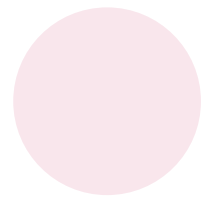
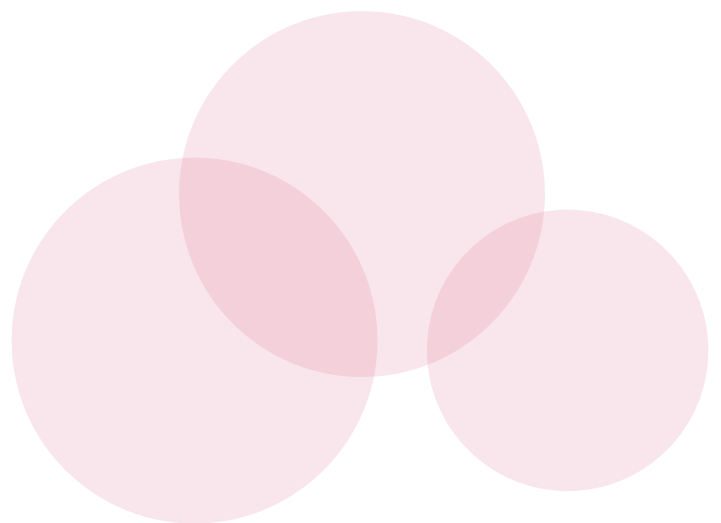
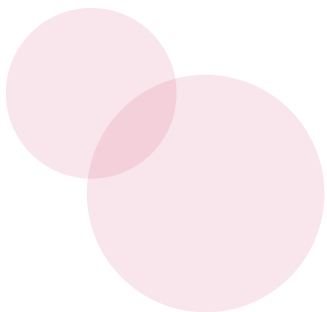
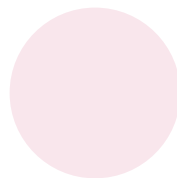


Research Paper



Arbitration in collective disputes: A useful tool
in the toolbox

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2015

Susan Corby (University of Greenwich)

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Arbitration in collective disputes: A useful tool in the toolbox

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December 2015



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About the contractor

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ABBREVIATIONS/GLOSSARY

Acas - Advisory, Conciliation and Arbitration Service
CAC - Central Arbitration Committee
CIPD - Chartered Institute of Personnel and Development
ET - Employment Tribunal
FTO - Full-time officer
GCHQ - Government Communications Headquarters
TUC - Trades Union Congress
USB - Portable memory stick

Executive summary

This report focuses on collective arbitration, the process whereby parties voluntarily agree that their dispute should be adjudicated by an independent third party and that they will be morally bound to accept the adjudicator's decision. In practice, virtually all union-management arbitration is carried out in Great Britain by the Advisory, Conciliation and Arbitration Service (Acas) within a statutory remit.

Against the background of Acas's role more generally and relevant literature, this report has four main aims:

- 1) A discussion of the recent trends in the volume of Acas collective arbitration cases (namely the decline in the number of cases) and the underlying drivers behind this decline;
- 2) An exploration of the role of the arbitrator;
- 3) An exploration of the benefits of collective arbitration;
- 4) An account of users' experience of collective arbitration.

First, an analysis of Acas management statistics for the years 1994-5 to 2014-15 inclusive was carried out. These statistics show a decline in the use of arbitration both absolutely and as a proportion of Acas's collective conciliation. They also show a decline in the use of pendulum arbitration, as opposed to conventional arbitration, no growth in Acas's dispute mediation and no clear trend in respect of the issues subject to arbitration or whether there is private sector or public sector use. They also show that after head office, the next two Acas regions referring the most cases to arbitration were London and Northern.

Second, interviews were held with collective conciliators, arbitrators and users. Collective conciliation, a prerequisite to arbitration, is carried out by Acas staff, whereas arbitration is carried by fee-paid experts on a panel drawn up by Acas. The collective conciliators interviewed said that they generally only suggested arbitration, if at all, to the parties at the end and that rarely was the arbitration option at the forefront of their thinking at the start of conciliation. There were mixed views on whether some contact between the conciliators and arbitrators in advance of a hearing might be helpful. The arbitrators interviewed described the process of arbitration, including receiving the terms of reference from the conciliators, the hearing and the issuing of the award. Users, and the arbitrators themselves, were content with the process and had no suggestions for improvement.

The report then turns to the costs of arbitration and the benefits. In the absence of counter-factuals, only non-financial benefits could be discussed. The most important benefit of arbitration, according to interviewees, is that it provides a fresh perspective and resolves an impasse, preventing industrial action. Other benefits cited include the confidentiality of arbitration; the fact that the parties, when preparing their cases, analyse their dispute afresh; and the fact that the award takes account of the employment relations context in the organisation. Some of the users interviewed had appeared at Employment Tribunals and compared it with arbitration, which they found speedier and more relaxed.

Finally, the report considers the reasons for the decline in the use of arbitration and concludes that these are mainly connected with the external environment, which Acas cannot control or change. It concludes that although trends in employment relations have moved against the use of collective arbitration, Acas is held in high regard and, if the socio-economic climate was to change, the

decline in arbitration might be reversed. Meanwhile opportunities exist for Acas to capitalise on its good reputation and promote one of its core services more robustly and proactively than hitherto.

As a postscript, a case study exemplifies many of the matters discussed in the full report.

1 Introduction

1.1 The report

This report focuses on arbitration carried out by the Advisory, Conciliation and Arbitration Service. This is 'the process under which an 'employer and trade union agree to hand over to an independent person (or group of persons) the responsibility for telling them how a dispute or difference should be settled' (Lowry, 1990:60).

Having defined arbitration and looked at the context and background in this first chapter, the report's structure is as follows:

- Chapter 2 sets out the research aims and methodology used;
- Chapter 3 focuses on an analysis of Acas management statistics;
- Chapter 4 concentrates on collective conciliation, the gateway to arbitration;
- Chapter 5 examines the role of the arbitrator;
- Chapter 6 considers the costs and benefits of arbitration, looking particularly at this from users' perspectives.

In the final chapter the findings are discussed.

1.2 The context

The Advisory, Conciliation and Arbitration Service (Acas) was established in Britain 40 years ago and, as its name suggests, it provides conciliation, arbitration and advice. When Acas was established, British industrial relations were characterised as 'founded on industry-wide collective bargaining, reactive trade unionism and avoidance, as far as possible, of the law and courts' (Hawes, 2000: 4). In the last 40 years, however, industrial relations has changed considerably with trade union membership falling from 13.2 million in 1979 to 7 million in 2014-15 (Certification Officer, 2015). Moreover, where collective bargaining exists, it is often conducted at organisation level, not industry level as before, and the incidence of industrial action has declined (Van Wanrooy et al, 2013).

In this changed context, under the umbrella of its 'general duty to promote the improvement of industrial relations', Acas offers many services it previously did not provide: these include a telephone helpline, web-based advice and from 2014 Early Conciliation, that is conciliation before a claim is lodged at an employment tribunal (ET), in addition to conciliating after a claim has been lodged, a service provided since Acas's establishment.¹ Paradoxically, although the media has often dubbed Acas 'the arbitration service', in fact the bulk of Acas's work centres on conciliation before and after an ET claim has been lodged and on its helpline, rather than arbitration in collective disputes.

1.3 Defining arbitration

This report has briefly defined collective arbitration, that is arbitration in collective disputes, but this definition needs expanding. Although the parties are often the employer and union, sometimes the dispute may be between a number of

¹ TULR(C)A 1992 - Trade Union and Labour Relations (Consolidation) Act 1992

employers and a number of trade unions, as in local government or the National Health Service where there are many employers and many unions. Very occasionally, instead of a union there is a staff association or a works council. As to the arbitrator, he/she has a quasi-judicial role and he/she issues an award, a quasi-judgment. Unlike a court of law, however, the arbitrator does not follow precedent or case law, and, although conversant with employment law, is not required to be legally qualified. The arbitrator, however, is an expert in employment relations and takes the employment relations context into account. Virtually all collective workplace arbitration is provided through Acas and is on an *ad hoc* basis², although until last year Acas also oversaw a standing arbitration body, the Police Arbitration Tribunal³.

According to Jim Mortimer, Acas's first chair, arbitration is 'a means of resolving disputes', rather than determining rights and social justice and the 'award that is made will depend **partially** upon the power relationship' (Mortimer, 1982: 61 and 63 – emphasis added). Burchill (2014: 110) puts it more dramatically, quoting the adage that the arbitrator has 'to find out who the lion is and make sure that the lion gets the lion's share'. Of course, it is important to note that arbitrators are constrained by the terms of reference jointly agreed by the parties and they are also constrained by the impact of their decisions on future relations between the parties.

It is important at the outset to make clear what collective arbitration is not. First, unlike commercial arbitration, it is not covered by the Arbitration Act 1996 so an appeal cannot be made on process. Second, collective arbitration is distinguishable from arbitration provided by Acas to individuals under its unfair dismissal scheme and its flexible working scheme, both of which are more legalistic than Acas's collective arbitration, not only having a detailed statutory context, but also being covered by the Arbitration Act. Third, in line with its well-established industrial relations tradition of voluntarism, Acas only provides arbitration if the parties so wish and its arbitration is binding in honour only, not in law, although awards are invariably implemented (Goodman, 2000). Indeed TULR(C)A 1992, s.212(1) provides that:

'Where a trade dispute exists or is apprehended Acas may, at the request of one or more of the parties to the dispute and with the consent of all the parties to the dispute, refer all or any of the matters to which the dispute relates for settlement to the arbitration of-

- a) one or more persons appointed by Acas for that purpose (not being officers or employees of Acas).'

Rideout (1982) termed workplace arbitration 'equitable arbitration', distinguishing it from what he called 'regulated arbitration', i.e. arbitration which is part of a statutory process and is not voluntary, for instance arbitration by the Central Arbitration Committee (CAC) as part of the trade union recognition procedure. In fact, Acas staff use the term 'trade dispute arbitration', not equitable arbitration for their voluntary process, while Acas annual reports use the term 'collective arbitration'. This report relates only to trade dispute arbitration/collective arbitration.

² The Central Arbitration Committee is empowered to carry out voluntary collective arbitration, but in practice does not do so. It last conducted a voluntary arbitration since 1989 (Burton, 2014).

³ Acas used to oversee other standing arbitration bodies in the public sector such as the Civil Service Arbitration Tribunal and the Post Office Arbitration Tribunal, but these no longer exist.

1.4 Background

1.4.1 *The international background*

Acas covers England, Wales and Scotland, that is Great Britain. Its equivalent body, the Labour Relations Agency, operates in Northern Ireland. There are government agencies with roughly the same remit in other common law countries including South Africa's Commission for Conciliation, Mediation and Arbitration, on whose establishment Acas advised after the ending of apartheid, New Zealand's Mediation Service, the USA's Federal Mediation and Conciliation Service and Ireland's Labour Relations Commission/ Workplace Relations Commission⁴ (Corby and Burgess, 2014).

Of all these countries, only the USA has a significant amount of collective arbitration. Even though unionisation in the USA is low (trade union density is now seven per cent), virtually all collective bargaining agreements/contracts provide arbitration to resolve labour disputes and individual grievances, whether or not based on a contractual or statutory right. Moreover, the US Supreme Court has barred employees from litigating over their statutory rights, where there is a clear and unmistakable arbitration clause in the collective agreement.⁵ (See Corby and Burgess (2014) for details).⁶ Unless and until the UK Supreme Court adopts a similar stance, take-up of arbitration in the UK is likely to be relatively rare compared to litigation.

In many civil law countries, in contrast to common law countries, the labour court, not a bespoke arbitral body, deals with issues arising from collective agreements. In Sweden's labour court, the worker cannot make a claim to the labour court; only the union can do so on his/her behalf, whether the matter is collective or individual (for instance unfair dismissal). See Corby and Burgess, (2014) for more details.

1.4.2 *Background: Great Britain*

Employment arbitration in Great Britain essentially stems from the 1896 Conciliation Act which repealed earlier arrangements for compulsory and binding arbitration⁷ and provided for voluntary arbitration to settle industrial disputes with the Labour Department of the Board of Trade appointing a single arbitrator. The operation of this voluntary arbitration service was taken over by the Industrial Relations Service in 1960, by the Manpower and Productivity Service from 1969 and by the Conciliation and Advisory Service from 1972. Because all these bodies were part of the government department responsible for employment matters, they became 'tainted, in the eyes of the labour movement, by the Department's involvement first with prices and incomes policy and then with the operation of the [1971] Industrial Relations Act' (Deakin and Morris, 2009: 82). Accordingly in 1974, the incoming Labour government decided that a conciliation and arbitration service established at arm's length from government would be more influential

⁴ The Labour Relations Commission will be abolished when the Workplace Relations Act 2014 comes into force, with its remit subsumed under the new Workplace Relations Commission.

⁵ Collective agreements in the USA are legally binding documents, unlike the normal position in the UK.

⁶ There is also a considerable amount of grievance arbitration in the USA in non-unionised workplaces.

⁷ In wartime compulsory, binding arbitration was introduced and as noted in the main text, arbitration is required to resolve disputes where industrial action is outlawed as at Government Communications Headquarters (GCHQ).

and be more trusted by employers and unions. Accordingly in 1975 Acas was set up, with a tripartite governing council and with its independence enshrined in statute⁸, charged with the general duty of improving industrial relations.

Also in the 20th century voluntary arbitration was provided by the Industrial Court, set up in 1919 as a permanent and independent tribunal, comprising an independent in the chair and side members drawn from employers and unions, a tripartite arrangement. The Industrial Court was renamed the Industrial Arbitration Board in 1971 and replaced in 1976 by the Central Arbitration Committee (CAC), but as noted earlier in a footnote, the CAC in practice only carries out arbitration which is part of a statutory process, leaving voluntary arbitration to Acas.

1.5 Third party intervention in collective disputes

Arbitration is not the only form of third party intervention in collective disputes which essentially takes three forms: conciliation, dispute mediation and arbitration. While these three forms of intervention may be practised differently in other countries,⁹ this report uses the Acas terms and focuses on the way they operate in Great Britain under Acas.

These three forms of third party intervention in collective disputes which Acas provides are all free; there is no charge to the parties. In conciliation, Acas seeks to bring the parties together to reach a settlement, clarifying the issues, offering advice and suggesting ways forward. Nevertheless, the terms of any settlement or the failure to reach a settlement are a matter for the parties, with the conciliator acting as a facilitator, but not imposing any terms. Mediation is generally a more directive form of conciliation. In the light of terms of reference drawn up by the parties, a mediator normally makes written recommendations which the parties are not bound to accept. Nevertheless, they very often agree in advance to try to sell it to their union members/the other directors and board of the organisation and this is usually reflected in the terms of reference by the inclusion of the wording "...which the parties agree to consider seriously." With arbitration, however, the parties morally (not legally) bind themselves in advance to accept any award the arbitrator may make.

This report has already commented on the differences in the label given to arbitration (e.g. collective arbitration/trade dispute arbitration) and similarly there are some differences in the label used to describe collective mediation. Acas staff generally use the term 'collective mediation', but Acas annual reports have used the term 'dispute mediation'. Accordingly this report uses the term 'dispute mediation'. Be that as it may, it should be noted that Acas's dispute mediation is distinguishable from Acas's individual mediation. The former is free, directive and carried out by someone on the Acas panel of arbitrators/mediators, not by an Acas employee. In contrast, Acas's individual mediation is a charged for service, carried out by a member of the Acas staff, essentially in a facilitative style, where there is no ET claim and it normally concerns relationships between two individuals, colleagues or a supervisor and supervisee, who should work closely and cooperatively together, but are failing to do so (Wornham, 2015).

⁸ Trade Union and Labour Relations (Consolidation) Act 1992, s.247(3). It should be noted that the bulk of Acas's funding comes from government.

⁹ In New Zealand, for instance, what is termed mediation, would be termed conciliation in the UK.

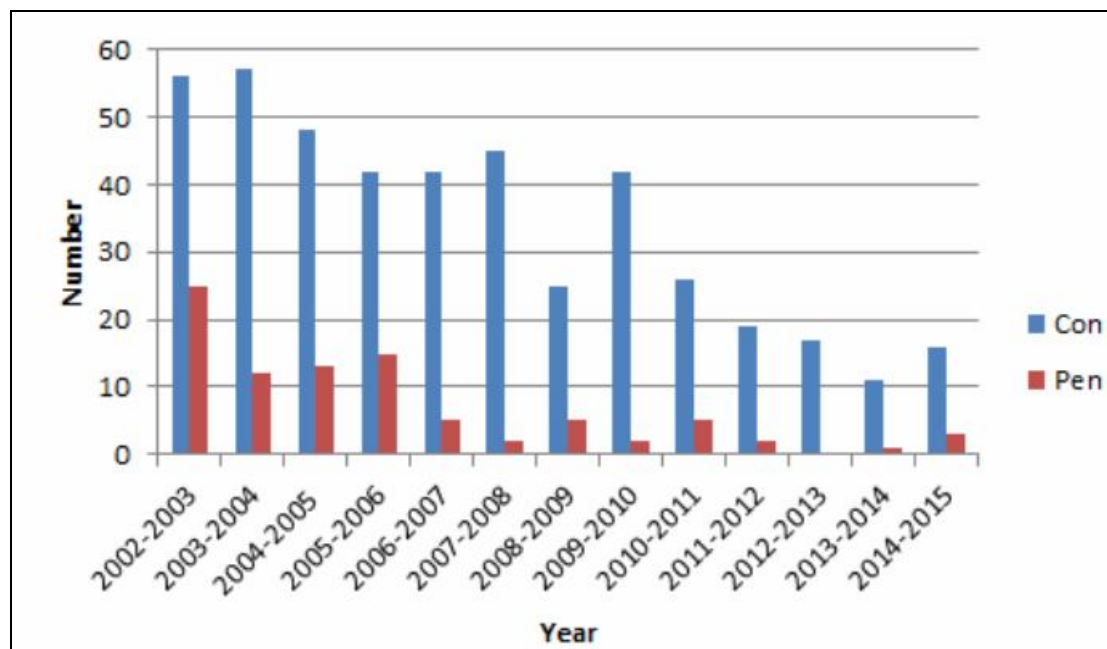
There can be some variations on dispute mediation and arbitration. For instance, although the norm is a single arbitrator or a single mediator, there may be a mediation board or an arbitration board. Such boards consist of three people: an independent chair and one board member drawn from a panel of trade unionists, the other drawn from a panel of employers. These 'side' members are not partisan; they are not normally drawn from the parties themselves, i.e. neither is a member of the union concerned/an employee of the organisation concerned. A further variation is med/arb, a process whereby if the mediator's recommendations are unlikely to be accepted tacitly by the parties, he/she will make an award that the parties are morally bound to accept. The latter variation was seen, for example, in the Workforce Matters in Public Sector Service Contracts (the Two Tier code) process used by Acas to hear disputes over the two-tier workforce in local government and the National Health Service (NHS).

A survey by Ruhemann (2010: 35) of over one thousand union officials showed some confusion over what arbitration entailed; 'only 56 per cent correctly indicated that arbitration involves an arbitrator chosen by Acas choosing a solution'. A smaller scale qualitative follow-up study entailing interviews with a purposively sampled subset of union officials who were either low users or non-users of collective conciliation, found that they 'seemed to have a clear distinction regarding the differences between arbitration and the mediation/conciliation services' (Bond, 2011: 22), but showed confusion between mediation and conciliation.

1.6 Forms of arbitration

1.6.1 Pendulum or conventional

Figure 1.1: Conventional and pendulum arbitration



Key: Con = conventional arbitration; Pen = pendulum arbitration

Source: Acas management statistics

Note: In some of the earlier years, a case was not always categorised. In those cases, it is assumed that it was conventional arbitration

There are two main forms of arbitration; conventional arbitration and pendulum (also called last offer or flip-flop) arbitration. Under conventional arbitration, 'the arbitrator is free to construct what they regard as a satisfactory award....but may be restrained to within the range of parties' claims' (Gennard, 2009: 314). Under pendulum arbitration the arbitrator has to choose between the final position of either the employer or of the trade union, so providing the parties with an all-or-nothing outcome.¹⁰

The rationale for pendulum arbitration is that it provides parties with the incentive to make reasonable claims and to make realistic offers and genuinely to negotiate for fear of losing entirely at arbitration; thus it avoids the chilling effect of conventional arbitration, where parties may hold back in negotiations, taking up confrontational stances, for fear of compromising their positions in arbitration. Also, because there is an outright winner and an outright loser and a compromise is not a possibility, pendulum arbitration avoids the narcotic effect of conventional arbitration: the reliance on arbitration to resolve disputes because a party often obtains something. On the other hand, pendulum arbitration can be inflexible as it limits the arbitrator's discretion and being an outright loser can have a deleterious effect on the standing of the losing party, undermining a function of arbitration which is to provide a face saving device, so enabling employment relations to be rebuilt. (See Kessler (1987) for a fuller discussion of the advantages and disadvantages of pendulum arbitration).

Goodman (2000: 55) makes the point that despite its publicity, last-offer arbitration 'is found in relatively few disputes procedures and accounts for very few Acas arbitrations'. It is found in 'a handful of North American public sector jurisdictions (McAndrew, 2014) and in some Japanese owned manufacturing companies in the UK (Oliver and Wilkinson, 1992). As can be seen from Figure 1.1 above, pendulum arbitration has always had relatively little appeal for users of the Acas arbitration service and that has since become even more evident in recent years.

1.6.2 Unilateral/joint access

Another classification is whether access to arbitration is unilateral (at the wish of one party) or joint (dependent on the agreement of both parties). Regulated arbitration is unilateral, but also sometimes equitable arbitration is as well if the parties have agreed in their procedure agreement that access to arbitration should be unilateral, not joint. Up to the 1980s unilateral access to arbitration was a feature of many disputes procedures in the public sector, but when Margaret Thatcher became prime minister of the United Kingdom in 1979, several public sector procedures were changed with joint access to arbitration replacing unilateral access and then when public sector organisations were privatised, many of the new owners scrapped the provision of arbitration as a final procedural stage in a collective dispute. Unilateral access, however, is still a feature of the arbitration provisions in some public sector bodies, such as GCHQ (the government's electronic listening organisation), where staff are forbidden to strike and arbitration is unilateral. Moreover, until 2014 the police had unilateral access to arbitration.

Even where there is unilateral access to arbitration in theory, however, this does not mean there is necessarily unilateral access in practice. For instance in 2002-

¹⁰ Burchill (2014: 109) quotes the example of employer offering a 2 percent pay rise and a trade union seeking a 4 per cent pay rise, with the arbitrator being required to choose an award of either 2 per cent or 4 per cent, with nothing in between.

2003 the firefighters' union refused to agree to the employer's request to resolve the dispute by arbitration, even though the national procedure agreement provided for unilateral access to arbitration. Similarly in recent years local government employers have said that they will not go to arbitration, irrespective of the unions' wishes, even though unilateral access is written into their procedure agreement and since 2008 the Prison Officers' Association has eschewed arbitration, even though prison officers are statutorily forbidden to take strike action (Burchill, 2014).

1.7 Disputes procedures: reference to Acas

A collective dispute can be referred for arbitration by Acas whether or not there is a written collective disputes procedure and whether or not such a procedure makes reference to Acas. Nevertheless, the existence of such procedures are perhaps a guide to the likelihood of Acas being used.

Heery and Nash (2011), using the first four Workplace Industrial/Employment Relations Surveys (WIRS//WERS),¹¹ considered workplaces with formal collective procedures containing a provision for the issue to be referred to a body outside the workplace. Of these, they found that approximately a third named Acas. They also found, however, that those disputes procedures increasingly made reference to higher level management, rather than Acas: 27 per cent of workplaces in 1980 rising to 55 per cent of workplaces in 2004.

In a similar vein, the 2011 WERS findings indicate that 68 per cent of collective dispute procedures included a provision for the issue to be referred to a body outside the workplace. Furthermore, 'The most common outside body cited in these procedures was Acas conciliation (37 per cent) and the next most common was Acas arbitration (25 per cent of referral provisions)' (Van Wanrooy et al, 2013: 160).

Burchill (2014: 105) comments on the WERS data saying: 'It is difficult to imagine that a procedure would forbid the use of arbitration or conciliation.' He also quotes an observation by Millward et al. (1992: 211) in relation to the 1990 WERS survey that 'Only two fifths of our [management] respondents said, for example, that the decisions of the arbitrator must be final and binding on the parties'. Burchill asks whether this means that WERS is confusing mediation with arbitration, or whether it is confusing compulsory arbitration and voluntary arbitration, or making an observation that is 'utterly meaningless' (Burchill, 2014: 106).

Be that as it may, Ruhemann (2010: 42) in her study of the use of Acas by union officials observed that the fact that a collective disputes procedure failed to include a reference to Acas was 'not a major barrier to use'.

1.8 Collective conciliation

Although Acas has not carried out research on collective arbitration for some time, it has recently commissioned several research projects on collective

¹¹ WIRS/WERS have provided the basis for the study of the British workplace for over 30 years. The first survey was in 1980, with further surveys in 1984, 1990, 1998, 2004 and 2011.

conciliation. These research projects have a bearing on arbitration because collective conciliation is the gateway to arbitration; as Gennard points out (2009: 313), arbitration is 'the method of last resort and ... everything should be done to secure agreement by conciliation before arbitration is agreed'. Moreover, many of the same considerations often apply to both collective conciliation and collective arbitration.

Ruhemann (2010:5) in her survey of the use of collective conciliation noted above, found that union officials who were older, male, and had been longer in post and had previously been a lay activist or lay negotiator were more likely to have used Acas for collective conciliation than their more recently recruited colleagues who did not share these characteristics. Furthermore, union officials who were low or non-users of Acas were more likely to have a university degree than non-university graduates, were more likely to have been through the TUC's Organising Academy as opposed to respondents who had not been through it, and were more likely to be from the public sector, rather than from the private and mixed sectors (Ruhemann, 2010). The most commonly cited reason for non-use of Acas was that they had 'not reached a total impasse with any employer' in the last 10 years (Ruhemann, 2010: 5).¹²

These findings were confirmed when Heery and Nash (2011) conducted a secondary analysis of Ruhemann's data. They found that around 80 per cent of public sector union officials reported that they did not call in Acas to settle their dispute, compared to 65 per cent for private sector union officials.¹³ They also found that there was a positive correlation between the length of tenure in the role and the use of Acas, with the longer serving union officials more likely to use Acas than the more newly appointed officials (Heery and Nash, 2011: 52, 53). Moreover, the greater the number of bargaining units for which union officials were responsible, the more likely they were to use Acas. Heery and Nash conclude:

Acas emerges as an instrument of more 'traditional' officers (older with higher seniority who have served a lay apprenticeship)... There is also some evidence that professionalization of the officer workforce may be working against Acas, with many officers seeking to resolve disputes in a self-reliant fashion without resort to third parties (Heery and Nash, 2011:62).

A later research study, an Acas commissioned survey evaluating the experiences of 345 customers of its collective conciliation between November 2010 and November 2011, by Hale et al. (2012), reflects the Ruhemann study. It found that the most important reason customers gave for involving a third party was that they had reached a point where they could not resolve the dispute themselves. Hale et al. then suggest that Acas convey the message that 'Acas services can be provided at any stage of negotiations' (Hale et al. 2012: 58). In the follow-up qualitative study of union officials also mentioned above, Bond (2011: 41) suggests that Acas needs to convey a message correcting the misconception that collective conciliation is 'a time consuming process only appropriate in extreme situations'.

¹² Ruhemann (2010: 41) points out, that more experienced and older union officials might be responsible for more difficult negotiations that are in turn more likely to lead to an impasse and to Acas involvement.

¹³ Heery and Nash (2011: 52) say: '[t]his pattern of usage is seemingly at odds with the findings of the [2004] WERS survey, which showed that public sector organisations were far more likely to have a formal disputes resolution procedure that named Acas as a potential their party'. See also Figure 3.4 in this report.

Acas also commissioned research into public sector employers' attitudes to the use of Acas collective conciliation. As we have seen, the Ruhemann study had found that public sector disputes were less likely to be referred to Acas conciliation than private sector disputes and the later study by Broughton and Cox (2012) attributes this to the fact that, given the strong presence of unions in the state sector, managers were more used to dealing with trade unions. They say:

It would be understandable for a public sector union manager to feel that he/she was the best person to deal with a dispute..., rather than bringing in an outsider who is not party to that long-standing relationship (Broughton and Cox, 2012: 16).

Broughton and Cox (2012: 23) found that public sector managers' fear of losing control, and a perception that bringing in a third party was a sign of failure, was a reason for not involving Acas. This is an echo of a finding by Bond (2011) that union officials were of the view that the involvement of Acas was a sign of their professional failure and that employers might regard a union request for Acas involvement as a sign of weakness. This report looks at the public sector's use of arbitration in chapter 3.

A further study by Molloy and Lewis (2001) looked *inter alia* at how collective conciliators viewed arbitration. Some conciliators considered that Acas was not correct in categorising a reference to arbitration as 'successful: settlement'. 'This was particularly so for conciliators who placed more emphasis on outcomes such as improving relationships and enhancing the parties' ability to resolve future disputes themselves' (Molloy and Lewis, 2001:40). Other conciliators, however, considered that 'since arbitration would always result in the dispute coming to an end, it was appropriate to identify the outcome as "successful settlement"' (Molloy and Lewis, 2001: 40).

This report has picked out the main findings of some of the many recent Acas commissioned research reports about the use and non-use of collective conciliation because collective conciliation is a prerequisite for arbitration. The report's focus, however, as mentioned above, is arbitration and the report's methodology is discussed in the next chapter.

2 Methodology

2.1 Research aims

The research on which this report is based, originally had four main aims:

- 1) A discussion of the recent trends in the volume of Acas collective arbitration cases (namely the decline in the number of cases) and the underlying drivers behind this decline;
- 2) An exploration of the role of the arbitrator;
- 3) An exploration of the benefits of collective arbitration;
- 4) An account of users' experiences of Acas collective arbitration.

2.2 Data collection

This research was an exploratory study for two reasons. First, this research had little to build on; although there has been much Acas research on collective conciliation as noted earlier, there has been little or no research on collective arbitration for two decades. Second, it was a limited study to gauge the views and experiences of those involved in the collective arbitration process.

One aspect of this research was an analysis of Acas management statistics on Acas arbitration, for instance arbitration trends both absolutely and proportionately to collective conciliation, the issues referred to arbitration over time, regional comparison of references to arbitration and other related statistics. Acas provided management statistics from 1994-5 to 2014-15 inclusive to this researcher in the form of an encrypted USB. The results of this analysis are presented in figures and tables mainly in chapter 3 of this report.

To provide context, 13 interviews were carried out. Of these 12 were conducted face-to-face and one by telephone. Potential interviewees were sent in advance a summary of the project and before the face-to-face interviews signed a pro forma, *inter alia* giving assurances that any report would not identify an interviewee. These interviews mostly lasted an hour, were recorded and then transcribed, after which emerging issues were identified and the transcriptions analysed. The interview schedules are shown in the appendix.

Breaking this down, three interviews were held with arbitrators, in particular to throw light on research aim 2. Three Acas collective conciliators who are the gatekeepers to Acas arbitration were interviewed, two experienced conciliators and another with much less experience. In addition, users' experience was captured by interviewing three employers from two private sector manufacturing companies, two workplace union representatives one from the same companies as those of the employers and the two regional union officers who were responsible for the two companies. Triangulation could be made because the arbitrators interviewed had been the arbitrators in those companies. One of the companies had used conventional arbitration, the other used pendulum arbitration.

Last but not least, the research benefitted from extended discussions of over half an hour with two conciliators and shorter discussions with two arbitrators, although these conciliators and arbitrators were not formally interviewed.

Having summarised the methodology, chapters 3-6 set out the findings and in the final chapter the findings are discussed and conclusions drawn.

3 Trends

3.1 The data

This chapter seeks to answer the first research aim by looking at trends. It does so by analysing the statistics drawn from Acas management datasets, unless otherwise stated. These management datasets are for each financial year, not calendar year.

It should be noted that this report uses all arbitration cases received by Acas and entered into the dataset, unless otherwise stated, even though a case may have been withdrawn subsequently, that is without a hearing being held. Table 3.1 looks at the 11 years 2004-5 to 2014-15: in total the majority of cases received proceed to a hearing and the number withdrawn is small, only 35 (9 per cent) out of 383. Nevertheless, there are variations when considered on an annual basis: in two years there were no cases that were settled/withdrawn, but in 2007-08 eight (14 per cent) of the 47 cases were withdrawn.

Table 3.1: Cases received, hearings held and withdrawn

Year	Cases received	Hearing held	Withdrawn
2004-05	58	56	2
2005-06	57	50	7
2006-07	47	43	4
2007-08	47	39	8
2008-09	30	28	2
2009-10	44	44	0
2010-11	31	25	6
2011-12	21	18	3
2012-13	17	17	0
2013-14	12	10	2
2014-15	19	18	1
TOTAL	383	348	35

3.2 Types of dispute resolution

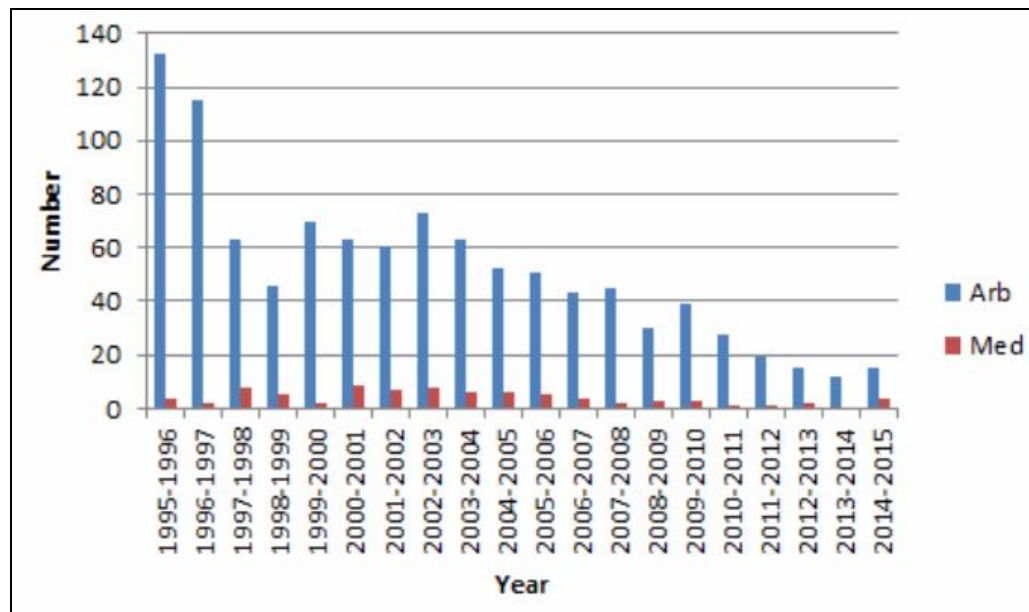
Under the general heading of collective arbitration, Acas distinguishes between:

- Single arbitration
- Board of arbitration
- Single mediation
- Board of mediation
- Mediation/arbitration (Med/arb)
- Police Arbitration Tribunal (PAT)
- Post Office Arbitration and Mediation Tribunal (POAMT)
- Committee of Inquiry
- Other

For the purposes of the charts shown below, all arbitrations, whether they take the form of a single arbitration, a board of arbitration or the Police Arbitration Tribunal are counted as arbitration. Similarly, dispute mediation includes single mediation, a board of mediation, and the Post Office Arbitration and mediation Tribunal (POAMT).

In fact boards are very much the minority. Taking the five years from 1 April 2009, there were two boards of mediation, and four boards of arbitration including the PAT. Med/arb and committees of inquiry/other are even rarer and are excluded from Figure 3.1. There was no med/arb before 2005 and after that there have only been seven cases, while the equivalent figure for committees of enquiry/other is four.

Figure 3.1 Arbitration and dispute mediation cases per year



Key: Arb = collective arbitration; Med = dispute mediation
 Source: Acas management statistics

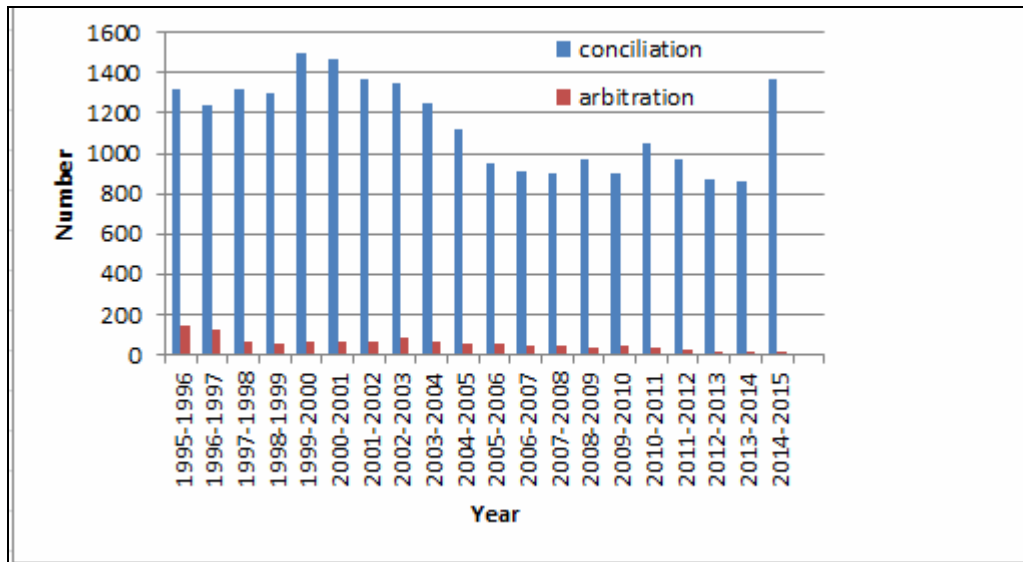
3.3 A decline in cases

Over 20 years ago, Sir John Wood (1992:258-9) said: 'There must be few processes that are so extensively studied and written about, even admired, than voluntary arbitration, yet are so little used.' This statement has even more salience today as the use of Acas arbitration has diminished further. Of course not all employment dispute arbitration is provided by Acas. Employers and unions may arrange arbitration privately and pay the arbitrator themselves. This researcher, however, was unable to obtain any accurate information on the number of such private arbitrations. Accordingly the data below are obtained from Acas arranged arbitrations only. (This report will address private arbitrations in chapter 5.3 below.)

Looking at the last quarter of a century and using data from annual reports and other publicly available data (e.g. Gennard, 2009), the number of arbitrations has been significantly lower than the number of collective conciliations, as will be seen from Figure 3.2 below, and the disparity has become more marked over time. In 1990 there were 1,140 collective conciliations and almost a fifth of those resulted in arbitration (200). In 2013-14 there were 858 collective conciliations, but only

15 arbitrations. By 2014-15 the number of collective conciliations rose to 1,371 while the number of arbitrations increased slightly to 19. This rise in collective conciliations, however, was essentially attributable to holiday pay cases and once adjusted for this, the underlying figure is relatively similar to that of the two preceding years.

Figure 3.2: Collective conciliation and arbitration/dispute mediation cases per year



Source: Acas annual reports and Gennard (2009)

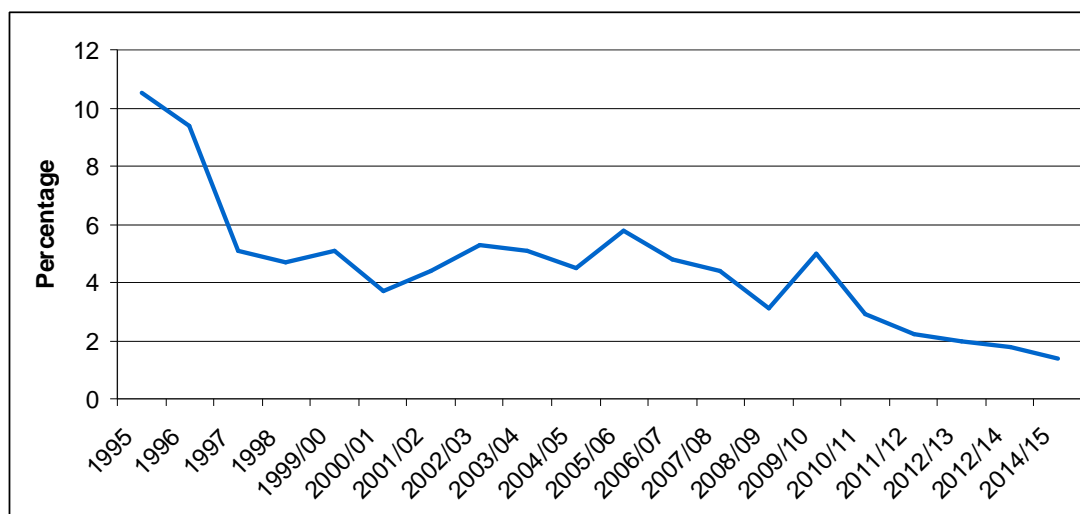
Note: The arbitration figures include all types of arbitration and dispute mediation.

The position is starker when arbitrations/dispute mediations are shown as a percentage of collective conciliations. As Figure 3.3 demonstrates, the decline proportionately of arbitrations/dispute mediations is not a recent phenomenon. There was a large fall in the 1990s, but thereafter there was a modicum of stability until 2010, when again there was a fall.

The steep drop in the 1990s can be largely attributed to the privatisation of electricity supply. There was a provision for arbitration under the former nationalised industry's disciplinary procedure, but this provision was either discarded or modified by the privatised companies (Goodman, 2000).

Interestingly the Chartered Institute of Personnel and Development (CIPD), in a survey of employers, found that 33 per cent reported an increased use of arbitration by an independent third party in the last 12 months and only 5 per cent said it had decreased. (The remainder said it stayed the same or did not know.) These findings are at odds with Acas's own figures and the CIPD's survey base is not clear: 'all employers who had used that method', but no number is stated (CIPD, 2015:12).

Figure 3.3: Arbitration and dispute mediation as a percentage of collective conciliation



Source: Acas annual reports and Gennard (2009). The calculation of conciliation cases was based on completed cases until 1999/2000. Thereafter they have been based on requests received.

3.4 The use of arbitration

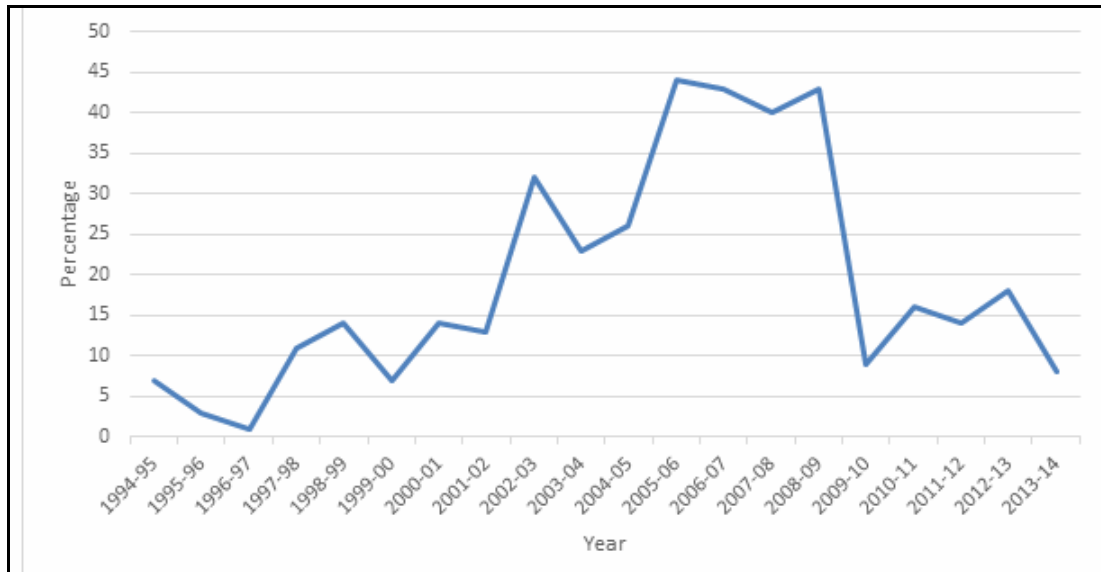
3.4.1 Public sector/private sector use

Having looked at trends in arbitration, this report now considers public sector arbitrations as a percentage of all arbitrations and Figure 3.4 indicates that there is no clear trend. There was a peak from 2004-2009. For instance, in 2005-06 public sector disputes comprised 44 per cent of all cases that went to arbitration. Against that only 3 per cent of arbitration cases were from the public sector in 1995-96 and 8 per cent in 2013-14.

In some years, there were arbitrations in some sub-sectors of the public sector, but not in others. For instance in 2007-08, when public sector disputes comprised 40 per cent of all cases that went to arbitration, over a third of these were from the prison service; however, none were from the prison service in 2012-13. Similarly there were four cases adjudicated by the Police Arbitration Tribunal in 2007-08, but only one the year before.

Of course what is in the public sector changes over time, for instance because of privatisations or some banks being brought into the public sector. Furthermore, this report follows the Office of National Statistics classification and thus universities are classified as being in the private sector. There were a plethora of arbitrations over gradings involving universities from 1994-97, so if universities had been counted as public sector, the percentage of public sector disputes would have been 44 per cent in 1994-95, not 7 per cent and 35 per cent in 1996-97, not just under 1 per cent.

Figure 3.4: Public sector arbitration and dispute mediation as a percentage of all arbitrations/dispute mediations



Source: Acas management statistics

3.4.2 The issues

Acas categorises the issue that is the subject of arbitration into five categories as follows:

- Annual pay
- Other pay and conditions of employment
- Dismissal and discipline
- Grading
- Other

As will be seen from Table 3.2, the issues as a percentage of the number of arbitrations for that year have changed over the last two decades. In the four years from (1 April) 2009 the category of discipline and dismissal scored the highest in percentage terms, but in 1994-5, 1996-7, and 2005-6 the highest percentage was the category of grading, while in 1999-2000, 2000-1 and 2003-4 it was annual pay. Perhaps the fact that arbitration has been less likely to concern a dispute about annual pay in recent years owes much to the fact that wage settlements have been generally low since the financial crash and the recent fall in inflation; thus the gap between the parties' positions has not been large. Be that as it may, reviewing the period 1994-5 to 2013-4 there is no clear trend in respect of the issues on which there has been arbitration.

Table 3.2: Cases referred to collective arbitration/dispute mediation by issue

Year	Annual pay	Other pay & conditions	Dismissal & discipline	Grading	Other
1994-95	26	9	27	62	24
1955-96	12	15	16	28	2
1996-97	17	23	13	43	3
1997-98	19	27	5	0	2
1998-99	10	20	13	1	3
1999-00	29	20	18	1	3
2000-01	29	21	18	2	2
2001-02	16	22	22	3	0
2002-03	19	26	15	β	18
2003-04	21	16	11	0	15
2004-05	14	13	14	1	16
2005-06	10	11	5	16	15
2006-07	14	9	11	2	10
2007-08	4	3	6	1	3
2008-09	10	3	6	0	11
2009-10	10	3	19	0	0
2010-11	8	2	11	2	8
2011-12	2	5	8	1	5
2012-13	4	1	10	0	2
2013-14	2	1	8	0	4
2014-15	6	2	10	1	0
TOTAL	282	252	266	167	146

Note: The figures for 1998-99 should be treated with caution as four entries are missing.

3.4.3 The regions

Acas has eight regions plus head office. Table 3.3 shows the percentage of cases referred to arbitration and dispute mediation by Acas region. As will be seen, in most years the highest percentage of referrals came from head office. In second place was London in seven years, albeit not after 2006-07. Northern region followed closely behind. It was second (six times) especially in the most recent years. *Prima facie* the high percentage of referrals from the London region is surprising. According to calculations by the Department of Business, Innovation & Skills (2014) based on statistics from the Labour Force Survey, trade union density has been significantly lower in 'London' (by at least 10 percentage points) than in the 'North East' for the last 20 years¹⁴. Given that collective arbitration depends on workers being organised by a trade union or staff organisation, one would expect that the Northern region would have more references to collective arbitration than the London region, but this has not been the case up to 2006-07. This suggests other factors are at work which could be explored by further research.

¹⁴ According to the Labour Force survey in 1995 trade union density was 43 per cent in the North East compared to 30 per cent in London; in 2005 it was 37 per cent in the North East compared to 24 per cent in London, and in 2013 it was 31 per cent in the North East compared to 21 per cent in London.

Table 3.3: Cases referred to collective arbitration and dispute mediation by region

Year	Region									
	Head Office	South & West	Midlands	Northern	North West	Wales	Scotland	London	S. East & East	
1994-95	80	3	5	15	9	6	0	28	0	
1955-96	39	0	6	7	5	2	2	4	0	
1996-97	30	2	5	17	2	7	2	8	0	
1997-98	28	2	5	17	2	7	2	8	0	
1998-99	8	1	2	6	5	3	5	2	0	
1999-00	18	3	11	8	9	5	8	10	0	
2000-01	21	5	8	8	7	4	6	13	0	
2001-02	15	1	1	9	9	4	8	21	0	
2002-03	7	6	9	17	14	3	6	19	0	
2003-04	8	3	7	10	7	4	7	22	0	
2004-05	9	9	5	12	4	3	3	10	3	
2005-06	3	3	6	3	9	1	20	9	3	
2006-07	14	1	1	3	4	4	3	11	6	
2007-08	8	0	1	0	0	0	2	4	2	
2008-09	6	1	4	1	4	5	3	5	1	
2009-10	19	1	2	3	3	0	0	1	1	
2010-11	15	2	3	2	3	1	3	1	1	
2011-12	13	0	0	3	3	0	0	1	1	
2012-13	11	0	0	4	0	0	0	1	1	
2013-14	9	0	1	1	1	0	0	0	0	
2014-15	9	1	0	2	0	2	2	0	3	
TOTAL	370	44	82	148	100	61	82	178	22	

4 The gateway

4.1 Canvassing the arbitration/dispute mediation option

Having looked at the trends, this chapter focuses on collective conciliation which, as noted above, is a pre-requisite to arbitration. The collective conciliators are Acas staff and, according to those interviewed, spend about a third of their time on collective conciliation, handling about 10 to 20 collective disputes a year. Otherwise, they carry out training, for instance for employee forums, undertake advisory projects, facilitate joint workshops and occasionally carry out individual mediation.

When there is a dispute, the collective conciliator is either requested by one or both of the parties to help resolve the matter or, finding out about the dispute he/she 'runs alongside' and, if he/she judges it appropriate, seeks to persuade the parties to have talks under his/her auspices. A conciliator said that when the parties are brought together. They will often ask him 'to arbitrate' and he has to explain the difference between conciliation and arbitration.¹⁵

Occasionally, knowing what arbitration entails, both parties say at the outset that they want arbitration, for instance because their procedure agreement contains a binding arbitration clause; alternatively one party says at the outset that it wants arbitration, (*"oddly enough management because it thinks the trade union claim is so unrealistic"* according to one conciliator). Nevertheless, in every such case conciliation is first attempted. One conciliator explained that in such a circumstance, he says to the parties:

"Let us give it a go first. If you want an Acas arbitrator, I want you to give me the opportunity to help you to settle it first. Then you can quickly tell whether it's likely to settle and then you can think about arbitration."

Collective conciliator

More commonly, however, the parties are thinking solely about conciliation, that is a meeting facilitated by the conciliator. If there is little movement or compromise by the parties at the conciliation meeting, the conciliator can suggest arbitration as a way of resolving the matter. The conciliators interviewed were asked at what stage in a collective conciliation they mentioned arbitration. The most common reply was at the end.

"Only right at the end. No, no, I don't even mention arbitration at the beginning... The alternative then [to industrial action] of arbitration is more attractive, whereas if I mention it right at the beginning or in the middle they've almost set out their stall and said that they are not going to arbitration, they would prefer not to, and then it's difficult to get them away from that."

Collective conciliator

¹⁵ This is in line with previous research (Ruhemann, 2010), which found that often the parties were not aware of the distinction between conciliation and arbitration,

"We wouldn't suggest arbitration while we're still trying to resolve it through conciliation, because we see that as potentially a better outcome, because it's not having someone else coming in; a third party making a judgement."

Collective conciliator

One experienced collective conciliator, however, with whom there were discussions, said that he mentioned arbitration as an option at the start of conciliation.

As to dispute mediation, one experienced conciliator said that he mentioned it as an option if there was no settlement and there was resistance to arbitration.

"I will say there's another half-way house where an arbitrator from our list will do the same... but won't tell you what to do, but make some recommendations."

Collective conciliator

Another collective conciliator said that the parties rarely wanted dispute mediation; as a result he had only referred a case to dispute mediation two or three times in the 20 years he had been a conciliator. Yet another conciliator said that he did not mention the option of dispute mediation because he considered that in his conciliation he mediated. Generally this was in a facilitative style, but sometimes he was directive.

"You push it sometimes with certain people and certain reps and some reps might want you to do that, others not; so it's kind of feel as you go."

Collective conciliator

4.2 The terms of reference

If the parties agree to go to arbitration, the next step is for the conciliator, with the parties' assistance and agreement to draw up the terms of reference. Sometimes, however, after discussions about the terms of reference, the parties decide that they do not want arbitration after all. One conciliator cited a case when he was working with the parties on the terms of reference when *"they said: 'No, we think we should fix it ourselves rather than put it in the hands of somebody else'."*

Drawing up the terms of reference is often not a simple process according to an interviewee.

"That's our job to pick a way through to get to a position without it being mealy mouthed and without any significant fog factor to give the arbitrator something really clear... Trade unions want 'War and Peace' for some reason whereas I want 'Noddy book'! The problem is that we don't get much practice."

Collective conciliator

The lack of practice in drawing up terms of reference, highlighted by the conciliator quoted above, is an issue for the more recently appointed conciliators and points to a training need currently being reviewed by Acas.

5 Arbitration in practice

5.1 The process of Acas arbitration/dispute mediation

5.1.1 Before the hearing

The starting point for arbitration is when a collective conciliator makes a referral (including terms of reference) to Acas's arbitration section, which then appoints an arbitrator/dispute mediator or arbitration/mediation board in consultation with the parties (see 5.2.1 below). For conciseness, this chapter will normally use the term 'arbitrator' to encompass dispute mediation, whether or not there are boards. This is because the arbitrators also carry out dispute mediation and boards are rare (see above).

Importantly, as already noted, although arbitration is part of Acas's remit, Acas officials do not themselves arbitrate. Instead Acas appoints an arbitrator drawn from its panel of outside experts (mainly employment relations academics and employment lawyers).¹⁶ The rationale for this practice stems from the fact that Acas is anxious to preserve its neutrality, so it eschews arbitration, as it wants to avoid adjudication, which entails choosing between sides. It extends this rationale to dispute mediation, although there is no adjudication, just recommendations.

Normally arbitrators are appointed without the consent of both parties, usually on the basis of availability, location and past usage by that organisation. Very occasionally the parties may insist on a choice of arbitrators and on other occasions there may be a need to appoint an arbitrator on the basis of specific industry experience.

After the appointment of an arbitrator and the sending out of the terms of reference to him/her, Acas does not withdraw; before the hearing it helps with the logistics, for instance, arranging the venue. It also calls on the parties to draw up their statement of case and then ensures that these statements are exchanged and copies given to the arbitrator(s), along with the names of any witnesses the parties wish to call and any relevant collective agreements or rules. This is normally done a week in advance of the hearing.

The arbitrator normally spends up to a day reading the statements of case and deciding on any points that he/she will require clarification from the parties either orally at the hearing or, occasionally, by documents.

Custom and practice at Acas is that the collective conciliator and the arbitrator are not in contact about a case that the arbitrator is about to hear. The rationale is that the arbitrator can then come to a case without any preconceptions and make a decision on the evidence presented to him/her. This is a legal model not an industrial relations model: an employment judge only decides on the evidence put before him/her.¹⁷ While two of the arbitrators interviewed observed the quasi-rule, as did one of the conciliators with whom there were discussions, one arbitrator did not. For instance one experienced conciliator said that he

¹⁶ The last major recruitment for Acas arbitrators was in 1999. Since then there have been *ad hoc* appointments.

¹⁷ The Employment Appeal Tribunal has warned employment tribunals to reach their decisions on the basis of the facts and evidence relevant to the particular case, rather than inform their decision-making by their own prior knowledge. See *Halford v. Sharples and Ors* (1992) ICR 146.

occasionally contacted the arbitrators he worked with and argued for such contact to happen more often.

"I've said to [the arbitrator], I think one of the important features of this dispute is this, so if you can find a way to mention it... I know the arbitrator's not there to do my bidding, but to flag things up. It's not often to be honest. I think it would be more helpful if this contact happened more often."

Collective conciliator

In a similar vein, another experienced conciliator gave an instance of an occasion when he had given advice to the arbitrator, but the arbitrator had disregarded it; as an independent person the arbitrator is not bound by anything that is said to him by Acas conciliators.

A less experienced conciliator, however, was of the view that *"her gut reaction"* was that there should be no contact and she *"made the assumption"*, that she should not contact the arbitrator. On reflection, she added that she could *"see how it would be useful"*, as she would have the background knowledge gained through working with the organisation for some time and could pass this on to the arbitrator.

5.1.2 The hearing

The hearing, which is in private and normally lasts less than a day, is chaired by the arbitrator and, unlike a court of law, evidence is not given on oath, rules of evidence do not apply and there is no cross-examination, although one side can and does question the other.

The three arbitrators formally interviewed and other arbitrators with whom this researcher has come into contact informally agreed that they had no preference whether they acted as a single arbitrator/mediator or chaired a board of arbitration/mediation. One arbitrator said that he particularly liked the arrangement 'like the old power station agreement' where the arbitrator was advised by two assessors.

"The assessors are not part of the decision but they are there because of their knowledge and experience and they can bring out the issues. I used to certainly take a lot of notice of what they had to say before I made the decision. I think that's quite a good pattern... The only trouble is I think it's probably more expensive and takes a bit longer to set up, and then takes a bit longer to get the report written."

Arbitrator

Although there can be variations, normally the hearing follows the following trajectory. First, after introductions, the arbitrator outlines the process. This can be detailed if one/both the parties have never been to arbitration before. Following the explanation of the process, the arbitrator checks and clarifies the terms of reference with the parties, if necessary amending them with the agreement of the parties. Then the arbitrator confirms that the parties have actually had the submissions and have exchanged the submissions. An arbitrator gave an example:

"The union official had the submission, but some of the shop stewards and the other people hadn't seen it and they're at a disadvantage in a way. So we made sure that there were enough to go round."

Arbitrator

The next stage is when the claimant, that is the union/worker side opens by summarising the main points of its case and raises any points on the management side's submissions. Then the management side questions the union side on its submission. Second, in a mirror image, the management side opens its case by summarising the main points of its submission and raises any points on the union side's submissions, if not covered earlier. Then the union side questions the management side on its case.

At this point, the arbitrator asks questions either of both sides or just to one side, with the other side commenting on the response. Sometimes, however, the arbitrator asks questions at an earlier stage. As an arbitrator said:

"I know I differ with one or two of my colleagues... I like to interfere as little as possible and I often find that a lot of my questions will be answered during that period. And then, once they've played themselves out, then I can home in on those areas which I think are important. One of my colleagues gets very quickly to questions he wants to get to. I differ on that because I think people like to feel they've had proper opportunity to state their case."

Arbitrator

Then, normally after an adjournment when the parties retire to their separate rooms both sides, having come together again, make closing statements. Here practice varies. Most arbitrators ask the party, (normally the union) that went first to go last. Another arbitrator interviewed normally gives the last word to the party that went second.

At the close of the hearing, it depends on the style of the arbitrator as some say virtually nothing, while others are more discursive at the end. For instance one said:

"I spend a bit of time summing up. I will tell them what I think are the essential arguments that the two sides have put forward... I will often say 'I'm not going to take that point as significant at all...these are the three things I'm going to major on? Is that fair by you?' Only very occasionally will anybody query that."

Arbitrator

Occasionally, one or both of the parties are represented by lawyers at the hearing.

"Since the 2000s certainly yes, I've had a number where lawyers have been present. You have to make it clear that it's not a court of law, and then you have to make sure that the lawyers don't make it too formal."

Arbitrator

5.1.3 The award

The next step is for the arbitrator to write up the award and in so doing the arbitrator does not have to follow precedent, but he/she does take account of

employment relations considerations. The time the arbitrator takes to write up the award inevitably varies according to the complexity of the case, but normally the arbitrator spends several days on this. Very, very exceptionally the arbitrator goes back to the parties for clarification, when writing the award.

The award itself is normally set out as follows:

- terms of reference,
- those present,
- background,
- a summary of the union's case,
- a summary of the employer's case,
- considerations,
- award.

Significantly, although the considerations indicate the factors that have had the most important bearing on the arbitrator's decision, the award does not contain 'reasons' as in an employment tribunal decision, thus the 'considerations' do not form a *ratio* in the legal sense.

Having written the award, the arbitrator then sends it to Acas, which scrutinises it to see that it flows logically and then sends it the parties generally a couple of days after it receives it. Sometimes the arbitration award contains recommendations, in addition to the actual decision. Normally Acas does not like recommendations to be added to an arbitration award, considering them otiose, and therefore often queries them. When however, the arbitrator explains that the recommendations have not emerged out of 'thin air' and have been discussed with the parties, who have said they would find them helpful,¹⁸ Acas is content.

Awards are the property of the parties and are not normally published by Acas. Since the inception of the Internet, however, it has become not uncommon for parties to put the awards on their websites and/or Intranet. This is especially so in respect of major employers and their unions. Thus the awards of the Police Arbitration Tribunal routinely appear on the Police Federation website, while an arbitration award on the wearing of a union tie pin by prison officers is on the internet.¹⁹ See Gennard (2009) and IDS (2010) for a further discussion of the process.

After the award has been sent to the parties, they normally have no further contact with the arbitrator. Very rarely one/both of the parties may seek clarification, but one seasoned arbitrator could not remember the last time that had happened, while another said that it had occasionally happened. The arbitrators themselves do not seek feedback from the parties.

"One party might be miffed and the other might be happy or they might both be miserable, but in a way what could you do."

Arbitrator

If a party asks for the same arbitrator/mediator again, however, that is a form of feedback, albeit not in a structured form.

¹⁸ In one case, according to an interviewee, the union officials wanted a recommendation to be made about changes to the shift system. They could then use the arbitrator's recommendation to persuade workers to moderate their hitherto recalcitrant stance.

¹⁹ <http://www.poauk.org.uk/documents/members-only/circulars-2008/POACircular6-2008.pdf>
[accessed 29.12.14]

As noted above, awards are not legally binding, but they are morally binding and invariably the arbitration decisions have been accepted (although sometimes not any recommendations). One arbitrator recounted one occasion when the employer initially reneged on the award and then subsequently accepted it.

5.1.4 Dispute mediation

The number of dispute mediations that Acas carries out each year is relatively small. See Figure 3.1. These mediations essentially follow the same process described above in respect of arbitration and are directive mediations, or what Americans call 'muscular mediation'. Occasionally the hearing in dispute mediation is longer than the arbitration hearing and may last more than one day.

Acas distinguishes between its collective conciliation where there is essentially facilitative mediation, dispute mediation where a directive style is adopted and the facilitative mediation its staff provide on a charged for basis, essentially where two individuals in a workplace have relationship problems; see section 1.5 above.

One collective conciliator, who like many of his colleagues carry out individual mediation, was of the view that Acas staff, rather than externals drawn from the arbitration/ mediation panel could carry out dispute mediation.

"I think we could because traditionally, when we've done things like surveys, we used to come up with a report which was findings, conclusions and recommendations. Yes at (organisation name redacted) we're about to go in and do some structured interviewing... and we will at the end of that process and probably back into a diagnostic workshop come up with findings, conclusions and recommendations. So you could argue that that is dispute mediation couldn't you? No reason that we can't do it; not that I can think of but others may be different."

Collective conciliator

Another collective conciliator disagreed. He cited a dispute where the external mediator had recommended a settlement that was very much weighted to the employer's case and this resulted in Acas's relations with the union being difficult for a time. If a member of the Acas staff had mediated, relations with the union would have been even more difficult.

The arbitrators considered that not only could they effectively carry out both arbitration and dispute mediation, but that the boundary between them was sometimes blurred. One arbitrator recounted a case where he acted as a quasi-mediator during the adjournment and canvassed scenarios.

"I got unofficial agreement to a change in working conditions as a quid pro quo for a pay rise. At the resumed hearing I was given supplementary evidence. Then I made my [arbitration] award on the lines that had been unofficially agreed."

Arbitrator

Another arbitrator said:

"I think one of the things we sometimes fail to do is see alternative dispute resolution as a continuum because I can remember several cases and [arbitrator's name redacted]²⁰ has had a similar experience – where I've realised that I can arbitrate or I can mediate a decision... For instance in one case at one point I did say: 'Would you like me to mediate this?' They both said they would and we ended up with a resolution by the end of the day and when I wrote it up, I wrote it up as a mediation.

Arbitrator

5.2 Users' views of arbitration

Acas no longer carries out a customer satisfaction survey in respect of collective arbitration. The last survey, based on an analysis of 198 questionnaires from parties who had used arbitration in the year before July 1989 found a high level of satisfaction with the role played by the arbitrator and the majority felt that the arbitrator's award was 'fair' (Brown, 1992). Given the length of time that has elapsed since this survey was undertaken, its relevance today is questionable and this report relies on the users interviewed.

5.2.1 Choice of arbitrator

Although not the norm, the users interviewed in both companies were given a choice of arbitrator.²¹

"[Acas] said, 'Would you mind if it was the same one? Have you got any preferences that it should or it shouldn't' and we said no; we don't mind."

Corporate Affairs Director

In the other company, where they had used arbitration three times in 12 years, each time Acas gave them three names with CVs. The first time management proposed the arbitrator and that was accepted by the union. The second time the senior shop steward proposed the arbitrator and that was accepted by management. The third time, management said; *"let's not beat about the bush and we'll just go and pick"*, so they put the three names in a hat and drew one out.²²

5.2.2 The process

The users interviewed, both management and union, were content with the process and had no suggestions for change; nor did the arbitrators themselves report any concerns on their part, or report that any of the parties had voiced any concerns to them about the process.

²⁰ Another Acas arbitrator not interviewed

²¹ According to Acas, this is not the norm, see 5.1.1

²² In the vast majority of cases Acas appoints the arbitrator usually on the basis of availability, location and past usage. Very occasionally the parties may insist on a choice of arbitrators.

"I like what they [the arbitrators] do. It's fair... The arbitrator is listening to both sides of the story."

Senior shop steward

We leave it [the process] to the hands of the arbitrator in that respect. It's all fairly amicable.

Corporate Affairs Director

This same user compared his experience as a witness at an Employment Tribunal hearing with his experience putting forward the company's case at an arbitration hearing. He said that the arbitration was *"more relaxed"*.

"You don't feel pressured: [Arbitration] is friendly, if not familiar. So it's not so adversarial."

Corporate Affairs Director

Moreover, the HR Manager in the other company where interviews were held had the same view.

"Employment tribunal more formal, more gruelling. Arbitration: formal process but more relaxed and everybody feels more able to open up than a tribunal maybe; that's the main difference. More opportunity to say what you really want to say at arbitration than what you're asked to say in an employment tribunal."

HR Manager

Also one of the FTOs interviewed considered that employment tribunals were more formal than Acas arbitration and required *"a lot more preparation"*.

5.2.3 Speed

Most users were of the view that Acas arbitration was not a lengthy process.

It's generally fine, we don't think it drags on....I've got no complaints on the timescale. I think we're happy enough."

Corporate Affairs Director

"It was fine, yes."

Union rep

An arbitrator agreed:

"I think it's quick. Acas can get the whole thing, somebody appointed quickly, dates agreed and the hearing, so the problem is not festering."

Arbitrator

An HR Manager, however, had a slight reservation, suggesting that perhaps the process could be speedier.

"That could be a bit quicker maybe, if I was really nit-picking... Maybe a bit quicker; sometimes it takes a while to set it all up, but I'm really nit-picking"

HR Manager

Moreover, an arbitrator was told by a district council that *'it's been painful' getting to a hearing, "so slow"*. Perusal of the statistics, however, indicate that the district council's experience was exceptional. The statistics show the date when the request for arbitration/dispute mediation was received and the date when the hearing was held. Looking at 20 arbitrations from 2012-2014, the time lag between the request and the hearing in 14 cases was 6 weeks or less. In four of the six remaining cases where the 6 weeks' target was not met, the delay coincided with either the Christmas holidays, or August when many take summer holidays. In short, any delays are usually caused by the difficulties in matching the diary commitments of several people.

5.2.4 Pendulum arbitration

As noted in Figure 1.1 pendulum arbitration is no longer as common as it used to be. Nevertheless, in one of the companies where interviews took place, pendulum arbitration was used and the HR Manager sang its praises and had recommended it to another company in the group.

"I think it makes you be very sensible, and I'm looking at this from both perspectives. If I was on the union side, I wouldn't be coming up with some mad idea in hope, because it would just be like it's so mad, it's not acceptable. From the management point of view, I think it has to be sensible... You can't be miles apart going to pendulum arbitration."

HR Manager

The workplace rep in the company that used pendulum arbitration, also favoured it as a way of resolving disputes.

"Arbitration is part of our toolbox...We know going on strike is not what anybody really wants to do, is it?"

Union rep

Moreover, the HR Manager was of the view that the availability of pendulum arbitration as the last stage in the collective disputes procedure had a positive effect on negotiations.

"It works because it makes us slicker to get the best deal ourselves... I think we all feel, the union as well, if we go to arbitration, we've all failed and in negotiations you know, we've almost said: 'Look if we don't agree it's arbitration' and we all kind of go; 'Come on; we can do this', so we've all rolled our sleeves up and worked extremely hard to avoid it."

HR Manager

Nevertheless, she admitted that many of her HR colleagues in other companies in the area considered pendulum arbitration a thing of the past.

"I do know [other] HR professionals always find it 'Wow' you know; there is always a look of shock when I say pendulum arbitration because it is quite dated."

HR Manager

One of the often quoted drawbacks of pendulum arbitration is that, because there is a clear winner and loser, it has a deleterious effect on working relations between management and unions, but the HR Advisor said that in his experience that had never happened.

"Many crossed swords, but no long term grudges...and it's just part of the process and there's no grudges held to the extent that I think we've even shared lifts and things there and back to the office after. So there's no kind of you know, fighting in the car park because we went to arbitration."

HR adviser

5.3 Private arbitrations

In some cases, Acas receives a request from a party/parties for so-called private arbitration/dispute mediation, i.e. collective arbitration/mediation not under Acas's auspices, where it is of the view that it does not have statutory authority to arbitrate. In such a case, Acas sends a letter to the enquirer giving three names from its panel of arbitrators, their CVs and their contact details and bows out completely. It is then up to the party/parties to decide on a potential arbitrator and then contact him/her to see if he/she is willing to carry out the arbitration, to agree the fee for the arbitration/mediation and other details such as the date and location of the hearing.

The Acas letter says:

"It is important that all parties involved in this assignment understand that while the Independent Person you appoint may be drawn from the Acas list of Arbitrator / Mediators, he or she is not acting in an official Acas capacity. This is why it is usual for an Arbitrator or Mediator to explain at the start of any process the basis of their appointment, and we advise our panel members that where they are appointed on the basis of an Acas recommendation that they should make it clear that they have not been appointed by Acas in undertaking the assignment."

Acas does not keep statistics on requests for private arbitration and there has been no research on the precise nature of the requests to see whether or not they fall within TUL(C)RA s.212(1), bearing in mind that the legislation is widely drawn.²³ One of the arbitrators said that she *"always had something [private*

²³ TUL(C)RA 1992 (1) In this Part, "trade dispute" means a dispute between employers and workers, or workers and workers, which is connected with one or more of the following matters-

- (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
- (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- (c) allocation of work or the duties of employment as between workers or groups of workers;
- (d) matters of discipline;
- (e) the membership or non-membership of a trade union on the part of a worker;
- (f) facilities for officials of trade unions; and
- (g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures.

arbitration] going on" and the arbitrators interviewed, and the arbitrators contacted informally, intimated that they were more than happy to carry out private arbitrations, not least because they often charged considerably more than the fee paid by Acas for its arbitrations and dispute mediations.

6 Costs and benefits

6.1 The financial costs

As noted above, Acas pays fees to arbitrators/mediators and to the two side members if it is a board of arbitration or a board of dispute mediation. The fees at the time of writing this report are £340 per day, for the day of the hearing and other activities: the time spent on reading, other preparatory work and writing the report. No fee is payable in respect of travelling time. These fees are good value for Acas: the arbitrators used by Acas often charge significantly more when they are carrying out non-Acas private consultancy work and these fees are less than half the amount that Acas charges per diem when its staff carry out individual workplace mediation.

Acas also pays its arbitrators (and side members if there is a board) travel (1st class train travel)²⁴ and car mileage (45p. per mile up to 10,000 miles at the time of writing). In addition, it pays a daily subsistence rate. At the time of writing subsistence is not paid for less than 5 hours and the rate for 5-10 hours is £8.96. If hotel accommodation is required, Acas arranges this in a hotel of at least a 3 star standard. In addition an overnight subsistence flat rate for an evening meal can be claimed, as well as a flat rate for overnight incidental expenses (both at £24.36 at the time of writing).

According to Acas management statistics, the average cost per arbitration, which encompasses mediation and boards of arbitration and boards of mediation (i.e. excluding withdrawn cases where no arbitrator's fee was paid), were as follows:

Table 6.1: The average cost per arbitration by year

Year	Cost
2011/12	£3,752
2012/13	£4,723
2013/14	£5,057
2014/15	£4,471

The figures above include both the fees, travel and subsistence paid to arbitrators/mediators and the cost of the time spent by Acas staff on the case, administering the arbitration process, for instance appointing the arbitrator/mediator, arranging the date and venue of the hearing and reviewing and perhaps amending the arbitrator's award, before sending it to the parties.

²⁴ Arbitrators are encouraged to travel by train 2nd class.

6.2 The benefits

6.2.1 *The financial benefits*

Acas has measured the value and impacts of its services for a number of years. It has done so using customer satisfaction surveys, case studies, administrative data and economic impact assessments, drawing on the methodology of Meadows (2007), updated for its 2013 triennial review (Acas Research and Evaluation Section, 2014).

Acas's business model is based on a suite of services and, as noted above, includes its telephone helpline, web services, open access training, workplace projects, and individual conciliation before and after an Employment Tribunal claim and conciliation and arbitration in respect of collective disputes. While some Acas services have been measured on a cost/benefit basis, Acas's arbitration work has never been subject to an economic impact assessment. The Acas service nearest to arbitration, whose value and impact has been measured recently, is collective conciliation. Using 2010-11 data the net cost of collective conciliation was £2,073,776 and the net economic benefit was £158,600,000 with a benefit/cost ratio of 76.5 (Acas Research & Evaluation Section, 2014:22).

Of course the financial benefits of collective arbitration may differ from those of collective conciliation. As Chivite-Matthews and Thornton (2011: 7) say: 'The question of whether the intervention had the desired effect cannot be answered without proving the counterfactual: that the effect would not have happened anyway.' In the absence of counter-factuals, however, it is difficult to establish a reliable picture. Matching is a particular problem in arbitration where the nature of the dispute, its context, the parties to the dispute and any previous history which has a bearing on the dispute are not easily replicable for a counter-factual and Acas has commissioned research into counter-factuals and quantum. Against that background, at this juncture this report cannot be precise, although intuitively it is thought that there is likely to be a net benefit.

6.2.2 *The non-financial benefits*

If one looks at the benefits in more general and non-financial terms, arbitration brings several benefits. First and foremost, it 'offers a fresh perspective', as an arbitrator said, resolves an impasse and draws a line under the dispute.

Second, it makes the parties analyse their dispute; it does this, 'by forcing them to work out and agree terms of reference' (Brown: 2010: 270), although, exceptionally, these may be modified at the hearing after discussion with the arbitrator. Also the parties may analyse their dispute further when compiling a statement of case.

Third, it provides the parties with the chance, where applicable, to save face and prevent damaging the employment relationship. Brown quotes two examples of this use of arbitration tactically: first, where a middle manager has made a mistake and senior management does not want to climb down voluntarily, but wants to be ordered to climb down; and second, where union negotiators have concluded a deal which subsequently members have rejected but the union wants the deal to be ordered. Mortimer (1982: 630) adds that the award 'should be such that both parties can be persuaded, even if only reluctantly, to accept it'. Similarly, Burchill (2014: 110) says that the arbitrator needs to 'reach a decision which allows the parties to move on from the dispute', while an interviewee said:

"An arbitrator is able to make decisions in recognition of the fact that the parties have got to live together afterwards. So you're conscious of the effect that your decision is going to have on the future relationship."

Arbitrator

The arbitrators themselves were of the view that one of the main benefits of arbitration was its confidentiality, unlike employment tribunals which are open to the public. As one arbitrator said:

It's a discreet service. Nobody needs to know about it other than the parties.

Arbitrator

The three employers interviewed, however, were of the view that one of the main benefits was the relative informality of the proceedings, albeit within a structured process: an arbitration hearing was "*relaxed*". See also 5.2.2 above.

6.2.3 Curtailing industrial action

All those interviewed, however, agreed that the single most important benefit of arbitration is that it prevents or resolves industrial action. This is particularly the case where there is binding arbitration: that is an agreement that any dispute must be referred to arbitration, effectively excluding the possibility of industrial action as a way of resolving an impasse. Such agreements are associated with foreign owned manufacturing companies established on greenfield sites since the mid-1980s. This researcher carried out interviews in two such companies, one a Japanese company (see case study), which used conventional arbitration, the other a European owned company that used pendulum arbitration (see 5.2.4. above). The HR people and the workplace union reps in both companies were of the view that arbitration was useful.

"The Japanese were very nervous about strike action and industrial action, so they did what they could to prevent it... Without it, I think we'd be struggling to supply our customers. They want an element of certainty and that's one way we can demonstrate that... If we do disrupt [the contractors'] production facilities [because we haven't delivered parts] there are fines to be paid. It's tens of thousands of pounds per minute."

Corporate Affairs Director

He argued that if there was not binding arbitration, it might be more expensive for the Japanese owners, because as soon as the workers contemplated a strike the owners would accept the union's demands in totality and immediately.

There might've been a strike ballot... The Japanese would've got scared to death; thrown money at it... [The workers] probably wouldn't have to go on strike. It's more than enough to get the Japanese to cave in, because the biggest thing a Japanese company can do is not supply or supply bad quality. It's anathema to them, so they'll do anything to avoid it.

Corporate Affairs Director

The senior shop steward in this same Japanese company, an ex-miner, also was in favour of binding arbitration. He said:

"I were 12 months on strike with miners and we achieved absolutely nothing... If it's by agreement with an arbitrator, I would say there's a good chance that you're going to get something without having to withdraw your labour."

Senior shop steward

Both this senior shop steward, the regional full-time union official and this Corporate Affairs Director, however, were aware of the disadvantages of binding arbitration. The senior shop steward said:

"You've got to go with the arbitrator. There's no two ways. You can't say well go with the arbitrator and then, because the decision hasn't gone your way, to take your ball home and then ballot for industrial action."

Senior shop steward

The Corporate Affairs Director also could see the disadvantage of binding arbitration but his reasons were different. He argued that industrial action was rare nowadays, and there were various hurdles before industrial action was taken and binding arbitration was "a free shot". He said:

"It's painless. Why shouldn't we? I'd probably do the same in their position. Yes, they might be lucky, but if they're not, well they are no worse off. Where they are worse off is to go down the industrial action route... There's a payment to be made, either by loss of overtime, an overtime ban or whatever or it might be or strike action... So there's a price to be paid for that and I think it might dissuade them... If they wish they can say, 'Well we accept that'. But just going over to arbitration, I think it's a bit of a free shot, too easy."

Corporate Affairs Director

Leaving aside those companies quoted above which had binding arbitration, what about elsewhere? Here there was little experience, positive or negative, of arbitration. One regional FTO interviewed, who had some 30 bargaining units within his remit, used Acas "often", but mostly for collective conciliation.

7 Discussion and conclusions

7.1 Summary

As seen in the preceding chapters, no criticism of the *process* of arbitration has been voiced by the users interviewed and almost no criticism of the *speed* of its delivery, while the previous chapter has set out the benefits of arbitration. Even a FTO who was against arbitration in principle as allowing a third party to decide a matter, admitted that the arbitrator had "*been absolutely fantastic*".

Nevertheless, as can be seen from Figure 3.2, the number of arbitration cases has declined absolutely over the last 20 years and in proportion to collective conciliations (Figure 3.3). Statistical analysis in chapter 3, however, did not reveal any indicators as to the reason for this decline. For instance there is no clear trend in respect of the issues that are subject to arbitration, although in the last few years there have been fewer disputes over the annual pay claim. As noted in 3.4.2 this may be because inflation has been low recently and thus there has been less disparity between claims and offers. Similarly there is no clear trend regarding the provenance of employers who use arbitration, that is whether they are from the public sector or the private sector. So why has there been a decline?

7.2 The drivers of decline

A number of interviewees cited the socio-economic climate as the key driver of decline. In particular they pointed to decline and fragmentation of collective bargaining and procedural machinery across most sectors of the economy, the culture of individualism and the decline in trade union membership, as collective arbitration only applies where workers are organised. Statistical tests show a strong association between both trade union membership and the number of arbitrations²⁵ and a slightly lower, but still significant, association between trade union membership and the number of collective conciliation cases.²⁶ Such statistical tests, however, do not show causality, nor do they explain why there is a higher proportion of collective conciliation cases, as compared to arbitration.

Given the current state of the labour market, interviewees said, power was with the employers, who were unwilling to hand the decision to an outsider, when in many situations they could impose a decision. As an arbitrator put it:

"A disinclination to have outside independent people setting what can effectively be additional costs on an employer."

Arbitrator

A collective conciliator illustrated how this decline in union membership and density played out at the workplace. He dealt with a number of third sector organisations where the union reps reported that because of relatively low union density in the workplace, strike action was often not effective and saved the employer money as he did not need to pay striking workers and so there was no pressure on the employer to seek to break the impasse by, for instance, arbitration.

²⁵ Pearson correlation 0.9

²⁶ Pearson correlation 0.2

"I'm not sure there is enough muscle in some of those disputes I'm dealing with for the union to either force the employer to make a substantial change or force them down the route of arbitration."

Collective conciliator

This reluctance to go to arbitration could occasionally be exacerbated when management had what they considered to be a bad experience with arbitration, i.e. the arbitrator's award was not in their favour. Nevertheless, it would be misleading to suggest that it is always the employer who opposes third party intervention. A collective conciliator said that in his experience unions, especially Unite and the GMB in his region, were more than willing to ballot for industrial action rather than go to a third party to be told what to do. Thereby sending a signal both to their members and to management that they were still a force to be reckoned with.

"They're saying: 'you may have thinned out the membership but we're still in the millions in total and we're still here and we're still making a difference... and we've still got some clout'."

Collective conciliator

Whether the unwillingness to use arbitration stems from the union side, the employer's side or from both parties, the use of Acas arbitration is rarely included in new procedures now in the newer industries, according to another collective conciliator in a different region (North West). He added that such a provision was previously often found in printing and engineering companies; companies that no longer exist.²⁷

7.2.1 Professional pride?

The reluctance to use Acas for conciliation and arbitration services, however, is not just a question of power, it is also a question of what the parties regard as their professional pride. For instance, one collective conciliator, an ex-trade union activist, described how he went to a meeting of regional union officials and was astonished at the negative reaction he received when he tried to promote Acas's collective dispute resolution services.

"[The union official] said: 'Well for us, coming to Acas is a failure on my part. My members expect me to help them fix their issues. Using you, is me not doing my job properly'".

Collective conciliator

This same collective conciliator now tells union officials that such an attitude is misguided and that Acas provides "*another tool in the toolbox*" and that union

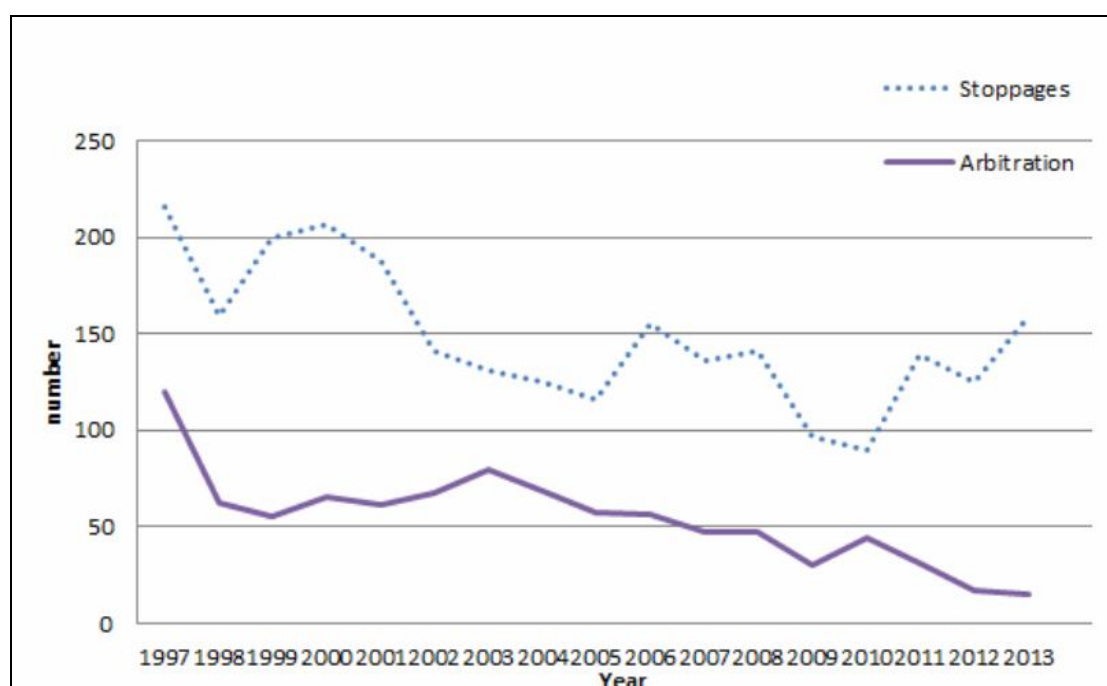
²⁷ As noted previously in this report, the absence of a procedural provision to use arbitration does not mean that arbitration cannot be used.

officials will be doing their job most effectively if they use "different tools at different times to do different jobs".²⁸

7.2.2 Workplace conflict

Another possible explanation is that there is less conflict at the workplace, but that would not explain why arbitration cases have declined proportionately more than collective conciliation. Moreover, taking stoppages as a proxy for workplace conflict, even though workplace conflict does not necessarily result in a stoppage, the number of stoppages has risen but the number of arbitration cases has declined, see Figure 7.1. Of course, this report emphasises the word 'proxy', because arbitration normally prevents industrial action, but the point made here is that workplace conflict has not diminished.

Figure 7.1: Stoppages and arbitration/dispute mediation



Source: ONS statistics on labour disputes as published in the Department of Business, Innovation and Skills (2014) is and Acas annual reports on number of arbitrations.

Note: The number of stoppages are in calendar years, while the number of arbitrations are in financial years.

7.2.3 Juridification

Some interviewees mentioned the juridification of industrial relations and the increase in statutory rights with the result that both management and unions often now seek legal advice. One collective conciliator was of the view that lawyers do not like arbitration, preferring Employment Tribunals. This is perhaps because lawyers, whose legal training makes them familiar with court procedures, tend to have little or no experience of workplace arbitration. Accordingly where the issue is, for instance, dismissal of a shop steward or redundancy consultation,

²⁸ As chapter 2 showed in respect of the literature on collective conciliation, the professional pride of both FTOs and managers was a factor in the non-use of Acas.

lawyers tend to advise a union to go to an Employment Tribunal, where one can appeal (on a point of law), rather than arbitration. A collective conciliator recounted a case she was currently handling: a dispute about the interpretation of an agreement; the employers were prepared to go to arbitration, perhaps desiring the confidentiality of arbitration rather than a public hearing, but the union had put in almost 50 deduction-from-wages claims to an Employment Tribunal.

7.3 The way ahead

While it is clear that the use of Acas trade dispute arbitration has declined, the findings show that there is nothing wrong with the process as a tool for resolving disputes, or with the quality of the service provided according to users and the relevant statistics. Indeed the main reason for the decline in the use of arbitration mainly relate to the external environment, which Acas cannot wave a magic wand to change. Moreover, at a time of relative industrial relations stability, the analogy with the Bank of England's role as 'lender of last resort' is not inappropriate: arbitration is very much a measure of last resort; it is there as a back-stop if needed.

It is worth noting, however, that arbitration is being increasingly used in the commercial context and that Acas continues to be widely used for other dispute resolution services by management and unions (as detailed in Acas's annual reports) and is generally held in high regard. As a user said:

"My opinion of the dealings we've had with Acas, they've been very good... We've used it for training and we've also used it for some conciliation and we've also used it as a sounding board. We have a local guy who's very good... He's just very good support or advice if you need it; very approachable."

HR Manager

The challenge for Acas is to find effective responses to the much changed employment environment so that its arbitration service can again find its niche. Proposed changes to industrial action balloting rules may present one such possible avenue worth exploring, especially if trade union responses to disputes are altered as a consequence.

Case study : manufacturing company

Background

This manufacturing company, situated in the north of England, supplies parts primarily for the automotive industry in Britain and Europe and is part of a Japanese owned group of companies which has manufacturing facilities world-wide, principally in Japan, Europe and the USA.

The company was established in 1991 on a greenfield site with some government support and at the time of writing employed 330 people. When it was set up the Japanese owners were determined to avoid industrial conflict because under their supply contracts with the customers in the automotive industry, they could face substantial fines if their production was disrupted. In addition, the company wanted to avoid the multi-union scenario common in many British companies at that time and the possibility of inter-union strife which could undermine teamwork. Accordingly, at the planning stage the company decided to have a single union agreement with the Amalgamated Engineering and Electrical Union (EEPTU section) which, after a succession of mergers, is now part of Unite.

The procedure agreement

The agreement, made in 1993, recognises a single union for 'for all employees'. If membership is less than 51%, the union only has representational rights. If it is 51% or more, the union has negotiating rights in return for the avoidance of conflict and binding arbitration to resolve disputes. The agreement says:

Every endeavour will be made to reach an agreement on referred employment issues. However in the event that an acceptable solution cannot be found the following procedure provides for the matter to be resolved through discussion, negotiation, conciliation and, as a last resort, arbitration.

Accordingly, this and other similar agreements have been dubbed 'no strike' agreements, but unlike many agreements of this ilk, the procedure does not specify the form of arbitration, that is whether it is conventional arbitration or pendulum arbitration. (Under the latter, the arbitrator must choose between the position of the employer or the trade union and so, unlike conventional arbitration, has no right to recommend a third solution which perhaps is part way between the demands of both sides.) So far the union and management have agreed on conventional arbitration.

"We always go for conventional because pendulum you can lose... Company are happy to go with that. One day they might not be. They might say no, we're going for pendulum."

Senior shop steward

The Corporate Affairs Director said that there had been discussions with the union about the form of arbitration but conventional arbitration had always been adopted because *"this was always how we've done it"*.

There are four stages set out in the procedure: the first stage is a meeting between the union rep and a member of the company; the second stage is a meeting between the local full time union official (FTO) and the Personnel Manager or another person nominated by the company; the third stage is a joint referral to conciliation by Acas; and the fourth stage is arbitration provided by Acas. Arbitration has been used six times: 1993, 2002, 2004, 2012, 2013 and

2014. In 2002, Acas categorised the arbitration issue as 'other pay and conditions' and the senior shop steward explained that it was a dispute about payments during lay-off, but in the other years, the arbitration issue was the annual pay round.

The process

Before arbitration is first considered, Acas tries to resolve the matter by conciliation as noted above. Conciliation at the company however, has never resulted in a resolution of the dispute and the Corporate Affairs Director said that he and the union had always mutually agreed to go to arbitration. The senior shop steward confirmed this: it was "*both together really*" and never the case of one side dragging the other along.

At the point that the parties decide to go to arbitration, the collective conciliator, with the parties' assistance, draws up the terms of reference and in the last three years it has been as follows:

The arbitrator is asked to consider the submission by both parties in connection with the pay round for [year specified], and to make an award.

The next stage is for the arbitrator to be appointed and in 2013 and 2014, Acas enquired from both sides whether they wanted the same arbitrator as before, or a different arbitrator, but both parties agreed to leave the choice of arbitrator to Acas. Then the two sides prepare their statements of case and exchange their statements with each other, while Acas ensures that the arbitrator has both sides' statements. This occurs about a week before the hearing. At the hearing both sides outline the main points of their statement of case and cross-question the other side.

The Corporate Affairs Director said that he had a full opportunity to say what he wanted to say at the hearing and compared arbitration favourably with an Employment Tribunal.

"I think it's more relaxed. Certainly you don't feel pressured.... It's friendly, if not familiar. [The senior shop steward] and I have been together for a long time... Clearly we have differences, but we've got to work together afterwards so it's not so adversarial, I would suggest."

Corporate Affairs Director

The senior shop steward similarly compared Acas arbitration favourably with an Employment Tribunal.

"I like what [Acas] do to be fair... Arbitration, that's obviously, you can still seek a compromise and the arbitrator is listening to both sides of the story and he's going to make a decision. In an Employment Tribunal, you either win or lose and there's no in between."

Senior shop steward

Nor was there any criticism of the timescale by either the union or the company.

[Acas] come and do the conciliation bit; that could take a month or so and then, okay, that didn't go very far so then an arbitrator gets appointed. There's then some time to prepare the statements, prepare the cases; that goes off. He [the arbitrator] reads them and a date is fixed ... and it's probably I think maybe a couple or three weeks between the

arbitration meeting and the result... It's generally fine. We don't think it drags on particularly. If there were a decision on the day it might smack of, I don't know, there's not a lot of consideration going into this... We've never waited longer than a month.

Corporate Affairs Director

The benefits of arbitration

The Corporate Affairs Director, who joined the company in 1993, had not had any experience of any type of arbitration, never mind binding arbitration agreements, despite working for many years elsewhere, including a Japanese owned company albeit on a brownfield site. He was of the view, however that such arbitration had some benefits.

Our customers want an element of certainty and that's one way we can demonstrate that..... It suits us at the moment. Well, what is likely to have happened if we hadn't got binding arbitration? There might've been a strike ballot, maybe threatening industrial action. The Japanese would've got scared to death. Thrown money at it..... [The workers would] have learnt that a threat of a strike is more than enough. They probably wouldn't have to go on strike; it's more than enough to get the Japanese to cave in because the biggest thing a Japanese can do is not supply, or supply bad quality. It's anathema to them so they'll do anything to avoid that. So if they thought that's going to happen they'll probably cave... So the ante would go up and the workforce would learn that's easy and they'd price themselves out of the market and probably this place would've disappeared.

Corporate Affairs Director

The senior shop steward praised arbitration wholeheartedly.

"I were 12 months on strike with miners and we achieved absolutely nothing. Now with an arbitrator, obviously if it's by agreement, with the arbitrator I would say that there's a good chance that you're going to get something without having to withdraw your labour... It's benefited us here. I can't speak for other plants. Like now, I'm trying to save jobs. Now I need something off management. If I'm forever withdrawing my labour, then that becomes difficult for them to listen."

Senior shop steward

The senior shop steward was also of the view that arbitration should be used more widely.

"I think [arbitration] is something to consider and I think other factories or workplace ought to consider it... Your trouble is a lot of people are set in their ways and they might think no, we've always done this for years and we're not going to alter... Obviously they've got to get agreement of the membership and that might be difficult in companies what never had that facility before."

Senior shop steward

Concerns about arbitration

The Corporate Affairs Director argued that although arbitration had had benefits in the case study company, he had some concerns.

"[Arbitration]'s just easier. It's a free shot. There's no cost to it for either party and so we might as well throw the dice... [Without binding arbitration] there's got to be some sort of industrial action. All these things have to be put in place and it consolidates the, 'well, hang on a minute, if I do go on strike, I'm going to lose this amount of money and what might I get'. So there are all those judgements made in people's mind, where the arbitration it's a free shot. Why not; why shouldn't we go...? I would probably do the same in their [the workers'] position."

Corporate Affairs Director

The regional full-time union official (FTO) similarly had concerns, albeit of a different kind. He had not been involved at all in the original procedure agreement that specified binding arbitration and its so-called 'no strike' provision and was of the view that it removed from workers' the right to make their own decision.

"[My] view is that it should always be up to the workers to choose whether they accept what the company is offering them or not. It should be their democratic right to inform the employer via a collective ballot whether they feel the deal is good enough or not. Should they choose not to accept it should still be in their hands, whatever method they choose to continue negotiations whether it be continued negotiations with a mediator or a conciliator or industrial action of some kind. It shouldn't be down to an independent person to decide who gets what. It should be down to the workers as far as I'm concerned. I always enter into negotiations however with the principle that once an offer is achieved that is fair I will as the Union lead recommend acceptance of the offer."

Regional full-time union official

Nevertheless, paradoxically he admitted that the arbitration provisions at the case study company had benefited workers, that the shop steward was happy with arbitration to resolve collective disputes and that the arbitrator had "been absolutely fantastic."

"Although we ought to be able to resolve things without somebody else making a decision, it is good to know that people are there to assist with resolving issues."

Regional full-time union official

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Appendix: interview schedules

Indicative questions for the arbitrator

General

1. For how long have you been an arbitrator?
2. What do you think the main changes have been over that time? (*Prompt: issues; type of arbitration i.e. pendulum/conventional; presence of lawyers*)
3. In what way, if any, does your practice as an arbitrator vary case by case? If so how? (*prompt: public sector/private sector; according to whether there is a first-time party; according to the issue in dispute?*)
4. As an arbitrator do you prefer to act as a single arbitrator or to chair a board of arbitration?
- Why? (*prompt – discussion helpful/ no need to adjust views to others*)
5. In what way, if any, in your view are voluntary arbitrations different from the Acas alternative for unfair dismissal?
6. You carry out dispute mediation. Is the trend in dispute mediation up or down?

The arbitration process

7. Have you ever been involved in drafting the terms of reference? If so, tell me about that.
8. Are you in contact with the collective conciliator before an arbitration hearing?
9. If so, tell me about it (*Prompt: who initiates the contact?*). If not, why not?
10. How long on average does it take you:
-to prepare for a hearing e.g. read statements of case, decide on any questions you may have;
- write up your award.
11. Talk me through the arbitration process
12. Have you ever been in touch with one/both of the parties after your award? (*Prompt: a request for clarification? To obtain feedback from the parties for your own self-development?*)
10. If so, tell me more about this.

Other

12. What was your most difficult arbitration?
13. Tell me about it.
14. Why was it was your most difficult case?
15. What do YOU think are the benefits of arbitration?
16. The use of Acas arbitration has diminished. It is now little used. Why do you think that is?
17. How could Acas make its arbitration service more attractive to potential parties?
18. Do you carry out private arbitrations?
19. If so, in what way, if any, do they differ from Acas arbitration?
20. Has the number of private arbitrations remained the same over time?
21. Have you anything else to tell me in relation to my research on collective arbitration and particularly on your role as an arbitrator?

Indicative questions for the conciliator

Arbitration in practice

1. Has collective conciliation changed over time and, if so, how has this impacted on arbitration?
2. Given that sometimes the line between a collective and an individual matter is sometimes blurred, who decides whether it is a collective or not? *(Prompt: you, the office manager...?)*
3. When do you suggest arbitration to the parties? *(Prompt: the opening blurb, mid-way, towards the end, at the end of the day, varies according to the case?)*
4. Dispute mediation is little used by Acas, even though it is becoming more popular outside of Acas. Do you ever recommend dispute mediation?
5. If so, tell me about it. OR If not, why not.
6. Do some parties want arbitration from the outset and only go through collective conciliation as a formality?
7. Do you ever suggest private arbitration to parties?
8. Talk me through the process of drafting the terms of reference.
9. Are you ever in contact with the arbitrator before an arbitration hearing to brief the arbitrator?
10. If so tell me about it. OR If not, do you think that would be helpful?
11. Is there recent written guidance, such as a handbook, on arbitration?
12. Have you ever sat in on an arbitration hearing?

Your views

13. Acas staff carry out individual dispute mediations, but its panel of arbitrators carry out so-called dispute mediation. Do you think that distinction is:
 - a) easy to make
 - b) a sensible distinction
14. Arbitrations as a percentage of collective conciliation cases have declined in recent years. Why do you think that is?
15. Do you think that it is a matter of concern?
16. Should arbitration be offered to the parties where there are multiple ET claims such as holiday pay claims where there is a common union rep?
17. How do you think Acas can make collective arbitration more attractive?
18. How do you think that Acas can make dispute mediation more attractive?

Indicative questions for the employer

Before arbitration

1. How did you first hear about Acas's dispute resolution service ?
2. Before the parties go to arbitration, Acas tries to conciliate in a dispute:
 - a) You have had arbitration three times in the past three years. Had you decided you wanted arbitration **before** you went to conciliation?
 - b) Roughly how long did conciliation last on those three occasions?
 - c) Have you been to Acas for CONCILIATION at other times and not followed that with arbitration?
 - d) If yes, tell me about it.
3. You have been to arbitration recently three times. Who **first** suggested it each time: you, or the union or an Acas conciliator?
4. If you suggested it first, what were your reasons? OR if you agreed to it, why did you do so?
5. After your first arbitration, you had the same arbitrator? Did Acas suggest that, or did you ask for the same arbitrator, or did it just happen?
6. If you suggested using the same arbitrator, did Acas readily agree to your request?
7. Did you make any other requests either to Acas or the arbitrator about the actual hearing process?
8. How much time roughly elapsed in these three cases between your agreement with the union to go to arbitration and the arbitration hearing?

The arbitration hearing

9. At the arbitration hearing, did you feel that you had a full opportunity to say what you wanted to say?
10. Have you ever been to an Employment Tribunal?
11. If so, in your view, what for you are the main differences between Acas arbitration and an Employment Tribunal hearing?

After the arbitration

12. What in your view are the benefits of arbitration?
13. What in your view are the disbenefits/disadvantages of arbitration?
14. Would you recommend arbitration to other employers?
15. If so, in what circumstances?
16. What could Acas do to improve its arbitration service?

Indicative questions for the workplace union rep

Before arbitration

1. When did you first hear about Acas conciliation and arbitration in collective disputes?
2. Were your members keen to go to Acas or did they need some persuading?
3. Did you explain to your members the difference between conciliation and arbitration?
4. Before the parties go to arbitration, Acas tries to conciliate in a dispute:
 - a) You have had arbitration three times in the past three years. Had you decided you wanted arbitration **before** you went to conciliation?
 - b) Roughly how long did conciliation last on those three occasions?
 - c) Have you been to Acas for CONCILIATION at other times and **not** followed that with arbitration?
 - d) If yes, tell me about it.
3. When you went to arbitration, who **first** suggested it: you, or the employer or an Acas conciliator?
4. If you suggested it first, what were your reasons? OR if you agreed to it, why did you do so?
5. Did you have a choice of arbitrator?
6. How much time roughly elapsed in these three cases between your agreement with the employer to go to arbitration and the arbitration hearing?

The arbitration hearing

7. At the arbitration hearing, did you feel that you had a full opportunity to say what you wanted to say?
8. Have you ever been to an Employment Tribunal?
9. If so, in your view, what for you are the main differences between Acas arbitration and an Employment Tribunal hearing?

After the arbitration

10. What in your view are the benefits of arbitration?
11. What in your view are the disbenefits/disadvantages of arbitration?
12. Would you recommend arbitration to others?
Prompt: If so in what circumstances?
13. If so, in what circumstances?
14. What could Acas do to improve its arbitration service?

