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ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT

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The Employment Act 2008 followed an independent review of employment dispute resolution in the UK and a public consultation in GB. The Employment Act 2008 repeals employment law and regulations in the UK. As employment is a devolved matter this gives Northern Ireland the opportunity to tailor an employment dispute resolution structure that is tailored to suit local needs. This paper examines developments in GB and the review currently being conducted by the Department for Employment and Learning in Northern Ireland. Early resolution of disputes within the workplace is acknowledged as a favoured alternative to costly tribunals and this Research Paper examines models for alternative dispute resolution in the workplace.

SUMMARY OF KEY POINTS

The Employment Act 2008 received Royal Assent on 13 November 2008. It repeals previous legislation and regulations for employment dispute resolution in the UK. The intention of the 2008 Act is to simplify employment dispute procedures and make informal dispute resolution in the workplace a more viable option.

The review of employment law in GB had been necessary because the *Employment Act 2002 and (Dispute Resolution) Regulations 2004* were resulting in more employment disputes reaching tribunal stage, instead of fewer as had been the intention. This was having financial implications for the Government, employers and employees. It is estimated that it costs the Government approximately £120 million per year to operate the employment dispute resolution system and an average cost to business of £9,000 to defend an employment tribunal claim. In addition there is emotional stress for employees that cannot be quantified.

Recommendations to come from the review in GB have reflected the need for a simplification of the system. Complexities had led to confusion for both employees and employers, particularly in small businesses, that meant proceeding straight to tribunal seemed a simpler and safer option.

As employment is a devolved matter, the Department for Employment and Learning (DEL) are conducting a review in Northern Ireland that will encourage the early resolution of workplace disputes within the workplace. Pre-consultation discussions have taken place with key stakeholders and DEL will be launching a public consultation early in 2009. Northern Ireland will have an opportunity to create an employment dispute resolution framework to suit local needs.

Methods of alternative dispute resolution will form a key part of the consultation. The Labour Relations Agency has a statutory duty to offer conciliation and arbitration services to parties involved in a workplace dispute before it goes to a tribunal hearing. Although it does not have a duty to do so, the Labour Relations Agency also offers a mediation service to employers and employees. DEL's consultation will look at how models for dispute resolution can become a viable first option for resolving disputes at an early stage within the workplace rather than escalating to an Industrial Tribunal or Fair Employment Tribunal.

CONTENTS

1.0 INTRODUCTION

This Research Paper will look at Alternative Dispute Resolution (ADR) in employment, currently the subject of review in Northern Ireland. Minimum standards for disciplinary and grievance procedures have been provided for by the Employment Act 2002 and (Dispute Resolution) Regulations 2004 since 2005 (2004 in GB)[1]. Following changes in GB, the Department for Employment and Learning ('the Department') propose launching a public consultation on employment dispute resolution in January 2009.

In March 2007 a Consultation[2] was launched in GB based on recommendations contained in an Independent Review of employment dispute resolution conducted by Michael Gibbons[3]. The need for a review was based on an acceptance by Government that the current legislation, although recent, was too administratively burdensome for both employers and employees. Contrary to its intention to reduce the need for litigation in employment disputes, it had led to an increase in cases brought to tribunal.

The Consultation allowed the Government to identify key legislative reforms contained in the Employment Act 2008 which received Royal Assent on 13 November 2008. The *Employment Act 2008* repeals the legislation and regulations that also applied in Northern Ireland[4].

In comparison with GB, Northern Ireland has a high proportion of small business employers and a large public sector. Since employment is a devolved matter there is now an opportunity to create a bespoke employment dispute resolution model tailored to fit the needs of local business and employment[5].

This paper reviews the findings of the Gibbons Review, the *Employment Act 2008* and proposed changes in GB. It will also include discussions the Department for Education and Learning held with key employment stakeholders in Northern Ireland prior to the public consultation on employment dispute resolution reform in 2009. Finally, it will look at models of alternative dispute resolution (ADR).

2.0 THE GIBBONS REVIEW

An agreement that the regulations have not worked as intended led to the Government commissioning Michael Gibbons in December 2006 to conduct an Independent Review of employment dispute resolution in GB ('the Gibbons Review'). The aim of the Gibbons Review was to simplify and improve all aspects of employment dispute resolution for both employer and employee.

When the *Employment Act 2002* was introduced, small businesses had expressed their concern about the level of resources and expertise required to comply with the legislation. A year after the regulations that followed were implemented in 2004, the CBI claimed that many

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[1] The Employment Act 2002 and (Dispute Resolution) Regulations 2004 available at: http://www.opsi.gov.uk/si/si2004/20040752.htm

[2] *Success at Work: Resolving disputes in the workplace A Consultation* March 2007: BERR available at: http://www.berr.gov.uk/files/file38553.pdf

[3] Michael Gibbons *A Review of employment dispute resolution in Great Britain* March 2007: BERR available at: http://www.berr.gov.uk/files/file38516.pdf

[4] The Employment Act 2002 and (Dispute Resolution) Regulations 2004

[5] *Resolving workplace disputes: Report on the outcome of pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland* October 2008*:* DEL

firms were settling cases they could have won because they were afraid of the cost of going to tribunals. There was also a perception that tribunals allowed weak and vexatious claims to be heard[6].

The Gibbons Review found that the procedures introduced in 2004 (2005 in Northern Ireland) had brought some benefits. There was now more clarity for employers and employees on the steps that needed to be followed in formally pursuing disciplinary and grievance cases. Employers were more likely to ensure their managers were trained in handling such situations and there was the opportunity to consider an employee's grievance before submitting a tribunal claim, thereby offering an opportunity for early resolution.

However, the findings of the Review concluded that the costs outweighed the benefits, placing additional administrative pressures on employers and generally failing to deliver what had originally been intended. It is estimated that the average cost to business of defending an employment tribunal claim is £9,000[7] and that the dispute resolution system costs the UK Government around £120 million per year[8].

Gibbons summarised that overall:

> In conducting the Review I was struck by the overwhelming consensus that the intentions of the 2004 Regulations were sound and that there had been a genuine attempt to keep them simple, and yet there is the same near unanimity that as formal legislation they have failed to produce the desired policy outcome. This is perhaps a classic case of good policy, but inappropriately inflexible and prescriptive legislation.

Gibbons presented his main findings under the following headings:

- Formalising disputes – The complexity of the procedures and the penalties for failing to follow them mean that both employers and employees have tended to seek external advice earlier.
- One size does not fit all – Procedures apply to many situations where they do not fit or are excessive. The three-step[9] process is inappropriate in agreed redundancy situations or where fixed-term contracts terminate.
- Too bureaucratic and complicated – Employment tribunals are considered too costly and complex for all involved. The requirement to focus on procedure rather than merits is now excessive.
- More effective targeting of resources needed – Concerns that employment tribunals are making inconsistent decisions and that too many weak and vexatious claims are being allowed through the system.
- Early resolution and alternatives to tribunals – Early resolution can involve outcomes not available through the tribunal system such as a positive job reference, an apology and changes in behaviour. Around 75% of claims made to tribunal are resolved without the need for a hearing, a substantial proportion with the involvement of the Advisory, Conciliation and Arbitration Service (Acas).

[6] CBI Press Release: *'Tribunal system – one year on government reforms falling short'* 28 September 2005 in House of Commons Research Paper.
[7] BRE-PwC Administrative Burdens Database (2006).
[8] Executive Summary *'A review of employment dispute resolution in Great Britain'* Michael Gibbons (March 2007).
[9] The procedure involves putting the problem in writing, holding a meeting to discuss it and, where the employee is dissatisfied, holding an appeal meeting.

Gibbons key recommendations were to:

- ensure that employment tribunals at their discretion take into account reasonableness of behaviour and procedure when making awards and cost orders;
- introduce a new simple process to settle monetary disputes without the need for tribunal hearings;
- increase the quality of advice to potential claimants and respondents through an adequately resourced helpline and the internet; and
- offer a free early dispute resolution service, including mediation where appropriate.

3.0 GB CONSULTATION

Building on the Gibbons Review the Government launched a Consultation[10] seeking views on resolving employment disputes successfully in the workplace. There were over 400 responses to the Consultation and following changes in the responsibilities of Government Departments the work is being taken forward by the Department for Business, Enterprise and Regulatory Reform (BERR)[11].

Based on the Review and Consultation, the Government response was published in May 2008[12]. It contained a number of measures the Government was considering, not all of which require primary legislation.

Measures to help resolve more disputes successfully in the workplace by:

- repealing the *Employment Act 2002 (Dispute Resolution) Regulations 2004* and the corresponding sections of the *Employment Act 2002*, and examining any consequential changes to other areas of law;
- providing clear guidelines on good practice for resolving disputes, building on the work currently being done by Acas;
- providing encouragement to follow good practice in resolving disputes, which would include penalties for those who make little or no attempt to resolve their dispute before an employment tribunal hearing; and
- inviting employer and employee organisations and others to develop guidelines for using alternative dispute resolution and to promote its use to their members.

Measures to help employers and employees resolve disputes beyond the workplace by:

- providing a new advice service on dispute resolution accessible by telephone and internet;
- providing a new, swift way to settle straightforward monetary disputes without the need for employment tribunal hearings; and

[10] *'Resolving disputes in the workplace' A Consultation* (March 2007): DTI.
[11] Department for Business, Enterprise and Regulatory Reform (BERR) website at: http://www.berr.gov.uk/
[12] Resolving Disputes in the Workplace Consultation: Government Response (May 2008): BERR available at: http://www.berr.gov.uk/files/file46233.pdf

- encouraging earlier conciliation in appropriate cases and removing the fixed conciliation periods which place time limits on Acas' duty to conciliate tribunal claims.

Measures to make the employment tribunal system simpler and cheaper by:

- simplifying employment tribunal forms;
- considering unifying time limits and the grounds for extension;
- improving procedure and encouraging more active case management;
- simplifying management of multi-claimant claims;
- improving the handling of weak claims and vexatious claimants; and
- considering when chairs should sit alone in employment tribunals[13].

4.0 EMPLOYMENT ACT 2008

The *Employment Act 2008* received Royal Assent on 13 November 2008. The changes to employment dispute resolution in the workplace in GB will inform consideration of the process in Northern Ireland.

The *Employment Act 2002 (Dispute Resolution) Regulations 2004* included minimum 'three-step' dismissal, disciplinary and grievance standards. Unless the 'three-step' disciplinary procedures[14] were adhered to, any dismissal of an employee was automatically deemed by a tribunal to be unfair. Whether or not the dismissal would have been upheld by the tribunal if the three-steps had been followed was not a consideration. A primary recommendation of the Gibbons Review was the repeal of the three-step rule.

Sections 1-7 of the 2008 Act make the following changes to legislation and procedures in GB and will come into force in April 2009. The changes are outlined below[15].

- Existing statutory dispute resolution procedures and related provisions about procedural unfairness in dismissal cases are repealed. This means that a dismissal will no longer automatically be deemed unfair where there is a procedural breach by the employer. It also means that employees will no longer be prevented from bringing a claim before an employment tribunal without first having raised the grievance with their employer.
- Discretionary powers are conferred on employment tribunals to adjust awards by up to 25% if parties have failed unreasonably to comply with a relevant code of practice. This is the Acas Code of Practice on Disciplinary and Grievance Procedures which will come into force in April 2009. It focuses on appropriateness of behaviour rather than compliance with a set procedure.
- Acas's statutory duty to conciliate between parties where proceedings have been issued is currently bound by a fixed time period. The Employment Act extends Acas's duty to conciliate throughout the proceedings, up until judgement is made.
- Employment tribunals may be authorised to decide cases without a hearing[16]. The permission of the parties involved must first be gained in writing. (Tribunals may

[13] '*Employment Bill [HL] 2007-08'* House of Commons Research Paper 08/63, 11 July 2008.
[14] The three step procedure the employer had to follow was written notification to an employee of allegations, a meeting to discuss and inform employee of the employer's decision and the right of the employee to appeal.
[15] Information taken from Employment Act 2008 Explanatory Notes.
[16] Tribunals have had this power since 2002, but it has never been used.

continue to issue default judgements without a hearing and without the permission of the parties involved.)

- In unlawful deduction of wages or redundancy payments, tribunal's powers will be extended in order to be able to award an additional amount to fully compensate an employee for any additional financial losses such as bank charges.

5.0 NORTHERN IRELAND EMPLOYMENT DISPUTE RESOLUTION

Employment dispute resolution in Northern Ireland closely resembles that of GB. Therefore issues identified and proposals for change in GB are useful for consideration in the review in Northern Ireland. However, there are some key differences, notably the way in which the tribunal system is set up:

- While GB has a single Employment Tribunal Northern Ireland has an Industrial Tribunal and a Fair Employment Tribunal.
- Northern Ireland has no Employment Appeal Tribunal where decisions can be appealed on points of law. In NI anyone wishing to appeal on a point of law must go to the Court of Appeal.
- The Labour Relations Agency (LRA) closely resembles Acas and performs a role in dispute resolution including conciliation[17] and arbitration. LRA will also carry out mediation, but is not under a duty to do so.
- NI employees are approximately 20% less likely to make a claim to a tribunal than employees in GB.

5.1 TRIBUNAL SYSTEM IN NORTHERN IRELAND

The Fair Employment Tribunal (FET) hears cases where discrimination on a religious or political basis is involved. The Office of the Industrial Tribunal and the Fair Employment Tribunal (OITFET) Annual Report 2006/07 shows that registered claims and complaints to the FET have fallen steadily over the last five years from 500 in 2002/03 to 160 in 2006/07[18].

Pressure has been mounting on the tribunal system in Northern Ireland in recent years. In order to support its work the Department has introduced the following measures as part of a reform process[19]:

- changes in 2004 and again in 2005, to the rules of procedure governing the operation of tribunals, including enhanced powers to manage cases;
- the introduction, from 3 April 2005 of statutory minimum dispute resolution legislation requiring all employers to have in place, as a minimum, the three-step procedure for dealing with formal employment rights disputes in the workplace. Failure to follow the procedure can result in penalties ranging from a reduced tribunal award to rejection by the tribunal of a claim;
- the introduction respectively in 2002 and 2006, of statutory arbitration schemes enabling the LRA to provide an alternative to tribunal proceedings where the point at issue relates only to unfair dismissal or flexible working; and
- the appointment of additional full-time judiciary and administrative staff, a strengthening of management structures, improved liaison arrangements between the OITFET and

[17] Unlike Acas, the LRA can continue to carry out conciliation after a tribunal hearing.
[18] OITFET Annual report 2006/07 available at:
http://www.employmenttribunalsni.co.uk/annual_report_final_2006-2008.pdf
[19] 'Resolving workplace disputes: A pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' February 2008: DEL

the LRA, and the procurement of new information technology solutions to automate some functions relating to the handling of cases.

During the short time these measures have been in operation and despite criticism of their complexity, the Department believes that early indications show they have had positive impacts.

A main impact the Department viewed as positive in the February 2008 pre-consultation document[20] was the Department's estimate that, for the first time in years, the number of claims registered as a proportion of employees had fallen below that of GB. However, the Department acknowledges that this may be due to the bar having been raised for accepting claims, the complexity of the system acting as a deterrent, or that it only represents a temporary reduction while claimants and advisors adjust to the new statutory requirements.

5.2 CASE OUTCOMES[21]

The majority of tribunal claims do not proceed to a full hearing; 12% of IT and 10% of FET cases. Most cases have one of three outcomes; successful conciliation by the LRA, private settlement between the parties, or withdrawal. In 2006/07 24% of claims received by the LRA settled before a claim was made to a tribunal.

When cases register with a tribunal, even if they do not go to full hearing stage, there will have been a high degree of case management in the form of discussions and pre-hearing reviews. Some parties wait to settle until just prior to the hearing itself. The benefits of early resolution would therefore have an obvious beneficial effect on resources involved in the preparation and conducting of tribunals.

6.0 DEPARTMENT FOR EMPLOYMENT AND LEARNING PRE-CONSUTATION PROCESS

Following the Gibbons Review and GB Consultation, the Department has been in discussion with key players in employment dispute resolution in Northern Ireland. The discussions were based around a pre-consultation document published by the Department in February 2008[22]. A desire for change has been identified and the Department intends to have a full review of employment dispute resolution in Northern Ireland beginning with a public consultation early in 2009. The desired outcome from such a review will be to have '*a bespoke system that best reflects the needs of the Northern Ireland economy while upholding the rights of individual employees'*[23].'

Based on the discussions with key players and interest groups, GB recommendations that would make a useful starting point for discussion in Northern Ireland include:

- repeal of provisions relating to the three step process for unfair dismissal and reverting to the legal position before the procedures were introduced[24];

[20] 'Resolving workplace disputes: A pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' February 2008: DEL
[21] ibid
[22] ibid
[23] 'Resolving workplace disputes: Report on the outcome of pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' October 2008*:* DEL
[24] Refers to the position established by the case of Polkey v A. E. Dayton where the House of Lords ruled that an employer's failure to adhere to procedures rendered a dismissal unfair except in exceptional circumstances. However, a compensation award could be reduced or eliminated if it is judged the employee would have been dismissed in any case if the procedures had been followed.

- revise the Acas Code of practice and enable an Employment Tribunal to raise or lower an award if the Code has not been followed;
- remove time limits on ACAS' ability to offer its conciliation services;
- provide funding for an improved ACAS helpline and increased availability of early conciliation services; and
- adjust the compensation powers of tribunals.

These recommendations will form the basis of the Public Consultation the Department intends to conduct at the end of January 2009.

7.0 ISSUES FOR PROPOSED NORTHERN IRELAND CONSULTATION

The outcome of the pre-consultation in Northern Ireland identified the advantages and disadvantages in retaining the statutory procedures currently operating in Northern Ireland. While many felt that NI should follow GB in dispensing with them, there were also arguments for their retention.

7.1 ADVANTAGES OF CURRENT PROCEDURES

Opinions voiced in pre-consultation discussions showed that the statutory procedures did have their place. They provide a 'safety valve' that forces grievance issues to be raised and addressed between employers and employees, with the opportunity to resolve them. They also mean that employers are forced to respond to employee issues. Where discussion takes place, issues can be clarified and an informed decision made about whether there is a need to proceed.

Around the issue of smaller businesses operating in Northern Ireland, it was pointed out that the procedures equip employers with a 'mandatory baseline' that leads to 'a degree of consistency' among employers regardless of their size and knowledge of employment law.

7.2 DISADVANTAGES OF CURRENT PROCEDURES

Complexity is a recurring theme of any discussion around the statutory procedures and is in line with the findings of the Gibbons Review. A widespread view is that the 'legislation itself has proven unfit for purpose' and over-formalises dispute resolution processes from the beginning. It is argued that putting a dispute in writing at too early a stage encourages parties to become entrenched with a focus on the possibility of a tribunal, rather than considering a more informal approach. It was thought that the procedures could encourage formal rather than informal dispute resolution.

A lack of clarity about what precisely constitutes a grievance *'places pressure on employers to scrutinise every written communication and to react formally if there is the slightest possibility that it could be seen as a stage one grievance letter. Employers therefore begin formal processes where this may not be necessary.'*

In order to ensure that a claim will be accepted by a tribunal, a claimant has to decide at a very early stage whether they wish to follow statutory procedures as they will ultimately have to account for the decision on a tribunal claim form if they go to tribunal stage.

The Department acknowledge that the implications for the review show that *'any fundamental review of dispute resolution systems will have to look carefully at whether statutory procedures have a future, how they can be modified if they do, and what might replace them if they do not.'*

The Department concludes that the implications for the review that have come from the pre-consultation exercise show that[25]:

> Stakeholders are agreed that tribunals provide an essential service where alternative methods of resolving a dispute have been tried but have failed, or where other methods are simply inappropriate. Beyond that, they have identified a range of issues that they would wish the review to explore, from the operation of the Rules of Procedure to the fundamental structure of the tribunal system. Drawing on these concerns, the dispute resolution review will set out to ensure that tribunals continue to be fit for purpose and are able to mesh successfully with any new arrangements that are made for wider dispute resolution.

8.0 ALTERNATIVE DISPUTE RESOLUTION (ADR)

The Acas statutory Code of Practice[26] ('the code') on discipline and grievance states in its foreword:

> Employers and employees should always seek to resolve disciplinary and grievance issues in the workplace. Where this is not possible employers and employees should consider using an independent third party to help resolve the problem. The third party need not come from outside the organisation but could be an internal mediator, so long as they are not involved in the disciplinary or grievance issue. In some cases, an external mediator might be appropriate.

The code replaces the 2004 statutory dispute regulations under the *Employment Act 2008*. Tribunals have the discretion to amend awards to parties if they have failed to comply with the code.

In Northern Ireland pre-consultation discussions, key stakeholders agreed on the need for a statutory code. Currently the LRA produces a code of practice on disciplinary and grievance procedures. However, there is no requirement to follow the code, but failure to do so can be taken into account if a case reaches tribunal stage.

8.1 FINANCIAL IMPLICATIONS

As previously stated, the average cost in GB to a business where an employment case goes to tribunal is estimated at £9,000. The tribunal system costs the Government £120 million per year to administer[27].

Research published in November 2007 by the National Institute of Economic and Social Research[28] showed that for every pound spent by Acas, over £16 is returned. They claim that

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[25] 'Resolving workplace disputes: Report on the outcome of pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' October 2008*:* DEL (paragraph 6.20).

[26] The Acas Code of Practice will come into effect on 6 April 2009. It has been approved by the Business Secretary, Lord Mandelson. Until parliament gives final approval it remains in draft form and can be accessed at: http://www.acas.org.uk/CHttpHandler.ashx?id=961&p=0

[27] Michael Gibbons *A Review of employment dispute resolution in Great Britain* March 2007: BERR available at: http://www.berr.gov.uk/files/file38516.pdf

[28] 'A Review of the Economic Impact of Employment Relations Services Delivered by Acas' November 2007 available at: http://www.niesr.ac.uk/pdf/141107_91327.pdf

this generates benefits worth almost £800 million a year across businesses, for employees and for the economy in GB.

As a result of individual conciliation the research estimated that the intervention of Acas reduced employer's potential costs by up to £223 million. This represented £138 million in lower legal costs and recruitment costs in cases that are settled compared with those that proceed to hearing and a saving of £6 million in compensation paid to employees. Employer's costs in terms of management time spent on cases that proceed to hearing, compared to those that are settled, were worth £79 million. The taxpayer is also estimated to save over £71 million in the cost of tribunal hearing days as a result of fewer cases going to a tribunal.

It is obvious that financial savings could be made if circumstances favoured finding a resolution without registering with a tribunal. When registration takes place there is immediate involvement with case management until such time as a case is settled, however long that may take. Cases that 'go to the wall' and are withdrawn or settled just prior to, or on the day of a hearing, are a waste of resources. LRA's duty to provide conciliation was an effort to address this, but changes are required in statutory procedures to make it a more attractive and viable alternative to tribunals.

Through their conciliation service Acas reduced the potential workload of Employment Tribunals by 75%, slightly up on the previous year according to their 2007/08 Annual Report[29]. The percentage of users for whom guidance helped solve a problem at work or reassured them they had taken the right course of action was 76%. Workplaces (81%) also reported an improvement in employment relations following intervention by Acas advisers[30].

9.0 MODELS FOR ALTERNATIVE DISPUTE RESOLUTION

9.1 CONCILIATION

The LRA provide a free conciliation service that is available before and after a tribunal hearing. When a claim is lodged with OITFET it is automatically copied to the LRA to offer their services. LRA can also be approached by employers and employees to provide conciliation where no claim has been made to a tribunal.

Conciliation is voluntary on the part of both parties, with either side free to withdraw at any time. Impartial and independent information is offered to focus attention on the issues involved and assist the parties to make informed decisions.

Conciliation does not involve any decision on the part of the LRA who facilitate rather than direct discussion. Any decisions reached are the responsibility of the parties involved.

The Department found that stakeholders commended current conciliation processes for '*providing neutral, non-directive assistance whilst leaving the parties themselves in control*'. However, conciliation was felt to be more successful in situations where an employment relationship still existed rather than when it had already broken down and ended. Stakeholders felt it would be beneficial to explore the use of other methods of ADR[31].

[29] Acas Annual Report 2007/08 available at: http://www.acas.org.uk/CHttpHandler.ashx?id=919&p=0
[30] ibid
[31] 'Resolving workplace disputes: Report on the outcome of pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' October 2008*:* DEL

9.2 ARBITRATION

Arbitration is also provided by the LRA. A case is only referred for arbitration when it applies to unfair dismissal or flexible working and because its remit is so narrow it is rarely used. Most employment cases will incorporate more issues than simply unfair dismissal or flexible working.

Although arbitration has to be agreed to in writing by both parties involved, unlike conciliation an independent arbitrator[32] will ultimately make a judgement in the case. Their judgement is binding on both parties and can only be appealed against on a point of law.

The LRA's arbitration service is under-used and this is thought to be due to the lack of an appeal mechanism and its narrow remit. Legislation is in place to allow arbitration to be used in discrimination cases, but there is no such scheme in place. The Department feels that if the scope of the scheme was widened and an appeal mechanism put in place it may encourage use of the scheme.

9.3 MEDIATION

In mediation parties to a dispute agree (usually with LRA assistance) on joint terms of reference to be put to a mediator or mediation panel. The LRA has a list of suitable independent mediators who take written and oral submissions from the parties involved and make formal non-binding proposals or recommendations to settle the dispute.

Since mediation involves a high time commitment on the part of the parties involved and the mediator, it is not considered the most suitable method for simple cases. It is also less suited where allegations need to be investigated or where legal points have been raised.

The Department point out[33] that if mediation were to be given a greater role in the system, a decision would have to be made about how and by whom it would be carried out.

9.4 EARLY NEUTRAL EVALUATION

This involves an independent third party examining the details of a case and advising the parties involved of its likely outcome. During pre-consultation discussions it was suggested that such a service could be run by the LRA, possibly through a helpline service.
In a survey[34] of callers to its helpline in GB, Acas found that those who reported being the most satisfied with the service were those without an HR specialist in their workplace or small organisations with one to four employees.

More than two thirds of employees who called the helpline said that it had been influential in helping them to reach a decision about an Employment Tribunal claim. Figures showed that approximately 16,000 prospective claimants decided against pursuing a claim after calling the helpline.

The survey also showed that more than two in five employers reported that calling the helpline had motivated them to update or improve their existing policies, particularly if they had no HR specialist in their business.

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[32] The LRA have a panel of experts and can appoint an individual or panel to act as an independent arbitration service to decide how a dispute will be settled.
[33] 'Resolving workplace disputes: Report on the outcome of pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' October 2008*:* DEL (paragraph 7.9).
[34] 'Acas Helpline Survey 2007' Acas Research Paper available on the Acas website at: http://www.acas.org.uk/media/pdf/m/7/0307_Acas_Helpline_survey_2007_e-vers(FINAL).pdf

9.5 RIGHTS COMMISSIONER MODEL

In RoI the Rights Commissioner Service[35] is operated by, and a service of, the Labour Relations Commission. The Service is independent in its functions and investigates disputes and grievances in the workplace.

It is only possible for a party to a dispute to object to a Rights Commissioner's investigation under Industrial Relations Acts or Unfair Dismissals Acts, in which case the applicant can ask for the case to be heard by the Labour Court or Employment Appeals Tribunal. All other cases not referred under these Acts are investigated by the Rights Commissioner in the first instance.

A Rights Commissioner's recommendation or decision can be appealed within certain time limits either by the Labour Court or Employment Appeals tribunal (depending on the relevant Acts) and their decision will be binding.

9.6 MED-ARB

Med-arb[36] was not included in the Department's pre-consultation discussions with key stakeholders. Med-arb is a recent development in ADR. It is intended to combine the advantages of both mediation and arbitration, while using the two methods separately within a single dispute. Both parties agree to take part knowing that if they fail to reach an agreement during mediation the next stage is arbitration when a decision will be delivered that is binding on both parties. Therefore it is important that both parties agree to the full process in advance, in the knowledge that the final outcome involves a binding decision by an arbitrator.

This model, on first consideration, would eliminate the possible expense of trying mediation and, if unsuccessful, having to bear the cost of a tribunal. It also provides an option to have the same expert independent mediator carry out the arbitration, but only if both parties agree.

There are advantages and disadvantages in having the same person involved in both mediation and if necessary arbitration. At arbitration stage it may be advantageous to have the person who is familiar with the case. However, there may be a disadvantage in that they may have pre-conceptions from the mediation process making it difficult to reach a neutral binding arbitration decision. At mediation stage both parties feel free to discuss issues freely knowing that what is said remains confidential and is not divulged in a tribunal hearing. Some participants therefore prefer to introduce a new person/organisation to conduct arbitration and that choice will have to be made by both parties before the arbitration process begins.

9.7 MANDATORY ADR

There was no widespread support in pre-consultation discussions for mandatory ADR[37]. Some stakeholders advocated an incentive where parties would have to explain their reasons to a tribunal if they had not taken part in voluntary mediation before having their case heard. This may have the advantage of leaving tribunals with cases that were more complex and could not be resolved through mediation and may set precedents in future. Another suggestion was barring access to tribunals unless ADR had been attempted.

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[35] Rights Commissioner Service website at: http://www.lrc.ie/ViewDoc.asp?fn=/documents/work/rights_commissioner.htm

[36] Included on the ADRnow website available at: http://www.adrnow.org.uk/go/Default.html;jsessionid=a3ZA5WbZBFJb

[37] 'Resolving workplace disputes: Report on the outcome of pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' October 2008: DEL

CONCLUSION

Settling disputes within the workplace has obvious advantages, not least that it provides a better likelihood of an employee remaining in their post. Tribunal hearings carry costs, both financial and emotional.

However, there can be drawbacks to the use of ADR in employment disputes. ADRnow is an information website independent of Government and ADR providers[38]. In addition to providing information on models of ADR, it highlights some of the risks involved. The most relevant to employment dispute resolution is the possible imbalance of power between parties that may make face-to-face mediation unfair.

While mediators claim that mediation is quicker and cheaper than going to a tribunal and can produce a win/win solution, if mediation fails its cost will be additional to the tribunal cost.

There are diverse employment dispute resolution needs in Northern Ireland. These are more marked than in other jurisdictions as Northern Ireland has a high level of both small business and public sector employment. While the public sector has dedicated HR departments for handling employment disputes, small businesses need a model that is easy to understand and access. These differences in levels of knowledge and expertise will require consideration in employment legislation and regulation.

[38] ADR website is available at: http://www.adrnow.org.uk/go/Default.html;jsessionid=a3ZA5WbZBFJb