

Dispute Resolution in England and Wales: Call for Evidence

Submission to the Ministry of Justice

Chartered Institute of Personnel and Development (CIPD)

September 2021



*Championing better
work and working lives*

Background

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has 155,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.

Our response

We focus our response to this call for evidence on dispute resolution in the workplace, as that is our area of expertise and focus at the CIPD.

1. Drivers of engagement and settlement

There is much scope for improvement in dispute resolution between individuals at work, both in formal processes via access to employment tribunals and in the application of informal conflict resolution techniques. It has long been an aim of successive governments to implement reform in this area by reducing the number of formal tribunal claims and encouraging less adversarial 'alternative' dispute resolution approaches in the workplace. This has been supported by a series of public consultations over many years, including the [2007 review by Michael Gibbons](#).

Despite this enduring public policy focus and various reforms to the Employment Tribunal process, there has been negligible progress. We are very much in favour of encouraging earlier and informal resolution of disputes between individuals in the workplace, and believe more could be done by Government, working with employment stakeholders, to encourage greater use of 'alternative' dispute resolution processes. The CIPD consistently promotes the advantages of voluntary, impartial and informal resolution techniques such as early neutral evaluation and [mediation](#) in helping to reach less costly, less stressful and less time consuming solutions. Conflict is best dealt with at source, at the earliest opportunity. This means that the conflict resolution approaches and management capability in resolving individual disputes must be available in organisations. It also means ensuring the optimum use of Acas early conciliation.

Formal processes still dominate individual dispute resolution in the workplace

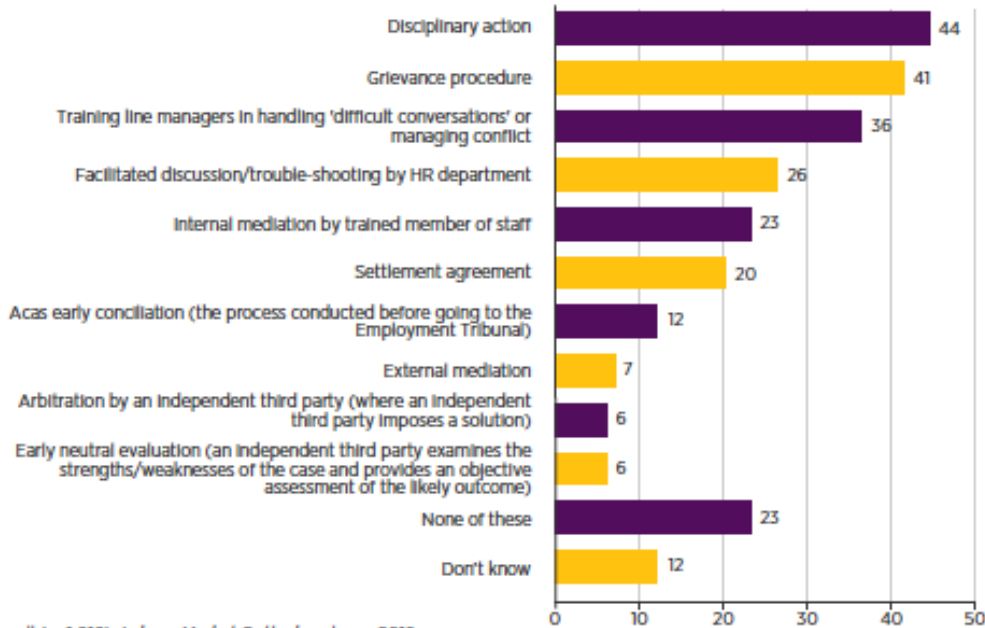
The 2020 CIPD research report [Managing conflict in the modern workplace](#) shows that organisations remain most likely to use formal approaches to handle conflict and disputes between individuals at work. Disciplinary action and grievance procedures are the most frequently used methods (see Figure 25).

Informal approaches are less common, but over a third (36%) of organisations train line managers in handling difficult conversations or managing conflict and a quarter (26%) use facilitated discussion/troubleshooting by HR.

In 2015 when we carried out similar research, we were encouraged by tentative signs showing employers' increased willingness to use early, more informal methods to resolve conflict. However, use of the two most popular informal approaches has fallen in 2020, with 36% now training line managers to handle difficult conversations (versus 47% when we carried out similar research in 2015) and 26% using facilitated discussions and/or troubleshooting by HR (versus 38% in 2015). Just under a quarter (23%) used internal mediation by a trained member of staff while just 7% used external mediation. Our

research also shows the use of alternative dispute resolution approaches such as mediation, arbitration and early neutral evaluation hasn't shifted since 2015.

Figure 25: Methods of dealing with workplace issues used in the last 12 months (%)



Base: all (n=1,016), *Labour Market Outlook*, autumn 2019

Employers' appetite for using dispute resolution approaches that are linked to a court process, such as Acas early conciliation offered before an Employment Tribunal, can't be understood without an appreciation of the wider employment context. Ongoing trends in employee relations, including the fall in trade union and employee representation and lack of people manager capability in dealing with challenging people issues, have had a significant impact on the ability of employees to access effective conflict resolution processes, according to [Acas](#).

Employers – and employees – will be more willing to use mediation and early conciliation if their employment relations framework, culture and management practices support a collaborative and problem-solving approach. Over the past decade CIPD research has highlighted the decline in conflict management as a core strategic focus for HR professionals. Too many organisations view conflict through the narrow compliance lens of formal complaints and procedures rather than as an inherent and dynamic element of the employment relationship.

One consequence of employers not viewing conflict from a strategic standpoint is that it tends to be dealt with in a reactive, ad hoc way. The focus is on handling individual disputes as they occur rather than on developing an organisational approach that develops early and collaborative ways to resolve conflict. Therefore it's not surprising our findings

show that employers are not making the most of the potential of early dispute resolution approaches like mediation to help settle disputes.

Further, over the years there's been significant expansion in the individual statutory rights framework in the UK. This has prompted many organisations to adopt an increasingly compliance-focused approach to handling conflict: it can feel much safer for employers, including HR, to avoid falling foul of the law by following policy and process to the letter. Too often, this means that formal procedures become the default option instead of coming into play only when there is no hope of resolution through a more positive approach. Our findings call out the need for more effective and collaborative ways to resolve conflict.

Public policy could do more to promote early conflict resolution and boost line management capability and skills

Acas Code of Practice on disciplinary and grievance procedures

Although not legislation in itself, the [Acas Code on Practice on disciplinary and grievance procedures](#) is an authoritative document that employers follow in handling individual disputes because it reflects the law and is taken into account in Employment Tribunal proceedings. As such it carries considerable weight with employers in how they handle individual disputes and in determining the kind of best practice processes for dispute resolution they develop inside the workplace. Acas does extensive work across its services to promote the benefits of 'alternative' dispute resolution such as mediation and early conciliation, and the Code's accompanying [Acas guide on Discipline and Grievances at work](#) has a section on resolving grievances informally and another on using mediation. However, the Code of Practice itself has only one paragraph in its Foreword on using an independent third party such as a mediator. It is the Code of Practice that has most influence on employer practice and so if more weight was given to the use of 'alternative' dispute resolution processes including mediation in the main body of the document, this could help to encourage more employers to adopt earlier conflict resolution processes. Mention could include the advantages of informal resolution as well as the ability to use mediation at any stage of a dispute/process – a fact that isn't always taken on board.

Acas early conciliation

We very much welcome the continued availability of free conciliation and advice from Acas. The 2020 CIPD research report [Managing conflict in the modern workplace](#) shows 12% of employers used Acas early conciliation in the past 12 months to deal with individual disputes.

As part of that research and to help inform a review by BEIS, we also have the following findings from a survey of employers included as part of the CIPD's autumn 2019 Labour Market Outlook (LMO) conducted by YouGov Plc. Our findings indicate strong satisfaction levels with the service provided by Acas for early conciliation.

<i>Please indicate whether the frequency of Acas Early Conciliation use in your organisation in the past 12 months has increased, decreased, or stayed the same compared with 12 months ago (%)</i>	
Increased	22
Decreased	14
Stayed the same	48
Don't know	17
Base: 101 employers (who have used the service)	

<i>How satisfied or unsatisfied is your organisation overall with the service provided by Acas for Early Conciliation? (%)</i>	
Very satisfied	13
Satisfied	40
Neither satisfied nor unsatisfied	20
Unsatisfied	4
Very unsatisfied	4
Don't know	19
Base: 101 employers (who have used the service)	

NB – Net scores = 53% satisfied, 7% unsatisfied

As the [Acas 2020-21 annual report](#) points out, only 7% of disputes notified to Acas resulted in an ET hearing, ‘representing very high value for money’. Of concern, however, is the other point made – that the spikes in caseload in the summer meant Acas was at risk of breaching its statutory duty.

It's crucial that Acas is provided with the ongoing resources and funding needed to not only perform its statutory duty and take steps to prevent a dispute from reaching the Employment Tribunal (ET), but to promote the benefits of early conciliation and other ‘alternative’ dispute resolution approaches such as mediation. We welcome the work undertaken by Acas and BEIS to deal with some of the difficulties within the conciliation process such as increasing the time given to conciliators to resolve a case as well as the creation of specialist teams to increase speed and efficiency.

We would welcome the opportunity to work with Acas, BEIS and other stakeholders to help promote the benefits of engaging with Acas services including early conciliation as well as the even earlier opportunities to resolve individual disputes at an informal stage in the workplace via ADR approaches. There could be scope for expanding on the 207 mediations Acas was involved in during 2020-21 if Government proactively promoted Acas mediation services among employers, for example to small firms via the Local Enterprise Partnership Growth Hub network and other employment networks across England, Scotland and Wales.

People management capability

Management training is key to ensuring organisational behaviour complements the provision of informal dispute resolution techniques such as mediation in the workplace. Line managers should be trained in managing people effectively, including how to address conflict in their teams and deal with any concerns or complaints. They should be competent in encouraging early, positive resolution and in promoting the use of internal or external independent third party mediators to resolve disputes where appropriate. This should be on a voluntary basis. All employees should know how to raise a complaint and to whom, and organisations should deal promptly, seriously and discreetly with any issues that are raised.

However, our 2020 research on [Managing conflict in the modern workplace](#) shows that managers tend to be least confident about the 'people' aspects of their role, such as managing conflict and having difficult conversations, not surprising given the low level of investment in their training: only two-fifths (40%) of line managers say their organisation has provided them with training in people management skills to support them in their management role. Of the 406 managers in our employee survey who said they had received people management training, the training included:

- how to have difficult conversations (67% of managers)
- conflict resolution skills (62%)
- discipline procedures (57%)
- grievance procedures (51%).

If more organisations were aware of the potential benefits of training managers perhaps more would be keen to invest in this area. Respondents to our employer survey are significantly more likely to report a number of tangible outcomes in their ability to handle conflict and resolve disputes where they have invested in people management skills training. For example, four in five (79%) agree that 'if there is conflict within a team, a line manager would help to resolve this quickly' compared with three in five (61%) organisations where managers haven't been trained, while four in five (82%) agree that 'line managers help their team to build healthy relationships' compared with 56% of organisations where managers hadn't been trained.

Our findings show how line managers are at the forefront of identifying and managing conflict, as well as often being a cause of it. A third (32%) of employees who had experienced conflict said their line manager had made the situation worse. This isn't surprising given that the person most likely to be the source of the conflict is the individual's line manager or supervisor. Managers need to have the confidence and capability to be proactive and deal with conflict at the earliest possible stage including the use of 'alternative' dispute resolution processes to resolve individual disputes.

We believe the Government should reinstate the ability for employment tribunals to make wider recommendations to employers to improve their people management practices, but this should cover all aspects of employment rights, not just equality issues. The employer

would be required to work with Acas or a professionally qualified HR adviser to improve their people management practices. The new Single Enforcement Body, when established, or other relevant enforcement body such as the HSE or EHRC would be responsible for following up these orders to monitor compliance, with power to fine employers not meeting their obligations.

As our recent policy paper on [revamping labour market enforcement in the UK](#) also recommends, the Government should also invest £13 million a year in England to provide high-quality HR support to small firms via the Local Enterprise Partnership Growth Hub network to support efforts to improve compliance and boost line management capability at a local level. Similar funding should be made available to Scotland, Wales and Northern Ireland to improve the availability of accessible HR support for small firms across the UK.

2. Quality and outcomes

Disappointingly, our 2020 research on [Managing conflict in the modern workplace](#) shows a mixed resolution rate for disputes in organisations, with fewer than half of employees (44%) reporting that the conflict was fully or largely resolved, and over a third (36%) reporting it hadn't been resolved. This means the conflict continues to hang over a significant number of people, with all the potentially negative impacts that can have on the individuals concerned as well as the organisation. Stress, a drop in motivation or commitment and anxiety are the top three impacts reported by employees.

We are in no doubt that, in many cases, dispute resolution processes such as early neutral evaluation and mediation have the potential to provide solutions that address underlying causes and are more genuinely win-win than adversarial approaches such as court and tribunal cases. This applies to both employer and employee. Our 2020 research shows the negative impact on organisations and individuals where disagreements are *not* resolved. Court proceedings and ET cases place a huge demand on an organisation in terms of management time, as well as the wider repercussions for wider employee morale, wellbeing, engagement, retention, performance and customer service.

'Alternative' dispute resolution approaches like early conflict resolution, facilitation and mediation can help to encourage dialogue and mutually acceptable outcomes to disagreement and difference. They can create a safe, confidential space for those involved to find solutions that are acceptable to each side and are preferable to more formal processes in various ways, for example by:

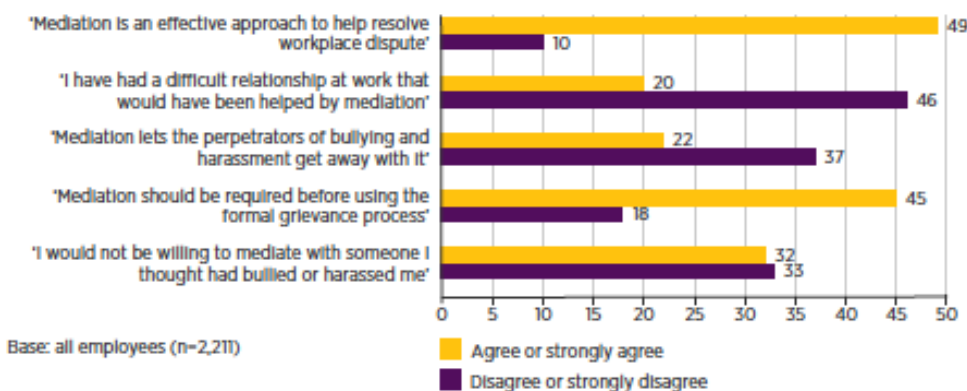
- encouraging people to be more open to compromise
- helping to maintain and improve relationships
- being less stressful for those involved
- avoiding the costs involved in defending employment tribunal claims.

Specifically, where appropriate and voluntarily used, mediation provides the potential to:

help the parties involved in conflict to hold open conversations that would normally be too difficult to have constructively, and to understand and empathise with each other's emotions and situations
 explore all parties' issues and concerns and use joint problem-solving to find a solution that each side feels is fair
 encourage communication and establish workable relationships
 help participants develop the skills to resolve workplace difficulties for themselves in future.

The CIPD believes there are real opportunities for more organisations to reap the benefits of dialogue and early conflict resolution: currently just over one in ten (12%) employees reported that they had taken part in mediation to help resolve a dispute but our employee survey reveals a high degree of openness about the potential of mediation, with five times more employees agreeing than disagreeing that '*mediation is an effective approach to help resolve workplace disputes*' and that the process should be required before using the formal grievance process (see Figure 29).

Figure 29: What do employees think about mediation? (% of employees)



Disappointingly, the research also shows that employers are not tapping into the openness with which many people view the potential of mediation to resolve disputes at work. We hope that a greater public policy focus on this area and more proactive promotion and investment by Government will help to achieve a step change in this area.

7. Additional evidence

Access to justice

The MoJ consultation paper states that '*the courts will, however, always remain as an option open to everyone.*' However, we believe that individuals' access to justice has been significantly hampered in recent years, most notably by the introduction of the fee structure in 2013. The CIPD wholeheartedly welcomed the Supreme Court judgment on Employment Tribunal Fees in July 2017. Given the staggering drop in claims to that date after tribunal fees were introduced in 2013, it's clear that the fees were denying access to



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justice for many people, with some perfectly valid claims undoubtedly never having the chance to be heard.

We are now concerned that the increase in waiting time for tribunal cases to be heard, particularly regarding multiple claims, in most areas of England and Wales is acting as a considerable barrier for many people to seek redress and access justice where informal routes to resolution have failed. Following a recent Freedom of Information request from the CIPD to the Ministry of Justice, across the 11 regional offices, the 'mean age at disposal' for single employment claims increased in 10 offices with the longest disposal time recorded for South London at over a year (from 54 weeks in 2019 to 62 weeks in 2020).

The situation for multiple employment claims represents the greatest barrier to access to justice: there's considerable variation across regional offices but the longest 'mean age at disposal' for multiple employment claims is well over three years in South London (184 weeks) and nearly three years in Manchester (147 weeks).

We fully appreciate the practical difficulties in holding in-person hearings experienced by the courts and tribunals since the onset of the COVID-19 pandemic, and acknowledge the specific arrangements put in place for hearings to go ahead such as telephone and video technology. However, the pre-pandemic backlog in cases has been exacerbated and, given the anticipated increase in potential new claims linked to COVID-19 (for example, in relation to alleged health and safety breaches as well as redundancy and furlough) could bring further pressure to bear on the ET system. This could have serious implications for workers' access to justice over the coming months, and brings even greater urgency to the need for government and other stakeholders to encourage the earlier settlement of disputes in the workplace. Ideally the focus should be on the prevention of disputes but where they do occur, the benefits of informal conflict resolution processes should be promoted. This includes the use of mediation in the workplace, as well as early conciliation by Acas and the use of judicial mediation which Employment Tribunals already encourage.

CIPD

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