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Research report

March 2015



Conflict management: a shift in direction?

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Conflict management: a shift in direction?

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Summary of key findings

The introduction of employment tribunal (ET) fees has changed the balance of power between employers and claimants. This has had a significant impact on employees' willingness to bring claims. The reduction in claims volumes, and the increased emphasis of public policy on conciliation, has led some to anticipate the possibility of a marked reduction in the role of the law in the dispute resolution process.

Employers spend an average of 19 days of management time dealing with individual ET cases. Larger organisations with more than 250 employees spend 20 days dealing with individual ET cases, while organisations with fewer employees spend 12 days.

The longer-term future and impact of fees will depend on decisions still to be taken by the courts and/or the Government. Most employers (38%) who participated in the *Labour Market Outlook* (LMO) survey say that the present fees system should be left as it is, while 36% say that fees should be either reduced (26%) or abolished (10%).

Beyond the introduction of ET fees, recent legislation has so far had only a limited impact on employers' approaches to managing conflict. However, the general direction of public policy, in support of alternative dispute resolution, appears to have had a continuing influence on employers' thinking about the balance to be struck between formal discipline and grievance processes, and the use of more informal methods.

As compared with the previous format of Acas conciliation, which came into play once a claim had been lodged with the tribunal service, early conciliation has the potential for Acas to develop closer relationships with individual employers, particularly SMEs. However, some employers are critical of the early conciliation process, often on the grounds that they are given insufficient information at the outset to decide how to respond.

Employers and trade unions generally take a pragmatic approach to deciding whether or not to seek settlement of a claim or allow it to go forward to a hearing. If an employer believes they would have more than a 50% chance of success in resisting a claim at a tribunal, they will be less likely to accept an offer of Acas conciliation. In combination with the impact of fees, this will tend to constrain the take-up of early conciliation.

There is an increased level of interest by employers in using settlement agreements as a means of terminating employment. The majority (56%) of employers responding to the winter 2014–15 *Labour Market Outlook* (LMO) survey feel that settlement agreements are a useful mechanism for removing an underperforming employee without the need to go through an unnecessary and time-consuming performance management process. Two in five (40%), however, feel that settlement agreements are a default option, to be used only when significant attempts such as

training, coaching or relocation had been made to retain the individual in employment.

Few large employers say they are interested in making use of the extended 'without prejudice' provision in recent legislation, believing that it offers them inadequate protection against possible tribunal claims, for example on discrimination. But employers have so far seen little evidence that the new provision is undermining good practice in managing performance.

Both lawyers and employers are sceptical that the new ET procedural rules, placing more emphasis on pre-hearing reviews as a means of weeding out weak or vexatious claims, will be effective in achieving their object. However, employers believe that weaker claims are more likely to be discouraged by the introduction of fees, while employees will continue to bring claims which they believe are well founded. People working in the public sector, and higher-paid employees, appear less likely to be discouraged from bringing claims.

Employers are making increased use of mediation, and other forms of alternative dispute resolution, to resolve workplace issues. Responses to the winter 2014–15 LMO survey show that mediation by an external provider has been used in the last year by just under one in ten organisations, and its use has increased over the same period in one in three organisations. Its use

in the public sector is significantly higher (at 17%) and in public administration (21%).

But there is also a marked interest by employers in developing internal mediation skills, particularly among HR staff, to be deployed for example in 'facilitated discussion' with the parties to workplace conflict. One in four LMO employers say they will actively identify issues that may give rise to conflict, and deal with them before they become a serious problem.

Employers are also focusing on training line managers in managing conflict and handling 'difficult conversations'. Nearly half of respondents report that their organisation has trained line managers in handling 'difficult conversations' or conflict in the last 12 months, and more than half of respondents in all sectors report that its use is increasing.

Training line managers and troubleshooting by HR are the two methods of handling conflict that have shown the largest increases in use by employers over the last year. Of those LMO employers who recognise a trade union, more than half (58%) report that they feel union representatives are helpful in resolving individual workplace disputes, while one quarter (26%) do not feel they are helpful.

There is a perception that public policy and employer practice has been moving slowly but definitely towards a more workplace-focused, informal style of dispute resolution. Most employers and trade unions would support this general approach, which has its roots in traditional employment relations practice.

Nevertheless, many HR managers lack confidence in developing informal approaches to managing conflict and continue to be nervous about departing from grievance procedures. This suggests there is a need for better training, and for Acas to review its Code of Practice on discipline and grievance, to make clearer the inter-relationship between performance management, mediation/ADR and settlement agreements.

Introduction: research outline

‘Are the changes achieving their declared aim of encouraging employers to rely less on legal procedures and more on improved workplace practice and the greater use of alternative methods of dispute resolution?’

This research set out to examine changes in employers’ use of different methods of managing individual conflict, and how far recent changes in legislation on dispute resolution have impacted employer practices. The report is based largely on telephone and face-to-face interviews with HR managers, supplemented by a small number of interviews with employment lawyers, Acas officers and trade union officials. However, these interview findings are reinforced by statistics from the winter 2014–15 *Labour Market Outlook* (LMO).

Recent changes in employment regulation and tribunal procedures have included:

- introduction of employment tribunal fees (July 2013)
- early conciliation by Acas (April 2014), building on experience of pre-claim conciliation
- ‘settlement’ agreements and extended ‘without prejudice’ protection for employers seeking to terminate employment (July 2013)
- new Employment Tribunal Procedural Rules (July 2013).

Some basic questions explored in the interviews include:

- Are the changes achieving their declared aim of encouraging employers to rely less on legal procedures and more on improved workplace practice and the greater use of alternative methods of dispute resolution, including conciliation and mediation?
- Is recent legislation likely to have a significant impact on employers’ choice of method for dealing with an unsatisfactory employee, between seeking to address the underlying problem, or looking to remove the employee by offering a financial settlement?

The next section reports on employers’ responses to the recent changes in employment legislation. Section 2 reports on changes in the methods being used by employers to manage workplace conflict.

Two concluding case studies highlight the shift in approach being adopted by enlightened employers towards greater informality in managing conflict.

1 Employers' responses to recent changes in employment legislation

Employment tribunal fees

Employment tribunal (ET) claims volumes have declined dramatically since the introduction of fees. The increased unfair dismissal service threshold and reduced compensation ceiling will also have contributed, but to a more limited extent. Some law firms appear to be suffering lower levels of business resulting from reduced claims volumes.

Claims volumes: Data from Her Majesty's Courts and Tribunal Service indicate a significant fall in the volume of claims since the introduction of fees. The figures show that the number of single claims received in the period April to June 2014 was 70% lower than in the same period in 2013.

Employers say they have not significantly modified their general approach to dispute resolution as a result of the recent changes:

'We've felt no impact from the statutory changes, only the absence of fly-by-night ET cases.' (head of HR, transport sector)

However, employers perceive that the balance of power between employer and employee has shifted in their favour as a result of the introduction of ET fees. This means that many employers are now less likely to be interested in negotiating or entering into Acas conciliation until they see if the claimant has been willing to pay an initial fee:

'We don't exactly call the employee's bluff, but if we believe there is no substance to their claim we let them decide whether to claim. We can always have a settlement discussion later.' (assistant HR director, healthcare)

Not all employers interviewed have noticed a reduction in the number of claims against their organisation: some doubt that fees will have any significant effect in discouraging their employees from bringing claims. This may be the case, for example, where employees feel strongly that they have been mistreated; or if they work in a sector where earnings are relatively buoyant:

'Our people won't hesitate if they have a valid case. The fee structure wouldn't put them off.' (global IT company)

Half of LMO employers (50%) report that they have not had any employment tribunal claims in the past 12 months, with employers in the private sector (55%) significantly more likely than employers in the public sector (26%) to report this. Of those LMO employers who have had a tribunal claim in the past 12 months, six out of ten (61%) report that the number of employment tribunal claims has stayed the same. A fifth (17%) report that the number of claims has increased and 23% that they have decreased.

However, most employers appear to have welcomed ET fees as bringing a fairer balance to the dispute resolution system and

believe they will have reduced the number of weak claims:

'The fees structure is a substantial deterrent to bringing flaky claims. Do fees discourage legitimate claims? If people have a burning platform, fees won't dissuade them. Fees haven't changed employees' expectations.' (assistant HR director, healthcare)

Some private sector employers suggest unions are becoming more selective about which claims they are willing to support:

'The unions have changed their stance on legal advice to members and what they're willing to pay for. The grapevine says that where an employee is in trouble, trade unions used to be willing to fund a claim provided there was at least a 50% chance of success. Now the unions are taking a tighter line and are a lot choosier about what they will support.' (employee relations director, drinks company)

Full-time officers (FTOs) from a number of unions made clear they continue to support members with good claims and believe that such support has a useful demonstration effect in helping to recruit new members:

'My union will pay the tribunal fee if we support the case and there is a reasonable prospect of winning. We could also support a case if it helped with recruitment. Trade unions mostly win their cases. Cases where the claimant is not represented go slower as the judge has to give them more help and

‘Employers say they have not significantly modified their general approach to dispute resolution as a result of the recent changes.’

the employer’s representative is unable to deliver hammer blows.’ (full-time trade union officer, transport sector)

However, ET fees will undoubtedly have shifted the cost-benefit equation, which is likely to mean that some cases that would have attracted union support before the introduction of fees will no longer do so. One trade union full-time officer commented that high-value claims are now settling at low values, and that people with high-value claims may choose to go to the civil courts instead in order to enforce contractual terms.

The fees system has been challenged in the courts by Unison and is subject to a further appeal. The Government has said it will review the system. The longer-term future and impact of fees will therefore depend on decisions still to be taken by the courts and/or the Government in due course. LMO employers were asked how they think the Government should respond to the 70% reduction in

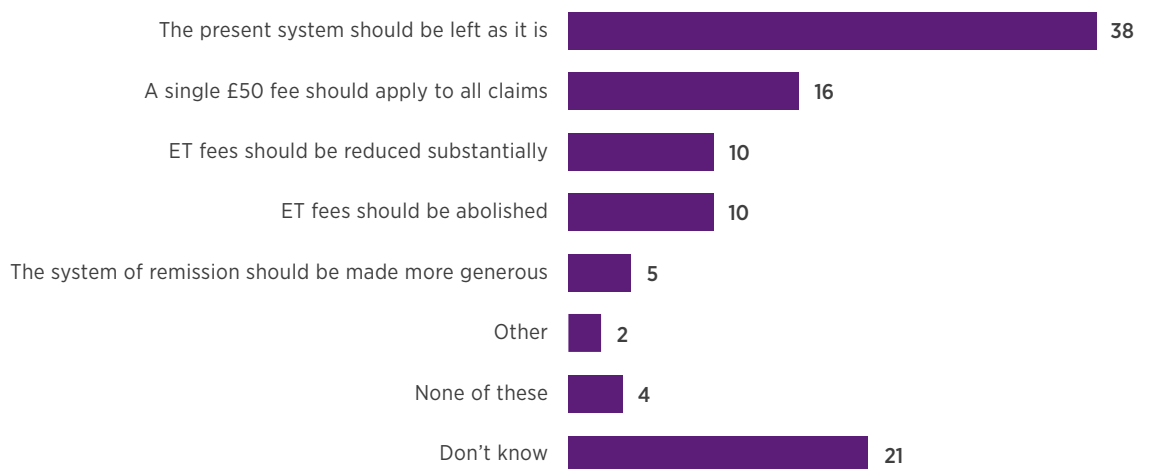
the number of claims made to employment tribunals since the introduction of ET fees (Figure 1). Most LMO employers (38%) say that the present fees system should be left as it is, while 36% believe that fees should be either reduced or abolished. Sixteen per cent believe that a single £50 fee should apply to all claims, one in ten that ET fees should be reduced substantially (10%) or abolished (10%), and a slightly smaller proportion that the system of remission should be made more generous (5%).

Private sector employers are significantly more likely than public sector employers to believe that the present fees system should be left as it is (41% compared with 27%), and conversely, public sector employers are more likely to say they do not know how the Government should respond (32% compared with 19%).

Early conciliation

Another change has been the introduction in 2014 of early conciliation, where anyone who wishes to make an employment

Figure 1: Employer opinions about how government should respond on ET fees (%)



Base: Winter 2014-15, all LMO employers (n=1,003)

tribunal claim must notify Acas, which then offers the option of voluntary conciliation to bring about an early settlement. The service is currently dealing with around 1,600 cases a week and Acas say that three-quarters of employers accept the offer of conciliation.

Most employers interviewed report good relationships with Acas but some are critical of the early conciliation process. Some feel that the process does not offer them enough indication of the nature of the employee's complaint, so they can't begin to assess how best to respond; others complain that contact by Acas can get lost in the system:

'I have negative feedback on early conciliation. When an Acas conciliator contacted us, he had no sensible questions and no information. His responses were sporadic, untimely and unclear. The follow-up was not great. What does he want? We have invited him to lunch.' (head of HR, global asset management)

'Acas should be trying to help rationalise the claim but the

officer is just pushing for financial compensation.' (assistant HR director, healthcare)

'Early conciliation has no benefit for us at all. The Acas conciliator says: 'I've spoken to [Fred Smith]: will you reinstate him or will you pay [say] £100,000?' We say 'no.' (HR director, emergency services)

One employment lawyer with a big litigation practice sees Acas early conciliation as effectively a post box for transmission of messages between claimant and employer.

Despite the falling-off in claims volumes, employers may still be under pressure to settle. A major law firm estimates the legal costs of defending an unfair dismissal claim from start to finish in an employment tribunal at between £20,000 and £50,000.¹ More generally, trade union full-time officers (FTOs) say that employers are more likely to want to settle when they perceive a risk to their reputation.

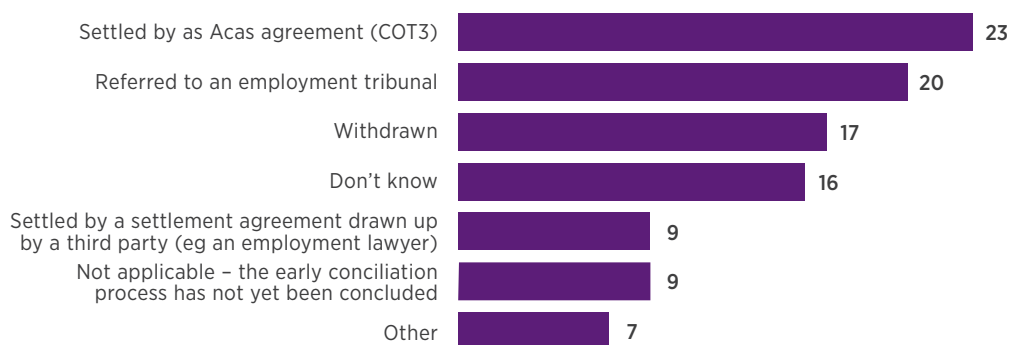
However, senior Acas officers report some indications that early conciliation is opening up more opportunities for them to support employers in developing better

employee relations, not just deal with ET claims. Some 75% of parties are currently represented by lawyers in the tribunal process. This can create a belief by employers that formal proceedings and/or financial compensation are the only way forward. But it is suggested that early conciliation may be beginning to change employer attitudes.

This is partly because of the design of the conciliation process. When the applicant submits an application, Acas phones the employer direct. This is generally before the employer has had time to consider whether or not he wants to have legal representation. So the conversation between Acas and the employer can focus more on how to resolve the issue that has led to the claim, not just the level of compensation. Acas has also compiled a list of major UK employers, including names and contact details, so that opportunities for conciliation are less likely to get lost in the management systems of large organisations.

Overall, nearly half (48%) of LMO employers whose organisations have been approached by Acas report that they are satisfied with the effectiveness of Acas

Figure 2: Outcomes of early conciliation (%)



Base: Winter 2014-15, all LMO employers who have been approached by Acas (n=129)

¹ The 2013 Survey of Employment Tribunal Applications (SETA) found that, among employers that paid for legal or professional day-to-day representation or advice, the median amount paid was £3,000.

‘Most employers report good relationships with Acas but some are critical of the early conciliation process.’

conciliation, with one third (33%) indicating they are somewhat satisfied and the remaining 15% being very satisfied. Relatively, a much smaller proportion of employers (18%) indicate that they are dissatisfied, while the remainder are split between being neither satisfied nor dissatisfied (16%) or being unsure (18%).

Small firms can find dealing with tribunal claims intimidating: their responses may be driven by fear of the unknown or a reluctance to admit to mistakes. Early conciliation means that Acas can seek to resolve the issue by dialogue with the employer.

There is anecdotal evidence that some employers are willing to talk to Acas about the possibility of re-engagement or reinstatement – something almost unheard of as the outcome of a tribunal claim in recent years. However, employers taking part in this research say that reinstatement is generally not seen as an option, either by the employer or the employee. It will be useful to have more definite evidence on this in due course.

Settlement agreements

The LMO survey finds that one in three employers make use of compromise or settlement agreements, and a similar

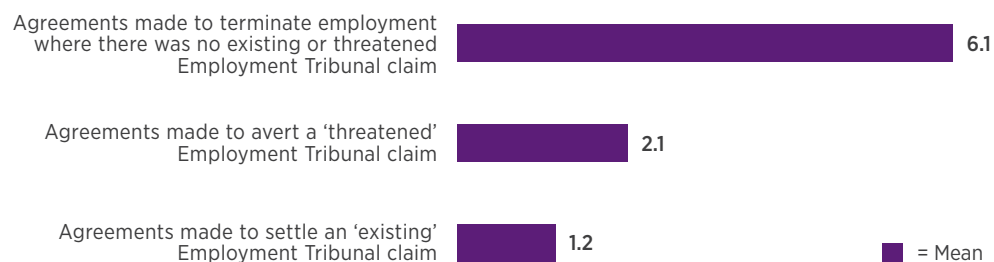
proportion report that they have made more use of them over the last year.

Some employers don’t believe in them, on the grounds that they encourage employees generally to expect some payment as the price of termination. Others make extensive use of settlement agreements. Judith Hogarth, Head of Employment Policy at EEF and a mediator and solicitor, has detected a significant increase in their use by the Engineering Employers’ Federation’s members:

‘We’ve noticed a significant increase in settlement agreements. We’ve also observed a willingness by employers to have more expansive and creative discussion around responding to discrimination issues, reputation and team-based issues, with the result that parties are more willing to consider mediation and/or settlement agreements.’

A third (35%) of LMO employers report that in the last 12 months they have concluded a compromise/settlement agreement. As Figure 3 shows, the most common type of compromise/settlement agreement are agreements made to terminate employment where there were no existing or threatened employment tribunal claims (on

Figure 3: Circumstances in which compromise/‘settlement’ agreements have been concluded by LMO employers in the past 12 months



Base: All LMO employers who had concluded a compromise/settlement agreement in the last 12 months

average six such claims in the last 12 months). This strongly suggests that compromise or settlement agreements are not in the main being used simply to spare employers the expense and possible embarrassment of an ET claim.

Employers generally say they see settlement agreements as a default option, to be used only after other options have been exhausted. However, the Engineering Employers' Federation (EEF) has noticed a 'huge' increase in settlement agreements, partly as a result of the 12-month cap on unfair dismissal awards. They have observed a willingness by employers to have more expansive and creative discussion around discrimination, reputation and team-based issues, which make settlement agreements more attractive. In some cases agreements will be the outcome of mediation. Judith Hogarth at the EEF thinks that the extension of 'without prejudice' protection has served only to raise awareness of settlement agreements, but has done little in itself to stimulate their use since the claimed protection from legal action is unreliable.

Sarah Veale for the TUC agrees that extending the 'without prejudice' rules has been unhelpful:

'Some employers simply see protected conversations as offering an easy way to sack someone. We think the rules are messy and almost impenetrable in parts and believe that extending the 'without prejudice' provision is dangerous. We preferred the former 'compromise agreements'.

Some employers also say they see settlement agreements as a 'quick and dirty' process for getting rid of people: such employers

prefer to 'do it properly' and dismiss employees on the grounds of redundancy, misconduct or capability:

'Occasionally we have a senior person who doesn't get on with a client and has to go, but it's the exception not the rule.' (HR director, public service contractor)

However, these employers are in a minority: most employers are entirely comfortable with using settlement agreements:

'We use settlement agreements, even when we don't need to: confidentiality helps. We make enhanced redundancy payments. The legislation will help, it will give people confidence to have conversations.' (head of HR, global asset management)

Some employers say that performance management processes can lead to game-playing; they prefer to have without prejudice conversations because they feel they can talk freely. Employers also say that performance management can be uncomfortable – employees are liable to get stressed and go off sick, possibly for lengthy periods. In such circumstances, the possibility of prompting an unfair dismissal claim may seem a risk worth taking:

'We generally have without prejudice conversations because you can talk freely; we ask the employee for an informal discussion without prejudice and explain the costs for both sides of [going to an ET], including expenses and our inability to give the employee a clean reference.' (assistant HR director, healthcare)

There are mixed opinions about the impact that extending the scope of 'without prejudice' conversations has had. Some

employers agree that this will give managers confidence and make them more comfortable about having 'difficult conversations'. Others say they don't need extra confidence to use without prejudice conversations:

'The new rules on compromise agreements don't change much. We always took the risk of having a conversation; it has never gone sour on us. By the time you're having that conversation, the relationship is broken anyway. It's not very expensive. We have in all cases exhausted all other avenues. It's last-resort time.' (head of HR, transport sector)

When the legislation extending the protection of without prejudice conversations was being mooted, there were worries that this might lead some employers to see settlement agreements as a short-cut to get rid of unsatisfactory employees and undermine good practice in managing individual performance. However, respondents to our interviews report they have no evidence of abuse:

'I don't think it's just seen as a quick way of getting rid of people. I have no evidence it's being abused. We have strict governance arrangements here – I chair a panel and we review trends – though other companies may not be quite so strict.' (HR director, global healthcare company)

Trade unions are, however, more likely to see the use of settlement agreements in particular cases as evidence of abuse:

'A pregnant employee protested against her appraisal marking of 'not adequate'. The marking was revised up on appeal. Two weeks later the employee was removed by a settlement agreement.' (full-time trade union officer, retail sector)

There are particular issues around the use of settlement agreements in the public sector, where offers of compensation outside the framework of the employment contract may require approval by central government. The Public Accounts Committee has also criticised the use of compromise agreements to terminate employment in the public sector as a means of covering up misbehaviour, on the grounds that such agreements generally include confidentiality clauses:

'We'd need a very strong business case to settle outside contractual terms, for example to make a special payment on the grounds of injury to feelings. We don't use them as much as we ought to because we're in a different climate, including worries about whistleblowers and gagging clauses.' (HR director, NHS)

'We do settlement agreements wherever we can. But we are constrained in what we can offer. I can't just say, 'Here is 4 or 5 months' pay, go now.' We need Privy Council approval and this can take some time. It's a long-winded

bureaucratic process and we would need legislative change to be able to go beyond paying for the notice period.' (assistant HR director, healthcare)

The LMO survey underlines the mixed feelings by employers about the use of settlement agreements (see Figure 4). The majority feel they are a useful mechanism for removing underperforming employees, but a substantial minority feels they are a default option, to be used only when significant attempts have been made to retain the individual in employment.

Revised ET rules

Under the revised rules of procedure adopted in 2013, if an employment judge considers at a preliminary hearing that a claim has no reasonable prospect of success, he has the power to strike it out. The earlier £20,000 cap on the costs that a tribunal can order has also been removed. The broad intention underpinning these revised rules is to encourage ET chairs to place more emphasis on weeding out weak or vexatious claims at an early stage, before they reach a hearing.

It seems possible that costs orders will play a bigger part in the tribunal process than formerly:

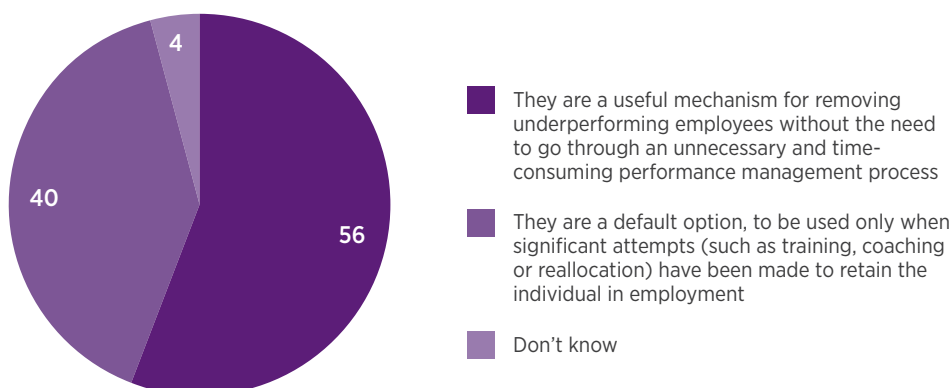
'There is an increased readiness to award costs, at a more realistic level. It's worth a go now to try to weed out weak claims.' (partner, law firm)

But both employers and employment lawyers are sceptical that the new rules will have a big impact. The view is that employment judges will feel unable to conclude that a particular claim has only a marginal chance of success, and so deserve to be struck out, unless they have heard the evidence:

'In terms of weeding out weak claims, we thought the system would change. However, we see no evidence of this.' (assistant HR director, healthcare)

However, preliminary reviews can help to cut down the number of issues requiring to be dealt with at a full hearing since the judge can explore if there are any facts to support the claim.

Figure 4: LMO employer attitudes to agreements made to terminate employment where there was no existing or threatened employment tribunal claim (%)



2 Changes in employers' use of conflict management mechanisms

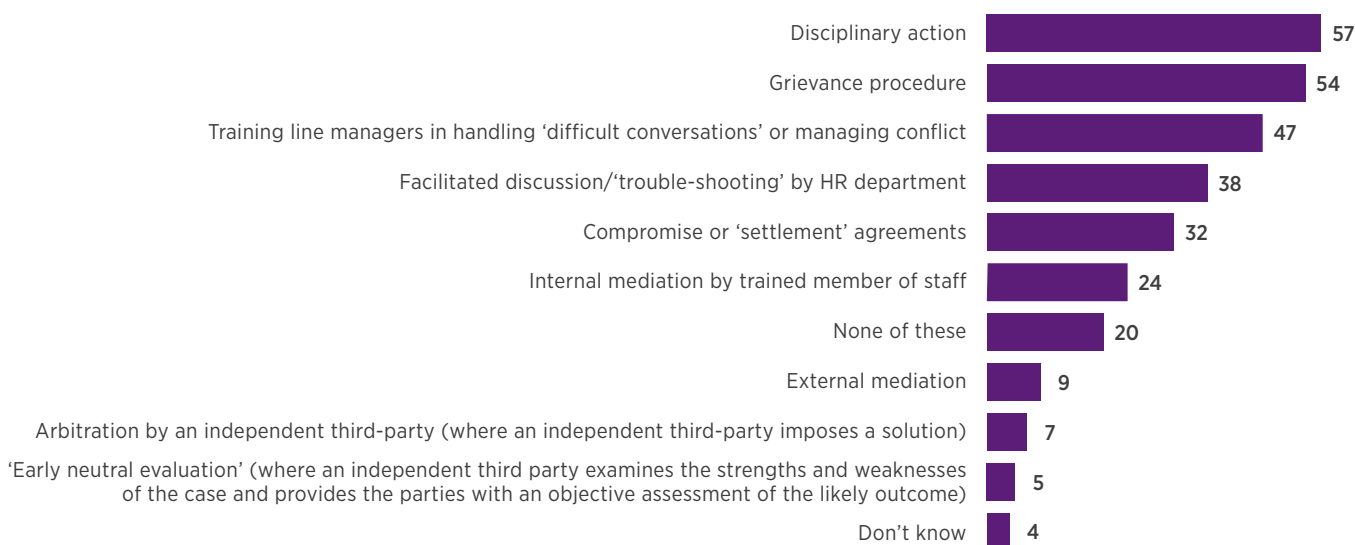
Although disciplinary and grievance procedures remain the most frequently used methods of handling conflict, employers do have a range of other choices (see Figure 5). Figure 6 shows increased usage over the last year by LMO employers of all methods, most notably training line managers and troubleshooting by HR.

Across the board, public sector organisations in the LMO sample report making more use of every

method of managing conflict than those in either the private or voluntary sectors. In each case, the difference is significant; in some cases, such as mediation, the difference is substantial. This may partly reflect the aspiration by public sector employers to adopt 'good practice'. However, it may also reflect a higher level of individual conflict in the public sector. The austerity measures adopted since the financial crisis have borne particularly heavily on

public servants, but this is only one possible explanation. Employee satisfaction, trust and engagement across the public sector have for many years tended to lag those in other sectors, and the vast majority of days lost due to industrial action are accounted for by the public sector. This is not necessarily a result of poor management since structural factors, including scale, trade union membership and political framework, are also likely to be influential.

Figure 5: Methods of dealing with workplace issues used in the last 12 months (%)



Base: Winter 2014-15, all LMO employers (n=1,003)

‘Across the board, public sector organisations in the LMO sample report making more use of every method of managing conflict than those in either the private or voluntary sectors.’

Grievance procedure

Most employers say that once an issue has entered the grievance procedure, it generally becomes much more difficult to resolve (see Capgemini case study on page 19):

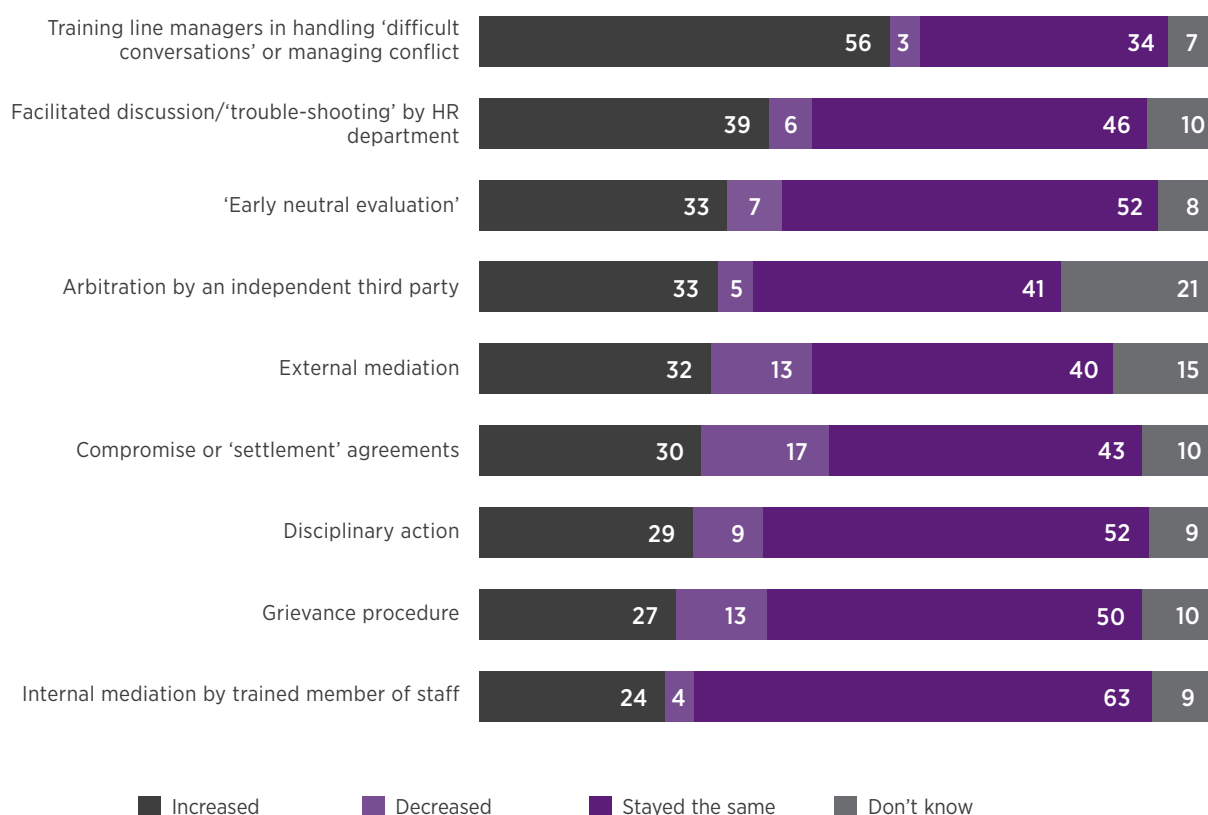
‘Grievances kill the employment relationship.’ (head of employee relations, global drinks company)

‘Grievances [are often] based on misperceptions; grievances are tough for the individual. We see discipline and grievance processes as a last resort.’ (head of HR, global asset management)

Use of the grievance procedure can be emotionally wearing for both employer and employee:

‘We had a complex grievance raised by an employee dismissed during her probationary period. She alleged she had suffered bullying and discrimination on account of her disability. In fact, she claimed to be suffering from a number of different disabilities. She was upset and it was an uncomfortable dynamic. She wanted reinstatement but we had nowhere suitable for her. Now she’s asked for financial compensation. We’ve spent many hours investigating her claims and produced hundreds of pages of written evidence.’ (head of human resources, healthcare)

Figure 6: Change in frequency of use of methods for dealing with workplace issues in the past 12 months



Base: Winter 2014-15, all LMO employers who had used each method

An analysis of discipline and grievance procedures and workplace mediation using WERS 2011 found no evidence of any reduction in formality in the wake of the Gibbons report on dispute resolution. The authors commented that successive governments have promoted the use of discipline and grievance procedures in order to provide fair and consistent treatment of employees. Interestingly, the study found that more positive attitudes in respect of employment relations and fairness were found in workplaces where the key discipline and grievance principles contained in the Acas Code were *not* adhered to.

Nevertheless, employers continue to set great store by grievance procedures and conscientiously try to follow the advice in the Acas Code of Practice:

'Managers worry if they deviate from the procedure in the Code.' (managing associate, law firm)

On behalf of the EEF, Judith Hogarth confirms that most employers routinely rely on grievance procedures to deal with individual issues:

'This is seen as the mainstream method of resolving workplace issues, and reducing the chances that employers will end up in a tribunal. HR attitudes are influenced by a lack of both skills and confidence. Employers don't want to be responsible for sending an issue down the informal route so they fall back on formal procedures when they could have used mediation.'

However, we find instances of employers actively seeking to identify conflict at an early stage and moving away from traditional

employee relations (discipline and grievance) models (see case study on drinks company, page 20). Some big employers say they are actively trying to keep issues out of the discipline and grievance process. Success in this depends on the ability to identify issues early, including making use of a range of information channels:

'We identify issues through HR teams but more often through trusted welfare officers.' (HR director, emergency services)

Does informality necessarily expose employers to more risk? Most employers see the grievance procedure as the default mechanism for use when other approaches have failed, and express a clear preference for using other methods for resolving an issue before going into the grievance procedure. It is not necessary to defer mediation until after a grievance has been raised. But it can require judgement to say where mediation fits in with the discipline and grievance procedure in a particular case. More guidance on how to position mediation might be expected from a revised Acas Code of Practice.

Mediation skills

The WERS analysis (see box above) concluded that, although mediation has become a significant part of workplace dispute resolution, there was little to suggest it was being used at an early stage to prevent issues from entering formal procedures or leading to litigation.

However, our research shows that some big employers are wishing to make more, and more effective, use of mediation and mediation skills at an early stage. We found evidence of employers seeking to avoid, and not just manage, conflict (see case studies on page 19).

'Most employers see the grievance procedure as the default mechanism for use when other approaches have failed, and express a clear preference for using other methods for resolving an issue before going into the grievance procedure.'

‘Many employers in both public and private sectors are now interested in the use of both formal and informal mediation processes.’

Reporting on a thematic analysis of five case studies, Saundry and Wibberley (2014) say that:

‘There was some evidence in the organisations within our sample that the revisions to the Acas Code of Practice had encouraged them to consider ways to promote early and informal resolution. However, procedural reform was generally focussed on improving the efficiency and speed of decision making while innovation was generally limited to the introduction of internal mediation schemes and/or the use of mediation training to develop conflict management expertise and capacity.’

Many employers in both public and private sectors are now interested in the use of both formal and informal mediation processes. Although one in four LMO employers report the increased use of mediation by trained members of staff in the last 12 months, the focus reported in interviews is in the wider use of mediation skills, rather than in formal mediation.

Several instances are reported of HR staff being trained in mediation skills:

‘We shall be doing mediation training for my team in early January. This is not directly in response to government policies but because it will give good core skills to my team. Mediation as such is not appropriate in every situation, but we are doing a general up-skilling and want to explore what works. We want to equip our HR people to deal with a variety of situations.’ (HR director, global healthcare)

‘I have no formal mediation training but I do mediate. I have had other training with some mediation skills. Mediation training should be bread and butter for HR.’ (HR business partner, housebuilding)

‘Our business partners are all trained mediators. Most workplace issues come down to poor communication. Most relationships can be saved so mediation is a key tool in the toolbox. We value mediation: it can re-establish a relationship when a grievance has been raised. We use mediation skills all the time: life skills, questioning skills. People should stop and think about how their actions are perceived by others: this can change how they respond.’ (head of HR, global asset management)

Four out of ten LMO employers (39%) report that they have increased the use of facilitated discussions or troubleshooting by the HR department as a method of dealing with workplace issues (see Figure 5 and case study 2).

It is interesting to reflect how closely some of the employers making most progress in developing ADR are approaching the North American model of strategic dispute resolution. There is certainly evidence that some employers are seeking to:

- identify issues at an early stage, so they can prevent, not simply respond to, problems
- train line managers to have better-quality conversations with members of their team, and be more prepared to tackle issues
- equip HR teams with the skills to undertake in-house mediation and/or conduct facilitated discussions

- consider a range of different approaches to handling conflict
- collect data on conflict management to help analyse where and why issues have arisen and evaluate their responses.

Training line managers

HR professionals say that line managers are generally unable to take the strain of managing discipline and grievance procedures or conducting settlement negotiations on their own:

‘Line managers are under pressure and don’t know how to deal with problems. So they end up in conflict. They have poor skills. We have a limited budget for line manager training. The best way of helping to improve conflict management would be to develop bite-sized training for line managers with three key messages that could be put across in two

hours. We could do this in-house with some external support.’ (assistant HR director, healthcare)

LMO employers are most likely to report that over the past 12 months they have increased the frequency of use of training for line managers in handling ‘difficult conversations’ or managing conflict, with 56% reporting that the use of this method has increased (see Figure 5).

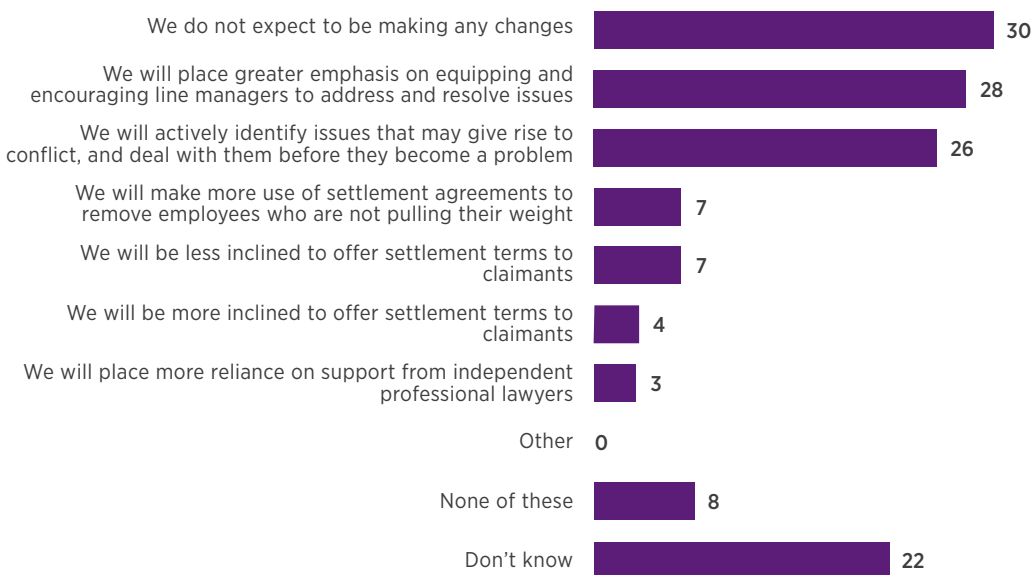
Most of the employers interviewed accepted that there remains much to do. However, many also refer to ongoing efforts to train line managers in conflict management skills:

‘Any company wants to sort out its problems in-house and avoid reputational risk. The desire is there. We take stuff seriously, educate the line and put best practice in place.’ (HR director, small IT company)

‘HR’s duty is to up-skill our managers. We are placing more emphasis on holding pre-emptive discussions and managing difficult conversations. This can be done internally, where people know the politics; we pull in external resources as needed.’ (global IT company)

The LMO survey finds that 30% of employers do not expect to be making any changes in their arrangements for managing conflict in the next 12 months (see Figure 7). However, an almost equal proportion (28%) say they will place greater emphasis on equipping and encouraging line managers to address and resolve issues at an early stage; and a similar percentage say they will actively identify issues that may give rise to conflict and deal with them before they become a serious problem.

Figure 7: Changes anticipated in next 12 months to manage conflict (%)



Base: Winter 2014-15, all LMO employers (n=1,003)

Employers' choices in relation to methods of managing conflict will evidently be influenced by their view of the relative costs and benefits. Figure 8 suggests that handling employment tribunal cases consumes about twice as many days of management time as settlement agreements.

There is a difference between smaller and larger organisations: those with more than 250 employees report more time being spent on workplace issues across the board. For example, larger organisations spent 23 days managing disciplinary cases, while smaller ones spent only 6; and larger organisations spent 20 days managing employment tribunal cases while smaller ones spent 12 days.

Wider employee relations context

Employers' interest in adopting more informal approaches is shared by the TUC. Sarah Veale says:

'In general we'd welcome a shift towards getting things done better in the workplace. We'd welcome more employee voice, greater reliance on collective means of sorting out disputes through negotiation and consultation. Why do we need to have lawyers involved in sorting out minor disputes about payment of wages?'

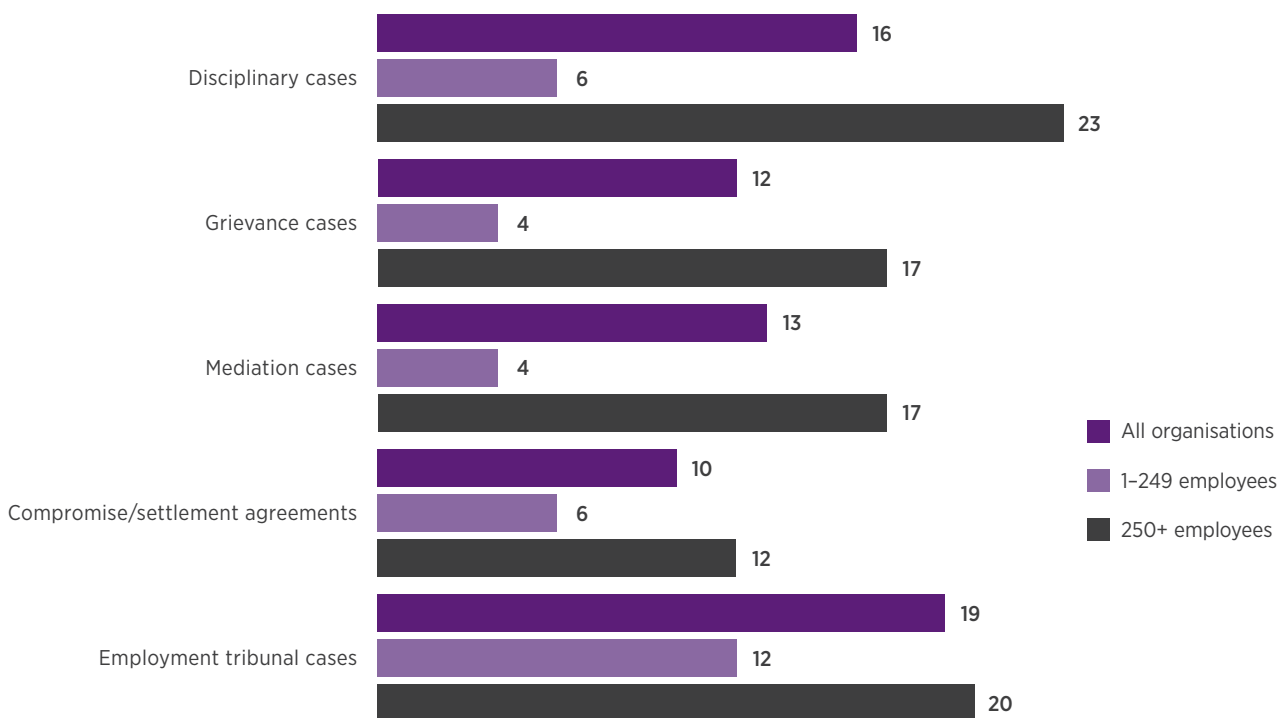
The reduction in claims volumes, and the increased emphasis of public policy on conciliation, has led some to anticipate the possibility of a marked reduction

in the role of the law in the dispute resolution process. There is a perception that public policy and employer practice has been moving slowly but definitely towards a more workplace-focused, problem-solving style of dispute resolution. Most employers and trade unions would support this general approach, which has its roots in traditional employment relations practice:

'Are employment lawyers anxious about losing business? The facts speak for themselves. The differences in claims volumes are massive. Certain types of firms are suffering badly.' (partner, law firm)

Several employers commented on the importance of trust, and the contribution of conflict

Figure 8: Number of days organisations spend dealing with individual workplace issues (average number of days per issue)



Note: Means are calculated excluding zero

management to sustaining employee engagement. The increased focus on employee engagement by employers in recent years is helping to support the more informal style of conflict management that is visible from this research:

'I 'buy' mediation as supporting staff engagement. Legal advice and ET claims damage the psychological contract. What kind of workplace culture and dynamics are you seeking to establish?' (HR director, NHS)

This increased employer interest in making use of informal methods of managing conflict supports the direction of travel for the HR function currently being explored by the CIPD. This suggests that, in a world that is becoming more volatile, uncertain, conflicted and ambiguous, the focus for HR needs to shift from a reactive and process-driven one to the search for solutions that are proactive, cost-effective and will deliver better outcomes for both employer and employee. This is likely to

have major implications for the development of professional HR skills and competencies.

In one sense this would resemble a return to the world before increased employment regulation led to an inexorable process of 'legalising' the management of workplace conflict. Interestingly, some trade union officials also prefer face-to-face discussion to reliance on formal process:

'I believe if we get to an ET we have all failed. I believe that if you have a face-to-face conversation, in a room, and if you have good relationships, things work well. You can have a fight, so long as you have trust between organised labour and HR. ... If something happens, I will phone a senior person in the company and say 'Is this true?' I will have a discussion. If it's serious, I wouldn't have to call, they would call me.' (national organiser, trade union in transport sector)

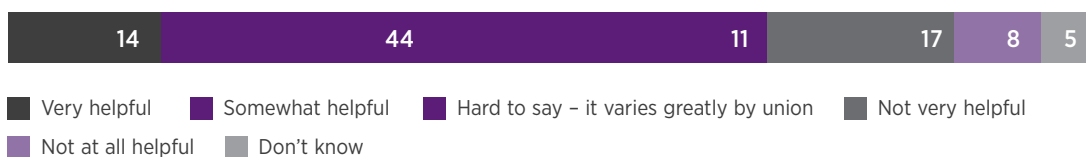
In unionised organisations, employers can use their relationship with local officials to

ensure that individual grievances don't escalate into collective disputes. Employers express appreciation for trade union representatives' help in getting employees to think through what they want and how to get it:

'My relationship with the convenor means if attendance is not perfect, we can see where it's going and he says, 'If you'd pay him notice, he'll be happy to go away,' and it'll be okay.' (head of HR, transport sector)

The LMO verdict on the value of trade union representatives in resolving individual disputes is positive (see Figure 9). Among the 44% of LMO employers who recognise a trade union, more than half (58%) report that they feel union representatives are helpful in resolving individual workplace disputes, while one quarter (26%) do not feel they are helpful. Employers working in the private sector are most likely to feel that they are not helpful (31% compared with 20% in the public sector).

Figure 9: Perceptions of helpfulness of union representatives in resolving individual workplace disputes (%)



Base: Winter 2014-15, all LMO employers who recognise at least one trade union (n=401)

Conclusions

The future shape of the dispute resolution system is uncertain. Business Secretary Vince Cable has instructed his officials to initiate a review of employment tribunal fees based on all the publicly available data and research on the impact of fees in employment tribunals. Shadow Business Secretary Chuka Umunna has promised that a Labour Government would review the employment tribunal system. The Chancellor of the Exchequer George Osborne has said that he is committed to labour market reforms to make it easier for companies to hire and fire. Speaking for the TUC, Sarah Veale says:

'Looking ahead, we are comfortable with the Labour Party's plans to review the dispute resolution system. If elected, I would expect them to act quickly on fees. But there are wider issues that will need further consideration and consultation, including the use of settlement agreements, voluntary mediation, initial pre-hearing proceedings, HMRC role, and high-value/equal pay cases.'

Meanwhile this research suggests that the full impact of the recent changes in legislation has still to come through. The introduction of ET fees has had a major impact on the balance of power between

employers and claimants, but the full picture will only emerge once a new government has had a chance to assess its options.

Early conciliation by Acas has the potential to lead to improved employee relations, particularly in smaller firms, but many employers currently feel under little pressure to come to an early settlement. The verdict on the changes to settlement agreements must remain open, though the evidence suggests that they go with the grain of majority employer practice. Employers see the changes to ET rules of procedure as helpful, but likely to have only a modest overall impact. Meanwhile, the following verdict by one employer seems apt:

'I think the statutory changes are broadly positive, and the Government has achieved what it set out to do. People are more willing to think about their problem, enter into discussion and settle. What happens to fees will all depend on who is the new government.' (HR director, small IT company)

More significantly for the longer term, the research also confirms that more employers are now using mediation skills to develop their conflict management capability.

Employers are encouraging line managers to have better-quality conversations with members of their team and take ownership of their own issues. They are investing in giving managers the tools they need for effective performance management and encouraging them not to let issues fester. HR teams are developing databases to help analyse where and why issues have arisen. More research will be needed to evaluate the impact of these developments on the outcomes for organisations and individuals, but there is evident potential for such reforms to bring about a sea-change in the way employers manage workplace conflict.

Case studies

Case study 1: Capgemini

Capgemini is one of the world's foremost providers of consulting, technology, outsourcing and professional services. With almost 140,000 employees worldwide, Capgemini has 7,800 employees based at different sites across the UK.

A review of the company's disputes procedure in 2013 highlighted a need for a more considered and sensitive approach to managing the process. The review found that, once a formal grievance had been embarked on, relationships became more challenging and positive outcomes were much harder to achieve. This is because the process inevitably leads parties to adopt entrenched positions against a backdrop of formal meetings, representation, investigations, minutes, formal written outcomes and the right to 'appeal' which is final and binding.

Employees had always been offered extensive support through a formal process but, without doubt, the employment relationship was challenging and stressful for all concerned. So what is the company doing now to manage grievances in a different way?

- Firstly, it is encouraging managers to own what were previously seen as 'HR issues or conversations'. Managers now manage conversations with members of their team and take ownership of their people management issues up front. If there is a need to involve a more senior manager in discussions aimed at resolving the issue, this will take place without a formal grievance having to be lodged.
- Secondly, in order to give more effective support to managers, members of the HR team have received training in mediation skills.
- In addition, Capgemini have transformed the operational HR manager team. There are now HR engagement managers who work in the business and support managers/employees in their business areas. One of their key focus areas is early intervention on an informal basis to enable potential grievance issues to be resolved early on, before the grievance becomes a formal 'complaint'.

Capgemini believe it is important to talk openly about an issue as, regardless of the outcome, an employee has invested emotion, time and effort in bringing it to the company's attention. Once damage has been done to the employment relationship, it can be hard to build trust and confidence again and disharmony can often continue beyond the closure of the formal process. The company uses mediation skills as a cost-effective way of helping HR to support business managers, having recourse to formal mediation only where necessary to deal with particularly intractable problems.

To ensure consistency of case management across the company and to complement the HR engagement managers, Capgemini have structured HR capability 'pillars' and disbanded a central employee relations team that now consists of a single employee relations manager (previously there were four) who oversees central policy and projects but does not advise on cases.

Within the dispute capability pillar, there is a team of three experienced HR managers who provide support across the UK. They manage all aspects of formal dispute management, including conflict management, discipline and grievances and mediation. In addition, there is a pillar with a team of two who are dedicated to supporting managers and employees through the probation process and performance improvement. This has been a valuable investment as it ensures that HR is proactively guiding front-line managers' handling of issues.

The effectiveness of the company's approach to conflict management in 2014 is reflected in a significant 50% reduction in the number of cases that have become formal grievances compared with 2013.

Case study 1: Capgemini (continued)

Lisa Connellan, Head of Employee Relations, says:

'Capgemini has made a significant investment in thinking how best to manage individual employee issues. We want managers to take responsibility for resolving them before they turn into formal grievances. A critical aspect of this is confident people management to ensure that managers see the signs for potential grievances and do not let issues fester. We ensure that we give managers the tools they need to support positive resolution of issues. Mentoring and training for people managers is key, with over 600 managers trained in HR practices this year on topics such as 'managing career conversations' and 'courageous conversations'.

'We believe that managers need to have objective conversations with their employees, particularly where potentially emotive issues are being addressed around development needs, performance or managing absence. We do not believe that 'off-the-record' conversations are particularly helpful. You have to be prepared to be open about what you're saying and lay an honest foundation for a sensible and supportive conversation to ensure the employee's needs are met and both the manager and employees are clear about the steps moving forward.

'If people become fixated with 'defending' their position, this makes it very difficult to conclude the matter. When an employee is aggrieved, it is important to listen to why they hold that attitude and take the time to appreciate what action needs to be taken to resolve it. Employee or trade union representatives can often help conversations and enable individuals to think where they're going and what they want as an outcome.

'We have used a major mediation provider to train 20 of our HR team in mediation skills. This enabled the team to think about how you look at issues when supporting a manager, with a clear focus on resolution. One member of the HR team has also had additional mediation training as she supports managers in challenging performance improvement conversations. This one-to-one support for managers and employees is critical as supporting employees with development needs requires sensitivity balanced with a need to progress the matter to a resolution.

'To ensure that HR managers are fully functional in their role, they rate themselves against a skills matrix each year to identify their own development needs. Much of the focus in 2014 has been on strategic case management and finding collaborative solutions, rather than procedure and process. This has enabled HR managers to think about a broader range of options for resolving a problem, and not just relying on the contractual grievance procedure. Developing a more instinctive way of engaging people is a priority as the overall aim is to ensure managers and employees have ongoing objective conversations. There is nothing to be gained by a relationship being irretrievably damaged; in my experience this does not benefit anyone.

'The HR team has developed a new centralised 'sharepoint' site which retains reports of all case data. This provides very useful information about all aspects of case management and identifies training needs for managers. Great case management is fundamentally about recognising the needs of an individual and working with them in a respectful way to ensure that they can move forward positively, in whatever direction that may be.'

Case study 2: Drinks company

This global drinks manufacturer with a collection of major brands is seeking to move away from traditional models of conflict management.

Within a shared services model, the HR team is developing an employee relations environment with engagement at its core to help manage organisational change and enable employees to function effectively. They are aiming to build an organisation culture which recognises employees' need for stability of income and employment while also helping to hold down costs and keep sales colleagues happy. The company seeks to establish trust between employees and line managers through focusing on people management capability development.

The Employee Relations Director believes that 'adult/adult' conversations are the only way to achieve this kind of positive culture, by avoiding the kind of 'parent/child' exchanges that can cause recrimination and unhappiness. This means doing the basics right, for example on pay and change management, and having a high standard of conflict management. The company wants to move away from traditional industrial relations models: the ER Director says, *'We haven't reached that green pasture yet but this is the direction we want to go.'*

The company focuses on using informal approaches to conflict resolution. They aim to take a preventative approach and not wait for issues to develop. This means picking up problems early, either through team managers or through union stewards who are happy to keep an eye out and speak up when necessary. The ER Director says *'We want to keep issues out of the discipline and grievance process where possible. We have to fall back on process sometimes but we are now looking to promote an informal approach.'*

The Acas Code on discipline and grievance is regarded as a back-up if informal attempts to resolve a problem are not successful. However, the company wants to put a framework in place before getting into the formal process. It has developed its in-house capability by building mediation skills within the ER team and giving some the full five-day training in high-level skills.

Responsibility for managing conflict has to sit in the line, but the employee relations team is telling the business that they are looking to get involved. In practice it's a blend between HR and the line, depending on the issue. The objective is to develop relationships between line managers and their teams that are strong enough to sort out issues at source, so that the HR focus is on building performance and people management capability. Part of that development has been focused on developing situational awareness and helping people be more aware of their own management style.

Trade unions are key stakeholders and support the company's direction of travel. The company believes it helps to avoid their members getting into trouble through the disciplinary process and possibly losing their job. The same philosophy of early information and consultation applies to managing both collective and individual conflict. The ER Director says, *'We don't know how many problems are avoided by our approach. But getting conflict management right is certainly good for the company's reputation as well as the unions that we work with.'*

A member of the employee relations team, who deals with issues between individual employees and between managers and employees on a day-to-day basis says:

'The company has a robust policy which talks about intolerable behaviours and any kind of conflict between managers or operators. It says that every effort will be made to resolve the issue informally. Such situations are not always appropriate for informal resolution techniques. With the consent of both parties, we will look to reach an agreement. If that doesn't work, or doesn't stick, you always have the opportunity to revert to a formal process.'

'I use 'facilitated conversations' or informal mediation. I will meet the parties separately at a meeting off-site and discuss their perceptions of what happened, asking for specific examples. I might have an hour and a half with the aggrieved person first of all. Then I will give the other party the same opportunity to say what happened. I ask them both to think about what caused the conflict. Following these initial sessions I draw

Case study 2: Drinks company (continued)

up a chart listing both parties' strengths and weaknesses. I try and show how they are actually either similar or dissimilar characters and why there is a personality clash.

'In the afternoon I invite both parties back in for a no-holds-barred discussion, normally for a minimum of two hours. I act as a prompt and go-between: it's hard work! The key is to keep on reminding people that they are there to resolve the issue. We usually end up with six bullet points in the form of an outcome letter, setting out what needs to happen in future and drawing on the lessons learned.

'I'm currently rolling out a new capability training course for both line managers and employee relations specialists, based on what I've learned.'

References

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Note on methodology

LMO survey

The fieldwork for the LMO survey is managed by YouGov Plc and this survey has been conducted using the bespoke YouGov online system administered to members of the YouGov Plc GB panel who have agreed to take part in surveys and the CIPD membership.

The survey is based on responses from more than 1,003 HR professionals and employers. All respondents have HR responsibility within their organisation, which may or may not be their sole and primary function within their organisation. The sample is targeted to senior business leaders of senior officer level and above.

An email was sent to each respondent from the YouGov sample who are selected at random from the base sample according to the sample definition, inviting them to take part in the survey and providing a link to the survey. Each member of the CIPD sample is invited to complete the survey. Respondents are given three weeks

to reply and reminder emails are sent to boost response rates (subject to the CIPD's re-contact policy).

Weighting

The quarterly LMO survey is sampled from the CIPD membership and through the YouGov panel of HR professionals. The data is weighted to be representative of the UK public and private sector business population by size of employer and sector. Rim weighting is applied using targets on size and sector drawn from *Business Population Estimates for the UK and Regions 2012*.

The delivered sample is drawn across all business sizes and in total 556 unweighted responses were received from small and medium enterprises (SMEs) and 447 from HR professionals within large employers (250+ employees). A very small number of HR consultants (2) from organisations of between 2 and 9 employees took part in the survey.

Interviews

Independently of the LMO, telephone and face-to-face interviews were undertaken with HR professionals from both private (11) and public (4) sectors, employment lawyers (3) including one with experience as an employment judge, and Acas directors (2). Judith Hogarth (EEF) and Sarah Veale (TUC) provided valuable comments. The research also benefited from discussion with a number of trade union full-time officers in the North West.



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