisited: A perspective on developments over the last two decades', *Industrial Law Journal* 46 (1), 6-22.

## 2. METHODOLOGY

Employment-related ADR is a relatively new topic of academic research and policy debate in the UK. Partly as a result, what constitutes and does not constitute ADR is the subject of considerable discrepancies. To identify the mechanisms which speak to the broad theme of WP6 (struggles for justice in times of austerity), an English-language literature review on ADR and justice was carried out. The review put a special emphasis on UK sources and those focusing on the employment context. After deciding on a working definition of ADR, policy documents were collated to offer a mapping of the main institutional mechanisms falling under this label in the UK. The documents were mostly found on the Acas website and included annual reports, explanatory guidance, Codes of Practice and policy evaluations. The main characteristics of the policy measures were briefly synthesised.

To examine perceptions of the Acas conciliation service, which turned out to be the most significant of existing ADR mechanisms, the quantitative data gathered in a recent Acas-commissioned evaluation was analysed in light of ADR and justice theory. The conclusions drawn are those of the authors and do not necessarily reflect Acas positions. Semi-structured interviews lasting approximately 30 minutes (except a shorter 10-minute one) were also conducted with two trade union representatives and two employer representatives between August and October 2018. Participants were asked to describe their experience with ADR and evaluate its relevance and outcomes in terms of labour justice. All interviews were audio-recorded, transcribed, stored on a secure server and subjected to qualitative content analysis.

The experience of workers themselves is analysed through six case studies drawn from a large qualitative data-set gathered as part of the study Citizens Advice and Employment Disputes (CAB-EMP, <http://www.bristol.ac.uk/law/research/advice-agencies-research/citizens-advice-bureaux/>). The project, undertaken by a team of researchers based at the universities of Bristol and Strathclyde,<sup>20</sup> examined how workers who cannot easily afford to pay for legal advice access justice when faced with employment problems. Specifically, the project sought to find out how workers who come to Citizens Advice Bureaux (CABx) for advice pursue their dispute after their first visit. Many workers in the UK look to the CAB when they face problems. Employment related queries are among the most important areas of work for local CABx, after benefits, debt and housing issues. This project was part of a larger research programme entitled New Sites of Legal Consciousness: A Case Study of Advice Agencies in the UK ([https://cordis.europa.eu/result/rcn/188199\\_en.html](https://cordis.europa.eu/result/rcn/188199_en.html)), funded by the European Research Council.

Fieldwork was carried out between 2011-14 in seven advice bureaux in England, Scotland and Northern Ireland. The study involved case-tracking the journeys of 158 people who approached the CAB for support with an employment problem as they tried to resolve their disputes, through interviews and observations of advice interviews and hearings in the ET. Over 35 advisers and bureaux managers<sup>21</sup> were interviewed. The CAB-EMP project is unique in unearthing longitudinal, qualitative data on experiences of the ETS, following 'live' dispute trajectories. Researchers observed between

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<sup>20</sup> The team members were Morag McDermont and Adam Sales, Bristol; and Nicole Busby, Emily Rose and Eleanor Kirk, Strathclyde. The authors would like to sincerely thank Nicole, Adam and Emily for their contribution.

<sup>21</sup> 35 interviews were formally recorded with such participants but many more were observed and interacted with researchers in the course of the ethnographic fieldwork in the back offices of CABx.

one and ten appointments per participant, participated in informal face-to-face interactions and communication via email and text messaging, and attended 14 out of 18 Tribunal hearings and one appeal hearing. The majority of participants took part in a final interview. Field notes were taken contemporaneously and where possible, interactions with participants were audio-recorded and fully transcribed. While eleven participants lost contact before case outcomes were recorded, only two declined to participate fully and none refused consent to have their advice session observed and the notes from this used. Participants were offered up to £25 of high street vouchers to compensate them for any expenses associated with participating in the research (mobile phone tops up, any travel necessary to meet with researchers).

For the ETHOS project, the second author sifted through the dataset to identify five case studies complying with the following criteria:

- 1) Acas interaction - involving workers who have had contact with Acas in the course of their case, either or both the Acas helpline and its conciliation service;
- 2) Data density - participants provide a rich account of their experiences and the implications for their (in)capacity to exercise their rights;
- 3) Precarity - participants are highly insecure workers;
- 4) Intersectionality- the cases reveal various forms of employment subordination.

The CAB-EMP dataset had been previously analysed in respect of participant experiences of Acas, meaning that a sub-sample of client participants who referred to Acas had already been identified. This list of participants was cross-referenced with spreadsheets summarising participant dispute logs signalling, among other key features, interactions with Acas via use of their helpline, conciliation services, a settlement reached through Acas, or other mention of Acas. A matrix was compiled tabling these interactions, and other criteria as above. The matrix allowed for the systematic identification of participant cases that best fit the criteria. All those that ticked the majority of boxes were examined as potential case studies.

In order to select participants for case studies, existing general case summaries (which had been compiled earlier as part of the CAB-EMP study) and individual data elements (e.g. interviews, observations and diaries) were examined to check the availability of qualitative detail on Acas as well as to discern whether other criteria such as evidence of precarity issues were prevalent components of the case. This narrowed the pool of potential participants to around 15, all based in England or Scotland. This relied upon the second author's evaluation of 'sufficient' data for a case study and also judgement regarding fit with other conceptual criteria. However, the selection was reviewed with a focus on to the range of views expressed regarding Acas and alternative dispute resolution. From this sub-sample, six cases were selected that contained the richest accounts of interactions with Acas. Due to the emphasis on richness rather than representativeness, these cases may be slightly skewed towards strong views of Acas (i.e. that were worthy of lengthy comment) whereas the average participant was likely to have little interaction with Acas, or to have no opinion about them. However, the selected cases all capture both praise and criticism of Acas and do so in a nuanced, contextualised way. The case studies are arranged alphabetically. All names are pseudonyms and some details, immaterial to the case study, may have been altered to protect participants' confidentiality.

### 3. ADR AND JUSTICE: A THEORETICAL OVERVIEW

While the concept of ADR can have multiple meanings, academic discussions examining its impact on employment relationships normally focus on cases where conflicting parties, unable to resolve a dispute by themselves, seek third party intervention in the search for a settlement. Since this intervention is understood as an 'alternative' to court adjudication, conceptualisations of ADR typically posit four categorical differences between the two: 1) the speed and affordability of procedures; 2) the agreement of both parties with the outcome; 3) the lesser attention given to legal rights and duties in the deliberations; 4) the private nature of the settlement.<sup>22</sup> Within these boundaries, ADR mechanisms may be divided between those which aim to solve a problem in pursuit of common interests and those which involve a negotiation over the distribution of benefits between parties.<sup>23</sup> As mentioned in the introduction, this section and the next ones will chiefly address the latter. ADR mechanisms can further be classified according to the degree of third-party involvement in the dispute. Whereas 'mediators' are generally described as merely facilitating communication and mutual understanding between parties, 'conciliators' also provide independent information to assist their decision-making and 'arbitrators' can impose a settlement.<sup>24</sup> The following discussion emphasises the aspects which can be expected to retain their validity, though perhaps in different measure, across all these types of extra-judicial intervention. To simplify reading, however, the concept of 'mediator' will be used as a shorthand for all forms of third-party intervention.

The relationship between ADR and justice may be apprehended by looking at the patterns of communication among the parties involved (procedural justice) as well as the settlements they reach (substantive justice).<sup>25</sup> For the purpose of this section, the degree of justice or fairness of an ADR mechanism will be assessed through its capacity to mitigate power inequalities between workers and employers and enable the exercise of employment rights. This operational definition may not be compatible with conceptions of justice allowing for large outcome inequalities<sup>26</sup> but appears reasonable in the current UK context of limited employment rights and mounting precariousness which has not only been associated with individual hardships but also sluggish productivity and growth.<sup>27</sup>

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<sup>22</sup> Hazel Genn (2010), *Judging Civil Justice*, Cambridge: Cambridge University Press.

<sup>23</sup> Rory Ridley-Duff and Anthony Bennett (2011), 'Towards mediation: Developing a theoretical framework to understand alternative dispute resolution', *Industrial Relations Journal* 42(2), 106-123.

<sup>24</sup> Conciliation is sometimes referred to as a form of 'directive' mediation. See Ridley-Duff, 'Towards mediation', op. cit., 109-110; Cheryl Dolder (2004), 'The contribution of mediation to workplace justice', *Industrial Law Journal* 33 (4) 22-26; Linda Dickens (2012), 'Employment Tribunals and alternative dispute resolution', in Linda Dickens (ed), *Making Employment Rights Effective: Issues of enforcement and compliance*, Oxford: Hart, 29-48.

<sup>25</sup> Joseph Stulberg (2005), 'Fairness and mediation', *Ohio Journal on Dispute Resolution* 13 (3), 911.

<sup>26</sup> For a review of philosophical egalitarianism, see Simon Rippon, Tom Theuns, Sem de Maagt, Miklos Zala and Bert van den Brink (2018), *Report on the European heritage of philosophical theorizing about justice*, ETHOS Deliverable 2.1, 13-16 [accessed via [https://www.ethos-europe.eu/sites/default/files//docs/d2.1\\_website\\_report\\_complete.pdf](https://www.ethos-europe.eu/sites/default/files//docs/d2.1_website_report_complete.pdf)].

<sup>27</sup> David Skelton (2015), *Tackling Low Pay*, Centre for Social Justice [accessed via [https://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJJ3147\\_Tackling\\_Low\\_Pay.pdf](https://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJJ3147_Tackling_Low_Pay.pdf)].

Given ADR's characterisation as a substitute for adjudication, the latter will serve as a baseline for the evaluation of the former.<sup>28</sup>

In terms of deliberative justice, ADR has been criticised for exacerbating informational inequalities between workers and employers. Unlike in judicial procedures which allow for the pre-trial discovery and sharing of documents, the declarations of witnesses and various opportunities for testing parties' claims, 'the more limited pre-trial discovery procedures of arbitration [and other forms of ADR] may seriously limit the ability of plaintiff employees to gather information necessary to support their claims. This concern is heightened in employment law cases because much of the relevant information, such as personnel records and files or witnesses who are employees, is under the control of the employer.'<sup>29</sup> In addition, the evaluation of ADR mechanisms according to the proportion of settlements reached creates a structural incentive for mediators to exact pressure on the party most likely to make concessions – that is, the weaker one.<sup>30</sup> These incentives become even greater when they are paid by employers themselves, who may become familiar with different mediation services and reject those they deem least attuned to their interests.<sup>31</sup> At the ideological level, the reproduction of power imbalances during the deliberative procedure is underwritten by the principle of mediator neutrality, difficult to reconcile with mediators taking a normative stance against the more powerful party.<sup>32</sup> This means that employers may introduce mediators in the workplace to conceal the exercise of managerial power.<sup>33</sup> Mediators can seek to persuade plaintiffs to tone down their demands through a variety of tactics such as inviting them to look forward and 'get over' the dispute, highlighting the danger of not settling or the unpleasantness of trial,<sup>34</sup> stressing parties' common interests, emphasising specific facts or values, discouraging the expression of negative emotions<sup>35</sup> and suggesting that it is morally wrong for workers to burden courts or employers.<sup>36</sup> Recourse to ethically dubious tactics is facilitated by the private nature of deliberations which shields them from public

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<sup>28</sup> An alternative approach, adopted by Stulberg above (936), would be to compare the results of ADR with those which would obtain in the absence of any third-party intervention. This standard would characterise as fair any mechanism whose outcomes are no worse than those of the unregulated labour market. In the context of contemporary capitalism, this would arguably be difficult to reconcile with most egalitarian philosophies. However, there may be specific cases of acute skill shortage or employer difficulties where the balance of power is tipped in the employee's favour and which would call for a different evaluative approach. See Genn, *Judging Civil Justice*, op. cit., 118.

<sup>29</sup> John Budd & Alexander Colvin (2008), 'Improved metrics for workplace dispute resolution procedures: Efficiency, equity, and voice', *Industrial Relations* 47 (3), 460-479. See also Owen Fiss (1984), 'Against settlement', *Yale Law Journal* 93, 1076-1077.

<sup>30</sup> Nicole Busby & Morag McDermont (2012), 'Workers, marginalised voices and the Employment Tribunal System: Some preliminary findings', *Industrial Law Journal* 41 (2), 182-183.

<sup>31</sup> Budd, *Improved metrics* op. cit., 471, 473.

<sup>32</sup> Linda Mulcahy (2001), 'The possibilities and desirability of mediator neutrality – Towards an ethic of partiality?', *Social & Legal Studies* 10 (4), 505-527; Genn, *Judging Civil Justice*, op. cit., 90; Busby, *Workers*, op. cit., 179-180.

<sup>33</sup> Dolder, 'The contribution of mediation', op. cit., 331-334.

<sup>34</sup> Genn, *Judging Civil Justice*, op. cit., 112.

<sup>35</sup> Dolder, 'The contribution of mediation', op. cit., 331-334.

<sup>36</sup> Emily Rose and Nicole Busby (2017), 'Power relations in employment disputes', *Journal of Law and Society* 44 (4), 674-701.

scrutiny.<sup>37</sup> On the other hand, ADR has been commended for giving parties greater freedom to formulate their claims outside the confines of legal categories, thus enabling greater communication and participation.<sup>38</sup> For instance, ‘an employee who is dismissed after many years of loyal service may be motivated to bring suit in order to give voice to feelings that the employer has violated the employee’s trust, yet in litigation the case may need to be framed as an age discrimination case to provide a legal basis for the claim’.<sup>39</sup>

When it comes to substantive justice, ADR critiques can be grouped into those that focus on the individual workers involved in the dispute and those which target the broader legal and socioeconomic system. In the first category comes the charge that extra-judicial settlements guarantee none of the democratically developed standards set out in legislation or precedent: ‘the measure of success in conciliation [...] is not concerned with the reasonableness or fairness or justness of that agreement’.<sup>40</sup> Because of this, they are even more likely than court decisions to reflect rather than counteract power inequalities: the more unequal the employment relation, the more unjust the settlement. Precarious workers may be more eager than employers to settle as a way of avoiding the direct and indirect, actual or potential costs of litigation, particularly if these are stressed during mediation (see above). Time is also on the respondent’s side, as long procedures temporarily free them from paying any compensation but simultaneously deprive claimants of resources on which they may rely for their livelihood.<sup>41</sup> This means that settlements are likely to amount to a renouncement of claimant rights; as Fiss elegantly puts it, ‘to settle for something means to accept less than some ideal’.<sup>42</sup> In the second category falls the criticism that by setting no precedent, ADR deprives the legal system of opportunities to create new standards for the conduct of employment relations. Yet jurisprudence on ambiguous statutory provisions is an important part of employment law and serves to articulate and underpin societal values and norms.<sup>43</sup> Undocumented proceedings also shield problematic employment practices from public scrutiny. While settlements may benefit individual parties, their privacy allows the sources of conflict to remain ingrained in the wider system and hamper positive knock-on effects on other workers.<sup>44</sup> This being said, ADR settlements can also be better suited than those of courts for claimants who seek non-financial forms of compensation, such as a reference, an apology or a change in working arrangements.<sup>45</sup>

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<sup>37</sup> Budd, *Improved metrics*, op. cit., 270.

<sup>38</sup> Stulberg, ‘Fairness and mediation’, op. cit., 933.

<sup>39</sup> Budd, *Improved metrics*, op.cit., 472.

<sup>40</sup> Busby, *Access to Justice*, op. cit., 185. See also Colling, ‘No claim, no pain?’, op. cit., 573 and Dickens, ‘Employment Tribunals and alternative dispute resolution’, op. cit., 38.

<sup>41</sup> Genn, *Judging Civil Justice*, op. cit., 111.

<sup>42</sup> Fiss, ‘Against settlement’, op. cit., 1085. See also Budd, *Improved metrics*, op. cit., 473-475 and Busby, *Workers*, 181.

<sup>43</sup> Dolder, ‘The contribution of mediation’, op. cit., 341.

<sup>44</sup> Dolder, ‘The contribution of mediation’, op. cit., 337; Ridley-Duff & Bennett, op. cit., 114; Colling, ‘No claim, no pain?’, op. cit., 573; Dickens, ‘Employment Tribunals and alternative dispute resolution’, op. cit., 34, 40.

<sup>45</sup> Dickens, ‘Employment Tribunals and alternative dispute resolution’, op. cit., 39.

#### 4. THE INSTITUTIONALISATION OF ADR IN EMPLOYMENT RELATIONS

Since the 1970s, Acas has been at the forefront of non-judicial dispute resolution in British labour relations. Initially focused on collective conflicts, the organisation has adapted to the decline of unions and the rise of ET claims by deploying a range of services tailored to individual disputes.<sup>46</sup> The irony behind this shift is that ETs themselves were created as a relatively informal and accessible ‘alternative’ to ordinary civil courts in labour law cases,<sup>47</sup> but a series of reforms have made them increasingly similar to ordinary courts.<sup>48</sup> This section will briefly outline five key Acas interventions in individual employment ADR: 1) the elaboration of Codes of Practice on mediation targeted at workers and employers; 2) mediation training for a range of stakeholders; 3) direct offer of mediation services; 4) conciliation in potential ET cases; and 5) arbitration. Other Acas activities geared toward collective ADR<sup>49</sup> or the provision of advice on employment rights through on-line guidance, helplines, ‘problem-solving activities’, ‘in-depth advisory meetings’, ‘in-depth advisory phone calls’ and ‘workplace projects’<sup>50</sup> fall outside the direct scope of this study. However the interaction of the helpline with conciliation services will be addressed in Section 6.

Since 2008 Acas has published Codes of Practice on mediation in collaboration with representatives of British employers and trade unions.<sup>51</sup> The codes define mediation as a process where ‘an impartial third party, the mediator, helps two or more people in dispute to attempt to reach an agreement. Any agreement comes from those in dispute, not from the mediator. The mediator is not there to judge, to say one person is right and the other wrong, or to tell those involved in the mediation what they should do. The mediator is in charge of the process of seeking to resolve the problem but not the outcome.’ The Codes explain that mediation normally takes place face-to-face, without party representation, and differs from conciliation in that it is conducted without the threat of an actual or potential Tribunal claim. They also offer a list of situations where mediation may be well suited or not. The former includes relationship breakdown; personality clashes; some bullying and harassment and perceived discrimination issues; when managers are not well placed to deal with an issue because they may be perceived as biased; and where negotiations between unions and management have broken down and both parties agree that mediation could provide a way forward. The latter encompasses situations where mediation is used as a first resort or to bypass or undermine agreed dispute resolution procedures or to avoid their managerial responsibilities; where a decision

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<sup>46</sup> Colling, ‘No claim, no pain?’, op. cit., 567.

<sup>47</sup> Dickens, ‘The Coalition government’s reforms’, op. cit., 244.

<sup>48</sup> Corby, ‘Employment Tribunals and the civil courts’, op. cit.

<sup>49</sup> See Caroline Booth, Michael Clemence and Sara Gariban (2016), *Acas collective conciliation evaluation 2016*, Acas Research Paper 06/16 [accessed via <http://m.Acas.org.uk/media/pdf/1/b/Acas-collective-conciliation-evaluation-2016.pdf>]; Susan Corby (2015), *Arbitration in Collective Disputes: A useful tool in the toolbox*, Acas Research Paper 05/15 [accessed via <http://m.Acas.org.uk/media/pdf/q/e/Arbitration-in-collective-disputes-a-useful-tool-in-the-toolbox.pdf>].

<sup>50</sup> For an overview, see Acas, *Annual report*, op. cit., 27.

<sup>51</sup> TUC/Acas (2010), *Mediation: A guide for trade union representatives* [accessed via [http://m.Acas.org.uk/media/pdf/m/7/Acas\\_TUC\\_Mediation\\_Guide\\_AUGUST\\_2010\\_\(Final\).pdf](http://m.Acas.org.uk/media/pdf/m/7/Acas_TUC_Mediation_Guide_AUGUST_2010_(Final).pdf)]; Acas/CIPD (2013), *Mediation: An approach to resolving workplace issues* [accessed via <http://m.Acas.org.uk/media/pdf/n/n/Mediation-an-approach-to-resolving-workplace-issues.pdf>].

about right or wrong is needed; where the individual bringing a discrimination or harassment case wants it investigated; where the parties do not have the power to settle the issue; where one side is completely intransigent and using mediation will only raise unrealistic expectations of a positive outcome. The Code of Practice for employers sets out a detailed list of skills that mediators should have. Few of those skills are in some way related to rights or fairness (one of them is non-judgmental) although mediators are expected to be 'impartial' and to have some knowledge of equality and diversity issues, power and minority issues and the legal context of mediation. Mediators can be in-house or external but should be registered and properly qualified.

In parallel to the Codes of Practice, Acas has sought to increase the supply of qualified mediators by developing its own Certificate in Internal Workplace Mediation. In 2016-2017, 272 persons received this accreditation.<sup>52</sup> The five-day course is delivered by two Acas trainers to a maximum of 12 trainees and comprises five units: 1) understanding conflict and mediation in the workplace; 2) introducing the parties to mediation; 3) moving through the mediation process; 4) skills and strategies for managing the mediation process and 5) practicing mediation skills.<sup>53</sup> Significantly, the course is currently targeted at in-house mediators rather than the specialised charities and law firms which have shown interest in developing mediation services in parallel to their litigation activities.<sup>54</sup> At the time of writing enrolment fees were set at some £2000 per person.<sup>55</sup>

Data on the prevalence of mediation in British workplaces is scarce but suggests that uptake remains low. A telephone survey with 1000 managers conducted in 2011 found that only 50, or 5% had used mediation, whereas 60% had only heard of it and 36% had not heard of it at all. Among the organisations that had used mediation, 43% had resorted to external mediators, 34% in-house mediators and 7% both (the rest did not remember). Uptake was higher among large employers than small and medium ones.<sup>56</sup> A separate survey with 2700 managers and over 20 000 employees revealed that mediation had been used in 17% of workplaces which had experienced a formal individual grievance, even if the possibility of mediation was provided for in 60% of disciplinary and grievance procedures.<sup>57</sup> In 2016-2017 the mediation service provided by Acas was used in a total of 248 disputes.<sup>58</sup> The last in-depth evaluation of the service, published in 2013, found that 82% of mediations

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<sup>52</sup> Acas, *Annual report*, op. cit., 13.

<sup>53</sup> Acas website, <http://www.Acas.org.uk/index.aspx?articleid=2003> [accessed 1 October 2018].

<sup>54</sup> Colling, 'No claim, no pain?', op. cit., 567.

<sup>55</sup> Acas, Certificate in Internal Workplace Mediation, <https://obs.Acas.org.uk/EventsList.aspx?SubRegionId=-1&SearchTopicId=52&SubRegion> [consulted 1 October 2018].

<sup>56</sup> Watt Williams (2011), *Workplace conflict management: Awareness and use of the Acas Code of Practice and workplace mediation – A poll of business*, Acas Research Paper 08/11, 3-4 [accessed via [http://m.Acas.org.uk/media/pdf/8/s/0811\\_Workplace\\_conflict\\_management-business\\_poll.pdf](http://m.Acas.org.uk/media/pdf/8/s/0811_Workplace_conflict_management-business_poll.pdf)].

<sup>57</sup> Stephen Wood, Richard Saundry & Paul Latreille (2014), *Analysis of the nature, extent and impact of grievance and disciplinary procedures and workplace mediation using WERS2011*, Acas Research Paper 10/14, 4 [accessed via <http://m.Acas.org.uk/media/pdf/2/d/1014-WERS2011-analysis-D-and-G-procedures-workplace-mediation.pdf>].

<sup>58</sup> Acas, *Annual report*, op. cit., 13.

involved a dispute where one individual had authority over the counterparty.<sup>59</sup> However only 8% of respondents mentioned the prevention of an ET case as the main objective of the mediation,<sup>60</sup> and other studies have found that it was seen as 'being most suitable for dealing with issues where there may be little or no basis for an ET claim'.<sup>61</sup> In this sense, it is far from clear that mediation can be cast as an 'alternative' to adjudication, particularly since workplaces where mediation is used also tend to have higher rates of ET applications.<sup>62</sup> For conceptual consistency, mediation services will therefore be excluded from the analysis in Sections 5 and 6.

Early Conciliation (EC) in claims that have been or may be lodged in ETs make up the bulk of Acas interventions in individual disputes. As mentioned in the introduction, since 2014 ET claimants (usually employees) have an obligation to submit the details of their case to Acas, which in turn has a duty to offer conciliation (usually over the telephone). The service is free, optional and available until the Tribunal has decided on the case. In addition, the time spent on Acas conciliation does not count toward the limitation period (usually three or six months) to lodge a Tribunal claim. If both the claimant and the respondent accept taking part, Acas conciliators have a mandate to discuss the motives of the dispute, explain the conciliation process, encourage recourse to internal workplace procedures, explain how Tribunals make decisions and decide what to award, discuss other options for dispute resolution, help parties understand each other's views and discuss settlement proposals. However, they cannot predict a judicial decision, advise parties of whether to accept a settlement proposal, side with one of the parties, help them prepare for Tribunal hearings or evaluate the merits of a claim. Settlements reached through Acas are legally binding and prevent future ET claims on the matter at hand.<sup>63</sup>

In 2016-2017, Acas received over 92 000 EC notifications, 95% from employees and 5% from employers. The most frequent grounds of complaint were unfair dismissal (33%), breaches of the Wages Act (28%), breaches of contract (14%), annual leave (12%); disability discrimination (11%), sex discrimination (7%); race discrimination (5%), redundancy pay (4%); public interest disclosure (3%) and maternity detriment (3%). Nearly 80% of claimants accepted participating in conciliation and 38% of these cases were settled either formally through Acas or informally before reaching the courts. Around 19% of notifications progressed to the ET and Acas conciliation resulted in the settlement of 55% of those claims. Only 5500 claims were decided on the merits. Importantly, approximately half of claimants contacted by Acas withdrew their claim without having reached any settlement, most of

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<sup>59</sup> Acas (2013), *Acas individual mediation: Feedback from participants and commissioners*, 2 [accessed via <http://m.Acas.org.uk/media/pdf/j/m/Acas-Individual-mediation-feedback-from-participants-and-commissioners.pdf>].

<sup>60</sup> *Ibid.*, 6.

<sup>61</sup> Paul Latreille (2011), *Mediation: A thematic review of the Acas/CIPD evidence*, Acas Research Paper 13/11, 15 [accessed via [http://www.Acas.org.uk/media/pdf/h/m/1311\\_Thematic\\_review\\_of\\_workplace\\_mediation-accessible-version-Apr-2012.pdf](http://www.Acas.org.uk/media/pdf/h/m/1311_Thematic_review_of_workplace_mediation-accessible-version-Apr-2012.pdf)]; see also Tony Bennett (2012), 'The role of mediation: A critical analysis of the changing nature of dispute resolution in the workplace', *Industrial Law Journal* 41 (4), 481 and Dickens, 'The Coalition government's reforms', *op. cit.*, 245.

<sup>62</sup> Wood, *Analysis*, *op. cit.*, 5.

<sup>63</sup> Acas (2018), *Conciliation Explained* [accessed via <http://m.Acas.org.uk/media/pdf/7/c/Conciliation-Explained-Acas.pdf>]

them after participating in conciliation.<sup>64</sup> A 2015 evaluation on the EC service, provided before the lodging of an ET claim, found that 24% of claimants had notified Acas within one week of the dispute, 38% within one month and 30% between one and three months. Conciliation had taken place via telephone in 95% of cases, email in 68% and letter in 18%. The average number of contacts was five for claimants and four for employers. Claimants reported spending a median of six hours on the dispute, whereas employers spent four. Some 90% of settlements reached through Acas conciliation at least partly consisted in financial awards, nearly all of which were paid.<sup>65</sup>

The last form of Acas intervention in individual disputes is an arbitration service for cases of unfair dismissal and flexible working time, where an inquisitory arbitrator is expected to reach a quick decision based on general principles of fairness rather than legal rules.<sup>66</sup> This service, which was requested only 12 times in 2016-2017, will not be addressed in the following sections due to the marginal role it has played since its creation in 2001.<sup>67</sup>

## 5. ACAS, UNION AND EMPLOYER PERCEPTIONS OF CONCILIATION

Consistent with prevailing conceptualisations of ADR as a mechanism to reduce the number of cases decided by the courts, Acas primarily evaluates the success of its conciliation service in terms of the proportion of settlements reached as a result of its intervention (see above). However, its website presents EC as a ‘better way to resolve workplace disputes’ overall, suggesting a normative value that goes beyond the narrow aim of reducing public expenditures.<sup>68</sup> The nature of this value emerges a few paragraphs later in a free-standing statement according to which ‘reaching a settlement through conciliation is quicker, cheaper and less stressful for all concerned than a Tribunal hearing’. The advantage of conciliation is thus mainly linked to the ease of accessing the procedure, although the reference to the stressfulness of Tribunal hearings also implies procedural benefits.

A 2014 evaluation aiming to measure the ‘value and impacts’ of Acas did not incorporate specific metrics for the justice, fairness or equity of individual or pre-claim conciliation. In addition to the settlements reached and time saved, the evaluation focused on the satisfaction of workers and employers with the quality of the service received. Satisfaction rates were generally high, possibly reflecting the alignment of conciliation with subjective perceptions of fairness. Substantive justice was addressed indirectly through the service’s ‘impact on wider employment relations’. However, this impact was also measured subjectively based on employer reports of changes in workplace practices and future cases prevented.<sup>69</sup> Glimpses of procedural justice appeared in a section stressing the

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<sup>64</sup> Acas, *Annual report*, op. cit., 15, 29.

<sup>65</sup> Matthew Downer, Carrie Hardin, Shadi Ghezelayagh, Emily Fy & Marina Gkiza (2015), *Evaluation of Acas Early Conciliation 2015*, Acas Research Paper 04/15, 4-8 [accessed via <http://m.Acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf>].

<sup>66</sup> Dickens, ‘Employment Tribunals and alternative dispute resolution’, op. cit., 32-35.

<sup>67</sup> Acas, *Annual report*, op. cit., 35; Corby, *Adjudicating employment rights*, op. cit., 92.

<sup>68</sup> Acas website, <http://www.Acas.org.uk/index.aspx?articleid=4028> [accessed 1 October 2018].

<sup>69</sup> Acas (2014), *Measuring the Value and Impacts of Acas*, 13-15 [accessed via <http://m.Acas.org.uk/media/pdf/j/e/TR14-Measuring-the-Value-and-Impacts-of-Acas-2014.pdf>].

importance of impartiality as a key value underpinning employer and worker trust in Acas and its services. This impartiality was defined as avoiding taking the side of either party.<sup>70</sup>

The employer representatives interviewed expressed very similar views on the importance and purpose of Acas. Timothy Thomas, Director of Employment and Skills Policy at EEF, a manufacturers' association, described the organisation as 'widely trusted and supported'. Neil Carberry, Chief Executive Officer of the Recruitment & Employment Confederation and member of the Acas council, characterised its conciliation activities as 'really important' and a 'second big piece' in its toolbox alongside the helpline on employment rights: 'the thing that matters most in Acas is that the helpline takes a million calls a year'. The strong link between advice and conciliation services was further highlighted in Timothy Thomas' interpretation of trust in Acas:

Acas tends to be a trusted brand because its helpline generally serves employees from an employer perspective. Acas provides support and training to employers as well, and the fact that they are that sort of neutral social partner tends to mean that if they come in, they are seen as completely external.

Like Acas itself, employers situated the comparative advantage of conciliation in its speed, affordability and informality compared to judicial procedures:

It's an alternative to the formal process. The formal process tends to be slow, can be costly, can be very stressful (Timothy Thomas).

It is in neither party's interest if we take individual disputes to go through an 18-month to 2-year employment Tribunal process which costs everyone a lot of money (Neil Carberry).

Subsequent comments from Timothy Thomas placed most emphasis on financial incentives such as Tribunal fees and cost orders. In particular, he highlighted that the introduction of fees had led to a 'great reduction in employment claims' and that their recent abolition might make claimants less inclined to engage with conciliation. Similarly, a greater use of cost and deposit orders would encourage workers to make responsible use of litigation and 'make a much better go at alternative dispute resolution'. The representative also described long judicial procedures as generating significant indirect costs for employers themselves:

If you go to a Tribunal, it costs you a lot of management time, because we'll come in and need to look through all your records, someone will need to dig them out for us and be with us, and we'll take huge amounts of that person's time. Then we'll see your witnesses. Then if it goes to a Tribunal, they need to leave the business, perhaps one or two or three days, and they need to travel around the country to where the Tribunal is. It's a costly and expensive process.

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<sup>70</sup> Ibid., 9-11.

Employers thus generally prefer to settle before the final hearing: 'the earlier you settle, the better'. Neil Carberry qualified the speed of conciliation by highlighting the necessity of 'time' and 'patience' to 'walk people gradually towards a solution'.

As the quote above shows, Acas is simultaneously perceived as external and engaged with employers and employees, serving the interests of both social partners or even constituting a social partner in its own right. Instead of 'impartiality', employers refer to this stance as reflecting an ideal of 'neutrality' which, according to Timothy Thomas, can underpin fairness: '[Mediation] can be fair and balanced. The lawyers I know that are trained as mediators take a neutral view.' At the same time, the primary purpose of mediators is not to 'negotiate' with parties as 'they are there to try and find the parties to reach agreement between themselves. And sometimes it's a lot easier if you've got someone there to do that, and then you don't end up with things being escalated that don't need escalation.' Neil Carberry similarly defined neutrality as 'the loyalty of the mediator to the idea of an agreed settlement', meaning they should help parties see the advantages of participating in alternative dispute resolution. This does not exclude independent engagement with their arguments however: 'The mediator should be even-handed in challenging the assumptions of the parties not just with what's coming from the other side, but with their own analysis of what is being said.' In the context of this study it is worth noting that both employer and worker representatives tended to use 'conciliation' and 'mediation' interchangeably, suggesting they did not perceive any significant difference between them.

Union representatives interviewed shared employers' negative view of court adjudication, for reasons which partly overlapped and partly diverged. Simon Crew, President of Bristol Trades Union Council, characterised it as potentially 'daunting' and 'frightening' for claimants:

So I think when it comes to it, most people wouldn't want to go to court and they'd rather try and get it sorted out beforehand. [...] I think some people would prefer some sort of a mediator rather than having to go and sit in front of a judge and things and the pressure that would give them.

Bill MacKeith, President of Oxford Trades Union Council, characterised courts as unable to deliver justice and workers' reliance on them as a sign of 'failure' and 'weakness'. Procedurally, 'you want to keep away from the courts because you're losing control. You've got that judge up there with the wig, hierarchy, part of the machine to keep you repressed. Same with an industrial Tribunal, this is all out and this is a failure'. Substantively, 'you don't get the results. You don't. Your best chance is that you get a crumb of justice. But it isn't justice, you'll never get your job back if you've been sacked. Even though the courts have the power to impose that. [...] I mean, there must be national examples of nationally important or even good local results. I just can't think of any. And it isn't simply ignorance. I think that reflects a reality.' To illustrate the law's limited role in the resolution of workplace grievances, Simon Crew estimated that approximately 10-15% of the cases he dealt with could have 'some arguable element' of illegality – particularly those that may involve indirect discrimination toward mostly female part-time workers.

Unlike employers, however, union representatives were also sceptical about the significance and benefits of Acas conciliation. Bill MacKeith was unaware of its role in individual, as opposed to collective, disputes, but considered that resorting to Acas was like resorting to the courts: a sign of

failure. Simon Crew described it as a necessary hurdle workers had to get over before lodging a Tribunal claim and viewed it as under-resourced to face the rising number of Tribunal claims that would probably follow from the abolition of fees. Having consulted other union members prior to the interview, he reported that one judged Acas conciliators to be variable in quality but 'reasonably good at progressing things when employers are difficult'. Another full-time official who 'used Acas quite a lot' considered that it was too under-resourced to effectively help reach settlements, so that many other union representatives tried to avoid 'spending time negotiating' with it.

When pressed to compare the fairness of Acas conciliation and court adjudication in employment disputes, Simon Crew expressed the view that the latter may be preferable for workers who had suffered gross injustice rather than more ambiguous forms of mistreatment: 'If you're really sure of your case, say the employer is being unreasonable, then I'd say take it to the court and get the victory. But if it's more sort of an arguable thing then you may get a better outcome through mediation.' He gave the example of pay rates versus discrimination:

If you're willing to compromise, say, I guess on pay, if you weren't rewarded enough for something, that would be something to negotiate, whereas if you've got a clear-cut case of, say, discrimination or something like that then you'd just want the outcome and you'd go to the Tribunal more.

Bill MacKeith was reluctant to compare the virtues of two unsatisfactory dispute resolution mechanisms but was critical of confidential agreements which could be used by employers to cover up abusive practices:

It reminds me of those gagging clauses, for instance, when somebody leaves an employer and they receive compensation for unacknowledged unfairness or acknowledged unfairness by the employer. You won't tell anyone else about it, and you won't say how much money it was. [...] So employers love that. They say that you can't talk to the press, can't talk to the public. You can't tell anyone else what's happening. [...]. An essential part of decent relations - fair industrial relations - is the right to speak publicly about what happens in your workplace. Why should it be secret? It's not a commercial secret, is it?

Ultimately, both union representatives saw collective bargaining as the best way to devise fair employment arrangements. However, they did not see it as a substitute for legal or alternative dispute resolution but as a way to make both fairer. Bill MacKeith identified a symbiotic relation between unions and the courts:

You cannot win in the courts or the Tribunals unless the political context nationally puts pressure on those courts and those Tribunals. And the improved national context has to be an expression of increased strength in the workplace. So you've got a symbiotic relationship between the national law and strength in the workplace. But it's not all one or the other. You've got to have them both.

Simon Crew similarly foreshadowed a greater role for Acas conciliators to facilitate sectoral collective bargaining under a potential Labour government.

## 6. WORKER EXPERIENCES OF ACAS CONCILIATION

In 2015 Acas conducted an in-depth quantitative study with 1337 workers and 1255 employers who had come into contact with its EC service after notification had become compulsory for all ET claimants.<sup>71</sup> While the design of the study did not allow for a direct comparison of claimants' experience with the conciliation service and ETs, which would be necessary to establish their respective strengths and limitations, the study does point to various way in which power inequalities manifest themselves during the conciliation process.<sup>72</sup> Firstly, workers are less likely than employers to have a good knowledge of the conciliation process itself. Secondly, they seek a greater amount of communication with the conciliators. Thirdly, they are more likely to be influenced by the information received from conciliators. Fourthly, this influence generally takes the form of dissuasion from taking their claim to an ET. Fifthly, they are much more likely than employers to be dissatisfied with the outcome of conciliation, especially when failing to reach a settlement.

In terms of awareness of the conciliation process, qualitative interviews revealed that 'when submitting the EC notification, claimants were unaware of what EC itself would involve. They generally had no expectations regarding the process and were unaware of any details as to what would follow once they entered the process. It was only after they were contacted by an Early Conciliation Support Officer that they became aware of next steps.'<sup>73</sup> In contrast, employers were more familiar with EC and had 'a better sense of what to expect than claimants'. Some of them viewed it as a 'tick box exercise' and chose not to opt out expecting it would 'reflect negatively on them once at Tribunal'.<sup>74</sup> Significantly, some 30% of claimants who had accepted conciliation had done so based on the mistaken belief that it was compulsory before lodging their claim.<sup>75</sup> This suggests that the optional nature of the scheme had not been made sufficiently clear to them. Only 34% of claimants but 79% of respondents had heard of the EC service before taking part<sup>76</sup> and they were more likely than respondents to confuse the roles of different Acas officials.<sup>77</sup> The following comment illustrates the problems caused by procedural misunderstandings:

Some of these claimants felt their conciliator was not proactive enough in trying to seek a resolution. On these occasions, it was not always clear to the claimant whether the delays in contact were caused due to lack of employer engagement or conciliator inertia. In one case, a claimant mistook the lack of Acas contact for stonewalling on the part of the conciliator as well as the employer, and therefore blamed both for not being able to reach a satisfactory settlement. The claimant reported that they followed up with multiple phone calls even though there were no updates on the dispute and felt their conciliator got annoyed by their persistence, adding to their dissatisfaction

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<sup>71</sup> Downer, *Evaluation of Acas*, op. cit.

<sup>72</sup> They also manifest themselves in judicial procedures. See Busby, *Access to Justice*, op. cit. and Kirk, *The problem*, op. cit.

<sup>73</sup> Downer, *Evaluation of Acas*, 35.

<sup>74</sup> Ibid., 36.

<sup>75</sup> Ibid., 40.

<sup>76</sup> Ibid., 43.

<sup>77</sup> Ibid., 47-48, 51.

with the service. This experience made the participant sceptical about the value of the EC process altogether.<sup>78</sup>

Workers' greater reliance on conciliators was suggested but the fact that they were more likely to contact Acas most of the time (15% versus 7% for employers) and to declare that they would have appreciated more contact (24% versus 8%).<sup>79</sup> A significant minority of employers, but not employees, stated that they did not need to contact the conciliator as they were always contacted by them.<sup>80</sup> The greater intensity of communication with employees also transpires in the latter's more positive rating of conciliators' trustworthiness, ability to listen, active involvement in seeking agreement, understanding of the case and claimant's feelings and help in deciding whether to settle.<sup>81</sup> Employees more frequently discussed with conciliators all of the following topics: 1) the mediation process 2) relevant employment law 3) offers to/from the other party 4) strengths and weaknesses of potential claims 5) pros and cons of resolving the problem without/before the submission of an ET claim 6) ET fees. At the same time, they were more likely to be dissatisfied with the information received. This suggests that not only did conciliators spend more time providing information to employees but employees also experienced greater need for such information,<sup>82</sup> particularly in the form of advice on how best to progress.<sup>83</sup> Indeed, 'some claimants were disappointed because they were under the false impression that Acas would accept and review evidence they had collated and act as their advocate to help build a stronger case. When 'evidence' was not seen to be used by the conciliator, the claimant perceived their dispute was not being dealt with in a comprehensive manner.'<sup>84</sup>

Employees were much more likely to declare that Acas involvement had been important in helping them decide on how to proceed with the dispute (73% versus 43%), in bringing the parties together (69% versus 52%) and in facilitating settlement (87% versus 70%).<sup>85</sup> According to qualitative interviews, they were also prone to change their initially sceptical view of Acas during the conciliation process,<sup>86</sup> initially engaging with conciliation out of a belief that it was mandatory but later adopting the view that it would help them reach a satisfactory settlement.<sup>87</sup> Some workers even referred positively to conciliators convincing them of the weakness of their case: 'The lady was quite forceful, abrupt, not rude, and she was very quick to point out what she thought were the weaknesses in my case... it was like I was getting very down to earth, very honest legal advice. I didn't quite agree with anything she said but nonetheless she put it into perspective for me... it was extremely no nonsense.'<sup>88</sup> Time was also on the employer's side:

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<sup>78</sup> Ibid., 83.

<sup>79</sup> Ibid., 49.

<sup>80</sup> Ibid., 56.

<sup>81</sup> Ibid., 54-56.

<sup>82</sup> Ibid., 54-56.

<sup>83</sup> Ibid., 56, 83, 86.

<sup>84</sup> Ibid., 83.

<sup>85</sup> Ibid., 74-76.

<sup>86</sup> Ibid., 35.

<sup>87</sup> Ibid., 40.

<sup>88</sup> Ibid., 56.

It is worth mentioning that within the timeframe of the EC process, claimants with a strong *initial* intention to submit an ET1 form reported a gradual diminishment in the strength of that intention, becoming increasingly distressed as the case proceeded due to a perceived lack of employer engagement. These claimants reported having lost faith in their case as negotiations wore on. Occasionally, coupled with apprehension regarding unpredictable Tribunal costs, this resulted in a decision to not move any further (i.e. to push for a certificate to be issued and drop the case altogether), or to accept an offer they otherwise would not have considered at the outset.<sup>89</sup>

Among those who decided against lodging a claim, 26% cited judicial fees and 12% considered they could not win the case.<sup>90</sup> The prospect of having to pay the employer's legal costs was another key disincentive.<sup>91</sup> Among claimants who neither settled nor pursued their case in the ET, 61% declared Acas had influenced their decision.<sup>92</sup> This finding should be read in light of the fact that 76% of claimants declared that without Acas intervention they would have submitted an ET claim either directly or after trying to reach an agreement with their employer. Only one in ten said they would not have lodged any claim.<sup>93</sup>

Employees who failed to reach a settlement through conciliation were much less likely to be satisfied with this outcome than employers in the same situation (34% versus 55%).<sup>94</sup> This suggests a greater eagerness to settle among claimants than respondents and the former's greater overall commitment to the procedure (which they normally launch in the first place). Frustration was particularly high among claimants whose employers had refused to participate in conciliation or engaged in tactics of delay or intimidation, such as intentionally avoiding calls and returning them outside office hours.<sup>95</sup> At the same time, claimants who failed to settle mainly attributed this to employers rather than Acas.<sup>96</sup> When they went on to lodge an ET claim after notifying Acas, the main reason given was to 'hold the employer accountable' (34% of claimants), followed by 'recover the money owed' (19%). Those who had been through conciliation were more likely than the rest to want to hold the employer accountable (38% vs 30%).<sup>97</sup> This suggests that these claimants viewed ETs as better placed than Acas to deliver justice.

On the positive side, settlements were more likely to be paid than Tribunal awards (96% versus 63%).<sup>98</sup> In addition to money, a quarter of settlements included a letter of reference and 4% an apology.<sup>99</sup>

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<sup>89</sup> Ibid., 103.

<sup>90</sup> Ibid., 97.

<sup>91</sup> Ibid., 100.

<sup>92</sup> Ibid., 8.

<sup>93</sup> Ibid., 101.

<sup>94</sup> Ibid., 80.

<sup>95</sup> Ibid., 83.

<sup>96</sup> Ibid., 72.

<sup>97</sup> Ibid., 95.

<sup>98</sup> Ibid., 70.

<sup>99</sup> Ibid., 69.

To obtain a broader view of the role played by conciliation in the context of employment disputes, let us now explore the experience of six highly precarious workers.

## **ALFIE**

Alfie came to the CAB after receiving a date for his Tribunal hearing. He had visited the bureau before, and received help completing the ET1 form but was not receiving ongoing support from a caseworker. He lost his head-waiter job in a restaurant on a salary of £14,400 per year after working there for two and half years. His employers undertook some 'restructuring' and rearranged the terms of his role in a way that made him appear unqualified for it. Alfie was asked to reapply for a restructured role within the organisation, with a contract describing the position as a 'business manager'. This role called for qualifications beyond his own, and that his existing contract was terminated with only a week's notice.

The bureau advisor did not seem to understand the complicated details he was presented with when Alfie showed him contracts and letters from his employer. Alfie had already filed a Tribunal claim disputing the fairness of redundancy and came to the CAB to ask for help working out what remedy he should ask the Tribunal for. Alfie said that he 'thought it was going to be straightforward' but the CAB appointment made him 'realise it isn't easy or straightforward, [so] there is a bit of doubt in my mind whether I should bother going on.'

The CAB advisor told the researcher after the appointment and Alfie had left that there might be a 'hint of indirect discrimination' to the case. Alfie is perceived as Black and the adviser was considering something to do with discriminatory qualifications, however, this claim or line or argument were not pursued further. The adviser noted that Alfie is 'not one of these over optimists. He doesn't think he's got one of these wonderful cases, he's open to thinking.' The adviser goes on to calculate Alfie's losses. Later, Alfie says this was 'Very helpful: he did it in a format, I wouldn't have known how to calculate it... very professional.'

The employer did not respond to the Tribunal claim and Alfie receives a default judgement. The employer appealed against the default judgement, arguing that her sister was having a difficult pregnancy. There was a pre-hearing to decide upon whether the respondent had due cause for missing the 'ET3' (the form containing an employer's response to an ET claim) deadline. Alfie says that the employer showed the judge a scan of her sister's pregnancy and somehow this was enough for the judge to grant the employer's appeal.

A short while after this, and six or seven months after being dismissed, Acas contacted Alfie, telling him that his employer might offer to settle. Alfie said that he would prefer to do so, to avoid the daunting and time-consuming process of going to court. Overall however, Alfie felt that he had not had much meaningful interaction with Acas:

I haven't spoken to Acas since last time I went to court [for the pre-hearing]... they're not really helpful. I don't regard them as doing anything to help or giving me any advice or anything like that. It's pretty pointless, to be honest with you.

We didn't even talk about anything to do with court. She [Acas officer] just said I spoke to [owner]. She's thinking-- it's not a definite but she's thinking about making an out of court settlement and that was it. It was about a two-minute conversation. We didn't talk about the actual case itself or anything, any details regarding that, it was just, she's thinking about it, and obviously she was just letting me know – that was it.

I understand that they're the go-between to me and [company] but they only seem to ring when it's so close to the court date. There's no interaction before then. Do you understand? The court case is like 2 ½ weeks away and it's like you're just ringing me now to find out what's going on like it's been some kind of interaction ongoing. I don't know what their role is. I know they're the go-between but that's all they've been doing really – nothing more than that.

Alfie felt discouraged by the conciliator he spoke to:

She was just basically saying, just give it up, they seem to ... I felt like she heard their side of the story and accepted it and rang me up and said, 'Look, I've seen how they have everything in place and going to the Tribunal isn't going to benefit you in any way'.

*Interviewer: Is that what she said?*

Yeah. I'm telling you. They don't help you, they ring you one week before you are actually going to court and then... they don't get to see the bundle of notes, they don't know what's happening, so maybe they had seen that, I don't know, when everything was done to the low of the low.

*So you felt they were little bit--?*

Dismissive, definitely.

Alfie had wanted some form of legal advice and representation:

Basically I don't understand what to do... I think I need to get a lawyer. I didn't understand the letter that was sent to me.

He had received letters and looked at the online guidelines offered by the Tribunal service but did not find this adequate preparation- they are 'just a basic guideline of how the process would work from beginning to end, which didn't tell you much.' He continued to feel 'very, very nervous, and very anxious, I don't know what to expect, through the process.' However, he did not seriously try to find legal representation, thinking there was little point, as he could not afford a lawyer.

In the run up to the full hearing he was nervous ('If you haven't got nobody to represent you, it is pretty daunting, yeah, 100%'). He was also hopeful that all he had to do was tell the truth but accepted that if his ex-employer had legal representation, they might try and argue their way out the claim. He said:

All I am going to do is go and tell the truth. If the judge believes me then so be it. It's taken too much of my energy - if they want to weevil out of it, and employ expensive lawyers,

then what can I do? It's not going to destroy my life, but at the same time, I don't want them getting away with it. They've been doing this for years. I honestly didn't think they were going to do this to someone who knew their rights.

Alfie was confident the truth would come out in the Tribunal hearing, so did not go to great lengths to prepare his case legally:

As I say, I feel like I'm in the right, so even if it goes to court regardless if they win, I feel like I've got so much evidence in my favour that it doesn't really matter, that's why she's thinking of settling.

No settlement was reached and the case proceeded to a full hearing. Alfie represented himself. On the day of the Tribunal Alfie found holes in his employer's witness statements but was not entirely clear about how he would make his case, and demonstrated his lack of familiarity with ET procedure:

Hopefully I'll get a chance to ask them a few questions on that. If not, I'll just give what I've written to whoever I need to give it to for the questions that have to be answered – that's all. I don't know how the process works. I don't know how people ask questions, I don't know.

The employer (through their solicitor) had submitted late documents. Alfie hurriedly tried to prepare in the claimants' waiting room, an hour before the hearing; 'I've been up all night,' he said. He knew that he should raise the issue of the late documents in the hearing but did not know with whom he should do this. The researcher intervened and told him to speak to the clerk. Alfie also brought late documents of his own: emails that he has not previously submitted, but when asked what he planned to do with them he said 'See if I can hand them in somehow.' Alfie therefore mirrored the actions of his employer. When the clerk asked him to hand over the bundle before the hearing, Alfie was confused about what she meant. He told the researcher present that the only guidance he had received from the Tribunal is a 'guideline of the process.' As they were walking in to the hearing, the employer's solicitor tried to present Alfie with another document, which unnerved him. The clerk spotted this and told the solicitor to wait and ask permission of the ET judge.

During the hearing, the judge raised concerns about the late documentation submission from both sides chiding both sides equally, explaining that having a deadline for submission of bundles is meant to make things fairer and threatening to send them both to a magistrate's court. She said she would 'return to this later' but never did. Alfie had gathered witnesses to testify that there was bullying by his employer, but the judge explained to him that the case was one of unfair dismissal, so bullying did not come into it.

Alfie questioned his employer with a quiet confidence. However, the judge, adopting an inquisitorial approach, intervened to do much of the questioning herself. The respondent's argument rested on the claim that the business was struggling and only made £70,000 profit per year. The judge did not ask for any evidence of this. Alfie's calculations during the break suggest to him that the restaurant would be making much more than this amount. However, he did not raise this with the judge – saying later that he felt there was 'no point'.

At the end of the hearing, the judge gave an oral judgment. The redundancy was ruled to be genuine, but the employer was deemed not to have followed correct procedures. Alfie was awarded approximately two weeks' pay – £528. However, the judge told Alfie that he should not apply to receive it, because he is on Jobseeker's Allowance and 'the government will take it.' At the end, the judge seemed to want to appease each side, telling the employer, 'Don't worry, you tried your best,' and to Alfie, 'Don't take it to heart; you should find something you enjoy doing.'

Afterwards, Alfie appeared stoical about the experience but said that he would have done better with legal representation:

If they didn't have a solicitor, it would have been curtains for them. She [the respondent] would have folded then. If I'd had a lawyer, yeah, definitely, I would have got that message across, it was a shame.

One of the things that is intimidating is talking to the Tribunal and speaking in front of a judge.

Still, he felt, 'The judge was quite nice; she was understanding. She knew I didn't have a representative.' He praised her for her informality and perceived fairness, even though he felt that she was mistaken. 'She was just helpful, like. I believe her, if she says it was a genuine redundancy. I know it wasn't.'

Alfie received the £528 the Tribunal had awarded. He sensed that the employer was so relieved at the low level of the sum that they paid up without too much resistance:

I got two weeks' wages redundancy. They tried to stiff me with holiday pay and stuff but we resolved that. After they got the judgment, they were, like, sure, let's give him all this money that we owe him.

He spoke about not caring to receive a full written judgment from the ET, saying:

Because it doesn't mean nothing. I'm not going to appeal or anything like that. I'm done now. I'm done, man. It's over.

*Interviewer:* Have you had enough of it?

I've had enough, I'm telling you. I've had enough.

## **AMANDA AND SASHA**

Amanda is a 47-year-old single female with one adult son. She had worked as an operative in a factory for 29 years since leaving school. Following the economic downturn, the company sought to make redundancies. Some people volunteered but were turned down. Instead, Amanda and several others, including her friend Sasha, were picked through a selection process that seemed opaque and somewhat suspicious to them. Of particular concern were some supposedly 'objective' criteria which the employer claimed to have used to rate and select people. When they asked for more information

the employer was not forthcoming. Amanda described how during an internal appeal hearing in which she challenged the decision 'The manager was very aggressive, it was just a waste of time.' She felt she 'got torn to shreds!'

Amanda said she knew something was wrong 'the day they told me I was being made redundant', suspecting that her manager was using redundancy as a convenient excuse to get rid of her and a few other troublesome employees such as Sasha who was on maternity leave. Amanda doubted that she could have genuinely been one of the lowest rated employees. Amanda eventually managed to get hold of the matrix of criteria used and their relative weightings of importance after repeatedly requesting the management to provide her with them. She had talked to colleagues, friends and family and learned that, 'Apparently when they make you redundant they have to give you all of these things.' She found that she scored very low for 'attitude' (1 out of 5) and 'skills' (2.5 out of 5) but felt that were any others who were less skilled and poor time-keepers who escaped selection.

She was informed that she would be made redundant but was kept on for a few months before her end date. However, the relationship between her and her employer broke down and they told her to leave early. Amanda was shocked and upset. She felt she had to do something about this:

It was really just because, like, I had been there since I left school, so that was 27 years' unbroken service, 30 years all in, and like my time-keeping was perfect, I was highly qualified in my job and I just felt as if... because there was a load of people that worked there who didn't have any of my experience. Their time keeping was atrocious, they had maybe between 2 and 6 years' service and I just felt like I was getting picked on... I personally felt that they had already decided way in advance who they were going to get shot of, basically, and I just felt that they'd done it too quick, and the criteria they said that they used wasn't used because I wouldn't have been made redundant if they applied that criteria, and that's when I just thought, I just didn't like them getting away with it.

I saw the way they treated people over a long period of time and I've always just felt like they can just do what they like to whoever they like. There's a handful of people in there that they could have made redundant who wouldn't have had a leg to stand on, so. I think it was basically I just felt it was so wrong.

Several of her former colleagues who had also been made redundant were not satisfied with the way the situation had been handled. A couple of months after they were dismissed, Amanda and a former colleague, Sasha, decided to put in claims to Tribunal. Another former employee had lodged a Tribunal claim earlier but withdrew because of the effect of the dispute on her health.

Amanda and Sasha both dithered over the decision to submit the application. Amanda was clear she wanted to raise the dispute, but was concerned for her son who still worked for the employer and whether he might be victimised:

I did leave it practically right up until the last week because my son worked there as well. So I had to really think about what I was doing... I didn't want to cause him any hassle.

Sasha had worked for the company for over 19 years and also felt a deep sense of injustice, but her trepidations were more about fear of the hearing and having to face the employer again.

The pair had put Sasha's husband down as a representative. Amanda noted, Sasha's husband 'is like a director of a company, so all the information I got, I got from him, and actually the form and whatnot.' He knew the 'ins and outs' of 'employment stuff and Tribunals.' The husband had used Acas websites to construct questions for the pair to pose in their appeal. He also wrote Sasha's statement of grievance for the ET claim form which Amanda then roughly copied. Sasha's husband said that Acas guides were helpful and he used them as they were 'thinking in terms of preparing the ground in case we had to take this further.'

However, this preparation was not sufficient to allow Sasha to represent herself in her internal appeal hearing. She spoke about this hearing, as captured during her advice appointment field notes. Sasha found this meeting

very daunting and the director was very 'in your face.' She took a colleague with her... The director gave [Sasha] a 'grilling' and did not let her ask questions she and her husband had prepared together. Her husband says that the director was obviously mad because they had 'clearly looked into Acas and all that.' The client was not able to 'use her list,' but her queries *were* communicated in the letter of appeal. The director had put the client on the spot and made her answer questions rather than letting her ask her own. An HR person was present at the meeting and the client managed to obtain minutes but did not feel that these were a fair reflection of what happened. (Field notes)

Sasha's husband mentioned that he had a conversation with someone at Acas after submitting the ET claim. After talking with them about what a Tribunal involved, Amanda, Sasha and her husband began to think they might need more specialist help and began looking into whether they could access legal advice and perhaps find a representative to act on their behalf in the Tribunal hearing itself. Amanda's sister had worked as a volunteer in a CAB somewhere else in the country and had advised her to go to her local bureaux for assistance. At CAB, Amanda and Sasha separately met with Alice, a specialist employment adviser who has a law degree, on several occasions.

Amanda was seeking reassurance from someone who understood the law and the Tribunal process that her claim was well founded. She did not want her employer to be given notice until she knew she was justified:

When I put the form in I didn't want my work to know that I was doing it if I then went and took their advice and was advised that probably you were wasting your time. So I was hoping to kind'a do it all and then, once I knew that I did have a case, then it would be fine for my work to know about it.

It was not certain that Amanda and her colleague would be able to be represented by Alice. Technically, Amanda was not resident in the catchment area of the bureau. Whilst it was part of the remit of the employment advice project to provide city-wide coverage, priority is given to those within the relevant postcodes. Decisions were taken by the bureau manager with regard to providing continued assistance

and representation at Tribunal. Alice initially undertook to help her with the preparatory phase for the moment before confirming this.

However, Alice was able to represent and dealt with all correspondence with the ET, Acas and the respondents, bringing Amanda and Sasha in for appointments to discuss developments in the case, helped them decide upon courses of action such as ranges for settlement and to prepare mentally and emotionally for the hearing. Sasha's husband expressed relief. He had asked Alice specifically if she would take on dealing with the Acas case conciliator, saying that 'It would be good to have someone legally-minded to deal with them.' He explained later to the researcher that he was not always certain of their role. Later he would ask Alice if the conciliator involved was the same person, noting that it was 'Hard to get a straight answer out of' this person when he was acting as the named representative.

Whilst the ET claim had already been submitted, Alice made sure that the claims entered were accurate and well founded. The adviser checked at one point whether Amanda might consider reengagement: Amanda replied:

No, I don't think so, because I'm 99% sure that they'd just make up some new reason to make me redundant or get me out.' Nevertheless, 'I said it all along. I wouldn't have cared how much of an award I got, just as long as I got the decision. That's what was most important to me.

From her first appointment at the CAB, Amanda privately doubted that Sasha would 'go through with it. She's scared to face the manager.' Indeed, Sasha fretted during her appointments and seemed to be using them to weigh up the decision to continue as much as prepare for the hearing. At her first advice appointment, Sasha said, 'I don't know if I want to go through with it, to sit in a court and face them.' At her second meeting she was still panicked and said, 'I'm not sure that I won't 'bottle it.'

While encouraging to her, Alice had advised Sasha that she might not get the kind of justice she was after by pursuing a claim, noting that 'The Tribunal will not be concerned with getting an apology or changing practices- they might not give you the remedy you want in that respect.' Alice also helped her clients think through whether a settlement might be a decent outcome for them. Sasha's husband said that she would have probably settled early on if the company were willing to have offered her a full redundancy package, that acknowledged that she had worked for around 19 years as a full-time employee, rather than one that was based on her most recent part-time working. Alice recommended that a realistic figure for settlement might be a few month's pay. Sasha replied that the amount does not bother her, 'It's not about the money situation.' Her husband added, 'It's completely out of principle so it's silly to come out with a figure.'

Sasha was worried that offering a figure for settlement would weaken her position in the eyes of the employer- 'Will they say, 'She's bottled it!?'', she fretted. Alice explained that Acas try and broker deals but that proposing a figure should not prejudice the Tribunal against her. The judge would not know about it, but setting some terms opens the door to further communication with the respondent to try and settle before the hearing. Similarly, Alice told Amanda that Acas act as an impartial 'middle man' [sic] who will try and broker a solution. Alice advised her clients that they proceed with the claim and prepare for a Tribunal hearing but reminded them to consider the possibility that 'In the background, there might be a settlement.' Amanda said that she would give the

idea of a settlement more thought and would see what Acas came back with, but mostly she felt that this was not really what she wanted. Amanda reflected later that she 'Wasn't actually in touch with Acas' personally, as Alice dealt with the conciliator.

In the end no settlement was reached. Sasha could not face pursuing her claim, *or* acting as a witness for Amanda, even though this would have helped her friend's case. Sasha dropped her claim the day before the hearing because she was nervous. She was unavailable to comment further on her reasons but had said previously that the decision to go ahead or not was very difficult for her. On the one hand she was very nervous and was not good at speaking up for herself, but on the other she did not want to give in and let the employer 'win'.

Amanda *was* successful in her Tribunal and was awarded around £3000. As Amanda went on to win her case, whilst not a certainty the similarity of their claims relating to the process and criteria for redundancy selection suggested that Sasha had a high prospect of success. Amanda said:

It wasn't a shock at all when Sasha pulled out but I'm not-- Sasha is a lovely person but she'll give it that she's gonn'a do this and she's gonn'a do that, and really she's a lot more timid than she makes out... She was delighted though that I won... She did love it but she wished, she said, 'I wished I had the nerve to go through with it', but she just couldn't.

Amanda did find the hearing quite nerve wracking, particularly with her former-boss representing herself and thus vocal in proceedings but was glad she went through with it. 'I never once thought about pulling out but, you see, the first day, maybe I didn't come across as being nervous, but I was terrified.' Amanda was irritated by a note in the written judgement that said that she had been nervous in the Tribunal as she thought she had put across her case very well. Amanda reflected that she had psyched herself up for the hearing and kept calm: 'It was a bit awkward, but I just had to keep telling myself that they're just people in the street to me and that's what I kept telling [Sasha], to try and get her not to pull out.'

At the hearing, Amanda's employer portrayed complete belief in their right to manage as they saw fit, noting several times that they referred to Acas guidelines when designing their policies, implying that this meant they had behaved lawfully. Amanda did not have any witnesses to call. The employer called a number of incumbent employees and managers. Amanda felt these people were briefed on the evidence they should give. Amanda reported that one manager who gave evidence had spoken to her son who still worked at the factory after the hearing: she said, 'This isn't anything personal. That was just something that I had to do for the company'. So I don't really think that they got much of an option about what they had to go and say.'

When she received the judgment, Amanda was very happy her claim was upheld but 'I don't think the judgment did- although it was in my favour, which was the most important thing for me- I didn't really feel that it did cover everything' with regards to the poor way she had been treated over many years.'

Amanda was shocked when she heard that the respondent had written to the Tribunal asking them to reconsider, but Alice allayed Amanda's fear that they might overturn their ruling, advising that there was no legal basis to do so. Furthermore, Amanda had to go to considerable lengths to obtain

her award payment. She had phoned the CAB but Alice was on maternity leave and her cover was not sure if she could act in Alice's stead as the client's representative. This adviser suggested Amanda might need to enforce the award using the Small Claims Court. Amanda decided to act herself to chase the employer for the money and then seek the help of bailiffs. She called the employer but felt they were trying to give her the run around when they told her that they had already posted a cheque to her. Two weeks later, with no cheque in sight and after Amanda had sent a letter reminding the employer, she instructed bailiffs:

I went to the [court offices] in the town and I paid them £97. I went to them on the Monday morning and they were at my work on the Monday afternoon, and my work then sent the cheque... but it was only for the award amount and they calculated the interest which was only £32 plus the £97 charge, and they just asked me what I wanted to do. I said, 'Send the cheque back to them, tell them I want the cheque sent directly to me for the correct amount of money'. So, they did and they did. And that was that.

As Amanda had feared, her son did find it hard to continue working for the employer during and after the dispute, feeling he was victimised:

He has been having a terrible time. They've moved him in another building. He's worked there for about six years. He's never been anything but praised for his work and now all of a sudden he was getting taken in and 'We don't like your attitude' but he's left, he's started a new job three weeks ago.

Amanda had done some research into how she would obtain her award and appreciated that she was one of the lucky ones who managed to get the money:

I did go on and Google and it did say that it was quite a high statistic that didn't get their money or that they were still chasing it. But that was fine cos it just meant I could draw a line under it after that. So I guess I better not use them as a referee.

Amanda is now a full-time carer for her mother but hopes to return to paid employment at some point as she feels isolated at present.

Sasha gave up a valid claim with a high prospect of success, despite having the advantages of a highly qualified representative and a co-claimant. Amanda was determined to see the hearing through, however, she may not have if she had had to pay a fee to pursue her ET claim. As she had received an initial redundancy payment before applying to ET, she would have been over the disposable income threshold for remission and thus liable to pay a full application and hearing fee. However, she did not feel financially secure at the time and decided to move in with her mother again. She reflected that she might not have gone ahead with her claim had she had to pay £1200 as she considered this too great a sum to risk.

## GRANT

Grant is a 45 year-old, married father of two young children. He had worked in a customer contact centre for a short time before the company he was working for dismissed him. He had been on a probationary period in which he underwent training and had his performance assessed. He accepted this dismissal as fair and initially did not query his employer's motives:

When I got paid off it was a case of 'We're having to let you go' it was a case of the onus was on me you know it was a case of, 'Sorry, you're not meeting your targets' and what have you... it was all done on a very good sort of base you know, they picked up on a lot of positives about me and what have you, they just says 'But we're finding it really hard'... I never even asked them about wages or anything like that.

It was after he went to an employability centre where he had been referred to for help obtaining work that he began to become concerned about wages he was owed:

My job advisor says to me, she said, 'Are you going to get paid?' I said, 'Do you know I never asked, because I went there straight away'. So the job advisor gave us a phone and I phoned up and I just says, 'Hi [name of admin assistant], do you know I've even forgot to ask you am I going to get paid?' And she says, 'Oh, of course you'll get paid'... so I've had a verbal promise as well if you like.

He had worked for a few weeks and estimated that he was owed £625. He had wage slips to document this amount. He attempted to obtain these by himself calling the employer and speaking with an admin person.

Grant had been in touch with Acas. He telephoned their helpline for advice when he first began trying to get his money. Acas had told him to go to his nearest CAB which he did soon afterwards. Grant had not thought of CAB till he had spoken with Acas. He said that once he was reminded about CAB, he realised that he should have thought of this himself, as he knew who they were and what they did although he had never used them before. He said that there had been a lot of change in the sorts of agencies and services available. Grant had been a union representative for many years and it would be to the union that he would turn for this kind of advice if he was having a problem. He had been a rep for a large union when he worked for a further education college in a non-academic role. He had been made redundant and had let his union membership and activism slide after this point. He commented on how unions were not a feature of many of the workplaces he had been in more recently. Despite being a trade union rep in the past he said that his knowledge of the ET system was slight, but he was comfortable dealing with workplace dispute resolution: 'Well it's not so much actually the Tribunals, there's a lot of disciplinaries and what have you and what have you and having to deal with management and that.'

His prior experience had given Grant a critical awareness of employers and their behaviour in workplace dispute resolution:

It's just when you think about it at the time like 'Sticking your head above the parapet' and all that you know, a lot of it's futile. If they don't get you one way, they get another,

it's that simple isn't it... A lot of the time they just try and baffle you with science you know. I mean they know it's unjust, you know it's unjust, the person that's brought up the hearing knows it's unjust and a' the rest of it but they all just sort of draw rank you know, they all stand in line and help each other out.

He felt that unionism and collective action were not the only legitimate means of interest expression but perhaps the only viable means of holding employers to account:

At the end of the day what else has a worker got to do but withdraw their labour. There's nothing else you can do. Going back to the old days it would be withdrawing your labour, and it's like a total no-no, you know I mean it's like-- I mean look at all the poor people that has died over the years because of health and safety issues and poor equipment and what have you none of that ever gets set up at this I mean look at the carry on with the London Underground, you would think they people stole the crown jewels you know because they went on strike.

Grant came to the CAB via the drop-in service and a generalist volunteer adviser helped him draft a letter requesting his owed wages which was sent to the employer. He was referred to Vicky, a specialist employment adviser who was able to see him the next month. Grant was pleased with the service CAB had provided, even if they were very busy and it was difficult to get an appointment. He had tried to come to drop-in earlier regarding this dispute but had found it so busy one morning that he just ended up leaving it. He eventually came back, on what was thankfully a quieter morning.

Vicky drafted a letter for him for the money owed by the employer. She asked if Grant wanted her to do this on CAB letter-headed paper, noting that bringing in an outside party can sometimes effectively apply pressure, but it can also inflame the situation. Grant wanted to have the letter sent by the CAB, having not got anywhere on his own. Vicky phrased the letter as a final demand before a potential Tribunal for breach of contract. She explained the possibility of fees being payable for a Tribunal claim but noted that as Grant was then on Job Seeker's Allowance, he would most likely get an exemption. Grant interjected at this point in his advice appointment that he was not sure if the adviser was aware that the company had told him that they are insolvent. He added that another former colleague was owed £1000 in wages. Vicky advised that she thought there was a government scheme to pay wages in such situations. She told Grant that she would check this out and get back to him with the exact details at a later date. Grant said that he would appreciate this. Vicky explained that there was a deadline for any prospective ET application.

Vicky sent the final demand letter on Grant's behalf. The employer ignored it and so, after a further appointment at the CAB, Vicky applied to the Tribunal on Grant's behalf. Grant felt that this course of action was the only thing to do and did not weigh this decision too heavily as he felt that he was clearly owed the money, and that Vicky had been clear that an ET was the most likely place that he might reach the resolution of his claim:

I followed the CAB advice to the letter and went ahead with starting proceedings with the employment Tribunal.

Grant obtained a full remission from fees with the help of Vicky who gathered evidence from him and submitted the ET1 and fee remission application. Had he been working, and therefore eligible to be charged fees, Grant thought he would not have applied to Tribunal as he would have had to have paid for an uncertain gain with the risk of losing more money:

It would have cost something I think it would be, it could have been round about the hundred and seventy pounds mark [for the issue fee]<sup>100</sup>, it could have been more [if there had needed to be a hearing] so then what you've got to do is you've got to weigh up, am I just throwing good money after bad? So I probably wouldn't have done it, no I probably wouldn't have done it. But in saying that as well I mean if I never got the P45 or the wage slip I probably wouldn't have bothered with anything.

As Grant awaited a response he was increasingly struggling financially and spoke pessimistically about his chances of finding another job. Even if he did find one, he was not hopeful of it being anything 'decent'. When he received vouchers for participation in the research he noted that they had 'just come at the right time,' and that he had spent his £25 on groceries.

Grant felt that since being made redundant from his job in the college his labour market trajectory had been downwards. He found that there were very few good jobs available. The job that was the subject of the dispute arose was in a telemarketing office where he estimated that around 50-60 people were employed. The main purpose of his role had been to get 'leads' on information from small businesses that other agents would then use to try and sell various products and services (i.e. business-to-business marketing). He felt that this was a nonsense, 'made-up' job and that its only redeeming feature had been the other colleagues in his team.

You phone up local businesses and it's basically you cleanse the information they give you, you know phone up and a lot these are like BS you know, 'on our records the last time we phoned you-' and they may not have been in contact [with us before].

The job was so bad that people often left shortly after completing the training programmes. Grant suspected that knowing this, the company tried to resist paying people wages in the immediate aftermath of the training. People think:

This job's crap and leave so they could get it off your pay... that got the old ears up there and then one of the girls I started with she was like that she said, 'You know, I tried checking this company out at Companies House and it's not even on Companies House'.

Others at the workplace who were having similar problems either left or were dismissed. 'I was actually the last man standing out of the four people that started.' Grant felt that employer and their use of the office space was 'dodgy':

It just made you feel, 'Oh God', you know, and we were down in the basement in that sort of office block and... they were doing things like the owners of this place don't know...

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<sup>100</sup> If Grant had to pay fees, the cost of the issue fee would have been £160, and £390 if it proceeded to hearing.

we've actually put phones in. We have told them we're a contact centre but we're actually dialling outside [i.e. cold-calling/making unsolicited calls].

Grant also complained about the way the company had dealt with taxes:

The fact that this that the company are sort of saying to the taxman well this person that's employed by us has earned six hundred and twenty-five pounds and you can go ahead and tax him which wasn't true. You know so I was quite aggrieved with that. I was also aggrieved with the fact that they went to the trouble of doing that and giving me a wage-slip as well. You know like I don't know, it's not the case here, but say if your partner seen the wage-slip, I thought you only got paid this year. I mean it causes a lot of confusion and things like that you know.

*Interviewer:* Yes, it's strange why they did that, do you have any inkling why they would have done that?

I've got a funny feeling it was just to sort of I think to myself they were just going through the motions. They just went through the motions doing that and then when they came to release the money in the bank they just says, 'Oh no, we can't do this'.

After submitting the ET1, Grant had contact from Acas. He was somewhat suspicious of them as he wrote in an update email submitted to a researcher:

Then Acas contacted me to try and resolve the situation (I got the impression they were trying to give [company name] a lifeline and weren't on the little guy's side, ie Me!) So my eyes were kind of open with them!

A researcher later probed this view during a telephone interview. Grant said:

The impression I got with Acas... usually you associate Acas with really big grand industrial disputes you know... I always thought that as well that Acas was like they would always do what they could to help the sort of workforce and that it really is I wouldn't say it's, I wouldn't go as far as to say it's more on the company and management side but it is pretty even-stevens as far as when it comes to the blame factor you know.

[Reading from correspondence from Acas] 'Our conciliators have a legal duty to try and help the parties in Tribunal cases to settle their differences without the need for a Tribunal hearing. This service is confidential and free of charge'. And basically that was that and then you've got the conciliator for this claim and, 'I will be in touch in due course,' and when they got in touch it was basically a case of, 'Do you have proof that you're owed this money?' and all the rest of it and I was getting the third degree do you know and I just wanted to go like that, 'Wait a minute here! I mean, I don't just sit in the house and make this stuff up you know!'...I got the impression that they were doing their best to keep the wee small business alive and it's not even, I can understand them doing that if it was an honest wee business but it wasn't an honest wee business it was people trying to make a fast buck and not pay any wages basically.'

Grant felt cynical to the extent that he saw the role of Acas as to tie-up claimants and discourage them from going forward:

The Tribunal contacted Acas and it's as if you know like somebody brings up this to the Tribunal and the Tribunal sort of kicks it into the long grass, 'Acas, can you do something with this you know?'

Grant's suspicion was that Acas had been set up by the business lobby or right-wing interests to moderate or suppress trade unions:

Well it seems as if I mean I don't know who set up Acas in the first place? I get the impression that it was business wasn't it?... Probably it was a thing that was maybe forced on to the unions, 'Well I'll tell you what, you're going on strike all the time, what we'll do is we'll get an arbitrator in Acas', and that's probably how it came about.

A hearing date was set. Grant prepared himself for the hearing. He was a little anxious as even though he had a representative adviser from the CAB, he did not really know what to expect. The situation seemed unpredictable:

I was prepared to go... I was a bit cautious about it because you know I didn't know what I was going to be going into if I was going to be sitting across from the person or whatever you know and who knows what might happen then you know but I mean it could be a case of you think all sorts of things.

During this time, Grant found it a little difficult to find time to make time for preparation and to make it to CAB advice appointments in particular. A researcher asked if he had been back to the CAB and kept in contact with Vicky. Grant replied:

No, I've not actually. I was going to. I've just been that busy and focused with this new job. It's quite a lot to take in this you know so I've no' really had a chance. But it's quite funny times with the Citizens Advice Bureau anyway they only have like open sort of sessions... Certain days pop-in you know.

In the end, Grant did not have to attend a hearing: as the employer did not respond he was awarded a default judgment which demanded payment of the owed wages in full:

To cut a long story short, [company name] ignored Acas as well and also ignored the Tribunal. As you are probably aware they ignored myself and CAB in the past. The Tribunal hearing was scheduled for the 30th of April, but they cant have it because [company name] Business Group ignored them! So they awarded me the verdict after cancelling the hearing. [company name] has 42 days to comply with paying me what I'm owed. I won't hold my breath! After 42 day's I can hire [bailiffs] to extract the monies due to myself. I will have to look at the cost of that and way [sic] up everything' (Email).

As he waited to see if the employer would pay up he reflected on whether it would be worth his while spending money to enforce the award.

I spoke to [a bailiff] and he said unless i can get an address for [name of company/employer], he can't serve the extraction order! I'll need to do some detective work over the next couple of days and find out where, where there operating from, so the sheriff can serve it, otherwise it's not worth my while, financially. (Email).

At this point, Grant had not been back to CAB. He had used the information provided on the default judgment document and the websites signposted to help him work out how to enforce the award:

[Going through his paperwork with the interviewer] There's a line here 'www.justice.gov.uk tribunals/employment', so I'll get the information I need off of that.

Grant's dispute rolled on. Seven months after the judgement, Grant was struggling to find the time to chase up the employer to pay the award. It seemed that Vicky had delegated all or part of this work to him, as the bureau usually does with post-ET enforcement.<sup>101</sup>

Grant eventually found an address for the business which he was planning to send to the bailiffs after double checking it.

[M]ight do it this week, as i've got some free time. I have been working all throughout the summer and on holiday for a week, last week. So I haven't had time.' (Email)

I've had to put it on the back burner for a while. I've had other issues to deal with. It's going to take me a wee while, probably re- look at it in the early Spring and track them down...I'll try and get I'll see what the next step is and how much it's going to cost. I think I could maybe go to a hundred pounds anyway and after that I'd really need to think about it, throwing good money after bad you know. (Email)

At last research contact he still had not received his award.

## **LENA**

Lena was a manager of a Betting Shop and had worked for the same company for 22 years. The company was being restructured and Lena and other staff members were suddenly placed under 'informal' investigation for 'credit betting'. It was alleged that staff were permitting clients to place bets without charging them until later on. Lena had been informally called into a meeting by a member of security staff for 'a chat about a cheque,' which she was 'really shocked' about. She found the meeting 'cloak and dagger,' with the conversation moving swiftly on to accusations being made against her of allowing customers to credit bet. She was extremely perturbed because she 'had never been in a situation like this,' and offered to resign. She was told 'if you do that,' 'we will put this on your reference that you resigned during an investigation.' Lena was dumbfounded about the allegations; from her perspective it had been an informal, everyday practice to let high profile customers credit

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<sup>101</sup> Staffed mostly by volunteer advisers, bureaux are usually under-resourced and also aim to empower clients to undertake as much of their own case work as they are able to.

bet. In her last shop it had been shown to her by her previous manager. Although contravening formal company policies, staff had previously been expected to turn a blind eye to it, so that high spending customers would continue to place a high level of bets. As she states this was an informal arrangement:

It was something the customer was allowed to do for five years, so to me it was common practice – it was like sending my mum to the local shop for five years, picking up a pint of milk, and the shop assistant knew she'd done it every day, and at some point in that day, she just paid for it because she was a regular.

Lena told the researcher, 'I'm not saying that what I've done was right... [but it was a] practice that had been allowed by the company.'

Formal disciplinary procedures began for many members of staff. Lena said they 'did not feel right'; she was unsure if they were formal meetings, whether they should be recorded, and why confidential information was seeping out to other colleagues. She was advised by a colleague to contact Acas after her second investigatory meeting. She knew that some members of staff were keeping their jobs and others not and Acas advised her legally that it was not correct for her employer to have 'two rule books' and that it was 'selective dismissal' 'Because if there is a rule in place in the company that actually says that you cannot credit bet then it should actually be the same with every member of staff.' Acas advised her to speak to her manager, particularly as she had never been disciplined before. However, the company said that those for whom they had CCTV evidence were to be dismissed. Lena was asked to name the supervisor who had taught her credit betting and to provide evidence but she admitted there had never been an explicit conversation. She was dismissed for gross misconduct and given seven days to appeal, which she did. The appeal process took approximately a month and, in Lena's view, was a sham.

Lena recognised her own lack of understanding of and control over the processes she was involved in:

I mean you don't know these procedures because nobody actually informs you of anything, you know like your rights, you don't know that you could go to Acas, that at any point you could take the company to court... there's nothing, even though there is a set of rule books [at work] which not being funny, were changed actually after my investigation and after they sacked so many people... Basically there was nothing in the books that actually said, 'Look you know, if anything ever happens--' it was never ever mentioned credit betting.

Lena had secured a new job but was dismissed again after two months when her reference from the betting shop, which stated that she had been dismissed for gross misconduct, was received. A friend told her, 'You really have to sort this out... you can't keep getting jobs and basically losing them because of your reference... you really need to take the company to court'. Lena was desperate – the situation with the reference meant she was 'in a vicious circle', unable to secure future work.

When she saw the CAB on the high street, she went in. Lena was seen at a triage advice session, and then four days later, she was given an appointment with Stephen, a specialist employment adviser. Stephen explained that the ET followed a strict deadline by which cases must be submitted, and Lena

had missed this deadline. However, Stephen explained that Lena should still submit a claim and explain why it was late:

He just told me the employment law is three months minus a day and you've run out of time, and he explained what it meant for me to run out of time and he went over my paperwork, and he explained to me why it was so important to fill out the form (ET1). He asked what had happened. I explained and he felt I had strong grounds for unfair dismissal.

Stephen advised her to submit a claim, suggesting that she could ask for an extension to the deadline based on her circumstances. He briefly explained how to complete the ET1 form. Lena did not find this too onerous a task:

It was fine, like really straightforward. You just had to state why you felt you should be given grounds for unfair dismissal and it was a very straightforward form to fill in. That went off.

However, although both Stephen and Acas had made it clear that the Tribunal was very strict about extensions, Lena did not understand this fully and failed to grasp that her case was dependent on the granting of an extension.

The bureau did not have the resources to support Lena through the Tribunal process and she was left to represent herself. Lena has a business degree. She nevertheless found it almost impossible to navigate the complex Tribunal procedures. Her ET1 was initially accepted but, when the respondent challenged the extension of the time limit for submission a pre-hearing was arranged to determine the validity of Lena's extension.

Lena became enmeshed in legal technicalities. She knew that she was required to prepare a 'bundle' but was unsure what its purpose was, describing it as 'A kind of legal bits and bobs, which didn't make any sense to me whatsoever.' She found it difficult when the respondent's solicitor was communicating with her about the bundle:

I didn't understand what she's [the respondent's solicitor] going on about, to be honest. It was like a demand. I didn't really understand what she was looking for.

She leant on Acas during this time to help her prepare:

They told me that in order to proceed you had to have, there were certain things that you needed, like one was that you needed to have your minutes of the meetings, you had to have various things you know within your possession to actually carry on.

Acas also explained to her what a pre-hearing related to and what she would be trying to persuade the Tribunal judge of. However, during the twists and turns of the dispute, Lena obtained information from different sources and was not always clear about what or whom they were. A researcher asked her at one point who she was referring to and Lena said, 'I don't know if it was Acas or if I actually spoke to. I can't remember. I think it was Acas.' Lena's lack of understanding led to crucial mistakes. She did not understand the purpose of the pre-hearing and sent witness statements regarding the claim for unfair

dismissal to the respondent prior to the pre-hearing, instead of the documents that justified her late ET1 submission.

Lena had not had much contact with Stephen, did not really know what was going on. She was very scared going into the pre-hearing, not knowing what to expect. Lena had felt bullied by the respondent's solicitor in the run up to the pre-hearing. She felt threatened by them stating that she would have to pay the respondent's legal costs if she lost. She was:

Quite shocked, because I mean I actually I never thought about the court costs. I thought I had the right to take the company to court, because I had been unfairly dismissed. It wasn't something I thought I would be charged for.

Lena described how these threats were passed on through Acas, in their capacity as an impartial go-between. Lena felt that her employer:

Came to me through Acas and they asked me what I was looking for. I said a well worded reference reflecting the 22 years I worked in [ex-company], without a disciplinary, and I said I'd like a year's compensation, because that's what the court suggested... They never came back to me, and then said I would have to pay the court costs... So I asked him, when the guy from Acas phoned, what they'd offered me... he said I could be charged the court's costs. [But] only in extreme circumstances, he said. And I asked him if these were extreme circumstances and he said no, and then I said to him, I think they're trying scare me. He said they were using barristers. He didn't say anything when I said they're trying to scare me.

Unlike a legal professional who is used to such threats and can assess where they are warranted, Lena felt terrorised by them. Lena needed advice as to how she should respond, something that an Acas conciliator cannot provide:

The day before the court case, they rang me up through Acas and they said that basically if I didn't drop the charges against them, that basically they would make me pay the court costs when I lost the case. And I remember saying to the guy at Acas, like, 'Well' I said, 'I'm sorry, but that sounds like a threat to me'... that was kind of frightening actually because, you know, it's a daunting thing for me to go to court in the first place, and to actually think that they're kind of saying to you, if you don't back off, we'll make sure that we will charge you for court costs because... then I was thinking, oh god you know. I was, like, what should I do, kind of thing because obviously being unemployed, and you've got court costs. So then I was defensive actually because I remember saying to the guy at Acas, 'well, you know I'm unemployed and like if I do lose the court case you know, I'm going to pay them £1 a week' – whatever is in my capacity. And he was, like, 'So that's the message you want me to relay to them?' And I was, like, 'Yeah, yeah', so I did. I didn't find him very supportive actually... I remember thinking, now I'm a couple of days from the court case, and you're like trying to scare me really in a way. And it was kind of scary, because I thought, how much is this pre-hearing going to cost, if I do lose the court case, like blah de blah? But then, I thought, no, I'm going to proceed with this no matter what.

I think I actually did say to him, just tell them I'll give them £1 a week or whatever it may be.

She needed advice to help her make sense of procedural issues which knocked her confidence and added to her stress:

I got a letter from the court. The court was [going to be] on the same day but they were reducing it to a two-hour hearing rather than the whole day. This was off putting. I didn't know what it meant.

She was also confused about what she could discuss with Acas in confidence and what would be relayed to her former employer which meant she was slightly unsure in her interactions with her case conciliator.

In the pre-hearing, Lena was easily defeated by the respondent's barrister. She had not developed an argument or evidence for the lateness of her claim submission, although she had brought a witness with her to support her account. She did not understand the procedure and was overwhelmed. Lena perceived the fundamental unfairness of fighting against a legally trained and experienced representative. The respondent's solicitors sent their bundle of documents so late that Lena did not receive it until after the pre-hearing but, not realising its relevance, she did not raise this. Her emotional involvement in the claim – in contrast to a lawyer's professional detachment – created a further power imbalance:

A barrister can express his opinion very openly and very precisely, whereas somebody like me, I mean I was very emotional.

Notably Lena did not provide a witness statement nor had she built a legal case explaining why her ET1 was submitted late. In her confusion as to the purpose of the pre-hearing she brought along one of her witnesses for the claim of unfair dismissal (which was not to be heard that day). In the pre-hearing, she felt that the respondent's barrister could articulate the issues in ways she could not. He attacked her reasons for the late application and mounted a strong argument against her. As she explains:

It was very difficult being up against the barrister because he was kind of like persuading the judge that I was very much aware of what the procedures were and that basically I had just allowed time to lapse through my own fault.

During the pre-hearing Lena crumbled, admitting that perhaps the Acas helpline had notified her of the deadline for ET1 submission when she first spoke to them, i.e. which would have allowed her to have submitted within three months. Later she revealed to the researcher that she had a doctor's note to explain that she was stressed at the time of speaking to Acas, but she did not think about raising this at the pre-hearing. She reflected:

I remember that when I spoke to Acas, I was extremely stressed. ... My doctor had actually written me off work because of the disciplinaries... when I spoke to Acas I was very emotional... possibly they did say to me it was 3 months minus a day but because they were emphasising the importance of appealing... I think I got possibly more interested in

the appeal side so I forgot about the actual 3 months minus a day, and the importance of it... and in the meantime I was concentrating on finding a job as well, a job which I started. I have two children as well... I mean, I'm not blaming Acas because they obviously would have advised me that it was 3 months minus a day, but when you have just so much going on, you're losing your job, it's very emotional, you're appealing against a decision of the company, and you're looking for another job, you've got financial worries – it's just so much going on that it's really difficult to kind of get it all correct.

Lena also did not raise the possibility that the respondent had used delaying tactics in the internal grievance procedure. The judge decided that her reasons for an extension were not reasonable and her case was struck out. The judge however ruled that Lena had a legitimate case, and therefore should not pay the other sides' costs.

Lena wanted to appeal but, with no response from the CAB, she decided against it, having been through enough already:

It was all so peculiar. It was kind of mind-boggling because I didn't actually understand... I was blind to it really because I am not really educated in law, so the actual technicalities of it all and the actual wording of the paperwork... If you're not aware of all this, you need help really because you need somebody who actually understands it all and can say, this is what you need to do, this is how you need to present it, this is what the procedure is – for that, I didn't know any of that, I was just like doing what I thought was right.

Lena was very disappointed with her experience with the CAB. Prior to this, Lena had no experience of legal situations or of ETs. She had little legal advice and did not get any support in relation to her pre-hearing, despite contacting Stephen prior to it. Lena did not understand the paperwork required from her and was intimidated by her former employer's barrister. Lena did not have the funds to hire a solicitor to help her.

## **MURIEL**

Muriel is a 27 year-old lone parent to a five year old daughter. She was working as an auxiliary nurse in a private residential care home when she was accused of patient neglect and demoted after working for the employer for 7 years. The first time she became aware of a problem was when she looked at her work rota and found she had not been allocated any shifts for the following week.

The employer told Muriel that they had begun an 'informal investigation.' Muriel was not given anything in writing about the variance of her work or duties but she then received a letter telling her she was suspended after she had queried her being removed from the rota. She was aggrieved that the charges against her had not been made clear and that she had not had the chance to answer them. She was simply told that she was no longer considered suitable for an auxiliary nurse position.

A chance meeting on an aeroplane had informed Muriel about the availability of advice organisations such as Acas and the possibility of joining a union:

When I went on holiday one time and I met this lady on the plane and I was kind of saying that I worked for a place that was kind of hellish... I was wanting to know what my rights were and things like that. She worked for Acas. She was, like, 'Just phone them up and they'll help you with everything'. And that was the very first time that I'd actually heard of them, that I knew that there was people out there that could actually help you, could help us, and I was so beaten down that you don't think that you have anybody to help you, you have nobody that - I didn't even know that I could be part of a union or anything, even though I'm in one now.

Muriel joined a union after she began suspecting foul play on her employer's behalf. Her rep suggested that she think about a Tribunal claim:

That was another man who helped me a lot as well... he had said to me, you know, 'You're really working against people who won't play the game and are not interested in playing the game, so I think the only outcome for this is an Employment Tribunal for it to be fair and for you to get what you want and what you deserve'.

Muriel felt supported by the union rep, but as she had only just joined, they did not offer representation for her Tribunal claim. Muriel came to CAB through a drop-in session and was given an appointment with a solicitor affiliated to the bureau, William, who offered legal advice and represented cases at ET. William's work was supported through a grant to Citizens Advice from the local authority which meant he was able to offer his services free of charge to CAB clients. However, the hourly fee claimed by William was low compared to private practice fees and he provided his services largely through his commitment to access to justice. Muriel saw him for four appointments in addition to telephone updates. Muriel wanted to know whether the employer could force her to accept this job and if not, what she should do. She brought her aunty, who also worked at the home, along to these appointments. Muriel felt that that 'The employer should have to prove what is alleged - patient neglect.' William says that the client is 'Kind of right.' The employer did have the right to dismiss but Muriel could challenge it if the basis or process was unfair. He explained 'proof' in the context of the ET. William advised that she put in a grievance claim to say that she did not accept the disciplinary sanction as there was no hearing or investigation. Muriel asked many questions during her first appointment and took notes, which was rare in client appointments. The bureau manager mentioned that Muriel also called the bureau quite a few times seeking advice over the phone.

At the second appointment, after it became apparent the employer was not going to great efforts to resolve matters, William commented that he had run into this employer before in the course of his CAB work, noting that 'It's 'shocking - the whole idea of [the place] is to provide care, love even, but their treatment of employees is in stark contrast to this. They don't seem to understand or respect the same type of obligation to their staff.' The aunty added, 'Or the law, William. Or the law!' At this point, Muriel mentioned that she had joined a union and asked whether she should try and get a representative to come in to any meeting she might be called to. William said yes and that this was a legal entitlement.

After several weeks, several appointments and several failed attempts to resolve the matter via grievance letters, first from Muriel herself and later from William, asking for the charges against her to be specified, an investigation and hearing to be arranged, William suggested that she file an ET1 for

unfair dismissal and claiming for wages lost while she was not working or being paid. The employer did reply to one letter, but only to say that she was 'unsafe' to look after patients and that she would be required to take a different role in either their kitchen or laundry, without offering to investigate the charges made against her or offering her the opportunity to put her side of the story. Finally, she was dismissed. Muriel felt that she was given little chance to resolve the matter informally, before going to Tribunal: 'They never even gave me an option for an appeal, they just dismissed me... I never got like a chance to appeal or anything so obviously when I spoke to [William] he just said that we were going for unfair dismissal right away.'

I thought, no, I'm not doing this anymore... I'm walking into no more meetings with them. I'm not doing it anymore. And that was [William]'s advice. You know, 'We need to go straight to looking at a Tribunal now because nothing is going - they're just think they're so - you know, bold that nothing's going to - we have to really put it to them now'.

The ET claim was lodged by William and a hearing of two days was listed. As she awaited her ET, Muriel spoke of her resolve to take action and of desire for justice:

Because I wasn't a 'yes' person... because I always spoke out and I always stuck up for people... [the employer] said, 'You're defiant and you don't do what you're told'. And then it was like, 'We don't want a militant in here, we don't want a militant'. And it was like, you weren't allowed to have a voice, you weren't allowed to have an opinion... just take everything that was thrown at you, but I thought, you know, I'm here working to get money for my wee girl... I gave my all to [employer], everything I had, even days for 14 hours where I wouldn't even see my own child and that was the way we were getting treated and I just thought, no, enough's enough, and that just made me want to fight even more.

[The claim was for] unfair dismissal, holiday pay, wages, and being treated unfairly, because [William] said there wasn't a compensation bracket for like emotional stress and things like that. He said there used to be but the law changed again, so they don't have it anymore... We obviously sat and discussed this about how you can't go back where you worked after everything that's happened to you cos you'd just have a star put on your back - they'd just be waiting for the next opportunity to pounce, basically.' (Email)

Muriel had taken a new nursing position with a private health care provider. She got this job just before she was dismissed formally and felt that she was only able to get it (without a reference) because her uncle knew people with the new employer, if not for that she would have struggled to get anything.

At this point she was struggling financially. The employer had stopped paying her shortly into her suspension:

I was out of pocket and just for all the, for everything they did to me it was really, really a horrible time I mean it was coming up to Christmas and I've got a wee girl who's five and I was thinking, 'How am I supposed to be able to support her when I don't even have a job?'. I really thought it was very ruthless what they did to me you know they're supposed to, they have like core values which are dignity, advocacy, compassion, some other things.

She faced the prospect of destitution, were it not for the support of her extended family:

I thought, how am I supposed to live when I have nothing? Well, it's a good job I had a good family that were able to support me and my Mum helped me because there's nothing worse when you have nobody and you're on your own... because I'd been sacked from my job, they weren't going to give me any benefits because I had been sacked because obviously I'm fighting my case, so that would have prolonged me getting any money as well, so all of that was on my head and I was thinking, god, it was such a stressful time period.

Muriel paid the initial fee for the issuing her ET claim but then obtained a remission. She was reimbursed as she was not being paid for some time:

I think I was supposed to pay £1200 and then I ended up only having to pay £222 because we applied and we qualified for all the remission fees, so that was quite good as well because like £1200 is a lot of money, especially when you haven't done anything wrong, especially when you don't have it, and you're still trying to catch up and get yourself back on an even keel, because it all had to be paid before February and it was like just after Christmas and it was like crazy.

Her family offered her financial support should she need to pay full fees. She recalled her aunt telling her, 'It doesn't matter about the money, I don't care about the money, we just want to see justice getting done.'

The employer made a number of offers of a financial settlement through Acas but the amounts were not acceptable to Muriel who felt the employer should pay her six months' salary - the period of time for which she was in limbo with her dispute and had not found alternative employment. She also felt quite strongly that she wished to have them taken to 'court' to clear her name, out of 'pride'. She also wanted answers. 'If they're not willing to settle for that kind of figure then I'd be as well just going to court and it's really not about the money it's not about that it's about trying to find out why I ended up in the position that I ended up in because obviously there's people in that place that have put me there, I just want to find out what the truth is.' At this point then, Muriel was only willing to settle if the employer provided an explanation as well as six months' pay. She talked of having to 'fight the good fight' and taking it 'all the way to Tribunal if necessary.'

Taking a settlement would mean being silenced, which conflicted with her desire for justice, exposing the employer for what they had done:

People were saying to me don't take the money, don't take the money just go to court and then you'll be able to talk about it you'll be able to expose [the employer] because if you take the money you have to sign like a confidentiality clause... You won't be able to say what the truth is, so basically they're just going to buy your silence and I thought, well it's no' really about that because at the end of the day they've put me in the position but

I don't think that they've ever actually been to court, Eleanor<sup>102</sup> just because they've always settled out because it never got that far you know... I'd say it's more it's a pride thing now.

A big part of her motivation was thus showing that she had done nothing wrong in spite of an earlier warning from William about the potential remedies available through the Tribunal system.

A lot of people say to me, 'I want to clear my name'. However, an Employment Tribunal is not looking at whether you did something wrong or not but really whether the employer did something wrong in relation to your employment. But the employee's record does not change. (Field notes, 2<sup>nd</sup> appointment).

Muriel reflected on this later:

William said to me, 'Oh, you might never find out the truth and you might', but at the same time I've got to try... I could have just walked away and just left it and you know like no I've moved on with my life now but at the same time you can't really get closure until you really find out.

However, quite unexpectedly, Muriel's partner broke up with her. This break-up took away her confidence to go to Tribunal. The relationship was with someone who worked with her who was going to act as a witness. He stopped taking her calls, and Muriel suspected the employer, whom he still worked for, had put pressure on him. She decided to accept a settlement because of this as she had lost the will to fight and felt without this witness, she did not have enough evidence to stand up in Tribunal:

I'm going to settle out of court take the money and run as my only ally in there was the person I loved and he left me [and] sided with the enemy so I can't go to court now knowing that he did that amidst everything else... He couldn't be a witness for me he wouldn't put his job on the line for me they must have got to him because he told me he doesn't love me or care for me anymore a week before the court I didn't tell William any of this but William says I should take the money so I get it all. (Email)

It was the most stressful thing that I'd ever, you know, went through in my whole life and, you know, there was a lot that went on in my relationship that played a big part. I'd say I was a very broken person at that point in my life, so I was, so I just had to do what was right for me, so I'm in a much better position now.

A number of former colleagues she asked for help told her they were too afraid of losing their own jobs to act as witnesses for her:

In there, right, all the kind of people I've got as my witnesses have all left there and aren't in there, because the people in there I can't use them because they still work in there

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<sup>102</sup> Muriel is talking to the researcher by name. By this point, they had met, exchanged messages and spoken by telephone many times.

because they're in fear of their jobs... The way it works in there is that they have such a control over people and they're very you know they don't want people speaking out and they don't want people having an opinion... Anybody in there that I had asked to you know help me they basically turned round and said, I'm sorry [Muriel] but I can't help you because I'm in fear for my own job. (Phone call)

My aunt wants to help me [as a witness] but I just can't let her do it because they'll just go after her as well... they've actually started going after her already... It's just it's bullying, I think that it's a bullying mentality so it is.

The only people who were willing to act as witnesses were in new employment, often having left because they themselves identified with Muriel's plight:

They're all in other jobs now and have not got a good word to say about the place. And it wasn't just to do with me and what happened to me. They could relate to my story because the things that they left for were the exact same reasons, about not being treated fairly and this is people who'd worked there for years, years, that gave their life to [the employer] and then ended up having to walk away through the bad terms of other people.

Muriel decided to take the settlement offer which was facilitated through Acas. Muriel was only indirectly aware of much of Acas' work as a conciliator 'went back and forth between [William] and their lawyer, but I never had any direct contact with them or anything, apart from at the very beginning.' Muriel had found her initial contact with Acas:

very, very supportive. They just said that it was more than likely going to get resolved... amicably: 'It will be between the party that you're suing, that they're always trying to resolve everything because they don't want it to go to a Tribunal because that just costs time and money, especially when it doesn't need to go'. So I just kept thinking about that.

Muriel felt she was in a strong position. She recounted that William 'was kind of saying that they're having difficulty with this case because they haven't followed any procedure at all,' meaning that the employer was keen to settle.

I'm still walking away a winner in my eyes as I've went this far however I didn't see it coming with regard to my relationship being over so that's why I can't go any further because I would end up with nothing so at least I am walking away with my settlement. (Email).

When she had received her paperwork, confirming the settlement, she commented:

[I] Feel great that it's all over with. Not happy with the way it ended as I would have liked to have had my day in court to expose them but could not take that risk with what happened with my relationship so I felt I did the right thing to walk away with something and still be a winner in my eyes and my family's eyes so I'm happy in that respect. (Email)

Even after the settlement, which included a confidentiality agreement, Muriel had further problems with her former employer who wrote to her accusing her of talking about her award figure:

I got a letter to say that I had been discussing elements of the case with people in the community and people that still worked in [workplace]. So I went onto [William] right away and I said, 'No, I haven't discussed anything' ...after she had given me the settlement figure, she's trying now to get that money back off me.

In general, Muriel found the problem at work very stressful and depressing. At the second appointment with William, the aunt commented:

'You don't know what all this has done to this wee girl. She's been in pieces'. The client does not look up at this point, her posture quite hunched - she appears quite emotionally drained. (Field notes).

Engaging a representative was key to ensuring she did everything correctly to obtain justice faced with an intransigent employer:

I have to just look after myself 100% here, make sure I'm doing everything properly, so that's why I got (William) on board. At the end of the day, they just wanted to take me out, and it wouldn't have mattered ... if they weren't doing it then, they were obviously going to do it at another point in my life, so that was that.

In future, she felt that as she was now part of a large union she would be able to call on their services to assist her:

Anything was to happen in another place that I work in now, because I'm part of that union, they will be right there, they will send somebody right there and then, but no, it's really good, I'm so glad I'm part of a union.

As Muriel's participation came to a close, she mentioned that a former colleague was taking the employer to Tribunal and pondered whether her settlement prohibited her from acting as witness:

There's another lady and she's taking [them] to court. I was going to ask [William] - obviously I did the settlement with them but would that impact me on being able to get involved in her case?... I think this lady's going to need ... as much support as she can get. And again, it's all the people that I was using in my case that's going to be getting used in her case. We're all banding together. There's a unit again and we're all going to do everything we can.

It's quite [a] similar [situation]... She actually had to go on the sick because she'd broken her ankle... they'd told her that, you know, 'There's nothing wrong with you, you have to go back on the ward to work, you've got 10 minutes'... They're just trying to make her life a misery but it's their fault that she's in this position that she's in and she said, 'I can't go back there and work, after everything that's happened'. So now she's went to a lawyer and she's doing all this to make sure that she gets some sort of compensation. I don't even think that she's interested in the compensation, I think she's interested in going to the Tribunal and getting a fair trial and getting a fair case because she was so bullied into - it was hellish, it was terrible... They were basically beating her down, the way they do it with everybody.

## **TOM**

Tom, a 47 year-old man who had been working in sales, had been on long term sick leave for four to five years with depression and anxiety. He was not being paid after his statutory sick pay ran out, but hoped to return to work, and sought advice when it looked as though he might not be allowed to. Tom had felt for some time that his employer:

wasn't sympathetic to my situation as far as my mental health problem. It was like he probably thought it was just someone skivving like or someone that didn't want to work or something along them lines.

When Tom first went off sick his employer said he had to come back to work, even though he had a sick note: 'They made me come back [pause] because they needed the cover... [I] basically was forced to come back to work when I was ill'. He managed to come back for another couple of weeks but was then was off sick again. His employer then put him on part-time work. He remained ill and then went off sick long-term.

After his statutory sick pay came to an end (at the time of writing it was paid by employers for up to 28 weeks), he was advised by his employer that he would need to claim sickness benefits; they also told him he did not need to continue to give them his sick notes but should instead give them to the benefits office. He did not have further contact with his employer after this time. He did not need to give them his sick notes and they did not contact him to see how he was or what the position was with returning to work.

His sickness benefit (contribution-based employment and support allowance) then came to an end when the law was changed so that it could only be paid for a maximum of 12 months. He could not get income-based employment and support allowance because his partner was working. At the same time, he also failed his medical (work capability assessment). He appealed this but was turned down; this meant he could not even get his 'stamp' (national insurance) paid. He still did not feel able to return to work, but after 12 months without any income of his own (he was financially supported by his partner) and with the encouragement of his counsellor, he contacted his employer. He wanted:

to find out exactly where I stand with work. 'Cause me counsellor I was seeing at the time told me, kept telling me, I need to get it sorted one way or the other so I can move on... Either, if I'm not employed by them anymore, look for another job or find out what sort of job I want. But he said, you can't do anything until you know where you stand with them like.

Tom felt he needed help at this point. He says of himself, 'I'm not the best of sort of educated people, I'm rather the opposite actually [laughs].' He made contact with the CAB, who advised him that he might be entitled to holiday pay for the time he was off and suggested that he contact Acas. He used their helpline to prepare for speaking to his employer:

I'd been in touch with Acas a few times so I'd been trying to build myself up to, to contacting work.

I was asking them, when I was ringing up and asking them advice, you know, where I stand because I didn't want to sort of go into work sort of unprepared so to speak, 'cause I know what they're like from old like, you know, they just make the rules up as they go along.

However, Tom felt confused by the advice he received from Acas at different times which he perceived to be contradictory, or inaccurate:

They were telling me that I was entitled to five years, I would be paid. Then they were telling me I was entitled to eighteen months I would be paid and... 'cause every time I rung you get someone different.

Tom appreciated that there were different types of Acas personnel that he came into contact with, saying, 'There's two different levels of people you speak to basically.' He noted that there are:

general sort of enquiries people that you speak to... [one] told me they couldn't trace who I'd spoken to. There are people all over the country that just [pause] just there to answer general questions about them and gave me a lot of disinformation.

He distinguished helpline personnel from case conciliators:

The lady that actually does the, the negotiations. I can't remember what she called herself, you know, her job title is something to do with negotiations and all that. She was good but you know, there was times when she said she was gonna ring me and she didn't.

Tom's account suggests that he was unclear about who he was talking to at Acas, and it is likely that he misremembers some part of these encounters or blends in interactions with other people he may have spoken to:

One person there [at Acas] told me they would represent me for a hundred pound. And then I was told when I... when I actually got the person that did the negotiations, that I was completely wrong and they were totally independent and [pause] unbiased and just to literally, a go-between like.

Tom recounted that:

When I told Acas what I'd been told about them representing me they said, 'Oh no, no. it's not the case'.

*Interviewer: Right, that they can't?*

Yeah, she was very sceptical that I was, that that was correct, that I'd been told that. She kept saying 'Oh are you sure you didn't ring a different number?' I said 'No' I said, you know.

*Interviewer: Really?*

I said, 'I've been ringing this—'. She said, 'Oh, well on our website there's adverts for solicitors and this is the thing, are you sure you didn't ring one of them?' I said 'No, I've

rung the same number I've been ringing before like'. Someone had told me that they would represent me because they would negotiate first and I mean, if that didn't - if they still refused to play ball then they would represent me because they were going through the process like of what, what they would do. And....

*Interviewer: And, so then-- so what, you then thought about--?*

Well, no. I just wasn't.... at the time I just wasn't willing.... Because the letter that he sent me.... I'm just trying to find it my emails now but I can't seem [to find it].

Whatever the truth of the matter, Tom did not have a clear view of Acas' role, capacities or responsibilities.

Still, Tom contacted Acas a number of times, seeking advice in order to bolster his confidence:

I initially rung, I mean, this was the first time I rung Acas... I didn't sort of act on anything. Then I'd sort of forget what they'd told me and I'd ring them again and I'd try and build myself up for it and then... I'd rung up I'd say two or three times and I just, one day I just thought sod it and went into work like!

When Tom went to his workplace to talk to the employer, he told them he had been in touch with Acas. In hindsight, he felt that this was a mistake:

The information they [Acas] give me initially caused me a lot of problems. Well, the way they told me to approach it. I shouldn't have even mentioned anything like about Acas or should have done it more informally. I think things would have gone a lot differently or could have gone a lot differently... I'd told them that I'd got in touch with Acas, they possibly thought that - wondered why I needed legal advice, that they might sort of try and pull a fast one on me or something. I think it might have got their backs up and put them on the defensive.

His employer asked him if he wanted his job back:

I just said, 'Well I don't expect you to have kept me job open all this time.' And that's all I said like. I said I was just wanting to know my employment status. And he said, 'Oh well, we'll speak to the solicitor, the company solicitor and let you know'.

The employer then emailed him to say that his contract had ended five years ago, after his statutory sick pay had ended, because he had not kept them informed about his situation. Tom spoke by telephone to a private solicitor he had found through the internet, who reportedly advised him that he 'was entitled to a minimum of 18 months [pay]' and that the solicitor could take the case on a no win no fee basis. However, Tom decided it was not worth pursuing this with the solicitor because the solicitor's percentage plus the Tribunal fees would take up too much of any financial award he may receive.

Tom also had an appointment with Havina, a solicitor at CAB. Havina was less certain than the private solicitor had been about the strength of Toms' case:

I went to see [Havina] and that was a meeting that also led me to think that I'm also better off trying to cut a deal with them because. She showed me some law books on employment and came up with some of the pointers that I'd been told would go my way, she said wouldn't necessarily go my way. There was more onus on the fact that I should have been in touch with them [his employer].

Tom contacted Acas again who then entered a protracted period of negotiations with the employer. Tom found this process very convoluted:

Every time these things were said it would take a week or two weeks to get back and through this, through this, you know, me ringing Acas, Acas ringing him, him getting in touch with his boss and then ringing back to Acas, Acas then getting back in touch with me like, [laughs] it was ridiculous.

At this point, Tom had not made a final decision as to whether or not to go to a Tribunal. The negotiation process was slow. At some point during this process he seems to have decided he was unlikely to go to Tribunal. Nonetheless, in his negotiations with his employer, he continued to act as if he would take them to the Tribunal:

I made it clear to Acas that I would go to Tribunal if I was pushed into the law of the land. They didn't know obviously that I'd decided. I wouldn't do that when it come, you know, when it comes to the reality of it, it just wasn't viable at all...they didn't realise that. They must have known that if push came to shove and they had to prove that they'd made me redundant and then prove what all they said was correct, that they couldn't do it like. You know, because they're just not that sort of company, they just let things... You know it's not... it wasn't an important thing to worry about, you know, for the amount of people that were involved in it, like, just the bosses' account. It would never have come up. It would never have been an issue. Like, they weren't paying me any money so I would have never been, you know, a file on the table or anything. I would have never been even, you know, given a second thought like.

Tom felt his illness hampered his handling of his dispute:

With me illness, you're very much up and down. I mean one week you're all raring to go and, oh I can take on the world, and then [laughs].... Then actually you think, oh God I'm not sure if this is such a good idea now!?

Through Acas, the employer offered him his job back on a new contract. He refused this because he believed they would then make him redundant. He was aware that he would have no rights in the first two years of a contract, and had seen former colleagues suffer because of this:

I wasn't willing to accept that [a new contract] because I knew once I'd signed all me rights away they would just make me redundant because you know ... They could just do that any time within the next two years like... When I first started working there, there was this big thing about people not lasting very long, because it was twelve months then at that time, you know, where your contract could just be terminated without you having

any rights to anything like because you hadn't been there for twelve months. So it was a big thing at the time. You know, when it was coming up to like your twelve months, people would either, you know, it could go either way. You could just be let go or you could, you know, you're kept on and that was it then, because once you'd gone past your twelve months they couldn't... They had to be sure they wanted to keep you because they couldn't just get rid of you whenever they felt like it because there was quite a lot they did like.

His employer then offered Tom his job under his old contract which he accepted, on the condition that he had a phased return to work because he did not think his health was such that he could come straight back into working five or six days a week. His employer said that they could not accommodate this.

He eventually agreed a settlement with his employer, the amount of which was confidential, because he signed a confidentiality agreement. He felt that the Acas negotiator 'Just wanted me to settle it so she could move on. She was getting a bit fed up with it because it had been going on for like two months'. He also felt unable to pursue the matter to Tribunal because of the risk of losing his Tribunal fee:

If I hadn't had to pay fees I would have gone... I would have revelled in the fact that I could have just turned round to them and said 'Well I'll see you in court'... I would have had nothing to lose then and all to gain... Not just financial gain but the satisfaction of them forcing me to take them to court and them having to deal with it like and spend time on it like.

Tom was extremely scathing of the system of rights' enforcement after his experiences. He reflected:

As far as I'm concerned for me there is no law or legal system... You've got to pay for justice, what sort of justice is that? You've got to buy it... When someone comes up to you in the street and hits you in the face, you can take them to Court and get, you know, get compensation for it or whatever like. But someone just cheats you out of money in your employment or treats you illegally, the law says that they can't treat me the way they did, I've got rights, I've got a legal rights, but I had to pay for them rights to be enforced like so there's no – there's no, the law isn't there. There is no law to stop them doing that as far as I'm concerned because I've got you know, I can't afford, financially afford to stick up for myself.'

## **DISCUSSION**

The case studies vividly illustrate several of the procedural and substantive shortcomings associated with conciliation in ADR theory and Acas evaluations. Some of them also arise in judicial procedures which reproduce power inequalities in multiple ways, from the uneven availability of representation to the discretionary application of procedural rules and the privileging of certain attitudes and modes of expression. When awards are made, they can feel low compared to the harm suffered (Alfie,

Amanda) or need to be enforced by claimants themselves through additional time-consuming procedures (Amanda) with uncertain prospects of success (Grant). Delays in obtaining a Tribunal ruling or reaching a settlement disproportionately harm workers, who may struggle to make ends meet (Alfie, Grant, Muriel) and find a new job (Grant, Amanda), sometimes due to negative references from ex-employers (Lena, Muriel). Workers may also go through periods of extreme psychological strain (Sasha, Lena), be subjected to intimidation, including through family, friends and colleagues (Muriel) and be persuaded to lower their expectations (Amanda, Muriel).

Other hurdles are specific or much more closely linked to ADR. The case studies show that despite portrayals of conciliation as an informal and accessible process, workers can experience it as complex and burdensome. Participants struggled to understand conciliators' limited role as 'go-betweens' relaying employers' expectations and offers (Alfie), especially when they had previously resorted to legal advice through the Acas helpline (Lena). Speaking to various Acas officials through multiple phone calls can also lead to unsatisfactory communication and confusion (Tom). The informal adviser of one participant (Amanda) felt he needed specialist help to deal with Acas. During conciliation, workers may feel pressured to settle by comments highlighting the weakness of their case or by reminders of judicial costs, including the unpredictable prospect of having to pay employer costs (Alfie, Grant). While these issues are not necessarily raised directly by conciliators, it may be difficult for them to reassure claimants that cost orders are unlikely. One worker (Lena) thus perceived Acas as uncritically conveying employer threats which she could not rationalise due to her lack of legal expertise.<sup>103</sup> More subtly, conciliators can frame the dispute as a private issue best resolved amicably between parties and downplay the substantive difference between settlements and court decisions (Muriel). One of these differences consists in confidentiality agreements which two participants (Muriel and Tom) were requested to sign, in one case leading Muriel to doubt the possibility of acting as a witness in future complaints.

## 7. CONCLUSION

With the continuous decline of union representation and the introduction of legal incentives for workers to resolve individual employment disputes without resorting to the courts, ADR is gaining increasing prominence in the British landscape of industrial relations. The most important sign and motor of this change has been the conciliation service offered by Acas to all workers wishing to lodge a claim in ETs. This service normally intervenes rapidly, entails no direct financial cost for parties and seems to be positively evaluated by most of its users as well as (other) employers. However, unions have been more critical of its capacity to deliver fair outcomes, and both legal theory and available data suggest important pitfalls in terms of procedural and substantive justice. When it does not conclude in a settlement, conciliation may lengthen the dispute resolution process in a way that imposes disproportionate burdens on precarious workers. Whatever its outcomes, it also offers employers an opportunity to shape workers' aspirations and expectations through the authoritative

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<sup>103</sup> For a review and additional illustrations of these arguments, see Adam Sales, Morag McDermont, Nicole Busby, Emily Rose and Eleanor Kirk (2015), *Citizens Advice Bureaux clients and advisors' perceptions of Acas*, University of Bristol/University of Strathclyde.

voice of conciliators, whose impartial position can be confused with that of a judge despite the fact that they have no mandate to interpret legal rights and standards. The ambiguity is compounded by Acas' multiple roles, including a helpline on employment rights which many employees contact prior to conciliation, as well as by workers' limited knowledge of labour law and uncrystallised expectations regarding the functions and outcomes of Acas. In contrast, employers tend to have better prior knowledge of the conciliation procedure, which gives them the capacity to use it strategically. High rates of satisfaction with Acas services may thus conceal that conciliation can result in workers accepting unfair settlements in which their legal rights are compromised. Also of concern is the prevalence of confidentiality agreements which can make further claims by other employees difficult to pursue, and which mean that employer abuses of rights are kept out of the public domain.

The tension between ADR and justice is signalled in Acas' own Codes of Practice on mediation, which explicitly list a series of cases where it may not be suitable. These cases seem to overlap with those likely to give rise to a Tribunal claim. At the same time, the pre-claim conciliation system puts the onus on claimants to decide whether to sue or not and Acas guidance on conciliation portrays it as a 'better' mode of dispute resolution for all types of cases. These positions could only be reconciled by drawing a clear distinction between the function of mediators and conciliators, but such a distinction is currently missing from Acas policy. In this context, it is difficult to avoid the impression that claimants are effectively encouraged to enter a process which is already known to be unsuitable to their dispute.

This somewhat pessimistic conclusion derives from the experience of highly precarious, typically unorganised workers, and may not apply in highly unionised workplaces where the bargaining power of different parties tends to be more balanced. In fact, unionisation itself has been associated to a greater number of disputes reaching the attention of senior managers but a lesser recourse to ETs,<sup>104</sup> raising the possibility (pointed out by the union representatives interviewed) of an elective affinity between collective bargaining and fair ADR. Even if this hypothesis were confirmed, however, it would merely establish that ADR can reflect the justice or injustice of employment relations, but not rebalance the scale.

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<sup>104</sup> See Dickens, 'The Coalition government's reforms', *op. cit.*, 245-246.

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