WORKPLACE MEDIATION: SUCCESS IN THE SECOND-OLDEST PROFESSION

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DECLARATION

I certify that this work has not been accepted in substance for any degree, and is not concurrently being submitted for any degree other than that of Doctor of Philosophy being studied at the University of Greenwich. I also declare that this work is the result of my own investigations except where otherwise identified by references and that I have not plagiarised another's work.

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ABSTRACT

The focus of this research is mediation in workplace disputes between individuals; and the research population, those Acas staff mediating in such disputes. The research questions ask what constitutes success, and how mediators achieve it. The theoretical framework is that of systems, a workplace dispute being a sub-system of the organisational system.

Success is often defined in the mediation literature as a written agreement. Measures other than agreements, written or otherwise, are also mentioned. The literature identifies many variables leading to success. These have been grouped into those contributed by mediators, and those of a situational nature.

The researcher adopted an interpretivist research paradigm and, primarily, the case study methodology, Acas mediators being the case. A model predicting success in workplace mediation is outlined. Various research methods were used, in particular, participant and non-participant observation, focus groups, individual interviews, and reviewing records.

Most mediators interviewed defined success as getting an agreement. They also identified indicators of likely success and reinforcers of agreements. Another important finding was that a so-called dispute impact approach to success resonated with mediators. Under that approach, success depends on what mediators seek to achieve: either to limit the dispute, or to settle it, or to address its root causes. The primary mediator variable leading to success was found to be the mediator's experience; and the primary situational variable, the tractability of the particular dispute.

Although success can be measured objectively, for instance by a written agreement, a relative measure such as the dispute impact approach provides a more nuanced gauge. Also, this thesis concludes, a systems approach is useful, not only when looking at the dispute to be mediated but also when considering the mediator, if s/he is part of an organisational system supplying mediation services. This system, in turn part of a

wider economic/political system, shapes the key approaches to be adopted by the mediator, including the style of mediation and the time normally allocated to a case. Moreover, in this case study, it was found that the organisation (Acas) gave less importance to mediation than to its other dispute resolution services.

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TABLES AND FIGURES

GLOSSARY

ACAS, later Acas: Advisory, Conciliation and Arbitration Service

ADR: alternative or appropriate dispute resolution

BA: British Airways

BIS: Department of Business, Innovation & Skills

CDDs: Customer Delivery Days, recorded in EARS

CEDR: Centre for Effective Dispute Resolution

CIPD: Chartered Institute of Personnel and Development

CIWM: Acas's Certificate in Internal Workplace Mediation course

CMC: Civil Mediation Council

DFL: Acas's Developing Future Leaders scheme

EARS: Acas's Events and Advisory Recording System

EC: Acas's Early Conciliation scheme

ET: Employment Tribunal

HR: Human Resources

IC: Acas Individual Conciliation

IiP: Investors in People

LYP: Listening to Young People (family mediation) scheme

NDPBs: non-departmental public bodies

NOCN: previously National Open College Network (renamed NOCN from October 2013)

OCR: Oxford, Cambridge and RSA Examinations

PCC: Acas's Pre-Claim Conciliation scheme (now superseded by EC)

PGC IEDR: Greenwich University's Post Graduate Certificate in Individual Employment Dispute Resolution course

REDRESS: USPS's Resolve Employment Disputes, Reach Equitable Solutions Swiftly conflict resolution programme

SMEs: small and medium-sized enterprises

USPS: United States Postal Service

WERS: Workplace Employment Relations Study

CHAPTER ONE: INTRODUCTION

The subject of this thesis is workplace mediation, that is, 'the intervention [in workplace disputes] by an impartial third party. Mediators do not offer advice or solutions;[1] their skill is in facilitating parties to come to their own solutions' (Reynolds 2000:166). After a section covering the background that led the researcher in this direction, this introductory chapter looks at the focus of the research; the research questions; the study's original contribution; the theoretical framework in which this study is set; and the research population. Finally, in this chapter, there is an outline of the structure of the rest of this thesis.

Background to research

The researcher was drawn to the study of workplace mediation because he wished to place his practical experience in a wider context, both theoretical, through perusing the literature, and empirical, by ascertaining colleagues' views and examining their practice. The researcher has been an Advisory, Conciliation and Arbitration Service (Acas) mediator for over 30 years, and has worked for many of those years either as a community mediator or as a family mediator, too.

The aspects of mediation that the researcher finds so attractive, and which make the occupation so compelling to him, include: disputing parties seriously needing the help of a third party; pressure on that third party to act quickly; people putting themselves out to assist the third party's work; a real sense for the third party of doing something worthwhile; the warm feeling that the third party experiences from achieving some sort of progress;[2] and the genuine gratitude toward the third party of those benefiting from that achievement, often people the third party would never get to meet as a rule. The researcher will give in chapter three some accounts of mediation from the literature that illustrate these aspects.

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[1] Rather, they offer their 'good offices' (Bailey 1993:132).

[2] Lord Rosebery's successful intervention in the 1893 Midlands coal dispute led to his writing in his diary, about the day of the much praised settlement, 'It would have been a good day to die on' (McKinstry 2006:267).

That said, it is salutary to remember Berridge's (2002:203) words, written albeit with an international or intrastate context in mind:

> Mediation is often needed and often accepted; but it is often refused as well, and, if accepted, sometimes discarded. The lure of direct talks, even at a high political price, is usually strong.

Also, trade union officers, who have been increasingly pulled into individual case work in recent years (see Watson 1988, chapter 2), often see themselves as best able to fulfil any mediating role needed within their membership, or between their members and management. Addressing a symposium on collective labour dispute resolution, Dix (2011:7) said that union officials:

> . . . essentially . . . [see] their own role as 'quasi conciliators', or 'mediators' in representing the interests of their members. Introducing Acas might be seen to usurp this role; or worse be seen as a failure on their part. This is perhaps most characteristic of newer officials, and those without experience of negotiating in times when industrial action was more prevalent.

Mediation is certainly demanding of the mediator. One of the International Labour Organisation's guides has an appendix of what now sounds slightly patronising 'advice for conciliators', which includes (ILO 1988:132):

> [The conciliator] . . . should prepare himself [sic] fully for every meeting; in particular he should read over and carefully study his notes on the previous meetings, especially the last one. He should excuse himself from attending any party that evening, and should instead do his homework for the meeting on the next day, where he will need a clear head.

and Tony Blair's former personal envoy to the Middle East, Lord Michael Levy, recalls:

> As I boarded the plane . . . for the first of my Syria visits . . . [in 1999], even the knowledge that I was carrying a fulsome personal letter of introduction from Britain's prime minister could not fully quell a sense of apprehension . . . I found myself repeatedly heading for the toilet. By the time we set down at Damascus airport, I doubt I had ever relieved myself so often at 37,000 feet (Levy 2008: 158).

Focus of research

The focus of the research is mediation in workplace disputes concerning individuals (rather than collectives), to help resolve – as Acas would see it - 'disputes between individual employees and their employers, or between individual colleagues or groups of colleagues' which 'do not involve actual or potential claims to an Employment

Tribunal' (Acas 2009a:12). A broad definition of workplace has been adopted and, as will be seen, examples quoted include the highest level of government in the United Kingdom, that is, the Cabinet.

Disputes concerning individuals are often referred to as interpersonal disputes, but it is important to remember that, while some such disputes may well be about the very personal, others may reflect broader, perhaps collective, conflicts. The researcher later mentions, in this regard, the differences between Tony Blair and Gordon Brown while they were UK Prime Minister and Chancellor of the Exchequer respectively, and questions whether their dispute was about mainly personal ambition or whether it reflected, in reality, a philosophical disagreement as to what New Labour was about.

In the same vein, Bollen and Euwema (2013:331) consider that the goal of workplace mediation:

> . . . is to settle interpersonal employee conflicts arising out of a continuing or terminated employment relationship. Workplace mediation may seek to resolve disagreements over work conditions, conflicts between employees, the reintegration of employees after a leave of absence, and disagreements about an employee's termination. [It] . . . can also address complaints about sexual harassment, discrimination, bullying, multiparty conflicts and/or business-to-business conflicts.

and Saundry (2012:13) mentions that the mediation service at Bradford Metropolitan District Council 'is now routinely used for long-term sickness absence cases related to workplace stress where there is no medical resolution'.[3]

In addition, West and Markiewicz (2004:116) make the point that work role or organization factors 'cause the largest proportion of interpersonal conflicts in teams', those factors including:

- lack of clarity or mutual understanding of roles;
- the absence of clear, shared vision and explicit goals;
- inadequacy of resources;

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[3] The researcher recently saw a 'return to work' agreement mediated by an Acas colleague in a case of long-term sickness absence, albeit caused by chronic fatigue syndrome rather than stress but where relationships had deteriorated prior to the absence. The agreement ran to some 15 points, for example, T (employee) 'to keep . . . [N, her manager] fully informed of current medication regime'; and there was still to be a further mediation meeting 'to iron out some finer detail'.

- overlapping authority (it is not clear who is in charge); and

- task interdependence (where team members have to rely on one another to complete their part of the task successfully).

Fox (1971:140) identifies four basic types of conflict at work:

> The first involves only individuals . . . The second involves management and a lower participant who is not a member of a collectivity . . . The third is between a collectivity or one of its members and a manager or management group. The fourth involves conflict between collectivities.

This research focuses on Fox's (1971) first and second types of conflict in the main, but also on his third type in as much as any collectivity has limited involvement in the conflict in question.

Conflict has been defined in many ways but the definition adopted in this thesis is as follows: 'conflict is a relationship between two or more parties (individuals or groups) who have, or think they have, incompatible goals' (Fisher et al 2000:4), which may be illustrated as:

Figure 1.1 Goals and behaviour in conflict

		GOALS	
		COMPATIBLE GOALS	**INCOMPATIBLE GOALS**
B E H A V I O U R	**COMPATIBLE BEHAVIOUR**	NO CONFLICT	LATENT CONFLICT
	INCOMPATIBLE BEHAVIOUR	SURFACE CONFLICT	OPEN CONFLICT

Source: Fisher et al (2000:5)

In this thesis, too, the researcher will try to follow what Saundry and Wibberley (2012:6) say is Dix et al's (2009) distinction between 'conflict' and 'disputes': Dix et al 'define [conflict] as "discontent arising from a perceived clash of interests" [a definition similar to Fisher et al's (2000:4) above] and [they define] disputes . . . [as] "manifest expressions" of that discontent', what Fisher et al (2000:5) label as incompatible behaviour.

Using 'conflict' and 'disputes' interchangeably, Moore (1988:253) looks at the causes of conflict and identifies interest, structural, value, relationship and data conflicts. Perhaps somewhat contentiously, he suggests (his emphases) that interest, structural and value disputes are largely '*genuine* or *realistic* in that the objective conditions . . . for disagreement exist', while relationship and data conflicts are largely '*unrealistic*, and in fact *unnecessary*, because the conflict is fuelled by strong feeling, misperceptions, poor communications, repetitive negative behaviour, lack of information, or misinformation rather than conflicting objective conditions'.

'Crossover'

Although the focus of this research is individual workplace mediation, the researcher has also drawn in this thesis upon practice and theory in collective workplace mediation, and – more significantly - upon practice and theory in mediation in contexts other than the workplace, such as commerce, the community, the family, and the international arena. The styles and attributes applicable to mediation in these other fields are applicable to individual workplace mediation, too – and vice versa. The researcher would argue this on the basis of his own experience as a community, family and workplace mediator; on the basis of the training that he has received, and the reading he has done, for these various roles; and on the basis of comments such as Newman's (2000:183) on the qualities of a mediator.

Also, Whatling (2012:20) has suggested that, from his experience of a wide range of different mediation and dispute resolution contexts, 'the core skills and strategies are applicable across the board'; and Haynes, whose practice and writing – as we shall see – has greatly influenced Acas's mediation practice, argues in Haynes and Haynes (1989:xv):

> The five case studies in this [*Mediating Divorce*] book are related to family mediation, but the issues that emerge from the management of negotiation are universal; the applications can be made by all who are engaged in studying negotiating behaviour and resolving conflict through negotiation.

In addition, Beer (1997:iii) says that copies of her mediation manual have
> . . . surfaced in such far-removed places as South Africa, Costa Rica, Norway, Australia, Israel, Romania, and Burma. Mediators have found the . . . model useful for working within corporations and institutions, for public policy and environmental issues, for family and community disputes, for schools, and in their private lives.

In his early mediation work with clients of Acas, and in the early mediation advice and training that the researcher gave within Acas, or to client organisations on behalf of Acas, the researcher borrowed from the mediation training that he had himself received, either for community/neighbour dispute work or for family separations. The training received for community/neighbour dispute work had drawn upon Mediation UK (1995), and the researcher's publicising this manual within Acas led to other operators using it for the training they offered to clients. The original Acas Certificate in Internal Workplace Mediation (CIWM) manual (the original, that is, of Acas 2011a) drew considerably upon Mediation UK (1995), and the influence is still recognisable in the current version.

The training that the researcher received for mediating in family separations owed much to the work of Haynes. Although known as the 'father of family mediation', Haynes always said that his ideas on the subject came from his earlier work as a union negotiator in the USA, and that there are generic mediation principles and strategies, regardless of context. The researcher still uses Haynes's 'Michael and Debbie' family mediation video (transcript at Haynes and Haynes 1989: 49) in his work with Acas clients, as do other Acas operators.

In addition, Liebmann (2000:32) has indicated the similarity of mediation in different contexts, in pointing out:

> Early mediation practitioners linked with each other to explore mediation as a basic concept. Then the different sectors of mediation developed separately, as funding allowed. Now more and more links are being made across sectors.

She notes (Liebmann 2000:33):

> . . . the emergence of 'multi-mediation centres' [in this country], similar to many mediation centres in the USA. This could be particularly appropriate for rural centres, where there may not be enough referrals for one particular kind of mediation, to make a single-type mediation service viable.

To be fair, however, in trying to summarise similarities and differences between different fields of mediation, Roberts (2007:218) concludes: 'The majority view, that there are both commonalities and differences, is complicated by the variety of perspectives on the subject.'

On the theme of 'crossover', Powell (2008:135) reports that, in 1999, the then Secretary of State for Northern Ireland, Mo Mowlam, 'appointed Frank Blair of the Scottish industrial mediation service, Acas, to act as mediator' in the issue of Orange Order parades. 'But despite Frank's valiant efforts, and those of the two governments, over many months the deadlock could not be broken' (Mowlam 2002:108).[4] Disappointingly, but perhaps understandably, the details of Frank's experiences in Northern Ireland have never been fed back to his operational colleagues.

Finally, the researcher has also drawn – in this thesis - on portraits of well-known (mainly, international) mediators and on the area of diplomacy.[5] Diplomacy is not synonymous with mediation but the latter is one of the modes or channels through which the functions of diplomacy are pursued (Berridge 2002:89). Also, Nicolson's (1939:104) thoughts on the 'ideal diplomatist' – that s/he should display truthfulness, precision, calm, good temper, patience, modesty, and loyalty – remind the researcher very much of the qualities of a good mediator. And, in this year (2015) of a Royal Academy exhibition on Rubens, it is worth recalling the painter's work as a diplomat in seventeenth century Europe and his qualities of 'uncommon intelligence, preternatural charm, and ability to navigate through ever-shifting political winds' (Lamster 2009:cover), again, very much the qualities of a mediator.

In short, although the focus of this research/thesis is workplace mediation, in his review of the literature and his empirical evidence the researcher draws on mediation in other contexts, particularly family mediation.

Research questions

Acas has commissioned research over the years in respect of its work of mediating in disputes concerning individuals. Much of this research relates to what Acas has rather

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[4] Mowlam (2002:108) wrongly refers to Frank's efforts as 'independent arbitration'.

[5] Unfortunately, after Askwith (1974), no Chief Industrial Commissioner, or person in a successor post in the UK, appears to have written up their experiences for public consumption. The researcher knows of few write-ups of workplace mediations comparable to, say, Bernadotte's detailed account of his mediation efforts in the international arena in 1944/5 (Bernadotte 2009).

confusingly called 'individual conciliation', the uncharged-for service where it has exercised its 'statutory duty to try and promote the settlement of almost every kind of claim to the Employment Tribunal, therefore avoiding the need for a full hearing of the case' (Acas 2009a:11). More recently, there has been research on the newer, charged-for service of 'individual mediation', which – as indicated – concerns disputes not involving an Employment Tribunal.

There is, however, a research gap in the individual mediation area, in that Acas has not looked specifically at what counts as 'success' in its workplace mediation, and how mediators in Acas might achieve that success. Accordingly, the research questions for this study were exactly that: what is 'success' in workplace mediation, and how might mediators achieve success? To flesh out these questions:

- **What is 'success' in workplace mediation?**
  the researcher has explored:
  - o what the literature says
  - o what practitioners say and do
  - o a measure of success based on the idea of 'conflict management impacts'.

- **How might mediators achieve success?**
  the researcher has explored:
  - o which mediator variables lead to success
  - o which situational variables lead to success
  - o which variables are the most significant.

Original contribution

As will be seen below, there is no consensus on what success is and how it can be achieved. Accordingly, this thesis, which considers these questions through a case study of Acas mediators and explores an emerging model predicting success, is an original contribution to the research literature on workplace mediation. Moreover, the fact that this academic research has been conducted by a person who is a practising

mediator[6] has, in the researcher's opinion, added an additional dimension to this original contribution.

Interestingly, Wilson (2002:67) says that 'research [into, at least family, mediation] appears not to benefit from the experiences and learning of high volume providers', which 'has resulted in a widening gap between what is written about mediation and what actually happens at grass roots level'. The researcher would stress that he has not looked to produce just another 'cookbook' on mediation (see chapter four) nor, on the other hand, yet another model that – while intellectually impressive – appears to offer little to the practising mediator.

Theoretical framework

The theoretical framework in which this study is set is that of 'systems', a system for these purposes being a bounded collection of linked, inter-dependent components or elements (human or otherwise) with a particular purpose, the components being affected by being in the system and likely to change the system if they leave it (Carter et al, 1984:4 and 113). An organisation within which a workplace dispute occurs might be seen as such a system. Some components of a system may be grouped into sub-systems, and this study regards those components typically involved in a workplace dispute as a dispute sub-system of the wider (host organisation) system.

The researcher will look in greater detail at the systems approach, and its application to this study, in chapters four, six, seven and eight of this thesis, in particular. There are diagrams of a dispute sub-system and of the Acas mediator system in chapter four. Suffice to say at this stage that any mediator looking to intervene successfully in any system must not neglect the linked, inter-dependent nature of its components.

Research population

The primary research population is those Acas staff (of whom the researcher is one) who provide mediation, on a charged basis, to help resolve the above mentioned

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[6] The position of the 'insider' is discussed, further, in chapter five.

'disputes between individual employees and their employers, or between individual colleagues or groups of colleagues' which 'do not involve actual or potential claims to an Employment Tribunal' (Acas 2009a:12). Seventy-six names are listed in the Acas 'mediators' internal e-mail group but the list needs updating (in terms of both additions and deletions) – and, as will be seen later, some senior Acas staff 'dabble' in mediation while not being labelled as 'mediators'. The researcher has tried to learn, and collect data, from some others too, for example, mediators working for other than Acas (whether on their own account or for other organisations), and trainees from outside Acas attending the organisation's shorter or longer mediation courses – as well as (the researcher) interrogating Acas's records and statistics on mediation.

Structure of rest of thesis

The remainder of this thesis comprises
- a chapter on Acas;
- a review of the literature on mediation generally;
- a chapter on what the literature contains on success in mediation;
- an outline of the methodological approach used to seek answers to the research questions;
- a detailed analysis and summary of the research findings, over two chapters;
- a chapter of discussion and conclusions; and, finally,
- a summary of recommendations for action and some proposals for further research.

CHAPTER TWO: ADVISORY, CONCILIATION AND ARBITRATION SERVICE (ACAS)

Introduction

Given that the primary research population of this study is individual mediators working for Acas, the researcher will look now at that organisation - its origins in state involvement in collective conciliation and arbitration in the 19th century; its current regional and Head Office/National structure; and its establishment as an 'independent' body and the reasons and safeguards for this. The chapter goes on to cover Acas's current functions, and their relative importance in terms of amount of work carried out. Finally, the chapter details the development of individual mediation work and training by Acas, effectively since the turn of the century.

Origins

To look at the functions reflected in the Advisory, Conciliation and Arbitration Service title, a useful starting point for considering state involvement in collective conciliation and arbitration is the Conciliation Act 1896. Webb and Webb (1926:243) say of the 1896 Act:

> The Board of Trade is empowered, in the case of an industrial dispute, 'to inquire into the causes and circumstances of the difference'. It may intervene as the friend of peace, to persuade the parties to come to an agreement. If a conciliator is desired, it may appoint one. Finally, if both parties join in asking that the settlement shall proceed in the guise of arbitration, and wish the Board to select the arbitrator for them, the Board may accede to their request, as it might have done without any Act at all!

Talking about both collective conciliation and arbitration, Amulree (1929:108) confirms that, by and large, 'the [1896] Act does not seem to have given the Board [of Trade] power to do anything which it could not do and was not in fact doing before'. By way of explanation, a Bureau of Labour Statistics had been established within the Board in 1886 to collect and prepare labour statistics, and, in 1893, these activities had been reorganised in a separate department known as the Labour Department. Although '[i]ntervention in trade disputes was not included nominally among the activities of the

Department', Amulree (1929:110) says that 'it was an easy step from the collection and publication of information to the proffering of advice and assistance'.[7]

Acas's advisory work had its origins in the Personnel Management Advisory Service set up in 1945 by the Ministry of Labour 'to assist in the improvement of relationships and manpower efficiency in industry by providing advice and information to employers on personnel management' (Armstrong and Lucas 1985:2); while the individual conciliation function was foreshadowed by the Donovan Commission's recommendation that its proposed labour tribunal hearings 'should be preceded by a "round table" meeting in private between the parties and the tribunal, or one or two of its members, in order to settle the case' (Donovan 1968:159). The function was created when the right not to be unfairly dismissed was established by the Industrial Relations Act 1971 (Hawes 2000:9), a statute remembered, of course, for other things and which Davies and Freedland (1993:327) labelled a 'legislative Titanic'!

The comment in Acas's First Annual Report that '[s]ometimes the [individual] conciliation officer may make several visits to the complainant and the respondent before he can obtain a settlement' (Acas 1976:25) shows how much the individual conciliation job has changed since then. The researcher himself carried out the individual conciliation function in London, from 1981 to 1983, and can attest to spending a lot of time travelling around and meeting with disputing parties, in addition to any telephone work. It was hard to disagree with Acas colleagues who said, 'This is the best job you'll ever have.'[8] The job at that time was, to the researcher's mind, not so very different from the type of work that was later introduced as individual mediation. Now, however, statutory conciliation work is essentially carried out by telephone and/or e-mail. The researcher says more on this at the end of this chapter.

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[7] In addition, McKinstry (2006:267) says that Rosebery's intervention in the 1893 Midlands coal dispute 'marked the first time that a Cabinet Minister acted as mediator in a serious industrial dispute. Within only a few months of his settlement, Asquith [as opposed to Askwith, in chapter three] was arbitrating in a strike by London cabmen. Within two years, a Conciliation Act was passed.'

[8] Now, with the introduction of Early Conciliation (see later) and the pressures it generates, it appears that Acas individual conciliators are going off work sick with stress.

Through various routes which we do not need to trace here, the advisory, conciliation, arbitration and some other state involvement functions ended up in a new body, Acas, in 1974, instead of being carried out by the government department charged with responsibility for employment matters. Acas's original statutory duty, set out in the Employment Protection Act 1975, was 'to promote the improvement of industrial relations and in particular to encourage the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery'. This was revised in the Trade Union Reform and Employment Rights Act 1993 to read, 'to promote the improvement of industrial relations in particular by exercising its functions in relation to the settlement of trade disputes' (Hawes 2000:26).

Structure

An organigramme of Acas is as follows:

Figure 2.1 The structure of Acas

Acas Council

Chief Executive Officer

Chair

HR & Estates

IT

Finance

Delivery

Strategy

London, South East & Eastern

Operational Policy and Performance

Midlands, South West & Wales

North of England

Chief Conciliator

Scotland

Source: Acas (2014a:46)
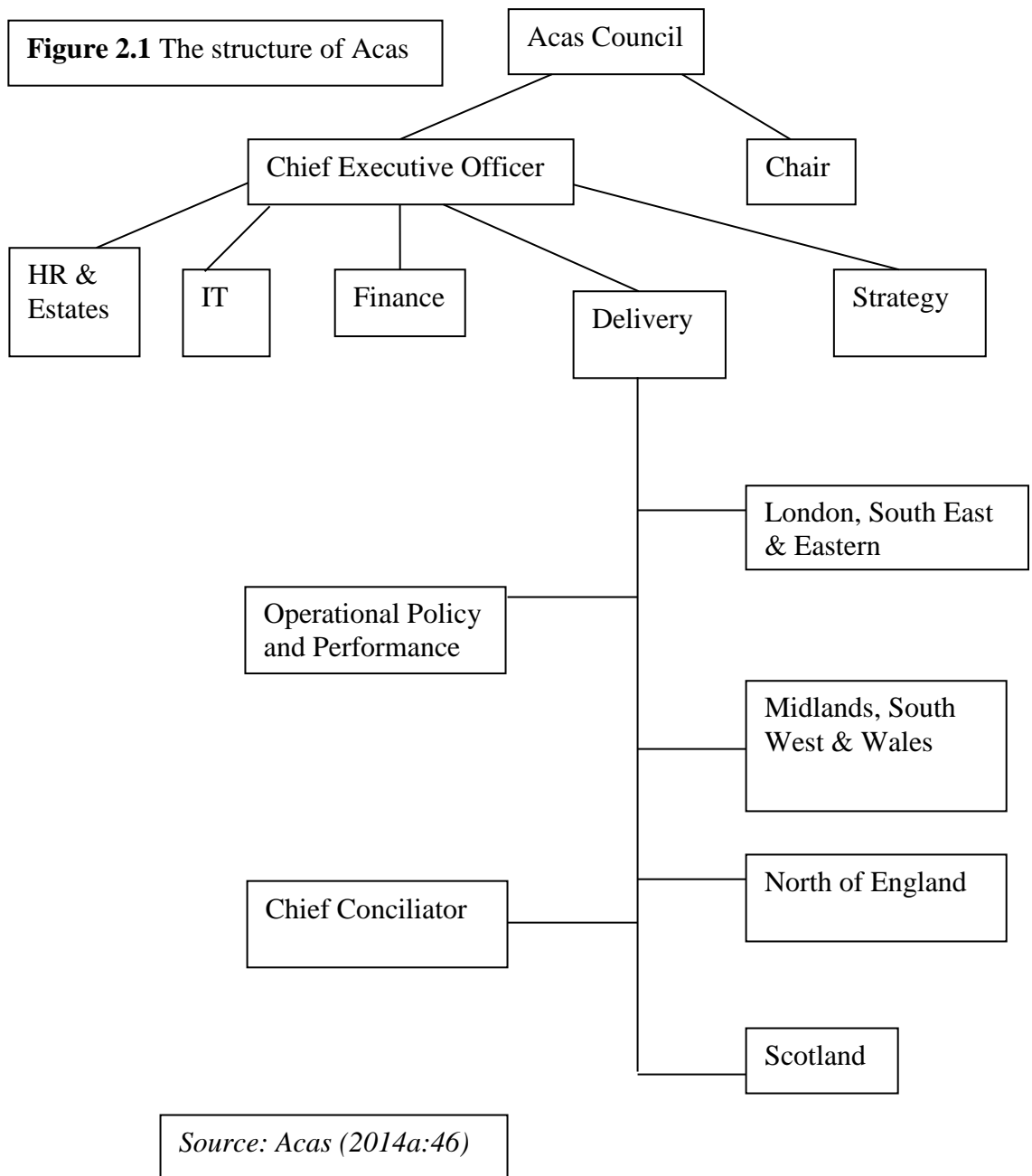
The three regions for England and Wales, and Acas Scotland, each carry out the full range of Acas functions (see below). The average number of persons employed during 2013/2014 at Acas National was 123, and in the Regional Offices and Acas Scotland 647, a total of 770 (Acas 2014a:88). A rough breakdown of Acas's staffing, by function, in the English and Welsh regions and Scotland shows:

Table 2.1 Acas's staffing by function in the English and Welsh regions and Scotland, November 2014

	Adv/CC	Concil'n	GPS	Helpline	National	Support
L, E & S						
BSE	6	17	5	9	2	4
Fleet	4	29	4		1	4
London	9	48	2	23	4	11
M, SW & W						
Birm'ham	5	22	3	22	2	7
Bristol	4	20	3	16	4	4
Cardiff	2	21	1	22	4	3
Nott'ham	4	20	1	22	12	4
Wrexham	1	1				
Northern						
Leeds	5	20	3	11	13	6
Liverpool	2	22	1	15	7	2
Manchester	4	27	1	25	1	8
Newcastle	4	21	1	38	3	5
Scotland	7	23		35		5
Totals	57	291	25	238	53	63

Source: Acas Staff Directory as at 19 November 2014

Key:
Adv/CC: Advisory/Collective Conciliation
Concil'n: Individual Conciliation
GPS: Good Practice Services
Helpline
National: National functions carried out by staff physically based in the regions
Support: Admin staff
(Regional and Area Directors have been excluded from the above figures. No discrete individual mediators are listed in the Staff Directory; the function is shown as being combined with other functions, usually individual conciliation.)

L, E & S: London, Eastern & Southern region
BSE: Bury St Edmunds office
M, SW & W: Midlands, South West & Wales region
Northern: Northern England region

Independence

Acas was initially founded as the Conciliation and Arbitration Service in 1974 and, after its change of name to the Advisory, Conciliation and Arbitration Service in 1975, it was established as an independent, tripartite, statutory body under the Employment Protection Act of the same year (Brown and Towers 2000:ix). It 'was created largely

because trade unions (and many employers) had lost confidence in the impartiality of the conciliation and arbitration services offered by the Department of Employment' (Davies and Freedland 1993:409).

Confidence had been lost because, it was felt, 'restrictive incomes policies [and the Department's responsibility for them] had inhibited conciliators and arbitrators from resolving disputes and differences on their merits' (Armstrong and Lucas 1985:3). The trade union leader, Jack Jones, believed that 'the eventual setting up of ACAS and certain aspects of the Employment Protection legislation of the 1974 Labour Government were initiated in . . . [an] article' he had written for *New Statesman* in February 1972 (Jones 2008:246). In that article, Jones argued for the development (at both regional and national level) of a voluntary conciliation and arbitration service, to 'replace the legal rigmarole of the Industrial Relations Act . . . with a simple, clearly understood . . . means of providing working people with an optional alternative to the use of the strike weapon' (Bell 2004:227).

In a letter of 8 August 1974 to Jim Mortimer, the first Chairman of Acas, Michael Foot, the Secretary of State for Employment, stated:

> It is of course essential . . . that . . . the Service should be, and be seen to be, independent and so attract and retain the co-operation and support of all sectors of employment. So far as the Government is concerned, it will not seek to interfere in the activities of the Service (Acas 1976:42).

'The independence of Acas is achieved in a number of ways' (Acas 1976:2). First, there is the statutory assertion/confirmation, originally in the Employment Protection Act 1975:

> The functions of the Service and of its officers and servants shall be performed on behalf of the Crown, but . . . the Service shall not be subject to directions of any kind from any Minister of the Crown as to the manner in which it is to exercise any of its functions under any enactment (Acas 1976:2).

Secondly, '[o]versight of the Service's operation is the responsibility of a Council consisting of representatives of employers and trade unions, and a group of independent people including the Chairman' (Armstrong and Lucas 1985:4). The members appointed in September 1974 to the initial Council of Acas were very much 'the great and the good' of industrial relations practitioners and academics in Britain, at that time:

Jack Jones and George Smith from the trade union world and Hugh Clegg and John Wood from academia, to name just four of the then ten (see Acas 1976:1).

Armstrong and Lucas (1985:4) point out, however:

> . . . the constitutionally established independence [of Acas] requires qualification and to be placed in a subtler context. Acas is funded by the State, the scale and status of its manpower resources are monitored and influenced by the Department of Employment and the Secretary of State, after consultation with interested parties, appoints the members of Council.

The Department for Business, Innovation and Skills (BIS) is now the sponsoring department for Acas and the Acas funding figures for 2013/2014 show that, while just over £3.9m came from Acas traded services and publication sales, £45.8m came from BIS (Acas 2014a).

Over the years since the researcher joined the staff of Acas in 1981, trade union representatives with whom he - as Acas advisor or conciliator – has been working have occasionally questioned, with differing degrees of seriousness, how independent Acas can be when its funding comes largely from a Government department with its own interests in the workplace. The researcher has always been able to respond that he was not aware of any pressure on him from that Government department to act in particular ways, and that he had determined for himself 'when, and under what circumstances, to intervene or to respond to invitations for intervention in particular industrial relations problems' (Acas 1976:2).

That may not, however, be true for, say, Acas's Chief Conciliator (whoever s/he is) when confronted with some national disputes – which may be embarrassing or annoying to politicians, who then push Acas for action. Also, while BIS may not seek to influence – in any obvious sense - the actions of an Acas officer when engaged in a dispute between individuals, the Government/BIS system does set the parameters within which Acas operates and thus influences its functions. As will be seen, these parameters go beyond just funding, a very topical example being the introduction of a Civil Service-wide 'performance management' scheme, the essentials of which Acas has had no choice but to adopt – regardless of its impact.

Current functions

Acas's Annual Report for 2013/2014 (Acas 2014a:4) identifies the organisation's strategic aims as being:

- To improve organisational performance and the quality of working life by providing practical advice and expert support.

- To resolve disputes at work at the earliest stage and help avoid conflict in the future.

- To lead debates on employment issues using insight from its own experience and wider research.

- To continue to develop as a flexible and resilient organisation that uses the skills of its people to provide value for money and excellence in everything it does.

It notes, 'These aims are underpinned by duties and functions set out in law', as follows:

- To promote the improvement of employment relations in Great Britain.

- To advise employers, workers, unions and businesses on employment relations and employment policy matters.

- To prepare codes of practice on good employment practice.

- To provide conciliation in complaints made by individuals under legislation on employment rights.

- To provide a conciliation service to resolve collective employment disputes. To arrange independent arbitration and mediation.

- To maintain a panel of independent experts for equal pay claims in employment tribunals.

- To administer the Acas Arbitration Scheme, including the appointment of arbitrators, administrative assistance during the hearing and the scrutiny of awards.

- To provide a secretariat for the Police Arbitration Tribunal.

As can be seen, individual mediation, the focus of this thesis, is not specifically mentioned.

An idea of the relative importance of the above functions might be gained from the following figures extracted from Acas's *Annual Report 2013/2014* (Acas 2014a):

- 40,938 net ET1 (individual) conciliation cases received by Acas
- 21,762 Pre-Claim Conciliation (PCC) referrals (the PCC service has now been replaced by Acas's Early Conciliation service, for individual disputes))
- 256 new individual mediation cases started
- 858 collective disputes received for conciliation
- 15 cases referred to collective arbitration and dispute mediation
- 115 joint problem-solving activities (fee-waived)
- 895,748 Helpline calls answered
- 1,685 in-depth advisory meetings
- 3,036 in-depth advisory telephone calls
- 110 charged workplace projects (joint problem-solving activities)
- 39 Certificate in Internal Workplace Mediation (CIWM) in-house and open-access courses
- 1,053 workplace training events

- 1,076 open-access training events.

Acas has recently been subject to a Triennial Review, such reviews being the Cabinet Office mandated process for the regular review of all Non-Departmental Public Bodies (NDPBs). The purpose of the exercise is to ensure that each body still performs a necessary function, and has appropriate delivery mechanisms and governance arrangements. The first stage of Acas's review concluded that Acas should continue to exist, in its current form and with its current range of services. Stage two confirmed that Acas's governance arrangements complied with most of the good practice guidelines (Acas 'Cassie', that is Intranet: 18 October 2013).

Development of individual mediation work and training by Acas

As noted earlier, individual mediation – as opposed to individual conciliation or collective disputes mediation[9] - is a fairly recent activity for Acas. It is not, for example, mentioned in Lowry (1990) or Towers and Brown (2000). For many years after Acas's establishment, the official response to requests for such mediation (to help resolve disputes between individual employees and their employers, or between individual colleagues or groups of colleagues, which did not involve actual or potential claims to an Employment Tribunal) was that, strictly speaking, Acas could not help. It could only do so if the disputes *did* involve actual or potential Employment Tribunal claims, in which case Acas would 'conciliate' between the parties (effectively, mediate in an evaluative style – see chapter three).

All of this the researcher knows from personal experience as an Acas operator, of having to respond to requests for mediation in situations not involving actual or potential Employment Tribunal claims. The researcher also knows from personal experience that, in practice, Acas operators sometimes helped disputing parties seeking assistance, but they would have labelled that assistance as, say, an 'advisory project'

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[9] Goodman (2000:52) defines this as being 'broadly intermediate between [collective] conciliation and arbitration, in that the mediator (or board of mediation) may proceed initially by way of conciliation but is expected to make formal recommendations', which the parties are 'not committed in advance to accept'.

and the Acas operators involved were unlikely to have had much, if any, mediation training. So, the end result might have been a bit 'hit and miss'! Hawes (2000:27) says:

> . . . it is difficult to avoid the conclusion that during the 1990s ACAS was more often coping with, or 'running alongside', changes in the employment world, than expanding its range and depth of services and helping to transform industrial relations behaviour in clearly thought out ways.

With hindsight, the foundations for a significant change in this situation, the eventual introduction of a chargeable, individual mediation service,[10] were being laid with the introduction into Acas of charging through the Trade Union Reform and Employment Rights Act 1993 - 'although, at the [Acas] Council's insistence, . . . [charging] was restricted to short courses for employers and to publications. The Secretary of State [however] took reserve powers to require charging in some other areas' (Hawes 2000:26). The Acas Council unanimously opposed this decision on reserve powers, and its 'concerns were not eased by being told that the Secretary of State had no current plans to exercise such a power' (Acas 1992:29).

However, by the time of the Acas Corporate Plan 2002/3 to 2004/5, it was being stated:

> In addition to grant-in-aid funding from DTI [the Department of Trade and Industry] we will be examining the potential for securing other revenue streams. We are planning to increase self generated income, mainly from our promoting good practice work, fourfold from just under £0.5 in 2001/02 to over £2m by 2004/05 (Acas undated a:5).

Later, Sisson and Taylor (2006:35) claimed: 'To allow Acas to increase its reach and impact, it has been necessary to introduce a number of charged-for services that enable it to further its mission.'

Arguments for something like what is now Acas's individual mediation service were set out by two members of Acas's operational staff in an internal paper dated September 2000. The paper was 'prompted by two recent requests for ACAS advice and assistance with the provision of third-party "mediation" at an internal stage of bullying/harassment procedure' (Hodder and Ronnie 2000:1); and it argued:

> . . . our expertise should be supplemented by an appreciation of counselling techniques and ACAS officers empowered to address the breakdown of individual employment relationships and prevent such problems arising in the future. ACAS officers have become 'experts' in facilitating change. This

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[10] In 2006, according to Wareing (2012:2), although the researcher would have said 2003, if not earlier.

expertise should embrace the skills necessary to change individual relationships at the workplace.

The Acas individual mediation service actually emerged following the establishment by the Acas Council in 2001 of 'a Task and Finish Group to review future strategy options. The Group's report *Today and Tomorrow* set out a number of recommendations for change' (Acas 2002:18). Included in these recommendations was one to '[c]onsider developing Acas as a centre of excellence in Alternative Dispute Resolution, including a training role in mediation techniques'. The Group's recommendations were divided into seven strands of work, for each of which there was developed a plan for action and delivery of the changes.

In a 2003 paper, Acas's then Programmes Directorate recalled that - under the *Today and Tomorrow* 'products and services' strand of work – it was recommended to consider 'Acas offering its services as a neutral third party mediator to resolve differences in organisations' (Acas 2003:1). In the paper, the Programmes Directorate proposed two principal products: Acas training for in-house mediators employed by the organisations concerned, and mediation by Acas mediators.

Interestingly, the Programmes Directorate paper noted:

> Outside Acas, the word 'mediation' tends to be used much in the way we use 'conciliation'. Some members of the Acas focus group charged with the development of this area had concerns that mediation may require a more psychological approach than conciliation and thus a different set of skills.[11] Therefore they felt that not all staff might wish to take on such a role. Other members of the focus group who have wider experience of mediators in other roles indicated that the training that Acas provides and the skills currently used by operators are not very wide of the facilitative mediation mark. A comparison between Acas conciliation competences and those required by the NVQ Level 4 in Mediation shows much in common (Acas 2003:3).

First mediation pilot

Around this time (September 2003), Acas actioned 'recommendations made by the Employment Tribunal and Better Regulations Taskforces . . . [to] pilot mediations, appeals and employment law advice visits . . . free of charge to businesses with less than 50 employees' (Fox 2005:1). The pilot was restricted to East London and the

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[11] In chapter eight, the researcher looks at the idea of a mediator-counsellor/therapist.

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Yorkshire and Humberside Region initially but later extended to the whole of London, the whole Northern Region and the Midlands (Seargeant 2005:1). It ran until September 2004. Two types of mediation were on offer: facilitative mediation (see below and chapter three) and 'directive mediation for disputes where the parties wanted a mediator to review the dispute and make proposals' (Seargeant 2005:1).

Fox reports (2005:1) that there were 24 mediations carried out under the pilot and (2005:2):

> The feedback from . . . parties taking up mediation was very positive. The vast majority . . . were highly satisfied with the service they received from Acas and reported a wide range of benefits, from the smooth running of the business to savings in costs of disputes (including the costs of employment tribunals and protracted internal procedures). Mediation worked well in nearly all disputes, including those which were highly complex and deeply entrenched.

Although the free pilot ended, Acas mediation continued to be made available on a charged basis.

As for Acas individual mediation history after the 2003/04 pilot: the *Acas Annual Report and Accounts 2004/05* indicated that the Department of Trade and Industry had 'identified lack of awareness of mediation as a key barrier to its use to resolve workplace disputes' (Acas 2005a:20). Further, that, to help raise awareness, Acas had published in 2005 a policy discussion paper *Making more of alternative dispute resolution* (Acas 2005b) and had held that year a national conference *New Horizons in Dispute Resolution* (Acas 2005c). The researcher particularly remembers that conference for the almost apoplectic reaction of several private sector mediation providers present when - at one stage - it was suggested that Acas was well-equipped to provide individual mediation, without their services also being mentioned![12]

Sisson and Taylor (2006:31) say that the 'direction set in *Acas Today and Tomorrow* . . . [was] developed further in the two editions of *Improving the world of work*'. These outlined Acas's strategic plans for the periods 2004-2007 and 2005-2008. The plan of action for 2005/06-2007/08 (Acas undated b:17) stated:

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[12] 'The challenge for mediation is . . . that everybody wants a piece of it' (Skills for Justice 2014:5).

> To complement our work in resolving individual rights disputes [the individual conciliation work], we will develop a portfolio of conflict management services aimed at resolving workplace problems and issues before they develop into full blown disputes. These could be communications or behavioural issues, personality or relationship problems together with conflicting rights and interests. Any stage of a dispute could also be covered . . . Included in the portfolio will be . . . the provision of trained mediators to facilitate the resolution of workplace disputes when there is no tribunal application imminent.

There was more of the same in the *Acas Corporate Plan 2007-2010* (Acas undated c:7), which pledged that Acas would provide 'a mediation service to facilitate the resolution of individual workplace disputes at an early stage when there is no tribunal application imminent'; also, provide 'accredited training to in-house mediators with a recognised award on completion'. There was, too, a pledge that Acas would '[b]uild the capacity and confidence of Acas staff and their managers to deal with the new and challenging situations they face through effective training and development opportunities' – a pledge whose honouring (or not) we shall explore in later chapters.

Second mediation pilot

In 2012, Cambridge and Manchester became the first areas where BIS proposed to 'fund mediation training for employees from a group of 24 SMEs [small and medium-sized enterprises] to set up pilot networks of trained mediators', the mediators to be 'available to provide mediation to other organisations in their respective network' (BIS 2013a). Acas was involved in the selection of the trainers and Consensio was chosen to develop and provide a comprehensive mediation training package. The researcher has not seen any BIS report on the success (or otherwise) of these pilots; but he did hear comments during the 2012/2013 ESRC-funded 'Reframing Resolution' seminars that it was proving difficult to find SMEs willing to offer up, for training, staff who might then need considerable time off work to mediate for a neighbour organisation.

A slightly different story comes from Skills for Justice (2014:8), which notes:

> . . . since the training was completed earlier this year, mediators are reporting that they are being little used by other SMEs in their network, but that they are performing 'informal mediations' in their own organisations using the skills they learned through mediation training.

One of those trained as a mediator was Vicky Keating, senior HR business partner at Marshall Aerospace and Defence Group (hardly an SME, with 1,800 employees),

whose comments in *People Management* (September 2013:18) would seem to confirm what Skills for Justice is saying.

Enthusiasm for mediation

So, in the early years of the new millennium, there did appear to be a marked enthusiasm throughout Acas for conducting, and publicly saying it conducted, individual mediation work and mediation training. It is, however, now the case that Acas does not seem to publicly 'push', to any great extent, its own individual mediation work.

Although it is not loudly articulated within Acas, the current reason for this lack of promotion (there have been other reasons, such as potential inability to meet likely demand, given in the past) is, apparently, that the senior management of Acas is minded to leave plenty of room for competition over individual mediation, given that the organisation has a monopoly over statutory individual conciliation work - a monopoly which it does not want to risk. It is not clear whether clients' interests have been explicitly taken into account in this decision. BIS will undoubtedly have shaped this stance of Acas senior management.

Looking back, however, enthusiasm for individual mediation among Acas senior management appeared to decline some years ago. For example, the *Acas Annual Report and Accounts 2008/09*, although reporting a significant growth in demand for Acas's mediation services, seemed to display much less enthusiasm for the function than previous annual reports, covering individual mediation in just one paragraph (Acas 2009a:12).

Style of mediation

It is not clear precisely when Acas first started to think in terms of the facilitative style[13] for its individual mediation work (actual mediations and mediation training).

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[13] The main objective of the facilitative style (also called problem-solving or interest-based mediation) is avoiding positions and, instead, negotiating in terms of the parties' underlying needs and interests rather than their strict legal entitlements (Boulle and Nesic 2001:28). This style is, however, explained in much more detail in chapters three and four.

Nor is it clear who 'chose' that style for Acas, and how much (if any) consideration was given to adopting other styles, such as the transformative mediation favoured by the United States Postal Service (USPS). It appears that the initiative for using transformative mediation for USPS's Resolve Employment Disputes, Reach Equitable Solutions Swiftly conflict resolution programme (REDRESS) came from the founder and first director of the programme, Cindy Hallberlin (Bush and Folger 2005:92).[14] It would be interesting to know whether any one individual wielded similar influence in Acas's choice of facilitative mediation, or whether there was just a 'drift' into that style.

The facilitative style is now, however, firmly embedded in Acas. Acas's own mediators are trained in it and Acas's trainers churn it out on the organisation's Certificate in Internal Workplace Mediation (CIWM) and shorter mediation courses.[15] Indeed, although the latest version (Acas 2011a) of the CIWM Manual retains a handout covering some of the other models of mediation, it has dropped a requirement that trainees define in their portfolios the 'facilitative model in [the] context of other models', and now asks merely that the 'Acas facilitative model' be defined.

Acas's mediation training
On the subject of Acas's mediation training, the *Acas Annual Report and Accounts 2004/05* reported that Acas had 'developed a training programme for larger employers who wish to use their own employees to mediate in grievance, discipline and other workplace disputes. This five-day course is accredited by OCR'[16] (Acas 2005a:19) and its successful completion leads to the Certificate in Internal Workplace Mediation

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[14] Hallberlin (2001:378) says that she decided to use transformative mediation as the exclusive model in REDRESS mediations because she 'knew almost any type of mediation could result in "settlements," but . . . I was looking for improved relationships'.

[15] Interestingly, a university mediator who had experience of both Acas and private sector facilitative mediation training told the researcher in interview that the two felt very different, in that the latter included much more summarising and reflecting back.

[16] With OCR's wish to give up CIWM accreditation, this had passed completely to NOCN by the end of September 2014. The accreditation is a check that trainees' portfolios cover all aspects of the CIWM specification, not that what is taught them is accurate or up-to-date. Although it could have sat in on actual training, OCR never did.

(CIWM) referred to above. A look at Acas's Events and Advisory Recording System (EARS) records shows that, by the beginning of June 2013, Acas had run the CIWM course about 150 times as an open access event for some 1,200 trainees, and around 100 times in-house. (If these figures appear somewhat 'broad brush', that is because some of the very early EARS records on CIWM contain seeming inaccuracies, such as shorter mediation courses being included. The researcher has been able to correct for some, but not all, of these inaccuracies.)

The EARS figures seem to suggest that the early demand to run the CIWM course in-house has now abated somewhat and that the open access courses have come to the fore. A combination of factors probably accounts for this: an in-house course costs £13,500 for up to eight trainees, and £17,995 for up to 12, as opposed to £1,995 per trainee on an open access course, quite a consideration in the current economic climate; even large employers have realised that they may not regularly generate enough mediations to keep eight to 12 mediators occupied/give them enough practice to maintain their skills;[17] and it is easier for Acas staff to set up and try to fill an open access course than it is to generate an in-house one, and the pressure is currently (early 2015) on Acas operational staff to produce income.

Some Areas of Acas, for example, London, Leeds and the North West, have done much better than others in running CIWM courses, much better, that is, in terms of numbers of courses. While geographical areas obviously differ and some may be easier than others in which to generate in-house courses, and/or set up open access ones and fill them with trainees, and while London, Leeds and the North West may have been blessed with particularly able staff, it is hard not to believe that local management has

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[17] See, in this regard, Acas's evaluation of the impact of its CIWM training (Acas 2009b and 2014b). The lack of formal mediations post-training that is reported in these evaluations has been confirmed by the handful of CIWM-trained mediators to whom the researcher has spoken after their courses. It probably results in the mediators falling back on their CIWM portfolios whenever faced with a new mediation, which may be unfortunate in that the portfolios understandably often show quite regimented and undeveloped thinking – so, there is a risk of the mediators becoming 'stuck' in their development. In the course of his research, the researcher happened by chance to speak to a representative of one university, several of whose staff had been CIWM-trained, who clearly felt that Acas had misled the university as to how many mediations its trained mediators might expect to handle, probably to 'sell' the course to it.

played a big part in the different rates of take-up. Some local managers may simply have been much more encouraging and facilitative over CIWM than other managers.

But, in-house or open access, and regardless of location, the CIWM is always 'extremely well received' and the trainers 'continue to be highly rated by delegates across all [the evaluative] measures asked' (Acas 2012a:2). One of those measures is 'knowledge of the subject area', the high rating for which is interesting given that the CIWM trainers for an Acas Area will not necessarily be the people most experienced in individual mediation, indeed far from it.

Some Areas of Acas have started to run CIWM follow-up events and/or to set up networks of CIWM (or otherwise accredited) mediators; and, as indicated, Acas trainers do run other mediation courses. These range from one, two, or three days to a five day course that is effectively the CIWM course but without the requirement to produce a portfolio (in order to get the Certificate). Those attending the shortest of the courses, for example, a one day one, will be told clearly that such a course can give only an initial appreciation of mediation. This does not, however, stop some of those attending afterwards claiming to be Acas-trained mediators![18] Also, an earlier idea in Acas to role play mediations for the benefit of paying customers has been revived.

Acas mediation and conciliation
At one stage, when Acas first ventured into individual mediation, Acas management argued that there was little difference between it (individual mediation) and individual conciliation. To some extent, this was probably to encourage Acas individual conciliators to embrace the new function with minimal training – rather than having them insist that, as with other Acas work, they should receive substantial training for this new role. But the argument that there was little difference between individual mediation and individual conciliation also reflected a genuine belief that, if you could handle individual conciliation separate and joint meetings, you could handle individual mediation.

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[18] Milne (1988:399) says, 'It is hard to imagine that the current vogue of 1- to 5-day training workshops [in divorce mediation] can provide the training and experience necessary for proficient practice.'

However, according to anecdotal evidence, at least, the situation in Acas for some time now has been that most individual conciliation work has been carried out over the telephone, if not through e-mails. To a great extent, this stems from the large number of cases each conciliator has been expected to handle (at least before numbers fell off with the introduction of ET fees, numbers that are rising, again, with the introduction of Early Conciliation). The situation does, however, appear to have been compounded by the fact that many individual conciliators nowadays are apparently concerned about (and therefore avoid) face-to-face conciliation work, particularly joint meetings.[19]

In the past, when Acas was part of the former Department of Employment Group, it was able to recruit potential individual conciliators from other parts of the Group, in particular, from the ranks of Jobcentre staff, who had a good deal of interpersonal experience and expertise in often difficult situations and who welcomed face-to-face contact.[20] That is no longer the case and recruits may well come, now, more from a 'paper' than a 'people' background. The end result of all of this is that the Acas individual conciliation job of late has looked very different from the individual mediation one.

Summary

The primary research population of this study is individual mediators working for Acas and this chapter has looked at that organisation's origins, structure, independence, current functions, and its development of individual mediation work and training.

The chapter has shown how Acas has developed from at least 19th century origins to what is now an organisation of nearly 800 people, most of whose work is done through a regional structure. Acas was created largely because trade unions and employers had lost confidence in the impartiality of the conciliation services offered by the then

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[19] By way of example, one of the 'Acas at its best' stories on Acas 'Cassie' (Intranet) is from an individual conciliator: '**My story stands out because:** I tried something new and it worked – my first face-to-face meeting with a claimant . . . **What I learnt from this experience:** Never make any assumptions – this situation challenged my belief and made me realise that meeting someone face-to-face . . . can be really beneficial . . . [I]t gave me confidence to go on and try joint meetings.'

[20] Such contact was, indeed, a big attraction of the individual conciliation job to many.

Department of Employment. Safeguards for Acas's independence, including a tripartite governing Council, were put in place. The current functions of Acas have been outlined as have their respective amounts of work, which indicate that individual mediation, the focus of this research, is a relatively small function.

Finally, this chapter has detailed the development of individual mediation work and training by Acas, including the organisation's involvement in two mediation pilots intended for smaller employers, and its development of a training programme for larger employers who wished to run their own internal workplace mediation schemes.

CHAPTER THREE: MEDIATION IN GENERAL - THE LITERATURE

Introduction

The researcher conducted a review of the literature on mediation (which appears to be vast, and increasing all the time), with a view to his fully addressing the research questions as to what is 'success' in workplace mediation, and how mediators might achieve success. This chapter looks at some of what that literature review produced. It looks, first, at the broad area of alternative (to litigation) or appropriate dispute resolution (ADR), of which mediation is but one process.

The chapter, then, turns to workplace mediation in the 20th/21st century; whether there is a theory of mediation; and styles or models of mediation. Next, it briefly reviews conciliation and mediation; mediation and counselling; and claims made on behalf of mediation. Finally, the chapter looks at the areas/fields in which mediation is practised in the UK; reasons for the spread of mediation; the incidence of conflict and the demand for mediation; and some of the main providers of workplace mediation in the UK.

The next chapter, four, reports on what the literature review uncovered on success in mediation.

Alternative or appropriate dispute resolution (ADR)

There are 'a range of voluntary processes involving a neutral third party that brings two sides together to resolve disputes without having to resort to litigation' (Acas 2005b:2), processes that are known collectively as ADR. The processes that ADR encompasses include so-called assisted negotiation, conciliation, early neutral evaluation, the mini-trial, and arbitration, besides mediation. The various ADR processes give differing degrees of influence to the third party. Newman (1999:9) reproduces a chart developed by the Academy of Experts 'demonstrating how parties lose control of their dispute the more formalised the method of dispute resolution adopted', so party control is at its greatest with negotiation (an ADR process) and at its least with litigation (not ADR).

In a similar vein, Liebmann (2000:10) refers to dispute resolution methods ranging from the least interventionist (by a third party) to the most interventionist - so, in ascending order of intervention: negotiation, mediation, arbitration, and litigation. At either end of this continuum, she believes, are two other forms of dealing with conflict: 'avoidance' and 'aggression'. Thus 'mediation is the least interventionist of the dispute resolution methods which involve a third party' (unless, that is, any negotiation is assisted by a third party) and 'the intervention by the third party [in mediation] is limited, as the decision making remains with the parties themselves'.

Constantino and Merchant (1996:37) see 'six broad categories of ADR options':

Figure 3.1 ADR options

Imposed ADR e.g. binding arbitration	**Preventive ADR**, e.g. joint problem solving
↑	
Advisory ADR, e.g. early neutral evaluation	↓
	Negotiated ADR, e.g. win-win bargaining
↑	
Fact-finding ADR, e.g. neutral expert fact-finding	↓
←	**Facilitated ADR**, e.g. mediation
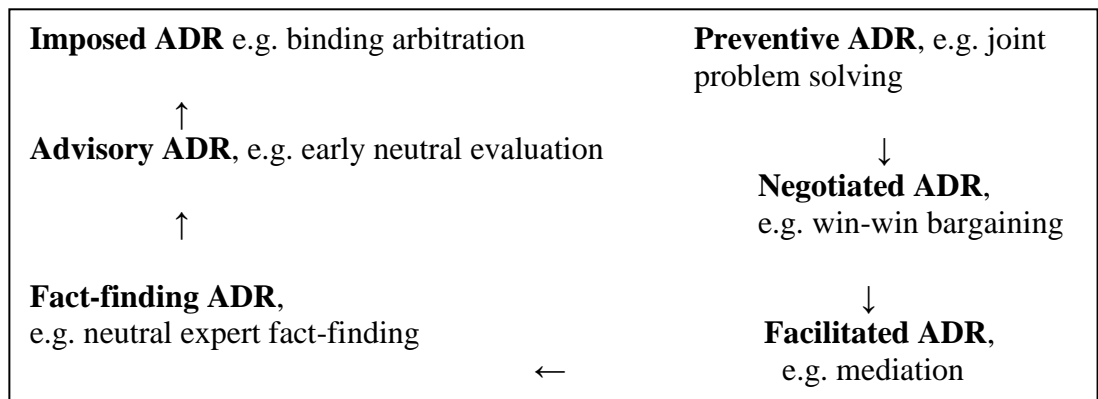
Source: Constantino and Merchant (1996:38)

ranging from 'those [options] that are least invasive [by the third party] and allow the [disputing] parties the most control over the process and outcome' to those that are very much otherwise.

Colling (2004:567) submits:

> Alternative dispute resolution (ADR) has become a major theme of [UK] government since 1997. Government departments have introduced mediation schemes to adjudicate disputes with commercial suppliers. Local authorities have been encouraged to do likewise, extending existing experimentation in areas such as housing and neighbour disputes. ADR has also become a more prominent tool within the court system, building and extending the practice from some of the minor courts. The Woolf reforms, enshrined in the new Civil Procedure Rules in 1999, enabled such court-based schemes to flourish further.

Workplace mediation in the 20th/21st century

Mediation has been around a long time. Kolb (1983:1) claims:

> Mediation may not be the oldest profession, but it surely must be close. As long as people have had disputes with each other, mediators have emerged to counsel the use of reason over arms.

and Gould et al (2010:7) believe, 'The origins of mediation and conciliation can be traced to China some 3000 years ago.'

Among the early mediators whom Kolb (1983:1) mentions is Menenius Agrippa, in Shakespeare's play *Coriolanus*, seeking a compromise between the tribunes of Rome and Coriolanus; and Roebuck and de Fumichon (2004:11) suggest:

> The history of Rome, or rather the surviving evidence from which that history can be deduced, shows that from early times those who inhabited the Roman world readily turned to mediators and arbitrators.[21]

Be that as it may, looking at workplace disputes in the United Kingdom, mediation by the state would seem to have come to the fore, at least in collective employment disputes, around the end of the 19th century, as indicated in chapter two. Several accounts in the literature encapsulate the aspects of mediation noted by the researcher in chapter one as being attractive and compelling to him. For example, in his reflections on his time as the British government's chief industrial 'trouble-shooter', Lord Askwith recalls his involvement in a dispute in the Scottish coal industry in 1909 and how this had caused him to miss the christening of his only daughter.

After his sacrifice became known, Askwith 'received a letter stating that the coal-owners and coal-miners of Scotland had united in presenting a silver porringer to . . . [his] daughter Betty in remembrance of her christening'. Askwith says that, when he told the story to his old friend Sir Henry James, the latter 'curtly remarked, with a gulp in his throat, "That is a good thing for a man to hear, and for men to do"' (Askwith 1974:133).

In a later story, Askwith recounts how, in December 1911, Dundee carters and dockers went out on strike, with a closing-down of jute-mills and factories owing to shortage of coal and material. On 22 December, thinking that his help with the dispute was not immediately required, Askwith left for his country house at St Ives, in

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[21] Roebuck illustrates the geographical breadth and long history of mediation with his books on its practice in Ancient Greece, Early England, England in the Middle Ages, Elizabethan England, and Louis XIV's France, besides Rome.

Huntingdonshire, for the Christmas holidays. That evening, however, at 9 pm, the postmaster, after hours, personally brought up a telegram from the Lord Provost of Dundee, seeking Askwith's attendance at a meeting in the city the next morning, at 9.30 am.

Askwith resolved to attend but first had to find his chauffeur, and some petrol, in order to get to Peterborough for a train; he then had to determine the right rail station there. By the time he arrived at the station, his train had gone but a set of railwaymen stopped another, hustled Askwith on board, and had wires sent to retard the mail train at Grantham, where a further set of railwaymen pushed the mediator onto that train. Askwith duly reached Dundee the next morning.

Askwith ends the story as follows:

> When I returned, unannounced, at early morn of Christmas Day, once more at Peterborough, after a settlement, I was greeted with: 'Well, sir, you've done it, and we did not think you could. We should all have been out this Christmas if you hadn't.' A taxicab was produced from nowhere. The man would only take his fare on pressure as a Christmas-box for his children. 'We might have been starving in a fortnight,' he said, 'and I would like to do my bit.' And so I got my Christmas (Askwith 1974:174).

Askwith 'was not [however] to enjoy the respite from his labours for many days. Just after the New Year he was called up to Manchester' over the Amalgamated Weavers Association's demand for a closed shop (Heath 2013:139).

A further example from the mediation literature involves Sir Herbert Samuel. When his work as Chairman of the 1925/1926 Coal Commission was finished, he went to Italy, to work on a book. However, Symons (1957:187) notes, when 'the threat [of a General Strike] became reality . . . [Samuel] felt bound to return', to offer his services as a mediator. He arrived at Dover on 6 May 1926 and, 'as a result of a telegram sent to the Postmaster-General . . . found the famous racing motorist Major Segrave waiting for him'. It appears that, after calling on Samuel's sister in Folkestone, 'they roared up the empty roads in Segrave's Sunbeam, reaching the Reform Club in Pall Mall from Folkestone in seventy minutes'!

Popularity of the job of mediator

The popularity of the job of mediator is emphasised by the many providers offering 40 hour plus courses for those wishing to train to be mediators, with prices ranging from below £1,000 to approaching £5,000 (Reid 2012:1). As was said, with only slight exaggeration, at a conference a decade ago (Acas 2005c), 'everybody wants to be a mediator'.[22] After Terry Waite had joined the Archbishop of Canterbury's staff in 1980, he is said to have

> . . . revelled in his new role. It provided him with the challenge that more traditional Christian work had failed to offer. He began spending more and more of his time as a mediator (Hewitt 1991:203).

Also, a recent report assessing the viability of a mediation centre of excellence in Wales concludes that '[a]t present there are sufficient mediators to meet demand' and that '[s]itting behind this tranche of experienced mediators is a large group of trained but inexperienced mediators' (Skills for Justice 2014:6).

The issues in mediation

Literature on and around mediation indicates that it has been used to address serious interpersonal conflict at the very highest level of workplace in the United Kingdom. Powell (2010:106), for instance, looks at what had been the 'extraordinarily intense' relationship between Tony Blair and Gordon Brown, 'more like a romance than a traditional political partnership'. He notes that they had started 'to drift apart by 1994, but Tony's decision to run for the leadership in that year tipped Gordon into an outright hostility from which he never emerged'. It seems that John Prescott 'repeatedly tried to make peace between the two', hosting 'numerous armistice dinners but they never led to a lasting peace'.

There has been much comment, particularly in the UK media, that a dispute that was 'merely' about personal ambition (Blair's to stay in office and Brown's to succeed him) seriously hindered the effectiveness of the then Labour Government. However, Blair (2010:495) himself suggests that, although Prescott 'thought it was essentially personal . . . the differences [between Blair and Brown] went to the heart of what New Labour

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[22] Including royalty (see Faber (2009:312) on the Duke of Windsor), business people (see Namier (1948:417) on Dahlerus), lawyers (see Goodman (1993) on himself), and latterly celebrities (see Cooper 2008). See Chigas (2005:128) for a way of categorizing unofficial intermediation activities.

was about'. Interpersonal conflict may, therefore, be about the very personal and/or it may reflect some broader, perhaps collective, conflict.

Undoubtedly, the peace deal that finally settled the long-running British Airways (BA) cabin crew dispute in June 2011 was helped by changes of leadership at both Unite, the union, and BA. Progress on what appeared to be a collective issue had been hindered by the desperately poor relationship between the leading individuals, Derek Simpson and Tony Woodley (for the union) on the one hand and Willie Walsh (for the company) on the other, and changes here enabled forward movement.[23] In addition, Blissett (2013) has argued, as regards policy making in trade unions, that micro-political factors, in particular, enmities and personal loyalties, along with the individual beliefs, values and ideologies of policy makers, profoundly influence their policy choices – again, a mixture of the very personal and of broader issues leading to conflict, in this instance over policy.

Despite John Prescott's lack of success, mediation has, nevertheless, apparently been successful in dealing with some instances of serious interpersonal conflict, indeed violence, in the Cabinet. Campbell (2010:57) comments that, in September 1809, 'at the height of the war against Napoleon, the two senior cabinet ministers most responsible for the conduct of the war fought a duel on Putney Heath'. The result was that '[o]ne was wounded, both resigned and the government fell'. Yet, three years later, with the mediation of Lord Liverpool – who had been charged with forming a government following Perceval's assassination – 'the two men [George Canning and Lord Castlereagh] met and shook hands'.

As in so many other cases (see Bray and Macneil (2011) in a collective mediation context), the detail of how Lord Liverpool achieved what he did in his mediation with Canning and Castlereagh, the strategies and techniques he used among other matters, all of this is, unfortunately, missing in Campbell's (2010) account. To be fair to Campbell, he is looking back to the early 19th century but, even with contemporary

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[23] On the other hand, good relationships between leading individuals can transcend collective bitterness: bizarrely, in the 1897 dispute in Norwich between the Boot and Shoe Operatives and the local manufacturers, the late arrival of a cheque for strike pay led to the union branch secretary successfully approaching the employers' leader for a loan, which enabled the stoppage to continue (Fox 1958:284).

mediation efforts, detail can be light. It may be that a lack of knowledge of the detail of the actual practice of famous mediators leads writers to focus instead on those mediators' supposed - superior - attributes (more on which later), and possibly to conclude that the mediators were born with such attributes.

A theory of mediation?

From their review of the literature examining workplace mediation, Banks and Saundry (undated:4) conclude that there is no general theory of mediation, as do Haynes and Haynes (1989:25), who say that, while there are theories about conflict and negotiations, '[t]here is no one clear and current theory of mediation, . . . still no coherent theory about the management of other people's negotiations'. Schneider (1994:1) thinks that Haynes's 1989 book with his wife is 'a unique compilation of verbatim accounts [of mediations] with commentary' and that he (Schneider) 'personally learn[s] an enormous amount from this format', but that the theory in the book 'seems less helpful . . . [with Haynes] struggling to find a conceptual framework that would adequately capture what he does in mediation'. More recently, Haynes et al (2004:21) state that '[t]he search for a unified mediation field theory continues . . . No one has yet articulated such an encompassing theory.'[24]

As for practitioners, Dennis Ross, the US Middle East mediator, claims that 'his techniques derived from experience and that he was not particularly influenced by any specific theory current in the mediation/negotiation literature' (Bebchick 2002:127). However, 'lack of articulated, scholarly mediation theory . . . should not be confused with . . . [an] absence of theoretical grounding . . . [M]ediators must have a theory underlying their practices, no matter how naïve or obscured' (Della Noce et al 2002:41). In Haynes et al (2004:x), Benjamin admits that 'Haynes was not a theorist', rather 'the epitome of an intuitive practitioner'; but he (Benjamin) goes on to say that '[m]ediation practice requires a thorough grounding in conflict . . ., communications . . ., learning . . ., systems . . ., political . . ., [and] legal theory'.

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[24] We are told that Taylor (1988:61) 'provides a general theory of [divorce] mediation' but this looks very much like one of the 'stage' models that Della Noce (2001) criticises (see chapter four, page 70).

Perhaps Tidwell (1998:61) starts to capture the situation when he reflects on people operating under different types of theory: theories-in-use and espoused theories, the former often not articulated while the latter 'are those we can state'. Espoused theories 'may often vary from the reality of action' or, more crudely, mediators do not always practise what they preach (Bingham 2003:25). This research may well show that most Acas mediators largely operate under theories-in-use and that these differ from the theories those mediators might espouse, if pressed – if they espouse any theories at all!

Haynes and Haynes (1989:25) suggest that certain assumptions and generic ideas 'are the tentative beginnings of a theory of mediation'. An example of an assumption is that 'behavioural conflicts need resolution *when they impede the solution of issues conflicts* [authors' emphasis], but they do not need resolution in and of themselves', that is, 'the mediator can allow a couple to fight and air their feelings for as long as fighting or bickering does not bog down the negotiation process'; and examples of generic ideas include summarising by the mediator and 'the mediator . . . [attempting] to define and control a mutual and neutral problem definition'.

Styles of mediation

Looking at all the ADR processes/dispute resolution methods, mediation is the one where the third party helps people in dispute to find their own way(s) forward – unlike the position in, say, arbitration, where the third party is entrusted with the right of decision-making. The mediation literature gives a variety of definitions of mediation, each often related to the approach of the mediator. By way of example:

> *Evaluative mediation* is a process where the mediator expresses her/his considered view on the merits of an issue in dispute . . . The advantage of the mediator evaluating some aspects of the dispute is that it may provide a reliable foundation on which the parties can build a comprehensive settlement (Boulle and Nesic 2001:172).

> *Facilitative mediation* is a decision-making process, in which the parties are assisted by a third person, the mediator, who attempts to improve the process of decision-making and to assist the parties [to] reach an outcome [to the problem] to which each of them can assent (Boulle and Nesic 2001:6).

> *Insight mediation* is a process that takes disputing parties through an in-depth exploration of the presenting problem rather than around it . . . [However, it]

assumes that, to solve the conflict adequately, parties cannot stay on the problem, rather they must move through it and beyond it to understand the deeper cares, concerns, values, interests, and feelings that underlie the problem (Picard and Melchin 2007:50).

Narrative mediation is a process where the mediator's task is to work with the participants to explore the narratives behind their conflict story, and then to identify and develop alternative, preferred stories. In this way, mediation provides an interactive space in which non-adversarial narratives can be advanced (Winslade et al 1998:26).

Transformative mediation is a process in which a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution (Bush and Folger 2005:65).

The mediator's approach is sometimes called her/his frame or model of practice, sometimes her/his style. '[M]ediator style refers to a cohesive set of strategies that characterize the conduct of a case' (Kressel 2006:742); '[s]tyle refers to the role mediators perceive themselves to play in the mediation and the types of strategies and tactics they display in that role' (Alberts et al 2005:221); and differences in philosophy about the purpose of mediation 'have concrete effects on techniques chosen' (Menkel-Meadow 1995:223). Currie (2004:11) suggests a mediator's approach can be predicted by 'background, formal mediation training, and biases' and Kovach (2005:310) thinks that mediators' basic personality and initial training help determine their style.

There are a number of typologies of styles. For instance, Kressel (2006:742) talks of 'the mediator acting in either a problem-solving or relational style'. He suggests that, in the former mode, 'three major stylistic subtypes can be identified: facilitative, evaluative, and strategic' (Kressel 2006:743) whereas 'relational styles focus less on agreement making and more on opening lines of communication and clarifying underlying feelings and perceptions' (Kressel 2006:744). Relational styles include transformational, narrative and victim-offender mediation. Some styles seem to bridge the problem-solving and relational divide, for example, insight mediation (Picard and Melchin 2007) or the style, the 'overarching approach', that comes from the dimensions of scope (inclusive or exclusive), method (forcing or fostering), mode (confidential or open) and focus (narrow or wide peace) (Svensson and Wallensteen 2010:16).

The principal styles that tend to be considered in the mediation literature are evaluative, facilitative and transformative. Looking first at *evaluative* mediation, the main objective is 'to reach a settlement according to the legal rights and entitlements of the parties and within the anticipated range of court outcomes' (Boulle and Nesic 2001:28). Authors differ as to how directive the evaluative mediator should be and range from, say, the mediator's acting as a custodian of rights (Branney 2003:39), to expressing an opinion as to the likely outcome (Newman 1999:37), to suggesting possible outcomes (Menkel-Meadow 1995:229), to *not* making 'suggestions to either side about suitable terms' (Lewis and Legard 1998:25). An obvious danger with evaluative mediation is that the mediator's actions may challenge what is surely the essence of mediation, that the way forward comes from the disputing parties themselves.

As to *facilitative* mediation, sometimes referred to as 'pure' or 'classic' mediation, a popular model in law schools (Douglas 2005:2) and commonly used in the UK, the main objective here is 'to avoid positions and negotiate in terms of parties' underlying needs and interests instead of their strict legal entitlements' (Boulle and Nesic 2001:28). Haynes et al (2004:5) developed earlier thoughts on facilitative mediation contained in Haynes and Haynes (1989) and Haynes (1996) into organizing principles ('the bases from which theory is constructed') and strategies ('the actions the mediator takes, based on the organizing principles'). An example of an organizing principle is the mediator's use of process as opposed to content suggestions; and an example of a strategy is the mediator's maintaining focus on the future.[25]

However, Folger (2001:59) contends that there is 'a misleading distinction between content and process'; Cloke (2001:11) thinks that many parties require assistance in developing options; Genn (1998:vii) indicates that negative assessments by the parties might include 'mediators being *insufficiently* directive' (author's emphasis); and Menkel-Meadow (1995:228) notes 'how rare it actually is for the mediator not to intrude somewhat' in the parties' deliberations. As for future focus, Schneider (2000) argues a place for apology in mediation and, by implication, that maintaining a focus

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[25] Whatling (2012:18 and 34) suggests that, since Haynes's death, there has been an over-simplification of his ideas, resulting in a 'Haynesian legacy' that places too great an emphasis on future focus and on 'cutting a deal'.

on the future cannot be sacrosanct; and Menkel-Meadow (2007:3) suggests 'some appreciation [in mediation] of the importance of the past'. In short, facilitative mediation may not often be practised in the textbook sense.

An analogy might be drawn between the use of facilitative mediation and the use of the model that has come into play in recent years in the field of marital therapy - as an alternative to the traditional approach, which 'is basically eclectic in nature, although it rests in part on psychoanalytic theory' (Dominian 1979:138). The alternative, behavioural approach

> . . . enables the couple to bypass the dynamic factors underlying their problems and to plunge directly into dealing with these problems. The treatment also has the appeal of simplicity and is suited to couples in whom interpretation may mobilize more anxiety than they can cope with.

Likewise, many potential parties to mediation will be concerned about what that mediation might open up, and may find facilitative mediation less threatening than other approaches in this regard.

As regards the *transformative* approach to mediation, which 'has its roots in the moral development theories of social psychologist Carol Gilligan' (Picard and Melchin 2007:37), this 'does not seek resolution of the immediate problem but, rather, the empowerment and mutual recognition of the parties involved' (Burgess 1997:1). Often, this paves the way for a mutually agreeable settlement but the primary goal is the parties' empowerment and recognition, which enables a better approach to the current problem as well as later ones. The contention is that, as the parties make empowerment and recognition shifts, their interaction as a whole 'changes back from a negative, destructive, alienating, and demonizing interaction to one that becomes positive, constructive, connecting, and humanizing, even while conflict and disagreement are still continuing' (Bush and Folger 2005:56).

It has been argued that '[m]ediators give the wide-ranging services they provide short shrift by focusing only on the task of settling cases' (Noll 2009:48), which happens with most models of mediation other than the transformative. Criticisms of transformative mediation, however, include its 'lack of attention to any of the structural changes that occur when conflicts heat up' (Pruitt 2006b:408) and that it too 'can become more of a focus on what the mediator [as opposed to the disputing parties]

wants' (Green 2005:344). Also, that, if their usual work experience is to be told what to do and how to do it, disputing parties may not be able to readily cope with too much empowerment.

Looking at *styles of mediation, generally*: on the one hand, it has been argued that leading mediators do not claim to practise in a particular style and, 'in most cases, a combination of styles is regarded as a positive option' (Roberts 2007:144). Levels of escalation in relationships require 'different approaches to third-party intervention' (Pruitt 2006a:861; 2006b:405); and, according to Linden (undated:4), 'the mediator should adjust and switch from one style to another in order to achieve the most effective resolution on a long-term basis to any conflict'.

Boulle and Nesic (2001:27) make a similar point when they say that '[m]ediations in practice might display features of two or more models. Thus a mediation may commence in the facilitative mode but later transform into the evaluative model.' On the other hand, Bush and Folger (2005:228) argue that styles cannot be combined; and, it seems, many mediators – far from changing their style to suit the context - practise the same style from case to case (Kressel 2006:742). Saposnek (2003:247) suggests that, whatever the espoused style, effective mediators practise more similarly than they preach.

A study by Manning (2006:81) suggests that the combined use of transformative and facilitative mediation 'has the potential to be more effective than a settlement based mediation model, in scenarios involving interpersonal conflict where there is an ongoing working relationship'.[26] Manning (2006:83) defines the goal of settlement based mediation as being 'to shift the position of the parties through a process of incremental bargaining in order to achieve a compromise'; and she suggests that, in such mediation, 'the emotions underlying the presenting issues remain unaddressed or unacknowledged'. However, some of the so-called facilitative mediation that the researcher has witnessed and, often, participated in has looked very much like what Manning is calling settlement based mediation – which is not to question Manning's

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[26] As will be seen, the empirical research in this thesis centres on mediation where there is an ongoing working relationship.

(2006) work, but to endorse the value of caution in accepting mediators' claims (as to their mediation styles) at face value.

Not referring to Acas training although he could easily be, Fox (2006:240) comments that most of the mediation training programmes he has come across in some 20 years have focused on skill development based on the evaluative, facilitative or transformative mediation model. Typically:

> . . . training is devoted to 'how to' skills and practices, with relatively little examination of the theories – let alone the cultural assumptions and worldviews – that underlie these practices. The result is that for most mediators, our own 'standpoint' with respect to the theories that drive our practice remains largely unexamined.

Fox says that, by 'standpoint', he is referring to where a mediator stands in the larger social structure, and how that informs the mediator's experience and understanding of conflict. So, a 'middle-aged, middle-class, white, [British], straight, male' Acas mediator (not necessarily the typical portrait) 'likely experience[s] and understand[s] the world (and, therefore, conflict) differently than another person whose "standpoint" is significantly different'. Some mediator standpoints are likely to be more helpful, in terms of success, in some dispute situations than others.

Finally, in a review of the literature as to 'what is mediation?', Banks and Saundry (undated:6) argue that 'no dominant methodology [i.e. style] has emerged' although 'research suggests that the facilitative style is practised most frequently in the workplace' while 'one of the largest workplace schemes (US Postal Service) utilises a transformative style'. There is a large amount of literature on the US Postal Service's process, known as REDRESS, literature authored particularly by Bingham - see especially Bingham (2003).

Although there is this variety of approaches to mediation, Picard and Melchin (2007:36) state:

> Central to all mediation approaches is that . . . [p]articipants come out of the process with new ways [- not imposed upon them -] of resolving the dispute between them and, ideally, of working and living together.

Handing over responsibility to the disputants in a case does not, of course, always sit easily with 'HR practitioners . . . generally used to providing solutions to problems' (Saundry and Wibberley 2014:34).

Also, we should remember that we are talking about Western/North American models of mediation and that 'mediation models in the United States are based upon individualist cultural assumptions that group-oriented, or collectivist, participants in a mediation may not share' (Wright 2001:1). Augsburger (1992:204) summarizes the contrasts between North American and 'traditional culture' models of mediation, for example, direct confrontation and communication between disputing parties, albeit in the presence of a mediator, as opposed to the indirect, triangular, third-party processes of a go-between.

A caveat to the idea that the way forward in a workplace conflict should come from the disputing parties themselves may be found in a book evaluating the use of mediation in the resolution of disputes between neighbours in the London borough of Southwark. Mulcahy (2001:103) notes that Southwark Mediation Centre staff *were* prepared to give advice to disputants. They 'recognised that, in an ideal world, advice giving would not be part of their role as it suggested a partisan stance was being taken'. However, the

> . . . stress placed on neutrality by mediation gurus appears to deny or, at best, ignore the conflict between the non-partisanship stance expected of mediators and the partisan stance assumed in the selection of mediators from the community in which disputes have arisen.

In addition, McConnell (2001:xxvii) recognises that a mediator might use her/his power to influence the choices of the conflictants, that is, 'mediation with muscle'; and, in the 'individual mediations' recorded on Acas's Events and Advisory Recording System (EARS), there are some examples of dispute resolution that hardly fit the above, standard definition(s) of mediation. In one entry seen by the researcher, for instance, an Acas facilitative mediator produced a report with recommendations for the commissioning party and subsequently noted that '[h]aving considered my Report, the [commissioning party] has decided to retain in employment both of the protagonists'. In another case, an Acas facilitative mediator wrote to the commissioning party, using directive language such as 'I would advise', 'I would also strongly advise', 'I suggest', and 'I also suggest'.

Conciliation and mediation

'Conciliation' and 'mediation' are often used interchangeably in the literature but the terms are sometimes distinguished. Boulle and Nesic (2001:79) say that 'some commentators maintain that . . . conciliation should be positioned on the mid-point of a spectrum, with mediation at one end and arbitration at the other'. As indicated earlier, Acas has labelled as 'individual conciliation' the uncharged-for service where it exercises its statutory duty to try to promote the settlement of almost every kind of actual or potential claim to the Employment Tribunal, thereby avoiding the need for full hearings. Acas calls 'individual mediation' its newer, charged-for service to help resolve disputes between individual employees and their employers, or between individual colleagues or groups of colleagues, which do not involve actual or potential claims to an Employment Tribunal.

In spite of the titles, however, *both* Acas processes involve some form of mediation. Individual conciliators often use evaluative mediation (defined above) in their work, and – as noted - Acas individual mediators are trained in, and draw upon, the facilitative mediation style. It will be interesting to see how the new Acas function of Early Conciliation – whereby potential ET claimants have to consider (but not necessarily undertake) conciliation before they submit any claims – works out in practice, whether it leans toward evaluative or facilitative mediation. The researcher suspects the former but the Acas literature on Early Conciliation does not really spell out the process.

Mediation and counselling

It is often said that mediation is *not* counselling or therapy and the website of National Family Mediation (NFM) (www.nfm.org.uk) used to give a list of 'important distinctions between the work of mediators and counsellors'. However, some of NFM's points were questionable, for example, its contention that a mediator, 'while acknowledging a person's feelings, does not explore them in any depth'. In addition, Whatling's (2012:15) experience is that people find it difficult 'to identify any skills

that are required of mediators that differ from those required for counselling and therapy'.

Whatling (2012:35) goes on to suggest that mediation 'does in essence, by definition of its non-directive principles, have its roots in long-standing traditions of non-directive therapeutic interventions'; and that '[d]espite the clear and essential differences between the outcome goals and objectives of counselling and mediation, the principles of client-centred counselling show remarkable similarities' to facilitative mediation. On the question of goals, Brown (1988:131) comments:

> The goal of therapy . . . is to help the individuals resolve emotional problems so as to become more comfortable and functional in their lives. The goal of mediation is to help the . . . [disputing parties] make decisions about . . . [their relationship] and to develop a workable plan for the future

The complementary nature of mediation, counselling and therapy is recognised in the family separations area by the occasional use of a conjoint mediation team. Gold (1988) discussed mediation conducted by a lawyer and a therapist working as a team, and, more recently, Jaffe Consulting Pty Ltd prepared a lengthy evaluation of the (Australian) Family Mediation Centre's conjoint mediation and therapy model of dispute resolution. This 'uses an interdisciplinary approach pairing two professionals (preferably male/female), from different disciplines – mediation and counselling/psychology' (Jaffe Consulting 2008:14). It is, however, explained that 'the two practitioners have entirely different approaches – one is more problem solving and focused on decisions, the other is more focused on emotional pain and previous trauma'.

While acknowledging 'definite similarities between mediation and therapy', Katz (2006:93) recounts how – early in her family mediation career, in dealing with a professional couple – she had strayed into the therapeutic area:

> Upon hearing my question, both members of the couple dissolved into tears, and I caught a brief glimpse of the pain that was lying just beneath their seemingly calm exteriors. Their [mediation] work was done, they had accomplished the agreement that they had set out to reach, and I had imposed an unanticipated therapeutic agenda into their mediation. This poignant interaction reminded me that there are real differences between professions.

Katz says that she has striven 'to attend to the boundary between professions . . . since that time'.

Claims about mediation

Much is claimed, especially by providers of mediation services, for the contribution of mediation to workplace conflict situations. For example, Bailey and Efthymiades (2009:3) state that, as a result of setting up an in-house mediation scheme, NHS East Lancashire realised 'significant benefits' in just 18 months. These include a cultural change from a 'reliance on formal processes as the only means of resolving conflict' and cost-savings of £213,753, this figure being calculated by comparing the cost of mediating some 23 cases with the potential cost had formal processes been followed.

Wilson (2002:64) suggests:

> Apart from the motive of avoiding the potential costs of litigation, mediation's growth in the Western world has also evolved from the need for people in conflict to have a mechanism whereby they can address multi-faceted, complex issues, which may not be best served by 'win-lose' rulings.

However, say Banks and Saundry (undated:9), 'mediation may not be appropriate for all individual disputes', it being 'a widely held view that it is unsuitable in cases involving overt bullying, harassment and other situations where formal sanctions should be used'. (A detailed look at whether mediation is suitable for complaints of workplace bullying may be found in Jenkins (2011).)

Genn (2010:196) notes claims that mediation is better – because cheaper and quicker – than litigation and 'capable of achieving creative solutions that would not be available in court adjudication'; she also notes claims that mediation can repair damaged relationships, reduce conflict and is 'less stressful for parties than court procedures'. However, she questions some of these assertions - she contends, for example, that '[o]nly a small minority of [civil and commercial mediation] settlements are in any way creative'; and she points out that the benefits of mediation tend to be 'expressed in opposition to adjudication, despite the fact that most civil cases are settled out of court'. Similarly, in the family area, mediation 'is no longer the only alternative to the adversarial litigation process, and litigation is no longer (and some would say never was) so adversarial' (Salem 2009:384).

Genn is a lawyer and so might be expected not to rate highly a non-legal process, that is, mediation; but, even among mediation practitioners, there are arguments against an over-ambitious view of what mediation can achieve, at least for long-term disputes:

> . . . when dealing with enduring conflict, mediators need to move past the idea of how quickly they can resolve . . . [it]. Instead, they should focus on how they can help people prepare to engage with an issue over time (Mayer 2009:inside front cover).

This realism does not, however, 'require abandoning the goal of resolving conflict or ending the search for constructive outcomes to difficult disputes. Rather it requires that we put these goals in perspective' (Mayer 2009:181).

Bercovitch (2005:104) is even less bullish about mediation when he says:

> In the context of intractable conflicts it is more sensible to talk about conflict management only. Conflict resolution denotes a removal of the conflict and a resolution of all issues at stake, as well as a change in behaviour and attitudes. The very intractability of the conflicts means that they can at best be managed, contained, or de-escalated; they are unlikely to be resolved.

He is talking about international conflicts, as is Chayes (2007:185):

> . . . likely, the mediated agreement offers a temporary victory in a continuum of hostility and recovery. Often the situation relapses into violence . . . [A] skilled mediator can help create what Gabriella Blum (2006) has called 'islands of agreement' in a sea of conflict.

But the researcher would argue that, although Bercovitch and Chayes are discussing international conflicts, their comments are applicable to workplace conflict too.

Similarly, Saposnek's comments on family mediation are also applicable to workplace conflict. He (2004:49) says:

> . . . findings showing that mediation has been unable to improve the relationship between parting spouses, and unable to improve compliance with agreements, are no surprise. They simply attest to the limitations of our brief models of mediation and to the strength of the emotional interactional patterns built up over the years of the relationship.

In addition, there is the argument about the 'fragility' of mediation. Latreille (2010:2) builds on earlier work by others in this respect: 'success or failure in (a single) [workplace] mediation can influence perceptions of its value more generally', so 'attitudes towards mediation are in many instances only as positive as the last experience'. A 'failed' mediation, then, may lead the commissioner of that mediation to question whether the process itself is worthwhile, however much 'success' there may have been with it in the past.

Workplace mediation may also have unintended consequences. Poitras et al (2005:43) argue:

> . . . the risk of inflated disciplinary action in the workplace . . . may be associated with the use of mediation as part of a dispute resolution system . . . [S]ome characteristics of mediation may compound with some features of the work environment to create such a risk.

A final thought, from Wilson (2002:66), accords with advice given the researcher by one of his earliest mediation mentors: 'Mediation is about uncertainty – indeed, uncertainty is a fundamental component of the process. Parties in total agreement regarding a settlement do not need mediation.' And, the researcher would add, if one of the disputing parties believes s/he is certain of success in, say, litigation, s/he will not mediate in any meaningful way.

In what areas/fields is mediation practised in the UK?

Boule and Nesic (2001:287) outline an A-Z of mediation practice in the UK, ranging from mediation in art disputes to (not quite Z) mediation in international trade disputes, and including banking and finance, charities, the NHS, schools, and telecommunications, to name just a few of the areas covered. So, at any one time, (different) mediators in this country are tackling clinical negligence claims, commercial contract disputes, issues between neighbours, the bringing-together of victims and offenders, and arrangements for children when their parents separate, among other matters.

Since Boule and Nesic (2001) wrote, we have seen the introduction of judicial mediation by the Employment Tribunal Service (ETS). This is offered, when deemed likely to be helpful, to the parties in ET discrimination cases, and other ET cases where a hearing of at least three days is expected. It complements, rather than supplants, Acas individual conciliation. An ET Judge will mediate in cases that are not part of her/his own caseload, using a facilitative approach. The parties may be represented throughout the mediation, if they wish. Originally not chargeable, judicial mediation has now become so.

Intriguingly, 'an evaluation of a judicial mediation service piloted in three regions of England' by the ETS in 2006 and 2007 found:

> Judicial mediation was an expensive process to administer and was not offset by the estimated benefits (both direct and indirect) of the process. Therefore, it was not recommended that the service be rolled out to other areas of the ETS in its current form (Urwin et al 2010:i).

Roll-out did, however, happen, it not being unusual for ideology to trump evidence in the employment relations area.[27]

Acas was involved in the training of the ET Judges (then called Chairmen) for the pilot and encountered the concern of some of them that they would be required to take a facilitative, rather than evaluative, approach. They felt more comfortable with the latter and there seemed a danger that they would slip into it.[28] In spite of some anecdotal evidence to the contrary, however, Boon et al (2011:78) appear to confirm that that has not happened, although they say that 'the format of the mediation and remit of the mediators [may] need adjustment to clarify the circumstances permitting evaluative intervention'.[29] In this connection, Goss's (2004:511) comments on judicial dispute resolution in Edmonton, Canada, may be useful:

> A judge meets with parties embroiled in litigation and their counsel to discuss the issues, evidence, and settlement, and, if no settlement is reached, provides the parties with the judge's nonbinding opinion as to the likely result of the case at trial based on the summary presentations of evidence.

Also, Peachey (2014:23) reports on the use of mediation by Scotland Yard 'to try to prevent gang disputes from ending in deadly violence'. A company called Capital Conflict Management was 'contracted by the Metropolitan Police with the task of trying to defuse hundreds of disputes between young gang members and their

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[27] In a paper to the 'New Frontiers in Empirical Labour Law Research' seminar at Cambridge, April 2014, Hepple gave several instances where conflict with current/prevailing ideology had led to research not being funded or its being suspended and of findings being ignored or suppressed.

[28] Whatling (2012:14) says that Haynes 'cautioned that, when the going gets tough for us as novice mediators, what we tend to do is to slip into the more familiar activities of the "day job" – our current professional role'.

[29] Also, Doyle (2015:4) says that 'the judges . . . [switch] to an indicative mediation method, if facilitative mediation has been exhausted and if the parties agree'.

associates'. As Liebmann (2000:16) says, 'new fields [for mediation] are developing all the time'. One of these might well be whistleblowing cases (Lewis 2013:46).

Even where mediation seems well-established, nothing can be taken for granted. There has, for instance, recently been reported a fall in the use of family mediation: 'the number of couples starting state-funded mediation fell by a third between April to September 2012 and the same period in 2013'. It would seem that the criteria for the public funding of mediation have been 'considerably tightened', which

> . . . is happening as figures show the number of private law cases involving child custody and access is going down, suggesting that many couples are trying to resolve their disputes without any professional help at all (Dugan 2014:6).

For what it is worth, Liebmann (2000:19) indicates, by sector, the order in which mediation started in the UK: industrial/employment mediation, family mediation, schools conflict resolution and mediation, victim-offender mediation, community mediation, commercial mediation, medical mediation, elder mediation, and organisational and workplace mediation. Liebmann (2000:32) adds, as indicated earlier,

> Early mediation practitioners linked with each other to explore mediation as a basic concept. Then the different sectors of mediation developed separately as funding allowed. Now more and more links are being made across sectors.

Reasons for the spread of mediation

Alberts et al (2005:218) suggest:

> . . . the practice of mediation has spread for two reasons: (1) the belief that it is less expensive than judicial remedies and (2) the finding that participants are more satisfied with the mediation process and, thus, are more likely to uphold any agreements reached during the mediation.

As was seen above, there is some debate as to how much cheaper than the legal route mediation really is; but, certainly, since the very beginning, people have generally preferred making their own decisions to being told what to do, to the extent that they will often do what they want to do, regardless of - or seemingly to spite - any advice.[30]

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[30] In ancient times, in *The Odyssey,* for example, Zeus complains that Aegisthus pointedly ignored the gods' warnings over his dealings with Agamemnon and his wife, with disastrous consequences for all concerned (Rieu 1946:26).

In addition, at the risk of sounding cynical, it must be said that there are fashions in employment relations just as there are in other areas, and mediation has perhaps been fashionable for some time now. Also, mediation may be attractive to an employer because it allows her/him to individualise conflict, to suggest that what might be a broad problem is simply down to the poor behaviour of a couple of individuals (see Banks and Saundry undated:14). (When the researcher worked as a community mediator, his manager always enjoined him to look out for the bigger, wider issues that might lie behind an individual's dispute with a neighbour.)

Furthermore, Newman and Richmond (2006:102) suggest:

> . . . there are parties that are a part of . . . [a] peace process but which are not seriously interested in making compromises or in committing to a peaceful endgame. They may be using the peace process as a means to gain recognition and legitimacy, time or material benefits, or simply to avoid international sanctions.

This might be reconfigured, in an Acas workplace mediation context, as disputing parties simply going through the motions; or as commissioning parties using mediation in an attempt to buy some time before, or delay, or put themselves in the best possible position for, a likely employment tribunal, at which they will be able to argue that they 'even tried mediation'; or as managers encouraging others to mediate in order to further goals they (the managers) might not have the courage to seek directly.

There has been high-level encouragement to use mediation in the workplace. A relatively recent review of employment dispute resolution in Britain suggested that mediation should be used more frequently and earlier in disputes (Gibbons 2007:chapter 3), a view endorsed by Acas. Also, in its consultation document on Mr Justice Underhill's 2011/2012 review of the rules of procedure for employment tribunals (BIS 2012:12), the then Coalition Government states:

> . . . we seek to encourage parties to look to tackle disputes before they get to the stage where parties are considering taking their complaint to an employment tribunal. Independent mediation at this stage of a dispute can mean that the employment relationship is preserved, productivity is maintained, sick absences are reduced and employees feel engaged in the process.

The Employment Act 2008 that followed Gibbons was seen as a 'missed opportunity' (Sanders 2009:45); and, surprisingly, the latest version of the Acas code of practice on disciplinary and grievance procedures has only one paragraph on mediation, in the

Foreword.[31] However, the current Acas guide *Discipline and grievances at work* does have a whole section on using mediation (Acas 2014c:7), with grievances 'most obviously lend[ing] themselves to the possibility of mediation'. It is, though, hard to see that Acas's new Early Conciliation service will generally provide the early mediation that might *save* an employment relationship, as opposed to bringing it to a 'settled' close.

There has also been judicial encouragement to use mediation, a recent example being the England and Wales High Court decision in a neighbour dispute about a pair of gates in Formby.[32] Although the context is not theirs, workplace mediators will welcome Mr Justice Norris's comments:

> I would add my voice to that of many other judges who urge that, even when proceedings have been issued to preserve the position, the engagement of a trained mediator is more likely to lead to an outcome satisfactory to both parties (in terms of speed, cost, resolution and future relationships) than the pursuit of litigation to trial.

Incidence of conflict and demand for mediation

Workplace mediation is conducted where there is conflict and, according to OPP, the UK workplace context is one where 'on average, each [UK] employee spends [1.8] hours every week dealing with conflict in some way' (OPP 2008:5). Moreover, the CIPD undertook a survey of employers' experiences of managing workplace conflict in November/December 2010 and found that 'the scale of workplace conflict is remarkable and has increased in the recession' (CIPD 2011:2).

In looking at individual disputes, the First Findings from the 2011 Workplace Employment Relations Study (WERS) state (BIS 2013b:26):

> . . . the incidence of disciplinary action was similar in 2004 and 2011 . . . [I]n 2011, 39% of managers applied at least one of the following disciplinary

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[31] 'Employers and employees should always seek to resolve disciplinary and grievance issues in the workplace. Where this is not possible employers and employees should consider using an independent third party to help resolve the problem. The third party need not come from outside the organisation but could be an internal mediator, so long as they are not involved in the disciplinary or grievance issue. In some cases, an external mediator might be appropriate' (Acas 2009c:1).

[32] *Bradley & Anor v Heslin & Anor* [2014] EWHC 3267 (Ch) (09 October 2014).

sanctions: a formal verbal or written warning, suspension, deduction from pay, internal transfer or dismissal. In 2011, less than one fifth (17%) dismissed at least one employee. The percentage of workplaces where an employee raised a grievance in the 12 months prior to the survey decreased from 38% in 2004 to 30% in 2011.

The Study makes the point (BIS 2013b:27):

> As well as raising a grievance, employees might express discontent at work through absence, leaving the employer or submitting an Employment Tribunal claim. The percentage of work days lost to employee absence remained at a similar level in both periods, at an average of 3.5% in 2011 and 3.7% in 2004. The rate of voluntary exits (i.e. employees who resigned or left on their own accord) declined since 2004, from a workplace average of 15% to 10% of employees. However, the voluntary exit rate can be attributed to many factors . . . The percentage of workplaces in which an employee made an Employment Tribunal application was consistent with 2004 – at 4%.

As for the use of mediation, a CIPD survey of both users and non-users of workplace mediation, published in July 2008, found (CIPD 2008:2):

- Two out of three [of 766] respondents report that mediation has been used between one and five times in the last 12 months.

- Sixteen per cent have not used mediation in the last three years and 17% have used it more than five times.

- Nearly half of respondents say their organisation is now making more use of mediation than it did three years ago, and a further 20% did not make use of mediation at all three years ago.

In 2008/9, Acas reported, there was a significant growth in demand for its mediation services, an increase of around a fifth over 2007/2008 (Acas 2009a:12). EARS shows that Acas has handled over 200 cases (net) of mediation a year for the past six years, and that in 2013/2014 there was an all-time high of 255 cases (net):

Table 3.1 Extent of individual mediation work by Acas, 2004/2005 to 2013/2014

Operational year	Mediations opened	Cancelled cases	Net cases
2004/2005	17	0	17
2005/2006	64	0	64
2006/2007	167	3	164
2007/2008	231	63	168
2008/2009	303	84	219
2009/2010	293	62	231
2010/2011	236	35	201
2011/2012	273	44	229
2012/2013	257	29	228
2013/2014	296	41	255

Source: EARS

The Centre for Effective Dispute Resolution (CEDR) conducts a biennial audit, to survey the attitudes of civil and commercial mediators to a range of issues. Two hundred and thirty-eight mediators participated in the 2012 audit. CEDR (2012:3) reports:

> On the basis of mediators' reported case loads, we can now estimate the current size of the civil and commercial mediation market as being in the order of 8,000 cases per annum.

The 2014 audit, with 295 respondents, indicated that 'the mediation market had grown by 9% in the last year, meaning 9,500 commercial mediations were performed in the last 12 months' (CEDR 2014:1).

According to the First Findings from WERS 2011, however,

> Provision for mediation is included in 62% of grievance procedures and 61% of disciplinary and dismissal procedures, covering 63% and 56% of employees, respectively. However, this has not translated into a high level of use. Of all workplaces, 7% had used mediation to resolve an individual dispute in the 12 months prior to the survey: 4% with an internal mediator and 3% with an external mediator. This low level of use of mediation in comparison to its inclusion in procedures may reflect a perceived low need for such an intervention, or the fact that mediation may not be embedded in the culture of conflict handling (BIS 2013b:27).

In their analysis based on WERS 2011, though, Wood et al (2014:26) elaborate:

> Mediation by an impartial third party was used by just 7 per cent of workplaces responding to WERS 2011. But closer inspection suggests that it has become a significant part of workplace dispute resolution regimes, being used in almost one in five workplaces which experienced a formal individual grievance . . . [W]orkplace size is positively related to mediation use . . . The evidence

suggests that the use of mediation may be triggered as a response to rising levels of conflict and the experience of litigation.

The situation is, however, confused by the potential conflation, by WERS respondents, of Acas individual conciliation and Acas individual mediation.

In an editorial on family mediation but, again, making points relevant to workplace mediation, too, Maclean (2010:105) notes:

> While demand for the services of mediation remains low, demand for lawyers continues. At a time of stress, men and women seek information, advice and support from someone who is committed to helping them, in preference to an impartial facilitator whose primary task is to promote an agreement rather than meet the needs of the individual client.

a point also made by Stokoe (2012:9) in the context of community mediation.

On the issue of in-house mediation services: in 2013, CMP Resolutions collected data from more than 40 such services, 'well-established and new, and representing all organisational sizes and sectors and found over half were handling fewer than 10 mediations a year' (CMP Resolutions 2013:7). This accords with the evidence from Acas's evaluation of the impact of its Certificate in Internal Workplace Mediation (CIWM) training, which has found 'limited involvement [for respondents] in mediation since their [CIWM] training' (Acas 2009b:5) and that, 'following the training, the actual time spent on mediation by the trainees was relatively low' (Acas 2014b:1) (more details on Acas's mediation training in chapter two).

The above figures may, though, be misleading in that they may not include the informal mediation that goes on in this country. Writing, albeit, over two decades ago and in an American context, Sheppard et al (1989:166) argued that 'most mediation efforts are made in less formal, everyday settings by people who are called into the dispute or intrude of their own accord', and Kolb (1992:64) said that 'formal channels of dispute processing are relatively underutilized, and mediation is rarely the choice of managers when faced with conflict among their subordinates'.

Kolb thought it likely that 'informal peacemaking is one of the most common forms of conflict management within organizations'; and that women 'are likely to be major practitioners of behind-the-scenes peacemaking' – because of 'the structure of contemporary organizations and the support roles in which women are represented in

large numbers'. In this connection, 'Diva strops, tears and back-biting [apparently] disrupt harmony behind the scenes' at *Strictly Come Dancing* and 'it has been left to the three female stars – Tess Daly, Claudia Winkelman and Darcey Bussell – to hold things together' (Showbiz 2013:12).[33]

However, Saundry and Wibberley (2014:6) found:

> . . . limited evidence of the systematic development of integrated approaches to the management of conflict. While organisations had used mediation to achieve specific objectives, it did not appear to be seen as a central part of broader organisational strategy and was consequently vulnerable to changes in wider operational priorities.

Main providers of workplace mediation in the UK

There are many providers of workplace mediation services in the UK. At present, it would seem that just about anybody can set up as a 'workplace mediator'. In this regard, there was some surprise in Acas in 2011 when the Joint Industry Board for the Electrical Contracting Industry (www.jib.org.uk) announced the establishment of JIB Mediation Services, to provide dispute resolution for employers and employees who were not covered by the JIB National Working Rules. The services offered clearly included individual mediation, and the 'professional mediators' were to be five, not-long-retired, former senior Acas managers. As far as was known in Acas, however, although at least three of the five had been individual conciliators at some early stage in their Acas careers, none of the five had ever conducted an individual mediation before leaving Acas.

However, the Civil Mediation Council (CMC), formed in 2003 as a representative body[34] for civil, commercial, workplace and other non-family mediation, did introduce

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[33] There is a long history of female third-party activity: see, for instance, Russell (1986) on female Renaissance mediators, McCarthy (2014) on female diplomats, and – in spite of Potter's (2005:2) comments – recent examples such as Mo Mowlam, Madeleine Albright and Catherine Ashton.

[34] Interestingly, the CMC awards annually a prize to a person that it feels has contributed most notably to the development of mediation in the UK. This (Lord Slynn) prize was awarded in December 2014 to the former Acas Chief Conciliator, Peter Harwood. In its press notice about the award (Acas 2014d), Acas says that Peter 'was

registration arrangements - in 2009 - for organisations which provide mediation services in the workplace. The essence of the registration scheme was that clients would be encouraged to use, and to recommend that others use, a CMC registered workplace mediation provider. Of the CMC registered organisations, this research has concentrated on Acas, for two main reasons.

First, - in starting up to a net 250 cases a year - Acas appears to be one of the bigger single providers of non-evaluative workplace mediation in the UK. (In 'conciliating' in tens of thousands of actual and potential Employment Tribunal claims a year, Acas has surely been the biggest single provider of evaluative workplace mediation in the UK.) Secondly, there were opportunistic reasons for conducting a case study of Acas, as will be explained in chapter five.

Of the other providers of workplace mediation services in the UK that the researcher has encountered, PMR Ltd and The TCM Group stand out as do two organisations already mentioned, CEDR and CMP Resolutions. The researcher has, however, drawn in this study, to a limited extent, on the experience and views of Consensio (www.consensiopartners.co.uk), who advertise themselves as 'a leading conflict management and workplace mediation provider with a distinctive approach' and who - as indicated earlier - were awarded a Government contract in 2012 to set up two regional mediation pilots. More will be said on this in chapter five.

Summary

Mediation is but one process of the broad area of ADR. It has been used for a long time and the job of mediator is a popular one. Besides official mediators there are many, what might be termed, 'unofficial intermediation activities'. Mediation has been used to address serious interpersonal conflict at the very highest level of workplace in the UK.

There is no general theory of mediation but, it is argued, mediators will have a theory underlying their practices. There are several styles of mediation, with disagreement as to whether mediators should adjust and switch from one style to another to be effective.

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well known for his work in both individual and collective mediation' ('crossover', again).

Mediation should be distinguished from counselling or therapy, although their complementary nature is recognised by the occasional use of 'conjoint' mediation teams.

It is claimed that use of mediation may contribute to a cultural change from reliance on formal processes to resolve conflict, and that mediation is cheaper and quicker than litigation, more creative, and can repair damaged relationships. Some of these assertions have, however, been questioned.

Mediation is practised in many areas/fields in the UK (although not necessarily a great deal in each), for various reasons including beliefs about the costs of litigation, people preferring to make their own decisions, fashion, and high-level encouragement to use mediation. However, WERS suggests that there is a low level of use of workplace mediation in comparison to its inclusion in procedures. There are many providers of workplace mediation services in the UK, not least because it seems that just about anybody can set up as a 'workplace mediator'.

CHAPTER FOUR: SUCCESS IN MEDIATION - THE LITERATURE

Introduction

As already stated, the researcher conducted a review of the literature on mediation, with a view to his fully addressing the research questions as to what is 'success' in workplace mediation, and how mediators might achieve success. Chapter three reported upon what that literature review produced on mediation generally, including setting it in the context of alternative dispute resolution and considering some of the main providers of workplace mediation in the UK. This chapter reports on what the literature review uncovered on the broad area of success in mediation.

It first locates success within the theoretical framework in which this study is set, the framework of 'systems'. It then considers, in its second section, what is contained in the relevant literature on success in mediation - written agreements and other measures. The third section of this chapter reviews those variables identified from the literature that might be seen as leading to success (or not) in mediation. These variables have been grouped broadly into those that might be contributed by mediators, and those of a more situational nature, related to the commissioning and disputing parties and what they might bring to mediation (particularly the character of their dispute).

The chapter's fourth, and final, section looks at some practical implications for this study flowing from the researcher's review of the mediation literature: exploring the attraction that achieving agreements holds for Acas mediators; and exploring, too, with those mediators a relative measure of success in mediation derived from Bercovitch (2006). Finally, it draws up a process model predicting success (or not) in workplace mediation, which the researcher's empirical evidence will seek to validate.

Theoretical framework

As indicated in chapter one, the theoretical framework in which this study is set is that of 'systems', a system for these purposes being a bounded collection of linked, inter-dependent components or elements (human or otherwise) with a particular purpose, the

components being affected by being in the system and likely to change the system if they leave it (Carter et al, 1984:4 and 113). An organisation within which a workplace dispute occurs might be seen as such a system.

De Board (1978:91) believes:

> An organization is a complex system of interrelated departments, processes, and people . . . The organization is an open system in that it exists within an environment and must continually import energy, materials, and people from that environment . . . As with all open systems, the organization maintains a steady state only as long as it continually changes and adapts to the forces outside.

De Board (1978:96) goes on to describe the concept of 'socio-technical systems', as follows:

> The major components within an organizational system are the technological aspects concerning the machinery, the particular method of working, and the social aspects that involve the inter-personal relation between the employees. These components are interlinked with each other and changes in one will automatically cause changes in the other. The whole system can now be perceived as a 'socio-technical' system and its total effectiveness will depend on the balance achieved between the social and the technological components.

Eldridge (1968:19) suggests that 'the notion of an industrial relations system, used as a heuristic device, can facilitate the analysis of industrial conflict'. Further (1968:23):

> What the concept of an industrial relations system does minimally is to remind us of a whole range of considerations to bear in mind when trying to explain strikes [or industrial conflict, generally]. The character of the inter-relations, both within the system and with the environmental features impinging on and interacting with the system, is a matter for investigation, but their existence is a warning against single factor explanations of social phenomena.

Some components of a system may be grouped into sub-systems and this study regards those components typically involved in a workplace dispute - the disputing parties, the nature of their dispute, their work colleagues, Human Resources (HR), any party commissioning mediation, employment policies and procedures, and the technology of the organisation (in the broadest sense) - as a dispute sub-system of the wider (host organisation) system. Constantino and Merchant (1996:22) believe it 'obvious that any organization must have a system, consciously or otherwise, by which it exposes and resolves dissatisfaction'.

There will, as suggested, be environmental influences outside the wider system that will impact on the components of that system; and components such as the disputing parties may be located simultaneously both within a dispute sub-system yet also within the rest of the wider system and its other sub-systems. One of the environmental influences outside the wider system may be a mediator, intervening to try to achieve an agreement/mutual understanding between the disputing parties. The mediator will in turn be influenced by any other systems of which s/he is a component. Other environmental influences outside the wider system include the family and friends of the disputing parties (often overly supportive and highly influential but rarely accessible to the mediator), and the economic, labour market, legal, political and social contexts in which the system is located.[35]

The components of any dispute sub-system (detailed above) will interact to influence the nature and the results of the mediator's intervention and, ultimately, the outcome of the dispute. All of this can be put into graphic form (albeit basically and imperfectly) as follows:

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[35] Carmichael (2013:23) says 'there are those "away from the table" who may exert significant influence on those at the table, and their influence may work against that of the mediator's. Spouses, parents, bosses, government bodies, etc. fall into this category.'

Figure 4.1 Diagram of a dispute sub-system

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┌──────────────────────────────────────────────────────────────────────────┐
│ ENVIRONMENTAL INFLUENCES ON WIDER (HOST ORGANISATION) SYSTEM               │
│                                                                            │
│                                                                            │
│  Family and friends of disputing parties        Legal, political and social context │
│                    ↓                                        ↓              │
│  ┌──────────────────────────────────────────────────────────────────────┐ │
│  │              WIDER (HOST ORGANISATION) SYSTEM                          │ │
│  │                                                                        │ │
│  │       ┌ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ┐       │ │
│  │                       DISPUTE SUB-SYSTEM                               │ │
│  │       │                                                        │       │ │
│  │         Nature of DPs' dispute          Work colleagues               │ │
│  │       │                                    of DPs                │       │ │
│  │                                                                        │ │
│  │       │        Disputing parties (DPs)                          │       │ │
│  │                                                                        │ │
│  │       │                                    HR                   │       │ │
│  │         Technology of the organisation                                 │ │
│  │       │ (in its broadest sense)          Mediation             │       │ │
│  │                                          commissioner                  │ │
│  │       │                                                        │       │ │
│  │          Employment policies and procedures                            │ │
│  │       └ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ─ ┘       │ │
│  │                                                                        │ │
│  └──────────────────────────────────────────────────────────────────────┘ │
│                    ↑                                        ↑              │
│                 Mediator                 Other influences, such as economic and │
│                                              labour market context         │
│                                                                            │
└──────────────────────────────────────────────────────────────────────────┘
```

Source: Researcher

NB: We could supplement the above diagram by using the 'conflict mapping' technique outlined in Fisher et al (2000:22), to represent graphically the main parties to the dispute, the other parties involved or connected in some way, the relationships between these parties (alliances, close contacts, broken relationships, confrontation, etc), and the key issues between the parties.

As suggested, the environmental influences indicated in the above diagram will in turn be part of, components of, other systems, and subject to environmental influences themselves. In this regard, (Acas) mediators can be depicted diagrammatically and systemically as follows:

Figure 4.2 Diagram of the Acas mediator system

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┌─────────────────────────────────────────────────────────────────────┐
│        ENVIRONMENTAL INFLUENCES ON ACAS MEDIATOR SYSTEM               │
│                                                                       │
│                                                                       │
│   Mediators' other Acas functions,              Managers of mediators' other │
│     eg individual conciliation work or training        Acas functions │
│                                                                       │
│                    ↓                                    ↓             │
│       ┌──────────────────────────────────────────────────────┐      │
│       │              ACAS MEDIATOR SYSTEM                      │      │
│       │                                                        │      │
│       │   Acas's mediation policies,          Mediation        │      │
│       │     procedures, and practices         co-ordinators     │      │
│       │                                                        │      │
│       │                                                        │      │
│       │   Mediation colleagues                                 │      │
│       │                                                        │      │
│       │                 Acas mediators                         │      │
│       │                                                        │      │
│       │                                                        │      │
│       │   Mediation targets                   Mediation referrals │   │
│       │                                                        │      │
│       └──────────────────────────────────────────────────────┘      │
│                    ↑                                    ↑             │
│         Mediators' lives outside Acas    Acas's priorities outside mediation │
│                                                                       │
└─────────────────────────────────────────────────────────────────────┘
```

Source: Researcher

NB: In the researcher's experience, there may be conflict within the mediator system, including between mediators and between them and mediation co-ordinators/gatekeepers.

As indicated earlier, the mediator and the situational variables identified from the mediation literature that might be seen as leading to success (or not) in mediation will be discussed in the third section of this chapter. It is, though, important to reiterate here the point made in chapter one that any mediator looking to intervene successfully in any system should not neglect the linked, inter-dependent nature of its components.

As the family mediator Lisa Parkinson has said, in comments that are pertinent to the workplace too:

> When couples coming to mediation are seen as interconnected and interacting, rather than as detached individuals moving in different directions, the difficulties they bring to mediation are easier to understand. A systems perspective also helps mediators to take account of broader social and legal processes that are relevant to a particular situation. If discussions take place in mediation without reference to these external influences and their possible consequences, existing power imbalances may be accentuated (Parkinson 2000:72).

It has been argued that 'the basic systems theory of family therapy is evident in Haynes's work' (Haynes and Haynes 1989:xiii).

In addressing the specific question as to whether mediation is suitable for complaints of workplace bullying, about which there has been some debate, Jenkins (2011:35) recommends the systemic approach, since this 'focuses not only on mediation at the dyadic level but also addresses the group and organizational dynamics that have been shown to contribute to workplace bullying complaints'.

Finally in this section, an example in the literature of how a systems analysis can contribute to our understanding of conflictual situations comes with one of the 'tales' in Grosz (2014:140), where the psychoanalyst's patient was a 'problem' ten year old called Emily:

> . . . I realised [a few weeks before her therapy stopped] that without knowing it, or consciously wishing it, Emily's parents had made her the problem so that they did not have to deal with problems of their own. When she changed her family had to change too. . . Towards the end of [Grosz's last meeting with Emily's parents] . . . they talked about themselves, things had become very difficult between them.

Although Grosz (2013) does not mention 'systems', he clearly saw Emily and her family as, in Parkinson's (2000) words above, 'interconnected and interacting, rather than as detached individuals moving in different directions'.

Defining success

Having placed the dispute sub-system within the wider (host organisation) system, this thesis now looks at the dispute itself and, in particular, when a dispute is mediated by a

third party, at whether that dispute is successfully dealt with. This leads first to a consideration of what is success.

Svensson and Wallensteen (2010:25) say that, in many international situations, '[t]he start of mediation is a success in itself'; and one of the Bristol community mediators in BBC (1993) suggests that the parties' participation in the mediation process is more important than any particular outcome. Whilst both points have some validity for workplace mediation, too, we do perhaps need more - for present purposes - on what counts as success.

Ideally, we would get at mediation outcomes that really do feel like success to the parties involved, rather than to just the mediator. After all, a mediator might claim success, in terms of her/his knowledge or skill development, in a mediation that had perhaps been disastrous from the point of view of the parties. We may all learn from our mistakes, but that may not be of much consolation to the recipients. The researcher returns to this ideal (and the difficulties of its being achieved) later in this thesis.

Often, success is not explicitly defined. If we return to Acas, this says in – for example - its annual report for 2009/2010 that 97% of its mediations that year were 'successful' (Acas 2010:41). There is, however, no immediate definition in the report as to what this means. The 97% success rate was, the researcher assumes, a combination of what had been input by Acas staff into their Events and Advisory Recording System's (EARS) categories of 'Dispute Resolved' and 'Progress Made'; but these categories, in turn, are not defined within EARS.

In the 2012/2013 annual report, the word 'successful' is not used up front; rather, we are told that the 'issue was progressed or resolved in 91% of cases' (Acas 2013a:16). Acas returns to the word 'successful' in its 2013/2014 annual report, claiming that 94% of its mediations were successful (not defined) as opposed to 91% the year before (Acas 2014a:26). So, what has been found in other literature to count as 'success' in mediation?

Written agreements

There are many so-called 'cookbooks' on sale for dealing with conflict at work and elsewhere, and a typical one contains 'some pointers for a successful mediation: Pre-mediation, Role of mediator, Ground rules, Positions, Meeting, and Agreement' (McConnon and McConnon 2004:150). For these authors, a successful mediation results in an agreement and the mediator should '[c]heck that the agreement is acceptable to both parties. Put this in writing and invite both parties to sign it. Agree a review date.'

Likewise, in their mediation 'handbooks', Charlton and Dewdney (2004:126) say that the 'final stage of the mediation calls for the drafting of the agreement reached by the parties', and Beer (1997:53) outlines a process ending in an agreement which 'there are good reasons to insist that disputing parties write down . . . Be prepared for resistance, though.' In a 'process for primary schools', Tyrell (2002:27) suggests that, as the 'tally of arrangements [between disputing parties] grows it is written down as an *agreement*' (author's emphasis). Although mediation is a voluntary process, where 'the parties have consented to mediate they are more likely [than not] to continue the process to the end and come to a mutual agreement'.

In a book specifically for managers, Crawley and Graham (2002) include a 'do-it-yourself guide to mediating', the penultimate stage of which is 'Building agreements', which a case study suggests be written down; while, in the first of a series of 'pocket guides' to conflict resolution, Crawley (2012:66) clearly envisages agreements on various issues emerging from mediation, and those agreements being written up. In their 'toolkit' on resolving conflict, Cornelius and Faire (1989:164) suggest that, at the end of mediation, 'Make some agreements. Write them down.'

Training courses in mediation, whatever their context (workplace, family, community, etc), often specifically point participants toward written agreements as the desired conclusion of formal mediation situations. The process that has been taught for years in the community mediation area, for instance, has a sixth, penultimate stage of 'Building agreements', which includes the key task for the mediator of 'checking and recording agreements' (Mediation UK 1995:129); and the process that Acas teaches on its

Certificate in Internal Workplace Mediation (CIWM) course has a fourth, penultimate stage of 'Building and writing agreements' (Acas 2011a:H11).

Equating success with a written agreement (or vice versa) is not uncommon in literature outside the cookbook/handbook genre. For example, in their study, Bailey and Efthymiades (2009:6) say that '[s]ince spring 2008, NHS East Lancashire mediators have carried out 23 mediations, of which 22 have reached a written agreement. This equates to a 96% success rate.' To be fair, however, as indicated in chapter three, Bailey and Efthymiades (2009:7) do look beyond written agreements and associated cost savings in some respects, when they note the change of attitudes and approaches of staff in dealing with conflict.

The Acas research paper reviewing the mediation scheme about which Bailey and Efthymiades (2009) write makes a similar point, that '[m]easuring the success of mediation in terms of dispute settlement is too simplistic' (Saundry et al 2011:7). They argue (authors' emphasis):

> . . . the introduction of mediation . . . can have a *direct* effect in improving the outcomes of those disputes that are referred to mediation . . . Secondly, it can have an *indirect* impact[36] in improving the ability of organisations to resolve disputes outside the remit of mediation.

Saundry and Wibberley (2012:35) do, however, caution that their case study of a large private business in the services sector 'raises question marks over the potential of mediation to transform the way in which organisations approach conflict and employment disputes'; and, to focus on direct effect, 'successful mediation' as such still seems to come back to 'written and . . . sustainable agreements' (Saundry et al 2011:33).

A mediation provider, one of whose directors co-authored the Bailey and Efthymiades (2009) study, provides a useful commentary on its website on written agreements (Consensio 2011):

> . . . [U]nlike other mediation providers, Consensio does not merely measure success by a signed agreement; nor do we directly link a signed agreement to a high success rate . . . [W]e see a signed agreement as a useful instrument. But we quantify our success as a mediation provider by a variety of factors post-mediation: regular follow-up conversations with parties, feedback from the

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[36] An 'upstream effect' (Banks and Saundry undated:8).

> parties, and an additional meeting that can be requested by parties. This allows us to follow and support the parties in the longer term, whether an agreement has been signed or not.

It is not, however, clear from this commentary what specific measures of success Consensio uses in its post-mediation follow-up.

A written agreement may well have a symbolic significance that goes far beyond the agreement's actual content. Examples of this are the UK's 1904 'entente cordiale' agreement with France (Hurd 2011:213); and the Record of Understanding signed by de Klerk and Mandela in South Africa in 1992, the substance of which was apparently relatively unimportant, but which 'symbolized the determination of the ANC and the National Party to reach agreement' in a situation where the country otherwise 'faced disaster' (Arthur 1999:484).

Unless there is some symbolic significance to a written agreement between disputing parties in a workplace mediation, however, it is the content of the agreement, and its sustainability, that is more important in judging its success than the agreement being written up (or not). 'Some matters come to mediation with a number of separate issues that are capable of separate agreement.' There may be 'complete resolution' or only 'partial or interim agreement' (Charlton and Dewdney 2004:124).

Reinforcing the point that written agreements will not necessarily be of equal quality is Poitras and Le Tareau's (2009) research that distinguishes between what they label as disappointing, satisfactory and value-added signed agreements. In his study of the Acas small firms' mediation pilot in 2003/2004, Seargent (2005:34) says, 'Mediated agreements were composed of around six points of agreed changes in behaviours and working arrangements.'

Far from being the sole or main criterion of success in mediation, a written agreement may, indeed, sometimes be a deliberate cover for a lack of success. It is not too difficult for a mediator to get some sort of written agreement, albeit on peripheral/trivial issues, even out of mediation situations that might otherwise be seen as relatively unsuccessful. In his study of the mediation pilot in 2003/2004, Seargent (2005:31) says that, in two cases, 'parties saw themselves as having reached agreement by giving in'.

They each had 'felt exhausted by . . . [the behaviour of the other party] and wanted it ended by reaching agreements they were not committed to'.

Written agreements for 'peace' in the workplace may not, therefore, last long. One of the more well-known instances of a short-lived written agreement for peace is the notorious 'piece of paper' signed by Chamberlain and Hitler at Munich in 1938 (see Faber (2009:416) for the contrasting attitudes of the two leaders to the document). And there are plenty of examples at the more prosaic level of workplace mediation – although, as with Munich (Reynolds 2008:93), there is an argument that a short-lived written agreement in the workplace may still last long enough to benefit at least one of the parties.

To conclude this sub-section, it is easy to understand the attraction of written agreements for those who fund mediation schemes and who look for reassurance that their money is being well-used; and similarly easy to understand written agreements' attraction for mediators and commissioning parties in specific cases. A written agreement may seem an obvious indicator of the certain, definite, 'successful' closure to a case that all these people would wish for, but – as intimated above – it may have major limitations.

Other measures of success

It is, indeed, important to look beyond written agreements, and also beyond agreements as such, agreements perhaps reached on a handshake (see Randall 1999:9). Saposnek (2004:47) says:

> Some researchers assert that if the mediation process focuses on relational issues with therapeutic objectives or with emotionally transformative goals, agreement is not the only important criterion for an outcome of success;

and Della Noce (2001:77) states:

> Agreements [in mediation] are but one possible outcome, which the mediator can and does help the parties reach, if they so choose. At the same time, other outcomes are also possible, and may be valued by the parties as much or more than they value an agreement. The ultimate end-state is the parties' choice.

Della Noce (2001) promotes the transformative style of mediation, which was explained in chapter three. She argues that, for the 'stage' models (where the mediator directs progress through a series of sequential stages) which one finds in, say, the

facilitative style of mediation favoured by Acas mediators, 'the ultimate desired end-state is agreement. Stage models encompass no other definition of success: a good mediation is one in which a win-win agreement is reached.' Stage models therefore 'distort the goal of agreement from one that the parties may have to one that they *must* have. Agreement becomes an end-point which belongs to the *mediator's* overall plan' (author's emphases) (Della Noce 2001:74).

Tidwell (1998:25) talks about the 'tremendous tendency to trivialize conflict in popular texts' such as Fisher and Ury's (1987). Particularly worrisome is

> . . . the emphasis on win-win outcomes, or simply agreements that generate mutual gain. While it may be easy as an outsider to invent solutions that provide mutual payoff to two parties, the parties themselves may not see it that way . . . For some conflict there simply is no way to create a mutual gain; one side may have to 'win', while the other 'loses'. The question may be more how to design an agreement that leaves open the possibility for building relationships in the future. Yet to glibly term that kind of tough situation win-win or even mutual benefit is to make the situation appear trivial.

So, if not simply written agreements, or even just agreements, as a measure of success in mediation, what then? Latreille (2011:49) draws from research on judicial mediation to suggest that 'there is no simple, single index of success in mediation and a variety of measures have been proposed'. In looking at the outcomes from judicially mediated employment cases, Boon et al (2011:58) note:

> Measures of mediation success include degree of movement from initial positions, proportion of issues resolved, rates of compliance, 'fairness' or 'quality' of outcome and improvement in the post-mediation relationship or environment.

Yet, the authors argue, although these measures are 'the ultimate justification for mediation and the facilitative model', they are difficult to evaluate.

Bercovitch (2006:291) makes the point that 'success in mediation is a quality that may be applicable to the process or the outcome'. In theory, it is possible that disputing parties may be happy with, and consider successful, the process of a mediation they have undergone, even if disappointed with the outcome. Pruitt (2006a:859) looks at the argument that 'disputants are as concerned about justice as about satisfying their interests'. He suggests that, besides distributive justice ('a sense that the outcome is equally favourable to both parties or more favourable to the party with a more legitimate claim'), the mediator must attend to 'procedural justice, a belief that the

mediation session was conducted fairly', and 'interpersonal justice, a perception that the mediator was sensitive, polite, and respectful'.

Trying to bring parties' sense of fairness about, and satisfaction with, the mediation process (as opposed to outcome) into any definition of success would, therefore, seem to be sensible. However, the researcher is mindful of the argument that it is, in practice, impossible to separate process and content/outcome of mediation. Folger (2001:57) contends that 'process and content are intertwined – the choices made about process have a direct and inevitable influence on the way a conflict unfolds'. Also, at the risk of going beyond a literature review, the researcher would say that his own mediation experience, particularly in the family context, suggests that disappointment with outcome often leads a party to rubbish the process, and the mediator overseeing it, when it comes to end-of-mediation evaluation – whether or not justified.

Boulle and Nesic (2001:6) identify (they do not specify how) the following primary and secondary objectives of mediation: giving the parties the opportunity for, and assistance in, making decisions; bringing clarity; overcoming or reducing communication problems; identifying needs and interests; promoting constructive negotiations; reducing anxiety; encouraging the parties to take charge; reducing tension; and providing the parties with a model for future decision-making. These objectives indicate some potential measures of success in mediation beyond simply an agreement, measures both of process and outcome. These potential measures would, however, seem extremely difficult to operationalise.

Degrees of success

Implicit in Boulle and Nesic's (2001:6) objectives/potential measures of success is the point that success is not an absolute, that there are degrees of success. This idea of degrees of success is made more explicit by Mareschal (2003:437), who, in looking at mediators in collective workplace disputes in the USA, says:

> [Some] . . . indicated that they feel a sense of success even when progress is made in small degrees . . . [M]ediators tend to view 'success' along a continuum . . . At the one end of the spectrum, success means the parties gain a better understanding of the bargaining process. Sometimes the relationship between the parties is so damaged that not much more than this can be achieved during the course of the mediation. Toward the other end of the spectrum is a negotiated agreement that satisfies the parties' interests and that both sides can

live with for the duration of the contract. Under the best of circumstances, the parties indicate that they would use the mediation process again.

A perhaps more sophisticated approach to looking at degrees of success comes with Weeks (1994:9), who advocates a 'conflict partnership' approach to resolving conflicts in an effective and sustainable way. The approach focuses on the immediate conflict and the overall relationship and 'provides the power to reach the top level of conflict resolution', a resolution 'that meets some individual and shared needs, results in mutual benefits, and strengthens the relationship'. Conflict partnership is described as a process with eight steps, the last of which is making mutual-benefit agreements 'capable of resolving specific conflicts within improved relationship patterns'.

To this measure of success might be added measures indicating lower levels of conflict resolution: a middle level, where there are 'some mutually acceptable agreements that settle a particular conflict for the time being, but do little to improve the relationship for the future' (Weeks 1994:10); and a lower level, where one disputing party effectively defeats the other(s). At all of these levels of conflict resolution, then, there is some degree of 'success', for at least some of the people involved in the process.

An even more sophisticated approach to looking at degrees of success comes from Bercovitch (2006:295), who examines 'four terms utilized in describing different conflict management impacts: settlement, management, resolution and transformation. Each of these terms may indicate a different degree of mediation success.' He focuses on settlement, which 'takes place when conflict-generating behaviour is neutralized, dampened, reduced, or eliminated', and resolution, which 'occurs when the root causes of a conflict are addressed, thus negating the threat of further conflict-generating behaviour'.

Bercovitch's (2006) definitions of 'settlement' and 'resolution' are not necessarily accepted by other academic authors (see, for example, Mayer (2000:98) or Tidwell (1998:38) or, indeed, Weeks (1994:10) quoted above). Also, the researcher is not totally sure, from Bercovitch (2005:104), of even that author's precise distinction between conflict settlement and management. Non-academics, understandably, use the terms somewhat more loosely. Blair (2010:181), for instance, suggests there has been

some resolution of the Northern Ireland conflict, while many academics might consider it premature to claim more than an element of settlement.

Finally, in this review of definitions of success in mediation, it is worth noting that there appears to be little written that is explicit on what should count as 'failure' in mediation. However, in looking at 'good-enough' conflict management, Ross (2000:33) notes that '[p]opular judgements about the success or failure of . . . conflict management are often dichotomous, focusing on the presence or absence of a signed peace agreement'. He suggests, instead, 'the idea of success and failure as a continuum'.

Variables seen as leading to success

The reading that the researcher carried out on and around mediation threw up variables that might be seen as leading to success (or not). The list of those variables was a long one; they were not necessarily discrete/they overlapped; and several might simply have been reflecting the same or similar matters under different names. The variables can be grouped broadly under two headings: those variables contributed by mediators, and those of a more situational nature, related to the commissioning and disputing parties and what they might bring to mediation (particularly the character of their dispute).

The division into mediator and situational variables is, however, somewhat artificial, as illustrated by, for example, Bollen and Euwema (2013:339), who suggest:

> . . . if the disputants expect or need to maintain a relationship after the mediation, it would be reasonable for the mediator to use techniques targeted toward maintaining an amicable relationship. If no such need exists, the mediator may prefer to focus on obtaining a resolution to the specific relevant conflict and have less concern for the long-term relationship.

Is it mediator or situational variables that are driving this set of circumstances, or some combination of both?

Variables seen as leading to success: the mediator

To look first at variables contributed by mediators, much of what follows relates to situations other than the workplace but is considered by the researcher, on the basis of

his practical experience, as nevertheless relevant to workplace mediation. In the researcher's initial judgement (based on his practical experience and on his interpretation of the mediation literature), the primary mediator variable leading to success was the stage of development of the mediator. The researcher will start with this variable and then look at associated variables such as mediator experience, her/his relationship with the disputing parties, attributes, readiness, strategies, ambition, knowledge of mediation styles and conflict theories, and leverage.

Stage of development of the mediator

As to what is meant by 'stage of development of the mediator', there are various models of development that might be considered in this respect. Adler (2003:63) refers to the often-quoted one of the four stages of skill development, which, 'no matter whether you are learning to play a violin, ride a bicycle, speak Hindi, ice-skate, or presumably mediate disputes, look something like this':

1. Unconscious incompetence
2. Conscious incompetence
3. Conscious competence
4. Unconscious competence

and he urges the reader to relish the moment of unconscious competence 'because it is usually fleeting. Very shortly, you will start the cycle over again, when you are confronted by some new aspect that devolves you back to previous stages.'

Perhaps more valuable for current purposes, however, is Lang and Taylor's (2000:11) dynamic four-part model of professional development: novice, apprentice, practitioner, and artist. Although their novice category appears of limited use (the novice 'may not have observed or participated in a mediation') as does their artist category (where the description seems rather nebulous and might be difficult to transfer in practice), the apprentice and practitioner categories do seem usable.

Lang and Taylor (2000:13) say that the apprentice

> . . . has a working knowledge of some of the principles and skills of mediation. Having completed a basic mediation training program, the apprentice has participated in role-plays and case studies . . . [H]owever, apprentices lack experience . . . in putting their knowledge and skills into practice . . . [They] seek mentors to provide guidance and to help them obtain practical experience.

Practitioners are

> . . . well regarded by their peers, and their services valued by clients. They are knowledgeable and have considerable experience in a variety of practice situations . . . Practitioners continue to seek knowledge and skills and may participate in advanced training programs, although they view themselves as proficient, skilful and talented . . . [They] are also trainers for novices and mentors to apprentices.

It may be, though, that Bowling and Hoffman's (2003:15) three stages of mediator development are the most useful of all for exploration of the argument that the more 'developed' the mediator, the more likely s/he is to be successful. McGuigan (2009:351) summarises these three stages well, as follows:

> In the first stage, mediators focus on developing techniques such as active listening, reframing, and helping parties generate options; in the second stage, the mediator works toward developing a deeper understanding of why and how mediation operates. Finally, in the third stage the mediator develops a growing awareness of how her or his own qualities influence the mediation process.

Lest the third stage, in particular, seems hard to grasp, it is perhaps worth quoting Bowling and Hoffman (2003:16) themselves on the differences between their stages, in the context of the technique of reframing, 'the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution efforts' (Mayer 2000:132):

> In skills training (first stage), mediators are taught how to restate and reframe the parties' accounts in a way that helps them feel heard and understood. Further reading and study (second stage) might demonstrate the reasons reframing is an effective technique. At the level of personal development (third stage), the mediator develops the ability to reach a deeper level of personal connection with the parties, so that the reframing resonates with authenticity.

Fox (2004:462) also elaborates on the third stage of Bowling and Hoffman: 'mediators should focus on their own personal qualities. Ultimately, these are the attributes that will either enhance or limit the conduciveness of the environment to resolving the conflict'; 'as we achieve mastery as practitioners, mediation is less about [Fox's emphasis] *what we do* and more about *who we are*. It is our presence in the room that matters';[37] and 'later stage professional development for mediators is inseparable from maturation in personal and interpersonal development'.

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[37] According to Powell (2008:124), Mo Mowlam would refer to Tony Blair's 'Jesus complex', 'a belief that his personal presence could resolve problems'.

Turning now to variables associated with the stage of development of the mediator, we might look first at the mediator's experience:

Experience

In her book presenting the reflections on theory and practice of several leading mediators, working in a variety of fields, Roberts (2007) looks at what motivated the individuals concerned to become mediators. For some, it was direct experience of political or industrial conflict and violence. For others, it was this and/or childhood and adult personal experience, positive and negative – for example, a family mediator's mother falling out with her mother/his grandmother and the two never speaking to each other again.

Perhaps more important, however, for present purposes, is the thought that – as a mediator – an individual may react to parties' conflict according to her/his own experience. That experience and associated reaction may be more or less helpful in terms of success in mediation. One can imagine, for example, some childhood, personal experience(s) having caused such fear of overt conflict that a mediator tries to shut it down whenever it appears in a joint meeting, to the possible detriment of the mediation process. Self-knowledge on the part of the mediator, therefore, becomes important here.

McGuigan (2009:349) suggests that, as mediators:

> . . . we are often drawing on unidentified and repressed psychological material and actively using it to restructure or make sense of conflict according to our own perspective . . . [W]hen we are strongly repulsed by another's beliefs or actions, or when we tenaciously align ourselves with one party and not the other in a conflict, we may be in the presence of what Carl Jung characterized as the Shadow.[38]

Reflecting on the psychoanalyst Melanie Klein, Spensley (2014:170) states that, in her (Klein's) view, 'the individual's early relationships with the primary objects (usually the parents), shaped by projection and introjection, determined the nature of the internal world of relationships'. Furthermore, 'these internally determined relationships were

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[38] One of the archetypes forming, for Jung, the collective unconscious (Hall and Nordby 1999:41).

laid down like a blueprint and would emerge to colour and shape all further personal relationships'.

By way of example, in reflecting on one of his family mediation cases,[39] Haynes says (Haynes and Haynes 1989:263) that he can see how his own childhood shaped his behaviour as a mediator in the case. As the youngest of five children, and beset with thoughts about being an 'accidental'/unplanned child, Haynes empathised with the youngest son of his client couple, Michael – particularly since his (Haynes's) middle name was also Michael:

> My background shaped the lens through which I viewed this family. I believe I ignored the couple's statements about Michael because they were just too painful to accept. They would have been painful even if they had not triggered some of my own dynamics.

Haynes says (Haynes and Haynes 1989:265) that, whenever he found himself more attracted to or sympathetic with one party in a mediation, he would look to see why he was biased. 'As I identify my bias and the reasons for it, I can see what part of my experience is causing the bias.' In the case referred to above, the father (Neville) was overtly hostile to Haynes 'and it was easy to dislike him because he was making my work more difficult'. When he realised this, Haynes concentrated even harder on finding something about the father that he could like, to offset the danger of losing his neutrality.[40]

So, it may be argued, the greater the mediator's self-knowledge, the more likely is s/he to be successful. A useful tool in this respect might be Lang and Taylor's (2000:93) 'constellation of theories', the 'thoughts, beliefs, values, and principles that are the foundation for the way . . . [mediators] experience and understand behaviour, events, and interactions'. Lang and Taylor (2000:94) suggest:

> A constellation . . . is like a set of concentric circles . . . ; each is a part of the whole, and each has different levels of organization and integration. They all work together synergistically, yet each level or ring has a different character.

The central ring comprises core values and beliefs; the second ring, theories and abstracts; the third, models and approaches; and the fourth, facts and information. Lang

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[39] 'Neville and Cheryl: Who *Doesn't* Get This Child' (Haynes and Haynes 1989:228).

[40] He sought 'That of God' in the father (Haynes was a member of the Religious Society of Friends (Quakers), who believe that there is 'That of God' in everyone).

and Taylor (2000:113) set out questions to help a mediator produce her/his 'unique constellation'. However, the number and depth of questions (30 or so, of the order of 'What are my beliefs about justice and fairness?') together with the necessary follow-up analysis may be rather off-putting for the hard-pressed mediator!

The concept of heuristics may also be relevant in this discussion of experience. 'People use heuristic devices to simplify decisions in the light of their perceptions, especially when those people perceive situations with a degree of uncertainty' (Tidwell 1998:92). A heuristic commonly used by people is representativeness, where 'the perceived probability of the occurrence of an event is based upon a given event's similarity to another event'. One mediator whom the researcher interviewed early on referred to his successfully using as a mediator a lot of experience(s) learned from previous Civil Service jobs, outside Acas. Heuristics 'sometimes result in bad or incorrect decisions', of course.

Very much linked with experience is a sense of timing - of when to try to initiate negotiations, and when to exit mediation, particularly in a 'no agreement' situation. The better the mediator's sense of timing, the more successful – it is suggested - s/he should be. Svensson and Wallensteen (2010:37) say that a 'mediator needs to know the right time to try to initiate negotiations'. They quote the international mediator, Jan Eliasson, as saying, in comments that may be applied to some extent to individual workplace situations (particularly if one takes a systems approach):

> In my view, timing is absolutely crucial and central to the art of mediation. It is about the momentum toward a settlement and when to take steps toward peace. The mediator needs to take the temperature of the situation. Are the parties receptive? Is the environment conducive to a settlement? Are the internal relationships within the parties ripe for resolution? Are their allies on board? These are critical questions for any mediator and need to be seriously taken into account in order to determine when to take different steps.

A survey of some of the literature about the 'ripeness' of conflict is contained below, in the situational variables section of this chapter.

In talking of a high-level mediation effort, the Middle East peace process in 1991, Hoglund and Svensson (2011:13) say about exiting mediation:

> When other tactics had proved ineffective, all that was left for the mediator [James Baker, the US Secretary of State] was to confront the parties with the

threat of withdrawal. By leaving 'the dead cat on their doorstep', the mediator could pressure the parties to overcome obstacles for a settlement.

Baker (1999:188) expanded on his 'dead cat' metaphor: 'No one wanted to accept blame for scuttling the process'; and this often applies in individual workplace situations, too.

The problem with Eliasson's 'critical questions' is that it is easier to ask, than to answer, them. Often, when new mediators question how they may learn to 'take the temperature' of a situation, they will be told something to the effect that 'it will come with experience'. There is not, however, the opportunity to gain a lot of mediation experience (Mayer (2004:113) talks of a 'reluctance to embrace mediation and tendencies to marginalize it').[41]

Relationship with disputing parties

Following on from the 'self-knowledge' mentioned above: Fukushima (1999) looks at transference and countertransference in the negotiation process, and it seems to the researcher that mediators and disputing parties will not be immune to these phenomena in their relationships. So, a disputing party may respond to her/his relationship with the mediator according to patterns from the past (transference) and a disputing party may in turn unconsciously remind the mediator of someone from her/his past (countertransference). The latter may explain why mediators will say on occasion that they 'took' to one of the disputing parties in a mediation but not the other(s).

There are other psychoanalytical concepts that appear relevant to this variable, for example, projective identification, where, according to Bateman and Holmes (1995:111):

> . . . the patient [read, for our purposes, disputing party] projects disavowed aspects of himself into the analyst [read, mediator], who becomes unconsciously identified with those parts and may begin to feel or behave in accordance with them. The first aspect of this process is clearly allied to transference while the second can be correlated with countertransference.

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[41] As will be shown later in the thesis, Acas mediators often do not have the opportunity to gain experience. In addition, mediators (particularly, Acas collective conciliators) may find themselves under irresistible pressure to intervene in a situation even though their experience tells them that the time is not right, the situation is not ripe.

The typical mediator is not a psychoanalyst but - it is suggested - the greater a mediator's understanding of what is 'going on' in her/his relationship with the parties, the more likely a mediation is to be successful.

Also, in a family mediation context, Haynes (Haynes and Haynes 1989:271) makes the point that 'measurable movement is not always obtained in the first [mediation] session. The mediator often must lay the groundwork.' Haynes describes one case where he 'used most of . . . [the first] session to develop a relationship with the . . . [disputing parties]', believing that 'no negotiations could have taken place before I developed a relationship that allowed the . . [parties] to trust me as a partner in solving their problems'. These thoughts are surely applicable to workplace mediation, too.

Attributes, or qualities, skills and techniques of the mediator

A further associated variable is the mediator's attributes, or qualities, skills and techniques ('attributes' for convenience). There is some debate about the extent to which these contribute to success in mediation. On the one hand, there are authors emphasising the importance of situational variables, for instance, Svensson and Wallensteen (2010:8), who say that '[o]ften outcomes do not just reflect the achievements of the mediator, but also the ambitions of the primary parties'; and Goldberg and Shaw (2007:394), who put it even more strongly when they say:

> . . . regardless of the mediator's talents, disputing parties will not agree to a proposed settlement unless it satisfies the core interests of each and is perceived by each as preferable to its best alternative to settlement.

On the other hand, several authors stress the contribution of the mediator to success. Mareschal (2003:435), for example, quotes a US federal mediator, albeit looking at mediators in collective workplace disputes:

> What makes for successful mediation is a mediator who has tremendous active listening and communication skills, understands the issues, and [understands] that there are two dynamics occurring during the mediation, the process and the content, and it's a unique ability of the mediator to know when to drop process and then be able to jump to content interventions and eventually suggesting alternatives.

Moreover, although mediators may stress the importance of their role, the parties may have a different view. As Adler (2003:75) says in an account of an analysis of some 30 successfully mediated cases, when 'asked . . . to explain what they did to bring about

success . . . [t]he mediators . . . gave elaborate explanations of strategies, timing, and tactics'. However, the parties 'had a very different view. What they recalled . . . [the mediators] doing was opening the room, making coffee, and getting everyone introduced.'

Also subject to debate is the issue of 'nature' or 'nurture', the extent to which attributes are intrinsic to mediators or may be learned by them. Boulle and Nesic (2001:188) say that '[c]ertain mediator skills such as active listening or empathising are sometimes regarded as "soft" skills which are innate in some people and cannot be learned'. The researcher is, however, at one with Boulle and Nesic (2001:188) in believing that 'all mediator skills and techniques can be learned, practised and developed to some extent'. That is not to say that all mediators can learn to do as well what seems to come naturally to others, particularly some of the better-known mediators (see below). It may be, too, that a lack of mediation training in many organisations (Acas included) leads to a greater reliance on nature, on what is intrinsic.

It often appears difficult, in practice, comprehensively to distinguish attributes or qualities from skills, and – in turn - skills from techniques. How, for example, does one characterise 'good listening'? Is it an attribute or quality of a mediator, a skill or a technique? An argument might be made for each. So, (it is) difficult in practice to distinguish, and perhaps also a rather pedantic exercise. There is certainly a huge amount of literature in this broad area of attributes and what follows is the researcher's attempt to pick out just some of what seem significant offerings.

It is worth looking, first, at some of the (admittedly, impressionistic) portraits of well-known mediators, to see what they tell us about attributes making for success. One famous mediator is former US Secretary of State Henry Kissinger, whose skill as 'a consummate manipulator of personal relations' is seen by Otte (2001:203) as 'a key to his negotiating success. Yitzhak Rabin recalled that Kissinger "created a kind of personal relationship that forced people to be committed to him".' An earlier UK counterpart of Kissinger, Anthony Eden, 'did not [however] believe in personal

diplomacy, which he regarded as something of a myth' (Henderson 1987:10). But '[s]uch was his personality that he could get the most out of people'.[42]

Another well-known mediator was Nelson Mandela, examples of the traits that 'make . . . [him] an effective integrative mediator . . . [being] self-confidence, expertise in persuasive debate, patience and persistence, self-control, authoritative bearing, empathetic capacities, and ability to win others' confidence and respect' (Lieberfeld 2003:247). While it seems reasonable, however, to propose that a good dose of self-confidence will help a mediator to be successful, too much self-confidence may perhaps lead, as with Mandela, to accusations of arrogance, inflexibility and stubbornness (Lieberfeld 2003:241).

Adam Curle, one of the best-known Quaker international mediators, suggested the following principles for peace makers: acknowledging the good in everyone; listening and attention; earning acceptance by those with whom they are working; and persistence (Curle 1987:56). On the last-mentioned, Curle (1987:67) says:

> . . . peace makers who derive their impetus from a deep sense of kinship with all human beings, particularly those who suffer, must be resolutely persistent. One may judge the authenticity of their ideals by the strength of their refusal to give in to discouragement. Indeed, just when peace makers (and so probably everyone else) are most pessimistic about the prospects for peace and consider giving up, it is most important to plug on without losing heart.

To some extent, then, the more the mediator's commitment to what s/he is doing, the more likely is success. Disputing parties may at some stage, however, react negatively to the mediator who simply refuses to give up; and it is a common mistake to blindly continue to do more and more of what has already failed to succeed. As Mayer (2000:168) suggests, to overcome impasse calls first for an analysis of its nature – is it tactical or genuine and, if the latter, emotional, cognitive or behavioural? Simple commitment, persistence, by the mediator is not enough.

Looking at another international mediator, Jan Eliasson, Svensson and Wallensteen (2010:53) say:

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[42] Earlier still, Woodrow Wilson's representative, Colonel House, was said to possess, if not magical qualities, then at least 'a magnetic personality which made it difficult for individuals who worked with him to resist his propositions' (Williams 1984:3).

> It is hard to describe . . . [his] personality without making reference to his charisma. Eliasson is positive, personable, and generous. He generates warmth. These traits are important in Eliasson's efforts to create an environment conducive for fruitful negotiations.

and, focusing on Dennis Ross's work over the years on the Israel/Palestinian conflict, Bebchick (2002) classifies Ross's techniques into nine categories: empathizing, building trust, creating movement, disaggregating issues and symbols, generating creative options, using deadlines effectively, equalizing a power imbalance, establishing confidentiality, and being a fair broker.

If 'disaggregating issues and symbols' seems rather opaque, Bebchick (2002:120) explains this as follows: 'positional bargaining commonly involves negotiating over symbols, and these symbols are almost always irreconcilable'. The mediator should try 'to switch the focus of talks to a discussion of practical, mutually beneficial arrangements that might plausibly be attained'. Interestingly, Ross claimed that 'his techniques were intuitive and derived from experience, and that he was not particularly influenced by any specific theory current in the mediation/negotiation literature' (Bebchick 2002:127).

Finally, moving into the workplace area, one of America's best-known mediators of workplace grievances, Bill Hobgood, is said – among other things - to be 'incredibly patient', just sitting and listening, letting people talk as long as they want (Kolb 1994:149). One is reminded of Harry Gosling's description of Lord Askwith (see chapter three), nearly a century earlier: 'he would sit for hours and hardly speak.[43] His patience was inexhaustible; he always seemed to be waiting until nobody could think of another word to say' (Heath 2013:119). Or, as Ben Tillett put it (about Askwith), somewhat more graphically:

> A patient, plodding, big man, with pigeon-holes in his brain, unemotional, diplomatic, calm, patient, cold – all these epithets could be applied to him. In industrial negotiations, he could sit without sign of being bored or absorbed, concealing his feelings, if he had any, behind a Chinaman's [sic] mask of impassivity, never raising his voice, never appearing to hurry, guiding the disputants on both sides without appearing to guide them (Wigham 1982:20).

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[43] In contrast, William Abraham (Mabon), the early 20th century South Wales miners' leader, 'was known to use . . . [his rich tenor voice] to good effect when union meetings were a bit fraught by singing Welsh songs to calm the atmosphere' (Heath 2013:110).

While there is only one Kissinger, one Mandela, one Ross, many of these mediators' – seemingly natural - attributes leading to mediation success are surely within the reach of mediators generally. Bebchick (2002:116) suggests that most of Ross's techniques 'can play a useful role in any mediation' – and, by implication, be practised by most mediators.

Turning to just a few of the more general studies where attributes making for success are set out, two Quaker mediators, Williams and Williams (1994:54), identify characteristics 'more useful than others in doing mediation' as including: willingness to listen to all sides; confidentiality and discretion; memory, writing and language skills; intuition and other qualities; and tolerance for ambiguity, transparency and uncertainty. And, following interviews – to find best practice - with 'over sixty conflict resolution professionals with theory or practice expertise in intractable conflicts', Portilla (2006:242) identifies 'a number of themes [that] came up repeatedly. Most prominent are the virtues of listening, humility, patience, and hope.'

Ironically, after a disclaimer that they are not attempting to describe and explain mediator skills and techniques exhaustively but to refer only to a selection, Boulle and Nesic (2001:189) nevertheless spend some 30 pages on organisational, facilitation, negotiation and communication skills and techniques – ranging from 'supervising arrivals and departures' to 'using silence'! And Herrman et al (2001:139), who report on an analysis of the job of mediators involved in interpersonal disputes, identify 18 knowledge and 13 skill areas emerging from that job analysis.

General studies listing attributes making for success in mediation may well become overwhelming for the everyday mediator. Benjamin (1999:8) remarks:

> . . . conventional wisdom in the field is that a mediator is a humanistic, compassionate, patient, empathetic and rational listener, slow to anger and frustration and eternally optimistic that all issues can be resolved and have a right and proper resolution;

and Boulle and Nesic (2001:188) suggest that '[s]ome lists of mediator proficiencies imply that only divine beings could qualify for the role'.

Perhaps more important for this chapter, the portraits and studies, some more rigorously constructed than others, quickly become overwhelming for a researcher

trying to distinguish the most significant attributes in a huge collection, none of which one would particularly disagree with (a 'motherhood and apple pie' situation). Helpfully, Collins (2005:13) conducted a literature review that explored the importance of the personal qualities - in a broad sense - of the mediator and came up with a top 10 list of (umbrella categories of related) qualities:

> The personal quality mentioned most often was empathy . . . followed by multivalent thinking. The middle bunch [i.e. numbers 3-6] included authenticity, emotional intelligence, presence and neutrality. The final group [i.e. numbers 7-10] incorporated intuition, valuing what the parties bring, artistry and curiosity.

Of these qualities, 'multivalent thinking' is perhaps the one calling for explanation/elaboration.

Collins (2005:5) explains this quality as that 'a mediator must be flexible enough to think and feel on many different levels simultaneously, while concurrently managing the mediation process' and so 'mediators need multi-tasking abilities that allow them to operate, and feel comfortable, in an environment that is dynamic and ever changing'. On a similar theme, in an article comparing the mediator with the jazz musician, Balachandra et al (2005:433) say that '[e]xperienced mediators develop a set of skills that they can draw upon in the moments that they need them. Some of these key abilities are improvisational.'

Collins (2005:2) admits that her 'research methodology was very simple and involved reading material and then giving the qualities a score based on how many separate articles/books mentioned them'. She acknowledges that 'the results of the top 10 are somewhat arbitrary; after all, reading one more article could change the order'. What Collins (2005) says does, however, seem to be broadly in line with what other authors quoted earlier are saying, either about particular mediators or about mediators in general. It appears to tie in, also, with Goldberg and Shaw's (2007) report on a large research project – involving both mediators and representatives - designed to determine how mediators in various contexts succeed (in the narrow sense of obtaining frequent settlements).

Goldberg and Shaw (2007:414) state (their emphasis):

> The central conclusion to be drawn is that a – if not *the* –core element of mediator success is the mediator's ability to establish a relationship of trust and confidence with the disputing parties.[44]

Trust and confidence is obtained 'by being friendly and empathetic, by demonstrating high integrity, or by being intelligent, well prepared'. The mediator must then 'be capable of taking advantage of the trust and confidence by exercising one or more skills' such as being 'patient, persistent, never quits', 'does useful reality testing' and 'asks good questions, listens carefully to responses'.

Poitras (2009:307) too suggests that 'consensus has developed among mediation scholars that building trust is a key factor in a successful outcome to mediation'. He uses qualitative analysis to define the variables that influence trust, and statistical analyses to ensure that conclusions are objective and valid. For him, the core mediator factors that contribute to trust are mastery ('experience with the mediation process and grasp of the case'); effectively explaining the mediation process; warmth and consideration ('similar to empathy'); chemistry, that is, 'the mediator's gaze or tone of voice or other less tangible factors can incite the parties' trust'; and absence of partiality/bias toward the other party. These core factors/variables are similar, but not identical, to what Goldberg and Shaw (2007) are saying.

To summarise, out of those mediator attributes identified as contributing to success in mediation, the literature seems to point toward the following five (attributes) as most important: a mediator's ability to build personal relationships/earn acceptance; empathy; multivalent thinking/flexibility of mind; authenticity/genuineness/integrity; and patience/persistence - attributes that are not necessarily discrete. A final, salutary point, however: Goldberg and Shaw (2007:415) argue that 'there is no single model of the successful mediator' and, by way of example, Curran et al (2004:514) say of George Mitchell in Northern Ireland and Richard Holbrooke in Bosnia:

> Each . . . took actions leading to what most observers would regard as a provisional success – at least over the short to medium term, and certainly relative to violent alternatives . . . Yet, the personalities of these two men could hardly be more different nor could they have taken more divergent approaches to their roles.

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[44] Ideally, the trust and confidence is two-way. It is difficult for a mediator to work with one or more parties whom s/he does not trust, for whatever reason.

The researcher nevertheless believes that it is possible, and will be trying, to generalise to some extent but (believes) that – as Curran et al (2004:514) argue - we should avoid 'easy generalizations about effective mediation'.

Readiness

Very much related to the attributes, or qualities, skills and techniques of the mediator is (the 'crossover', from international mediation, concept of) the mediator's readiness. Crocker et al (2004:110) state that, to be effective (successful), mediators must be 'ready in every sense of the word'. For Crocker et al, the concept of mediatory readiness 'encompasses three . . . dimensions: having operational and political capacity . . . ; having strategic and diplomatic capacity . . . ; and . . . being the right mediator for the job at hand'. Examples of the issues these dimensions throw up, examples that appear relevant to Acas individual mediation, include

- whether the mediator has the necessary resources for the mediation;
- '[a] mediating entity [45] is not ready to take on an intractable conflict if that conflict's settlement is not intrinsically important enough to warrant a central place in the entity's overall policy'; and
- one should 'carefully consider up front the prospective "fit" between a conflict and a third party. We are talking here of the mediator's identity, image, cultural and geographic links, and overall relationship to the parties.'

Having entered a conflict, a mediator 'will need to diagnose the situation to get a proper picture of what is possible' (Svensson and Wallensteen 2010:37). The mediator must

> . . . study the parties, their interests, and the issues and assess whether there is a real possibility to advance toward a negotiated settlement. It might also be possible to use the entry moment itself to make progress toward peace.

All of which suggests to the researcher that, while a mediator should be 'ready', s/he should not rush into a mediation. While doing so may seem very dynamic, it may not perhaps be as efficient as it might seem, at the time.

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[45] E.g. Acas.

Strategies

Whether or not strategies are part and parcel of the attributes, or qualities, skills and techniques of the mediator (and, sometimes, some authors appear to use the terms 'techniques' and 'strategies' interchangeably), the strategies that are used by a mediator, how they are used, and whether the mediator even thinks in terms of strategies: all of this might be taken to indicate the mediator's stage of development, whether s/he is at that first stage or has moved beyond. As to exactly what is meant by strategies, Carnevale et al (1989), for instance, identify four basic mediator strategies (integrate, press, compensate and inaction), with the choice of strategy determined by the relative strength of the mediator's concern for the parties' aspirations and the mediator's perception of common ground between the parties.

From experience, the researcher would question some of Carnevale et al's (1989) assertions. For example, the researcher's 'inaction' in some mediation situations may have been determined more by low, than by high, perception of common ground and also by the belief that the parties to a dispute are the best people to resolve it. The point remains, however, that the strategies used might well indicate the mediator's stage of development.

Ambition, level of service

A further variable associated with the mediator's stage of development is the mediator's ambition, the level of service s/he aims to provide in any particular case. Many attempts to evaluate workplace activities nowadays start from the objectives of the individuals involved and try to measure whether or not these were achieved. So, it may seem self-evident that a mediator's ambition, the level of service s/he aims to provide in a particular case, will feed into and help determine assessments of success (or not) in mediation.

It is not, however, simply a case of the greater the mediator's ambition, the greater the likelihood of success. There is also an argument that, the more ambitious one is as a mediator, the less successful one may appear to be - and vice versa. Bercovitch (2006:298) asks:

> How do we deal with mediators who have minimum goals, and contrast with those who have peak aspirations? The U.N. in conflict situations has only

minimal goals. It expects to achieve a cease fire or an end to violence. The U.S.A. as a mediator in many conflicts, on the other hand, may have more complex and ambitious goals, including a new structure of relationship, new institutions, and new ways of doing things. Is it fair to talk about UN success as a mediator and to contrast it with the experience of the USA?

As indicated later in this chapter, the researcher has worked with the concept of *appropriate* mediator ambition in his research.

For the researcher, an 'ambitious' mediator will be looking to follow up her/his work, not simply disappearing without trace once a mediation is completed. However, Saundry et al (2013:27) say that an important issue that emerged from interviews for their study looking at the participant experience of workplace mediation was 'the lack of any follow up after the mediation process either from the organisation or the mediator. A number of respondents thought that this could have been useful.' One of the authors of Saundry et al (2013) accepted, during discussion at the ESRC 'Reframing Resolution' seminar at Swansea in February 2013, that disputing parties to some extent felt abandoned by mediators (from Acas, in 15 of the 25 cases) who had, after all, spent time building up rapport with them.

Knowledge of, and preparedness to use, a range of mediation styles, and theories about conflict

The researcher would argue that a mediator's knowledge of, and preparedness to use, a range of mediation styles, and theories about conflict, is bound up with and will reflect her/his stage of development; and that the more knowledge of, and preparedness to use, a range of mediation styles and conflict theories a mediator displays, the more successful that mediator will be. The practice of co-mediation (discussed in chapter five), with the increase in knowledge it entails, is obviously relevant here. Some of the literature on styles of mediation[46] has been reviewed in chapter three.

Theory has been defined by Miller and Wilson (1983: 112) (their emphasis) as a

> . . . set of integrated hypotheses designed to explain particular classes of events. The structure of a theory is composed of two elements: a vocabulary of *concepts* and the *propositions* expressing the relationship between concepts.

Fisher et al (2000:8) identify 'major theories about the causes of conflict, each of which points to different methods and goals'. The theories they list are those of community

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[46] For instance, the evaluative, facilitative, insight, narrative and transformative styles.

relations, principled negotiation, human needs, identity, intercultural miscommunication, and conflict transformation; and the 'goals of work' for any one theory are the actions, say, a mediator operating with that theory might take, to resolve the conflict in focus.

By way of example, principled negotiation theory 'assumes that conflict is caused by incompatible positions and a "zero-sum" view of conflict being adopted by the conflicting parties'. Associated goals of work are:

> . . . to assist conflicting parties to separate personalities from problems and issues, and to be able to negotiate on the basis of their interests rather than fixed positions [and] to facilitate agreements that offer mutual gain for both/all parties.

On the other hand, intercultural miscommunication theory 'assumes that conflict is caused by incompatibilities between different cultural communication styles' and goals of work are 'to increase the conflicting parties' knowledge of each other's culture[,] to weaken negative stereotypes they have of each other [and] ultimately, to enhance effective intercultural communication'.

Leverage/power

As a general rule, the more leverage available to the mediator, the more likely s/he is to be successful. Crass use of that leverage may, however, prejudice success or make any (success) short-lived. So, again, it might be argued, the mediator's stage of development is crucial, whether – for example - s/he has that awareness of how her/his own qualities influence the mediation process. Crocker et al (2004:94) identify the sources of leverage that may be available to a third party to move disputing parties.

They are talking in the context of intractable conflicts around the world but their list can be adapted for individual mediation purposes. Potential sources of leverage for the mediator may flow from the following (some of which might be expected from a systems approach): the support of others, especially those who can help to overcome opposition to mediation; a balance of power in the conflict itself; the mediator's bilateral relationships with the parties; the mediator's ability to influence the parties' costs and benefits, as well as their fears and insecurities; and a proposed (by the mediator) settlement formula or package.

Paradoxically, perceived bias may give the mediator:

> . . . entry and even leverage over at least one of the parties and, reciprocally, over the other. The condition of effective bias is the concomitant supposition that the biased mediator will deliver the party toward which it is biased. The mediator has the challenge of using and redressing its bias by engaging it in the negotiation (Zartman 2008b: 306).

So, in the 1970s, Kissinger was widely seen as a friend of Israel but President Sadat of Egypt accepted him as a mediator who might be better able to 'deliver' the Israelis than an impartial mediator, whom the Israelis might trust less.[47]

Variables seen as leading to success: the situation

To look next at variables of a more situational nature: much of what follows, again, relates to situations other than the workplace but is considered by the researcher as nevertheless relevant to workplace mediation. In the researcher's initial judgement, the primary situational variable leading to success was the tractability of the conflict. The researcher will start this sub-section with this variable and then look at associated variables such as the ripeness of the conflict; the parties themselves; the quality of their relationship; the congruence of their perception about the 'problem'; the 'stage' of the conflict; the speed in getting into mediation; the parties' capacity to satisfy each other's interests; the balance of power; the parties' belief in moving forward; the time allowed for the mediation; the encouragement from others; and the physical environment.

Tractability of conflict

A key variable that disputing parties will bring to a mediation is the nature of their conflict, in particular, whether it is more or less tractable, whether or not it is one of those 'conflicts that stubbornly seem to elude resolution' (Burgess and Burgess 2006:177). Mayer (2009:21) suggested that it is 'useful to think about conflict as having six overlapping categories', one of which is that it may be enduring or intractable. He identified the defining characteristics of enduring conflict as that it has deep roots, reflects identity issues, involves values, is embedded in structure, is systemic and complex, is rooted in distrust, and involves fundamental issues of power.

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[47] In the same arena, Jimmy Carter was also 'far from neutral . . . but . . . decidedly successful and effective' (Bercovitch 1997:129).

Mayer believes that '[a]ll enduring conflicts exhibit some of these characteristics, and often all of them are present'.

Similar and complementary thoughts come from Zartman (2005:48), who argues:

> Five internal characteristics combine to identify intractable conflicts. They are protracted time [and the effects of that duration], identity [of the Other] denigration, conflict profitability [to someone], absence of ripeness [as a pressure toward negotiation], and solution polarization [that is, the competing pulls of salient solutions].

Zartman suggests that, although independent of one another, these characteristics tend to reinforce one another, which makes it hard to deal with them individually.

Mayer (2009) and Zartman (2005) are not, of course, the only ones to analyse intractability but their combined efforts allow exploration of the variable of (more/less) tractability of a conflict, and its importance relative to other variables, in an Acas individual mediation context. As for the relevance of the variable, Mayer (2009:52) cautions against trying for the immediate resolution of intractable conflict. We should instead 'stay with' such conflict, which 'requires us to live with unsolved problems, unresolved conflict, and more questions than answers' and 'to develop the ability to tolerate ambiguity, uncertainty, and contradictory needs and realities' - all of which has implications for 'success' in mediation.[48]

'Ripeness' of conflict

Identified by Zartman (2005) as an internal characteristic of intractable conflict, (absence of) ripeness is worth examining in its own right. Zartman (2008a:22) says:

> While most studies on peaceful settlement of disputes see the substance of the proposals for a solution as the key to a successful resolution of conflict, a growing focus of attention shows that a second and equally necessary key lies in the timing of efforts for resolution. Parties resolve their conflict only when they are ready to do so.

This is the idea of a 'ripe moment', a concept which 'centres on the parties' perception of a Mutually Hurting Stalemate (MHS), from which they seek an alternative policy or Way Out (WO)'.

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[48] 'Staying with' conflict is not, of course, the same as a mediator's blindly pressing on with her/his usual dispute resolution methods when they are clearly not working, in the hope that something will turn up.

According to Zartman (2008a:23):

> Ripeness is necessarily a perceptual event, although as with any subjective perception, there are likely to be objective referents to be perceived. These can be highlighted by a mediator or an opposing party if they are not immediately recognized by the party itself, and resisted so long as the conflicting party refuses or is otherwise able to block out their perception.

As for a Way Out, the parties need 'only a sense that a negotiated solution is possible for the searching and that the other party shares that sense and the willingness to search too'.

As is implied, a Mutually Hurting Stalemate 'can be a very fleeting opportunity, a moment to be seized lest it pass, or it can be of a long duration, waiting to be noticed and acted upon by mediators':

> . . . negotiators must provide or be provided prospects for a more attractive future to pull them out of their conflict, once a MHS has pushed them into negotiations. The seeds of the pull factor begin with the WO, but that general sense of possibility needs to be developed and fleshed out. When . . . [such a Mutually Enticing Opportunity] is not developed in the negotiations, they remain truncated and unstable (Zartman 2008a:30).

The implications of all of this for success (or not) in mediation are, hopefully, obvious. There would appear to be an onus on the mediator to help disputing parties identify those moments when 'efforts for resolution' are appropriate. So, it is perhaps appropriate to focus now on the commissioning and disputing parties.

The parties

Thomas and Kilmann (1974:9) suggest that, in conflict situations:

> . . . we can describe a person's behaviour along two basic dimensions: (1) assertiveness, the extent to which the individual attempts to satisfy his/her own concerns, and (2) cooperativeness, the extent to which the individual attempts to satisfy the other person's concerns. These two basic dimensions of behaviour can be used to define five specific methods of dealing with conflicts: accommodating, avoiding, collaborating, competing, and compromising. All five modes are useful in some situations. Each of us is capable of using all five conflict-handling modes: none of us can be characterized as having a single, rigid style of dealing with conflict. However, any given individual uses some modes better than others and therefore, tends to rely upon those modes more heavily than others, whether because of temperament or practice.

The disputing parties in a mediation may therefore be predisposed 'to rely upon some conflict behaviours more or less than necessary'. Some of these behaviours will be less

helpful to mediation success than others, for example, competing ('a power-oriented mode, in which one uses whatever power seems appropriate to win one's own position') and avoiding (not addressing the conflict). On the other hand, collaborating ('an attempt to work with the other person to find some solution which fully satisfies the concerns of both persons') should be more helpful to mediation success. Thomas and Kilmann (1974) have operationalised their thoughts in a questionnaire, which mediators might administer at the pre-mediation stage, with a view, say, to working on behaviours less helpful to mediation success.

A more sophisticated approach to commissioning and disputing parties may be found in Irving and Benjamin's (2002:84) Therapeutic Family Mediation model, whose first phase involves an assessment of the extent to which the disputing parties are amenable to mediation. Assessment 'is based on . . 19 indicators organized in . . clusters concerned . . with (a) interpersonal skills and attributes, (b) intrapersonal skills and attributes, (c) life circumstances, and (d) relationship quality'. Examples of (a), (b), (c), and (d) include communication skills, cognitive functioning, life resources, and frequency and intensity of conflict respectively. (The researcher will look at relationship quality, generally, in the next sub-section.)

Holaday (2002:191) suggests 'borrowing' from adult psychological development theory in order to better understand some of the behaviours that people show in mediation. She believes that the various adult psychological development theory models 'can help us to assess whether or not resolution [in mediation] is likely and, if so, the most promising paths to that resolution'. Her own five-stage model ranges from the so-called physical stage through to the hedonistic/impulsive, conformist/authority-seeking, rational/individualistic, and integrative stages. She indicates for each stage a 'typical worldview', 'common behaviours in conflict', 'major issues/requirements for satisfactory resolution', and 'the role of the mediator'. She thinks that mediators 'can become more mindful of why certain techniques work with certain people and not with others'. The problem is that it is 'difficult to accurately assess someone in the few short hours that most mediations last'!

Worryingly, an examination by Ettner et al of a representative sample of working adults in the United States found that 18% of men and 16% of women in the sample

had at least one personality disorder (Sidle 2011:76). By personality disorder is meant 'a type of mental illness in which a person has a rigid and unhealthy pattern of thinking and behaving no matter what the situation'. According to Sidle (2011:77):

> Ettner and her colleagues found that those who had . . . [obsessive-compulsive disorder], as well as those with paranoid and antisocial personality disorders, were much more likely to be fired or experience problems in interactions with co workers and bosses. In the light of these findings, it is clear that personality disorders account for a substantial amount of workplace dysfunction.[49]

In a recent mediation between staff in a school, the researcher was pulled up for his language by one of the protagonists and reminded that teachers do not talk of difficult people, only difficult behaviour. However,

> . . . if you are one of those unfortunate people who has had to tolerate the difficult behaviour of someone who has consistently manipulated, threatened, intimidated, undermined or in any way denied you the privileges the critics would afford them, then you probably find it very hard to relinquish the term 'difficult person' when thinking of them (Winbolt 2002:vii).

Boddy (2006:1461) talks of 'organisational psychopaths', who 'are able to present themselves as desirable employees and are easily able to obtain positions in organisations':

> Without the inhibiting effect of a conscience they are then able to ruthlessly charm, lie, cajole and manipulate their way up an organisational hierarchy in pursuit of their main aims of power, wealth and status and at the expense of anyone who gets in their way.

In examining the concept of the high-conflict post-divorce couple, Friedman (2004:101) questions the belief that post-divorce conflict 'is more or less equally the responsibility of both parties', so – for example – 'the ex-spouses of narcissistically disturbed individuals can do little to avoid a conflictual relationship short of acceding to their wishes', a conclusion that has implications for relationships in any workplace where such a disturbed individual is involved.

Finally, Saposnek (2004:38) reflects that 'the population of our [family mediation] craft has been changing dramatically' and that mediation 'approaches and techniques that worked quite well in the past often are inappropriate today'. By implication, not just

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[49] On the other hand, Whatling (2012:39) says that disputing parties 'coming for help [to mediators] because of a temporarily disabling conflict or dispute does not render them either mad or stupid'.

family but also workplace mediators should not continue to churn out, almost without thought, something that may have been out-of-date even when they first learned it!

Quality of parties' relationship

Contributing to the tractability of any dispute is the quality of the disputing parties' relationship. In the researcher's own mediation experience (be it community, family or workplace), disputing parties have often previously been very good friends. Work on relationship breakdown suggests five primary causes of workplace friendship deterioration: personality, distracting life events, conflicting expectations, promotion, and betrayal (Sias et al 2004:321).

Coser (1956:62) suggests that '[t]he closer the [social] relationship, the greater the affective investment, the greater also the tendency to suppress rather than express hostile feelings':

> . . . a greater intensity of conflict can be expected in those relationships in which the participants have been led to suppress hostile feelings . . . [T]he fear of intense conflict may lead to suppression of hostile feelings, and in turn, the accumulation of such feelings is likely to further intensify the conflict once it breaks out.

It may be, then, that the more 'secondary' the relationship, the less intense the conflict is likely to be – with more chance of success for the mediator.

Pruitt (2006a:861) points out that 'Fisher and Keashly (1990) distinguish four levels of escalation [in relationship] that require different approaches to third-party intervention', levels which they label discussion, polarization, segregation, and destruction. At the 'segregation' level, 'in which the parties are competitive and hostile', and the 'destruction' level, where the parties aim to 'subjugate or even to destroy each other',

> . . . relationship building is not feasible, and the mediator should try to contain the conflict by taking firm steps to stop hostile action.[50] If these steps are successful, it may be possible to work on relationships later.

Pruitt (2006a:861) thinks Fisher and Keashly's model is appropriate to conflict between individuals, although he does point out that it needs empirical testing. The researcher's concern is that, if the model is valid, mediators may well be wasting their time - in

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[50] What the researcher has labelled as 'dispute management' in chapter five of this thesis.

many cases - in trying to work on relationships, because of where the disputing parties currently are. What the mediator should attempt is contingent on an analysis of the context of the dispute.

In a family context, Irving and Benjamin (2002:88) mention Garrity and Baris's Conflict Assessment Scale, encompassing five points or positions of conflict: minimal, mild, moderate, moderately severe, and severe. Irving and Benjamin suggest:

> . . . it will be useful to think about client conflict in terms of the interaction between topic and intensity. Conflict that is mild to moderate in intensity and confined to one topic area represents a positive indicator for mediation. Conversely, conflict that is severe in intensity and includes . . . [more than one topic area] represents a negative indicator for mediation.

It would be interesting to try to use this scale in any future research.

Congruence of parties' perception about the 'problem' and its various aspects

A dispute may be less intractable, the more that the parties agree as to what is the 'problem' between them. Haynes and Haynes (1989:21) suggest that each party to a dispute will have

> . . . a unilateral problem definition, and the parties . . . [be] in dispute about process and content. Their inability to develop a joint and mutual definition of the problem is in itself a major part of the problem. This means that the mediator's role in the early stages of negotiation is to define the problem to be resolved. Thus, the mediator must attempt to define and control a mutual and neutral problem definition such that, when the problem is solved, its solution will benefit both parties.

Haynes et al (2004:6) identify generic strategies used by mediators to bring parties to a common problem definition. These are mutualizing, normalizing, maintaining a future focus 'with an additional focus on what the clients want rather than what they do not want', and summarizing 'useful' (while ignoring 'unuseful') information. A mediator cannot help parties

> . . . by helping them find solutions to disparate problem definitions. If the mediator focuses on one of the presented problem definitions, it will cause consternation in the other client(s). If the mediator persists in focusing the clients on the search for a solution to one client's problem definition, then the other client(s) will leave the mediation.

'Stage' of conflict

Relevant to the tractability of conflict, and surely related to Fisher and Keashly's (1990) 'levels of escalation', is the suggestion (Fisher et al 2000:19) that conflicts pass

through 'different stages of activity, intensity, tension and violence. The basic analysis comprises five different stages': *pre-conflict*, where '[t]here may be tension in relationships between the parties and/or a desire to avoid contact with each other'; *confrontation*, where '[r]elationships are becoming very strained'; *crisis*, where '[n]ormal communication has probably ceased'; *outcome*, where 'levels of tension [and] confrontation decrease somewhat'; and *post-conflict*, where there may be 'a decrease in tensions and [a move] to more normal relationships' although 'if issues and problems have not been adequately addressed, this stage could eventually lead back into another pre-conflict situation'.

The argument is that some stages of conflict will be more conducive to mediation success than others. A challenge for a mediator in a particular conflict might, therefore, be to determine what stage it has reached, with a view to deciding whether to intervene or not at that moment. The reality for Acas mediators, however, is that, if the parties want to go ahead with a mediation, the mediator will be expected to comply, regardless of her/his assessment of the stage of conflict and its conduciveness (or not) to mediation success - expected to comply, not only by the parties but also by Acas managers (mindful of, among other things, revenue). It will be a brave mediator who refuses to go ahead in such a situation.

Speed in getting into mediation

If a characteristic of intractable conflicts is protracted time, the mediator's speed in getting into mediation is relevant. A recent Acas report on those individual mediations conducted by its staff, a report based admittedly on a small number of completed evaluation questionnaires, indicates that 'six in ten (59 per cent) disputes had been ongoing in excess of six months' and

> . . . [m]ore than six in ten (61 per cent) participants felt that the timing of the mediation intervention was too late, whilst just one third (35 per cent) felt it was about right. There was also a strong link between participants' views on the timing of the mediation and whether the underlying issues have been resolved with those who felt it was too late far less likely to feel the mediation had resolved the underlying issues (Acas 2012b:1).

Parties' capacity to satisfy each other's interests

The researcher suggested earlier that the main objective of one of the principal styles of mediation, facilitative mediation, is 'to avoid positions and negotiate in terms of

parties' underlying needs and interests instead of their strict legal entitlements' (Boulle and Nesic 2001:28). Fisher and Ury (1987) outline this 'method of principled negotiation', developed at the Harvard Negotiation Project. There are four principles to the method, two of them being to

- focus on interests, not positions: 'In many negotiations, a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed.'
- invent options for mutual gain: Besides 'a shared interest in averting joint loss, there almost always exists the possibility of joint gain', perhaps through 'developing a mutually advantageous relationship, or satisfying each side with a creative solution.'

All of this begs the question as to whether the disputing parties in any situation have the capacity to satisfy each other's interests, to jointly gain. The researcher quoted Tidwell (1998:25) earlier, on the 'tremendous tendency to trivialize conflict in popular texts' and the 'particularly worrisome' emphasis on win-win outcomes. Mayer (2000:112) goes on to look at the belief that 'disputes are resolved when key interests are addressed' and argues:

> . . . most serious conflicts are based on a deeper level of needs than is captured
> through an exploration of interests . . . This approach . . . does not recognise the
> role of power and identity in the conflict process. Focusing on interests should
> be viewed as a tactic, not as an overall philosophy of conflict resolution. As a
> tactic it can be very valuable, but it is not always appropriate. Disputants can
> often arrive at effective agreements without dwelling on their interests, and
> sometimes doing so can become an academic exercise divorced from what is
> really important to people.

Also, Dingwall (2002:322) points out that 'dispute resolution rests on a framework of assumptions about bargaining capacity and, even more importantly, about commitment to peaceful settlement by means of compromise', assumptions that may not be shared by everyone, for example, by people claiming moral certainty. Indeed, the researcher knows, from recent experience of raising a grievance himself, that moral certainty rather scuppers any willingness to compromise!

Balance of power

Talking albeit about intractable international conflicts but expressing thoughts that may be tested in an individual mediation context, Bercovitch (2005:110) reflects:

> . . . what if one party in an intractable conflict has an abundance of power resources and the other does not? Where this occurs (where an 'asymmetric intractable conflict' exists), the stronger adversary may have very few incentives to accept mediation or to see it succeed. Power parity in intractable and other conflicts is more conducive to effective mediation than power disparity.

In general, then, the more there is a balance of power between the disputing parties, the more likely is success in mediation. This links back to the concept of a Mutually Hurting Stalemate (MHS).

Even though one of the accepted standards of mediation is the impartiality/neutrality of the mediator, many authors talk about the possibility of the mediator's having to correct a power imbalance when one of the disputing parties would otherwise be overwhelmed. Often, however, how to actually do it, how to actually balance power, appears to be left rather vague. For example, Charlton and Dewdney (2004:210) say that power balancing or equalising:

> Involves creating and maintaining an atmosphere of equality by ensuring that each party feels equally empowered in the mediation session, for example, by not allowing one party to dominate. May involve ensuring, as far as possible, that one party is not disadvantaged by the superior bargaining power, domineering behaviour, dominating personality features, articulation, or professional advice of the other party.

That might be called a politician's answer!

Haynes (1988:289) is, though, more specific. Analyzing power relationships in marriage but, again, expressing thoughts that may be tested in a workplace mediation context, he suggests:

> Many people know the right buttons to push, but when this knowledge is coupled with the ability to accurately predict the other's response and to know when and how to use this weapon, then the . . . [party] with these skills is devastatingly powerful.

Haynes outlines three basic mediator strategies for dealing with this power imbalance: identifying with the person under attack; forbidding an issue; and taking charge of the method of communication.

However, Bush and Folger (2005:76) are adamant that, when they support the empowerment of the disputing parties, this 'does not mean "power balancing" or redistribution of power within the mediation process itself in order to protect weaker parties'. And Agusti-Panareda (2004:28) argues:

> [It is inappropriate] . . . to view power in the mediation context as property or a possession of the parties. Power should be seen as an emerging, changing, relational and multidirectional force. The 'oppression story,' framing the relationships between the parties in terms of fixed and static power imbalances, can be misleading to a proper understanding of power relations in mediation.

Parties' belief in moving forward on the issues in dispute, their commitment to mediation

At the risk of stating the obvious, a dispute will be the more intractable, the less the disputing parties believe they can move forward on the issue(s) in dispute. As indicated earlier, Haynes et al (2004:7) identify generic strategies used by mediators and one of these is maintaining a future focus:

> Most clients want to talk about the past, yet the past contains the problem. The solution lies in the future. Therefore, the mediator can only mediate in the future tense. Talking about the past is not mediation since it is either judgement – trying to decide who is right and wrong from the past – or therapy – helping the clients understand their past. We believe that mediation can help people find new, hopeful, and mutually respectful futures without settling all of the past issues.

Inevitably, some parties will have less belief in moving forward than others, indeed may find it impossible to move on, at least for the time being. Mediation is unlikely to be successful in such situations unless – as in an example from the researcher's own recent mediation experience – the parties are offered, say, elements of evaluative mediation (to deal with the past) and facilitative mediation (to find a way forward). Even facilitative mediation, however, cannot completely ignore the past: after 'signing up' not to do so, clients will usually want to talk about it to some extent, before moving on.

Clearly, a dispute will be the more intractable the less the disputing parties are committed to mediation in general. The researcher previously quoted Svensson and Wallensteen (2010:8) as saying that '[o]ften outcomes do not just reflect the achievements of the mediator, but also the ambitions of the primary parties'. Zartman (2008b:309) suggests that mediation is 'at the mercy of the disputants', in whom the

mediator must cultivate a sense of need. Following research into community mediation, Stokoe (2012:1) considered that 'barriers to mediation appeared routinely during intake calls. These included . . . methods for explaining . . . [mediation]. In particular callers withdrew from mediation when it was explained as an impartial service.'

On an even less positive note, Newman and Richmond (2006:102) state that some conflicts experience 'spoiling', 'tactics that actively seek to hinder, delay or undermine conflict settlement through a variety of means and for a variety of motives'. They suggest, for example, that

> . . . there are parties that are a part of the peace process but which are not seriously interested in making compromises . . . They may be using the peace process as a means to gain recognition and legitimacy, time or material benefits.

This might be reconfigured, in a workplace mediation context, as disputing parties simply going through the motions; or as commissioning parties using mediation in an attempt to buy some time before/delay a likely employment tribunal.

To be fair to any disputing parties who are simply going through the motions: the supposed voluntary nature of mediation is a variable feature (Boulle and Nesic 2001:8), if not a myth (Kolb and Kressel 1994:460) – put simply, mediation is not always truly voluntary. The disputing parties may have been instructed – explicitly or implicitly – to attend the mediation. In this regard, Bannink (2007:168) talks of the mediator's having 'a visitor, complainant, or customer relationship' with each client/disputing party. It is only in the last-mentioned that 'the client does see himself as part of the conflict or solution and is motivated to change his behaviour'. A recent Acas report on those individual mediations conducted by its staff (Acas 2012b) shows that '19% [of mediation participants] felt pressurised into taking part such that it would have been difficult to say no, and . . . 6% were given no choice'.

The parties may occasionally 'use' a mediator, sometimes with her/his knowledge, as when s/he is simply asked to provide premises for the parties' direct negotiations (as may happen to Acas in collective disputes, particularly), but sometimes unbeknown to the mediator, as, for example, in the case of Terry Waite when lied to by Oliver North (see Hewitt 1991).

Time allowance

Ideally, the mediator will be allowed whatever time s/he judges necessary to succeed in a mediation; but, in practice, the amount of time s/he can spend helping the disputing parties – even in a seemingly intractable dispute - is often limited because the commissioning party is not willing to fund more than, say, a couple of days' work in aggregate. This is particularly so if the commissioning party has come to a mediator, such as Acas, as a last resort in a dispute on which, in that party's view, not too much more resource should be expended.

Limited time allowed for mediation combined with limited mediator ambition/service (see earlier) will have an impact on outcome, to a greater or lesser extent. In some time-limited situations, it might be better that the mediator uses the time available in trying to change the quality of the conflict interaction, rather than pursuing a hastily-cobbled-together agreement, which does not last. Burgess and Burgess (2006:185) argue that there should be 'recognition of the slow, long-term nature of . . . [dispute resolution]. Funders should quit demanding, and conflict resolution programs should quit promising, quick and dramatic successes.'

Sometimes, even a couple of days' work in aggregate for the mediator is a luxury. From their study of participant experience of workplace mediation referred to earlier, Saundry et al (2013:26) conclude:

> . . . there was a danger that participants could feel rushed in cases in which individual and joint meetings were held on the same day. Here, respondents felt that having time to reflect would be valuable. Instead they could go straight from explaining their own views in detail to the mediators into a joint meeting.

Adapting to the workplace what Salem (2009:377) says in a family court context:

> If mediators lack sufficient time to conduct mediation, it is simply not possible to honour, protect and nurture parties' self-determination; to conduct a mediation process in which parties can fully express their views and develop their own agreements; to help . . . [disputing parties] work together; and to help them understand the impact of the conflict on . . . [others].

Encouragement from others in and around the 'system(s)' of which the parties are part

As stated earlier, disputing parties will each be part/components of or elements in several systems, some focused on their workplace and some outside. Some of the components/elements in and around a system may encourage the disputing parties to

engage in mediation. Other components/elements, inside or outside a system boundary, may be opposed to mediation (or aspects of it) and its potential outcome for whatever reason. As Newman and Richmond (2006:107) state:

> Spoiling and the obstruction of peace processes tend to be associated only with the attitudes and intentions of actors that are direct participants in the conflict. However, it is essential to consider a broader range of actors and factors.

In the article on so-called 'high-conflict' couples referred to earlier, and with comments that ring as true for workplace conflict as for post-divorce conflict, Friedman (2004:104) suggests

> . . . we must look at the larger context of the conflict and the ways in which the conflict is often embedded in and encouraged by a larger system: extended family and friends, so-called support groups with their own political agenda, therapists, and especially attorneys and the adversarial legal process.

Parties' understanding of relationship with mediator

The obverse of the mediator's understanding of her/his relationship with the disputing parties (see earlier) is the disputing parties' understanding of their relationship with the mediator. It is probably asking too much of most of them to expect an understanding of, say, transference and countertransference - unless we see an educative role for the mediator in this respect, perhaps in pre-mediation, in which case success in mediation is more likely.

Physical environment

As indicated earlier, when looking at the skills and techniques in which mediators need to be proficient, Boulle and Nesic (2001:189) examine 'organisational' skills and techniques. These include (that of) arranging seating for the best possible negotiating behaviour of the disputing parties. The authors make the point that, sometimes, seating arrangements 'may have to be negotiated extensively with the parties before the mediation' whereas, on other occasions, there may be little choice of furniture and mediators may simply have to make do. The researcher believes few mediators will ever have the luxury of commissioning something like the 'special, diamond-shaped table' of the 2006/2007 negotiations about the Northern Ireland Executive, a table so structured 'that Paisley and Adams could sit at its apex, thereby being both opposite each other and next to each other' (Powell 2008:305)!

Mediation training manuals, too, usually contain sessions on arranging the seating for joint meetings – see, for example, Acas (2011) and Mediation UK (1995). Physical environment is more than just seating, of course. According to Powell (2008:94), Castle Buildings, where the 1998 'Good Friday' talks were held,

> . . . felt like a sick building. . . . [Its] malaise affected the mood of the people inside it. If ever there was an unpropitious place in which to reach agreement, this was it.

A measure of agreement in this seemingly intractable dispute was, nevertheless, reached but the point remains that, the more conducive a physical environment is to mediation, the more likely is success to follow. This links back to the mediator quality of multivalent thinking, in that a mediator often has quickly to make the best of inadequate facilities presented to her/him to carry out the mediation.

What if parties do not bring variables particularly helpful to mediation?

Finally, in this look at situational variables leading to success (or not) in mediation: if the disputing parties do not come to mediation bringing variables particularly helpful to the process, indeed, appear to be themselves exacerbating the intractability of the conflict, it might be useful for the mediator to draw on the concepts of 'therapeutic mediation'. The latter is sometimes used as an alternative title to transformative mediation (see Boulle and Nesic 2001:28) but Irving and Benjamin (2002) suggest it is something rather different. Their therapeutic family mediation (TFM) model has five phases: intake/assessment; pre-mediation; negotiation; termination; and follow-up; and it is the second phase, pre-mediation, that is interesting in the context of parties not bringing to mediation variables particularly helpful to the process.

Irving and Benjamin (2002:38) say that 'our concerns [in the pre-mediation phase] are with [achieving] change sufficient to allow clients to fully engage in mediation by being able to negotiate productively'. Pre-mediation 'involves four classes of intervention [by the mediator] – namely, giving information, providing education and training, intervening to improve the parties' performance, and advocating for different provisions' (Irving and Benjamin 2002:103). [51]

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[51] Related to this is Miller and Seibel's (2009) argument that legal practitioners should systematically prepare their clients for mediation, discussing key issues and developing strategies.

Irving and Benjamin (2002:119) state that, for the disputing parties to move on from pre-mediation to the negotiation/joint meeting phase of mediation, 'they should:

- have some conscious control over the type and intensity of their feelings;

- be able to advance an organized and logical proposal;

- be clear and effective in their communication (i.e. communication should address specific issues, one at a time, in the present, and express a clear preference or position);

- [if they have met in, say, pre-mediation] be responsive to the other [party], that is, speak to him or her respectfully, make eye contact, allow for reasonable turn taking, consider the other's ideas (without dismissing them outright), and show that he or she has heard what the other has had to say;

- show some willingness to accommodate issues in dispute, that is, display some flexibility and willingness to compromise or at least consider alternate perspective and solutions; and

- be responsive to the mediator, both as regards managerial (who speaks, turn taking) and substantive instructions and suggestions'.

These bullet points have been incorporated in the researcher's attempts to operationalise aspects of the model emerging from this literature review (see below).

Implications for this research

Despite all the limitations indicated above, the researcher decided to explore, in his empirical work, whether agreements (in particular, written ones) were the yardstick by which mediators measured success. Other potential measures of success – such as how much the disputing parties moved from their initial positions or how much their communication problems were reduced, while theoretically more promising, unfortunately had elements that would have been difficult to operationalise. However, the researcher decided, on the basis of his review of the mediation literature, to also explore – at some stage - in his empirical work (besides the seeking of agreements) a relative rather than objective measure of success in mediation, derived from Bercovitch (2006).

The researcher decided to build upon Bercovitch's (2006:295) 'conflict management impacts' (mentioned earlier) and his reflections (2006:298) on whether 'success or failure can hinge on what mediators expect from their conflict management'. In simple terms, the researcher decided to treat success in any one mediation as dependent on the impact that was attempted, whether that impact was achieved, and whether the choice of impact was, with hindsight, appropriate. The researcher explains in chapter five why, in adopting this measure, the views of commissioning and disputing parties were not directly sought.

The researcher focused (instead) on the views of mediators, and explored a measure of success in any one mediation case that drew upon the mediator's reflection, after her/his closure of the case, on:

- what s/he had been trying to do - manage, settle or resolve the dispute (definitions in chapter five);
- whether s/he achieved what s/he had been attempting; and
- whether this was, with hindsight, an appropriate choice of dispute impact or whether it was too ambitious or not ambitious enough.

Although the views of commissioning and disputing parties were not sought directly, those parties were nevertheless an integral part of the context of any particular dispute.

The researcher did not believe that, in each and every mediation case, there would be only one dispute impact that it was objectively 'correct' to attempt. A mix of several variables (some contributed by the mediator and others of a more situational nature) would determine the mediator's choice of dispute impact in a particular case and whether that choice was achieved or not. That mix might allow for some variation of mediator choice, not least because it would probably not be a static mix (for example, the absence of a potential 'spoiler' from a meeting might encourage a mediator to be more ambitious than s/he might otherwise have been).[52] It might well be, therefore, that there are a percentage of mediation cases where different dispute impacts could legitimately be attempted, with a reasonable expectation of success.

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[52] Or a spoiler's change of behaviour, for instance, Paisley's as detailed in Blair (2010:194), might also give encouragement to the mediator.

Also, a family mediator (Wilson 2002:65) observes:

> . . . any practitioner, however experienced, encounters uncertainty each time a new [mediation] session begins, even with the same couple. Uncertainty in this context does not denote a lack of ability but, rather, a respectful anticipation that this is the clients' meeting, the content of which has yet to be unfolded and within which the mediator has both to lead and follow.

and, whether the end result is objectively 'correct' or not, a mediator ultimately has freedom of action. 'It is this exercise of freedom and the ability to shape the future that distinguishes man from all the other beings that we know on earth' (Mullan 1999:60). In addition, Payne (2005:145) reminds us (his emphases) that 'systems exhibit both *equifinality* (reaching the same result in several different ways) and *multifinaliity* (similar circumstances can lead to different results)'.

From his literature review, the researcher identified an *emerging model* predicting success (or not) in workplace mediation. The propositions of this process model were that success (or not) in any mediation is a function of the interplay between the mediator's stage of development (and associated variables) and the tractability of the conflict (and associated variables). This interplay of variables, it was argued, contributes significantly to the mediator's choice of dispute impact, as defined above, and to that choice being achieved (or not). The model is set out in graphic form in the next chapter (page 118).

As part of his empirical work, the researcher examined the model in an Acas context. He explored the relative significance of the variables listed and whether some should be eliminated and others added. He did this, primarily, by asking Acas mediators to focus on, and discuss, specific cases in which they had been involved. More on this will, however, be said in the next, 'methodology' chapter. The researcher also tried to operationalise aspects of the model, through a set of questions that a mediator might put to each disputing party at the pre-mediation stage, to judge whether moving on to a joint meeting was likely to be productive. Operationalising the model was to be a way of testing it in an Acas context as well as producing a tool that would, hopefully, be of continuing value to Acas mediators. Again, more on this will be said in the next chapter.

<u>Summary</u>

The purpose of this chapter, together with the previous one, has been to report on an examination of the literature on mediation, carried out with a view to helping the researcher best tackle his research questions as to what is success in workplace mediation and how mediators might achieve success.

This chapter has looked, specifically, at the theoretical framework in which this study has been set, the framework of systems; at what is regarded in the mediation literature as success in mediation, including whether a written agreement is a true sign of success; and at variables identified from the literature that might be seen as leading to success (or not) in mediation, both those variables centring on the mediator (such as stage of development and experience) and those centring on the characteristics of the dispute (such as its tractability).

This chapter has outlined, finally, some implications of the literature review for this research, including the researcher deciding to explore in his empirical work a measure of success in workplace mediation derived from Bercovitch's (2006) conflict management impacts, and the researcher identifying a process model predicting success (or not) in workplace mediation, for testing empirically.

The next chapter of this thesis will consider methodology, including the researcher's choice of interpretivism and of the case study methodology. It will look at case study research methods, in particular, participant and non-participant observation, focus groups, individual interviews, and the examination of archival records. Finally, there will be an account of how the collected data were analysed.

CHAPTER FIVE: METHODOLOGY

Introduction

This chapter looks at the research approach used to seek answers to the questions of what is 'success' in workplace mediation and how mediators might achieve success. It examines, first, the concept of the research paradigm and the positivist-interpretivist continuum of paradigms; then, the philosophical assumptions underpinning positivism and interpretivism, and the researcher's choice of interpretivism and of the case study methodology. It reviews case study research methods generally, and then those used by the researcher: in particular, participant and non-participant observation (including the researcher as an 'insider' and some of the associated ethical considerations), focus groups, individual interviews, and the examination of archival records (particularly, Acas's Events and Advisory Recording System, EARS, and client evaluation forms) but other methods, too. Finally, there is an explanation of how the collected data were analysed.

Research paradigm and the positivist-interpretivist continuum

'A research paradigm is a framework that guides how research should be conducted, based on people's philosophies and their assumptions about the world and the nature of knowledge' (Collis and Hussey 2009:55). The paradigm being adopted for any piece of research may lie somewhere on the positivist-interpretivist continuum of paradigms identified by Collis and Hussey (2009:57), who describe the two extremities as follows: 'Whereas positivism focuses on measuring social phenomena, interpretivism focuses on exploring the complexity of social phenomena with a view to gaining interpretive understanding.'

Philosophical assumptions underpinning positivism and interpretivism

As for the specific philosophical assumptions underpinning positivism and interpretivism: while the *ontological assumption* (that concerned with the nature of reality) of the positivists is that 'social reality is objective and external to the researcher' and that 'there is [therefore] only one reality', interpretivism believes that

'social reality is subjective because it is socially constructed' and that 'each person has [therefore] his or her own sense of reality, and there are multiple realities' (Collis and Hussey 2009:59).

Turning to the *epistemological assumption* (that concerned with what is accepted as valid knowledge, which 'involves an examination of the relationship between the researcher and that which is researched'), positivists believe that 'only phenomena that are observable and measurable can be validly regarded as knowledge. They try to maintain an independent and objective stance' whereas interpretivists 'attempt to minimise the distance between the researcher and that which is researched'. For them, the researcher interacts with that being researched (Collis and Hussey 2009:59).

With regard to the *axiological assumption* (that concerned with the role of values), positivists consider that 'the process of research is value-free' and that they are 'detached and independent from what they are researching'. Interpretivists, on the other hand, believe that 'researchers have values, even if they have not been made explicit' and that these 'help to determine what are recognised as facts and the interpretations drawn from them'. The researcher is involved with what is being researched (Collis and Hussey 2009:60).

The *rhetorical assumption* (that concerned with the language of research) is that, '[i]n a positivist study it is usual to write in a formal style using the passive voice', while '[t]he position is less clear in an interpretive study' (Collis and Hussey 2009:60).

Finally, the *methodological assumption* (that concerned with the process of the research) for positivists is that they 'are likely to be concerned with ensuring that any concepts [they] use can be operationalized, that is, described in such a way that they can be measured'. They 'will probably use a large sample and reduce the phenomena [they] are examining to their simplest parts. [They] will focus on what [they] regard are objective facts and formulate hypotheses.' Interpretivists, however,

> . . . will be examining a small sample, possibly over a period of time. . . [They] will use a number of research methods to obtain different perceptions of the phenomena and in . . . [their] analysis . . . [they] will be seeking to understand what is happening in a situation and looking for patterns which may be repeated in other similar situations (Collis and Hussey 2009:60).

<u>Researcher's choice of interpretivism</u>

Collis and Hussey (2009:62) compare and contrast the main features, the relative advantages and disadvantages, of positivism and interpretivism as follows: positivism

> . . . tends to: Use large samples, Have an artificial location, Be concerned with hypothesis testing, Produce precise, objective, quantitative data, Produce results with high reliability but low validity, Allow results to be generalized from the sample to the population

while interpretivism

> . . . tends to: Use small samples, Have a natural location, Be concerned with generating theories, Produce 'rich', subjective, qualitative data, Produce findings with low reliability but high validity, Allow findings to be generalized from one setting to another similar setting [but not to the whole population] (Collis and Hussey 2009:62).

As a newcomer to the world of research, the researcher had initially thought in terms of a positivist approach, perhaps involving self-completion questionnaires for the Acas mediators; but several factors then pointed him toward the interpretivist end of the continuum of paradigms. The factors were those such as the researcher's position as a worker on the staff of the organisation under scrutiny and his relatively close relationship with many of the mediators under study; the researcher's carrying out himself, on occasion, the individual mediation work upon which he was focusing in his research; his great enthusiasm for that work; his particular research questions; the nature of mediation itself, so often dealing with perceptions rather than 'facts' and where 'the mediator becomes part of the [bargaining] process' (Wilson 2002:66); and the view, generally, that 'interpretivism focuses on capturing the essence of the phenomena [that a researcher is investigating] and extracting data that provide rich, detailed explanations' (Collis and Hussey 2009:65).

<u>Methodology</u>

Collis and Hussey (2009:73) suggest:

> . . . once you have identified your research paradigm, you can start thinking about your research strategy. This means choosing a methodology [an approach to the process of research, encompassing a body of methods] that reflects the philosophical assumptions of your paradigm.

Case study

Of the methodologies traditionally associated with interpretivism, the researcher carried out a case study (of Acas mediators), 'a methodology that is used to explore a single phenomenon (the case) in a natural setting using a variety of methods to obtain in-depth knowledge' (Collis and Hussey 2009:82). Yin (2003:1) suggests:

> . . . case studies are the preferred strategy when 'how' or 'why' questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context

and he goes on to talk of exploratory, descriptive and explanatory case studies. There was perhaps an element of each in what the researcher was doing, in that he was looking, for example, at what mediators had been trying to do in their cases (exploratory), whether they had achieved what they had been attempting (descriptive), and why they had made certain choices (explanatory).

There are, of course, potential down-sides to the case study methodology, in particular, the possible difficulty of access to a suitable case (not a problem, in this instance, for the researcher although his 'insider' status did, as will be seen, throw up other dilemmas) and the likely time-consuming nature of the research (the researcher would certainly endorse this point!). In addition, although the methodology does provide the potential of deep insights, these are - strictly speaking – insights only into the 'case'.

It is therefore particularly important to reflect upon the researcher's choice of a single (as opposed to multiple) case study on this occasion. On this issue, Yin (2003:39) identifies five rationales as major reasons for conducting a single case study: the single case represents the critical case in testing a well-formulated theory, it represents an extreme case or a unique case, it is a representative or typical case, it is a revelatory case, or it is being studied at two or more different points in time (a longitudinal case).

Although the researcher suggests that Acas is – in many ways – a unique organisation ('the only significant state-funded organisation trying to manage, settle or resolve employment disputes in Great Britain' – see below) and it could be argued that any conclusions from this study are applicable only to Acas, the individual mediation work that it carries out is, the researcher believes, typical of workplace mediation conducted by other UK providers. This belief stems from the researcher's contact over the years

with providers of such mediation services from the private sector and his reading of their promotional literature.

The researcher's study of Acas mediators is therefore – it is argued - the study of a 'representative or typical case', and the 'lessons learned . . . are assumed to be informative about the experiences of the average . . . [workplace mediator] or [workplace mediation] institution' (Yin 2003:41). Also, while the researcher has not looked at other workplace mediation institutions as such, he has – as mentioned in chapter three - drawn to a limited extent on the experiences of a workplace mediation provider outside of Acas, Consensio (more detail later in this chapter). In all, therefore, there will be much greater generalisability to mediation work outside of Acas than might at first seem likely.

Research design for case studies

Yin (2003:21) looks at components of a research design for case studies, including a study's questions, its proposition(s), and the unit of analysis. This *study's questions* enquire as to what is generally regarded as success in mediation (including how success in mediation in Acas might be judged); and how mediators might achieve success. These questions were fleshed out in chapter one.

As for this *study's proposition(s)*, these were that – in spite of the attractions that achieving agreements hold for Acas mediators - one might also (perhaps, better) judge success in any mediation case in Acas according to a relative measure derived from Bercovitch (2006), the mediator's reflection, after her/his closure of the case, on:

- what s/he had been trying to do - manage, settle or resolve the dispute (dispute transformation was also considered, but not pursued, since it might have proved too nebulous a concept to easily explain and for interviewees to grasp and work with):

  (i) dispute management – containing, limiting, if not de-escalating, a dispute;

  (ii) dispute settlement – establishing a framework that eliminates at least overt conflict; and

  (iii) dispute resolution – addressing the root causes of a dispute, negating the threat of further conflict-generating behaviour;

- whether s/he achieved what s/he had been attempting; and
- whether this was, with hindsight, an appropriate choice of dispute impact or whether it was too ambitious or not ambitious enough.

Further, this study proposes that success as defined is a function of the interplay between certain variables contributed by the mediator and other variables related to the dispute/situation. This interplay of variables contributes significantly to the mediator's choice of dispute impact and to that choice's being achieved (or not). Those components within an organisational system that are involved in a workplace dispute may be seen as a dispute sub-system. They will interact to influence the nature and the results of the mediator's intervention and, ultimately, the outcome of the dispute.

Ideally, in judging success using the dispute impact measure, the views of commissioning and disputing parties, as well as of mediators, would have been directly sought. The reality is, however, that commissioning parties may produce little in the way of objectives for the mediator at the start of a mediation, other than 'do your best to resolve this dispute, which has defeated all our efforts so far'; and, at the close of a mediation, not least because of the promises of confidentiality given to the disputing parties, commissioning parties may end up with little more detail about what actually happened than that the mediation took place and appeared to have been broadly successful (or not).

There would also have been, the researcher believes, considerable reluctance on the part of commissioning parties over his approaching previously disputing parties about the conduct and outcome of mediations, lest what had become closed issues (from which people were, hopefully, moving on) were opened up again. Also, Acas's post-mediation evaluation data collected from commissioning and disputing parties are not detailed enough to help the researcher much in what he was attempting.

The *unit of analysis*, as indicated earlier, was primarily those Acas staff (of whom the researcher is one) who provide mediation, on a charged basis, to help resolve 'disputes between individual employees and their employers, or between individual colleagues or groups of colleagues' which 'do not involve actual or potential claims to an

Employment Tribunal' (Acas 2009a:12). Acas individual mediators currently number around 80 and are based all over Great Britain. Not least because there is not enough mediation work in any one Acas Area for there to be dedicated mediators, even if Acas wanted this, the mediation role is combined with some other Acas job, usually with what the organisation calls individual conciliation. Acas is the only significant state-funded organisation trying to manage, settle or resolve employment disputes in Great Britain. It has built a reputation for impartiality and expertise, and it has even been listed in a book of 'business superbrands' identifying over 50 of the strongest business-to-business brands in Britain (Curtis 2000).

Yin (2003:28) talks of 'constructing a preliminary theory related to your topic of study'. At the risk of repetition, the researcher's preliminary theory was that success (or not) in any mediation, success as defined earlier, is a function of the interplay between, on the one hand,

> the stage of development of the mediator and associated mediator variables such as the mediator's experience, attributes, and ambition

and, on the other hand,

> the tractability of the conflict and associated situational variables such as the parties' attributes, the quality of their relationship, and their commitment to mediation.

This interplay of variables, it was argued, should contribute significantly to the mediator's choice of dispute impact, as defined earlier, and to that choice being achieved (or not). This preliminary theory was transposed to graphic form as follows:

Figure 5.1 A process model predicting success (or not) in workplace mediation[53]

| **Mediator** comes to a dispute situation bringing her/his stage of development and associated variables such as • experience • attributes • ambition | → | **Dispute situation** includes the tractability of the conflict and associated variables such as • the parties' attributes • the quality of their relationship • their commitment to mediation |
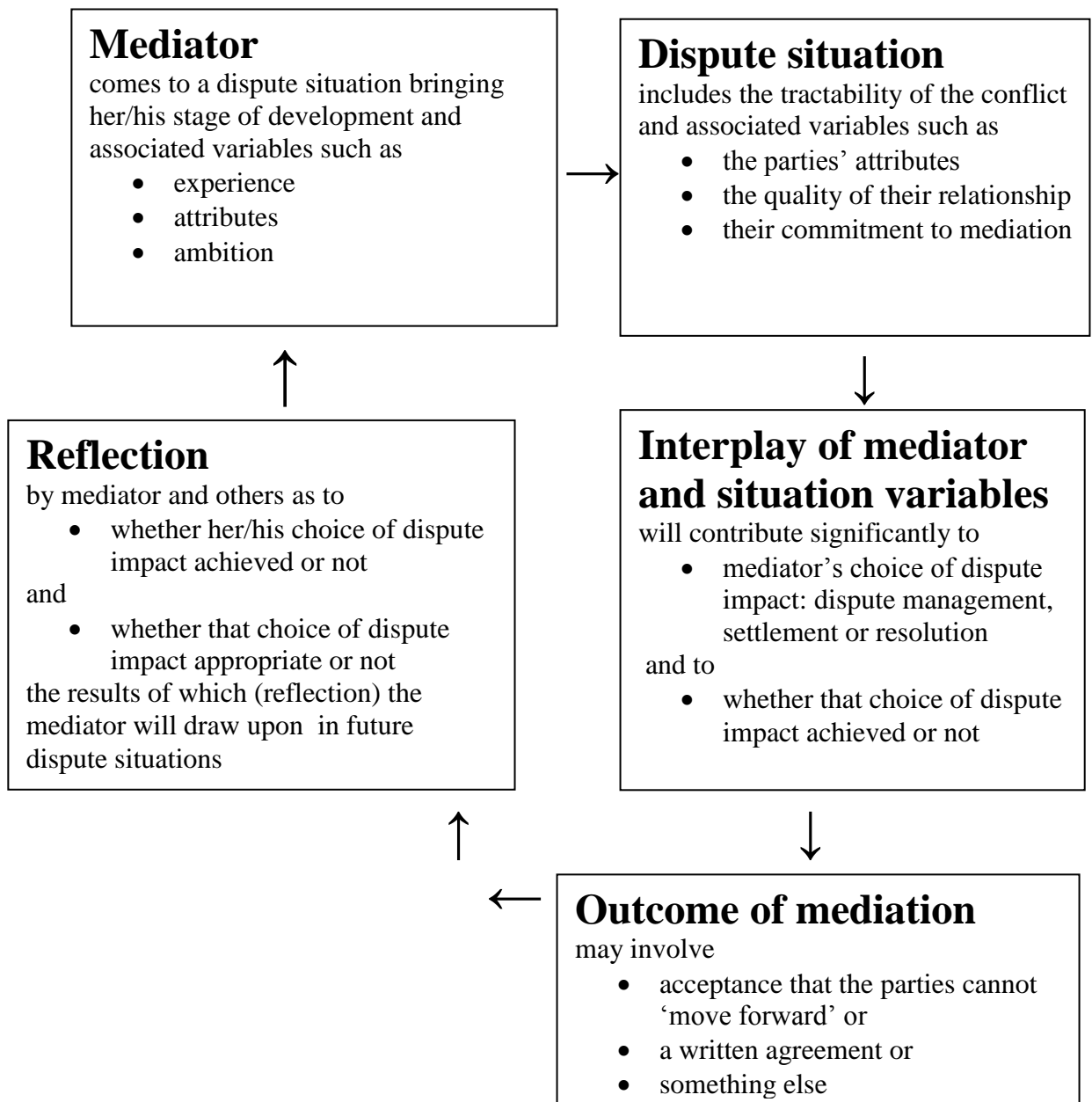
Source: Researcher

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[53] A mediator is not necessarily limited to one 'shot' at a dispute situation (although that is often the reality in Acas); and the interplay of variables the second or third time around may well contribute to a choice of dispute impact, and a mediation outcome, different to that on the first occasion. In the course of any mediation, the choice of dispute impact may change; and, in multi-issue situations, different dispute impacts may be attempted on each issue.

As indicated earlier, as part of his empirical work, the researcher examined the above model in an Acas context. He explored the relative significance of the variables chosen and whether other variables should be added or substituted. He did this by, for example, asking Acas mediators to focus on, and discuss, specific cases in which they had been involved (critical incident technique). The researcher tried to operationalise aspects of the model, through a set of questions (see Appendix One) that a mediator might put to each disputing party at the pre-mediation stage, to judge whether moving on to a joint meeting was likely to be productive. This was intended as a way of testing the model in an Acas context but it also produced a tool that, will, hopefully, be of continuing value to Acas mediators.

Case study research methods

Yin (2003:83) identifies six main sources of evidence for case studies: 'documents, archival records, interviews, direct observation, participant-observation, and physical artifacts'; but he says that 'a complete list of sources can be quite extensive – including films, photographs, and videotapes; projective techniques and psychological testing; proxemics; kinesics; "street" ethnography; and life histories'. To focus on the main sources that Yin identifies, however, he elaborates on them as follows:

documentation

> letters, memoranda, and other communiqués; agendas, announcements and minutes of meetings, and other written reports of events; administrative documents – proposals, progress reports, and other internal records; formal studies or evaluations of the same 'site' under study; newspaper clippings and other articles appearing in the mass media or in community newsletters;

archival records

> service records; organizational records; maps and charts; lists; survey data; personal records;

interviews

> of an open-ended nature; or focused; or with more structured questions, along the lines of a formal survey;

direct observations

> these can range from formal to casual data collection activities;

participant-observation

> a researcher may assume a variety of roles within a case study situation and may actually participate in the events being studied; and

physical artifacts

> a technological device, a tool or instrument, a work of art, or some other physical evidence.

Methods used in this research

Drawing from Yin (2003:83) and others: besides a review of relevant mediation literature (which, as already indicated, appears to be vast, and increasing all the time), a variety of other research methods/data sources have contributed to this research, in particular,

- observation (primarily participant but some non-participant),
- focus groups of Acas mediators,
- individual interviews with Acas mediators, and
- the exploration of Acas's archival records, especially those lodged in its Events and Advisory Recording System (EARS) and its client evaluation forms

but also methods/sources such as the examination of Acas internal documentation on mediation, interviews with mediators outside of Acas, and a review of videotapes produced mainly by practising mediators.

Relative contribution and rationale for use

As one would expect, the researcher's findings, set out in chapters six and seven, emerged largely during the actual PhD research period. Unless otherwise stated, they flow from recorded and written information still held by the researcher: primarily, interview recordings and transcriptions, EARS records, and client evaluation forms (and/or Acas Research and Evaluation section summaries of them); to a lesser extent, notes made during or very shortly after participant or non-participant observation; and, to a limited degree, videotapes of mediations and other sources (specified below). Chapters six and seven indicate the respective data sources for the findings outlined there.

The rationale for employing the different research methods (including drawing on contemporaneous observation notes on mediation cases from before the actual PhD research period) was that it would enable rich data to be gathered, and that it would allow triangulation[54] - especially important in a single case study - to take place. The variety of research methods that contributed to the findings in chapters six and seven are summarised in tabular form on the two following pages. It will be seen that this thesis draws to varying degrees on the 'voices' of participants (commissioning and disputing parties), practitioners (mediators), organisations (primarily Acas), as well as of the researcher.

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[54] 'Triangulation is the use of multiple sources of data, different research methods and/or more than one researcher to investigate the same phenomenon in a study.' Triangulation 'can reduce bias . . . and should lead to greater validity and reliability than a single method approach' (Collis and Hussey 2009:85).

Table 5.1: Research methods/Sources of researcher's data				
Method/source	**Application**	**Date**	**Place**	**Evidence**
Observation (primarily participant but some non-participant)				
	Facilitative family mediation	2003-2009	Milton Keynes	The researcher has drawn on the contemporaneous notes that he made, and still holds, on 164 family mediations, observed from 2003 until 2009. There were several joint mediation meetings for most cases, besides the pre-mediation meetings. A mean of two A5 pages of notes per meeting was made.
	Facilitative workplace mediation	2003-2015	Various locations, mainly in the East of England	EARS entries by the researcher indicate that he has been involved in nearly 40 individual mediations since 2006. He holds contemporaneous notes on these mediations (besides the commentary in the EARS entries), and on a further 10 mediations in which he participated between 2003 and 2006 (see page 134 as to the typical number of pages of notes).
Interviews				
	Four focus groups of Acas mediators (18 in all)	November 2010	Acas's Birmingham, Bury St Edmunds, Leeds, and London offices	Recordings and transcripts, and the commentary in the EARS entries on those cases to which the mediators referred
	Individual interviews with 27 Acas mediators	January 2011- September 2013	Various: see Appendix Three	Recordings and transcripts, and the commentary in the EARS entries on those cases to which the mediators referred

	Individual interviews with seven mediators outside Acas	October 2010-September 2013	Various: see page 146	Recordings and transcripts for 4, and contemporaneous notes for 3, mediators
Acas's archival records				
	A selection (guided primarily by the above interviews) of the entries in EARS; and analyses of EARS figures	2004/2005-2014/2015	EARS is Acas's electronic Events and Advisory Recording System, for England, Scotland and Wales	The commentaries in the EARS entries on those cases selected; and the analyses of EARS figures conducted by the researcher (see, particularly, chapters six and seven of this thesis). There is some further information on EARS at page 144.
	Client evaluation forms, the Acas summaries seen for 2012/2013, and the analyses in Acas reports	2007/2008-2012/2013	The forms relate to mediations undertaken by Acas in England, Scotland, and Wales	Some example completed forms; the Acas summaries seen for 2012/2013; the analyses in the Acas reports from 2007/2008 on; and the analyses conducted by the researcher (see, particularly, chapter six and Appendix Five of this thesis). There is some further information on the evaluation forms at page 145.
Videotapes of actual or simulated mediations	Facilitative, narrative, transformative, and victim-offender mediation	Viewed by the researcher throughout the period of research, and before	The videotapes relate to various situations and mediation styles: see page 147	The researcher holds over 12 videotapes.
Other	See 'Other case study research methods' below (pages 145-148)			

To supplement the data sources detailed in Table 5.1, the researcher has occasionally drawn on the family and workplace (facilitative) mediation work he conducted before 2003, and he has also occasionally drawn on his 400 or so Acas individual conciliation (evaluative mediation) cases from 1981 onwards and on his neighbour dispute (facilitative) mediation cases in the 1990s. This has, however, been done essentially to support other more robust data detailed in Table 5.1 since the researcher no longer holds pre-2003 contemporaneous notes of any substance.[55] It should also be noted that the researcher's long and rich experience of mediation has contributed massively to his understanding of mediation, and also to his understanding of what interviewees reported and of the archival records.

Discussion of the data sources

Each of the main research methods/data sources referred to in Table 5.1 will now be discussed in turn; and there is further commentary on them in the 'Analytical procedure' section of this chapter.

Observation

The researcher joined the staff of Acas in 1978 and has since fulfilled a variety of field operational roles for the service - individual conciliator, adviser, trainer, collective conciliator, individual mediator - as well as working for over two years as an internal staff trainer. When it was explained to others that he was planning to conduct research looking at a population comprising, primarily, those Acas staff - of whom he was one - who provide mediation, on a charged basis, to help resolve 'disputes between individual employees and their employers, or between individual colleagues or groups of colleagues' which 'do not involve actual or potential claims to an Employment Tribunal' (Acas 2009a:12), when this was explained, the reaction was often that – as an 'insider' – the researcher would be in a 'privileged' position, particularly but not solely as regards observation.

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[55] Although the researcher's memory of some pre-2003 situations is still vivid, Hawes (2000:1) does caution, 'Memories are, of course, notoriously untrustworthy' and, 'Others might offer different accounts' to what we think we remember.

Insider advantage

The researcher would not, it was remarked, have to face the problem of 'getting in' to the organisation he wished to research, or the problem of continuing to get access. As Lofland and Lofland (1984:20) say, 'It is one thing to decide for yourself about interest, appropriateness, accessibility and ethics; it is quite another to get all the interested parties to go along with your plan.' The difficulties of getting in, to research mediation, are illustrated by Seaman (2010:129). He 'required recordings of actual mediation sessions to inquire into departures' by mediators from a neutral disposition. He 'first considered carrying out a wider ethnographic study of an organization that operated an in-house mediation service, but ultimately was unable to find a collaborating organization for this approach'.

As he 'could not obtain data of actual mediations . . . [Seaman (2010:130)] began to consider an alternative approach', which was 'to set up mediation role-plays which could be recorded by video'. He persuaded Acas (and one other mediation service provider) to co-operate. Acas's staff, however, proved less than willing, at first, the then mediation lead at Acas Head Office/National having to write out to Acas mediation co-ordinators:

> If we are unable to find a mediator to take part, this will impact adversely on our reputation in the dispute resolution field because the researcher will approach our competitors for help. They are likely to make great play of the fact that they have been involved and we have not.

Seaman (2010:131) ended up 'recording two role-plays using the same dispute scenario', the first involving 'a pair of mainstream, facilitative mediators [from Acas] working as a team' and the second 'conducted by . . . [a] singleton mediator [from the other mediation service provider] in the transformative style'.[56] As it happens, the facilitative mediators are known to the researcher and he has been able to obtain a copy of the facilitative mediation recording (but not the transformative mediation one), to use in his review of videotapes (see later).

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[56] Goodman (2000:39) mentions similar difficulties in 'getting in' to Acas collective conciliation, too: 'The whole process is conducted on a confidential basis – a feature regarded by conciliators as critical to its success. This, however, has also in the past prevented observation by researchers, though some with direct experience of ACAS have shed some light on the process.'

Spared any problems of getting in to Acas and of having to continue to get access, the researcher has had the opportunity to be continually immersed in all things mediation, including participant and non-participant observation of actual mediations. The researcher is a home worker but, often, when visiting Acas's Bury St Edmunds office, he has been drawn into discussions about mediation and learned information that he would not otherwise have been privy to. The researcher also gets to see e-mails sent around Acas, documentation, and records - about mediation - that an 'outsider' would not.[57]

As Doc remarked in Whyte (1955:303), 'If people accept you, you can just hang around, and you'll learn the answers [to 'who', 'what', 'why'] in the long run without even having to ask the questions.' Further, as Whyte (1955:300) himself said, 'my acceptance in the district depended on the personal relationships I developed far more than upon any explanations [about my study] I might give'. So, a 'vague' explanation sufficed. Such has been the researcher's experience, too.

Internal support

Insider or not, however, at the start of his study, the researcher had to approach the then Acas Directors of HR and of Individual Dispute Resolution, the trade union recognised for Acas individual mediators (PCS), and Acas's Research and Evaluation section, to alert them about his intended research and, to all intents and purposes, get their support for what he was proposing. Also, being an insider has not meant that Acas colleagues have readily and unquestioningly complied with the researcher's requests for help. So, at various times, the researcher has invited colleagues to

- keep a diary relating to their mediation work and to be prepared to be interviewed about the results (see Burgess 1984:128);
- map their constellation of theories (see Lang and Taylor 2000:93);
- try out, and report back upon, the researcher's 'likely productiveness of a joint meeting' questionnaire (see Appendix One);

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[57] However, McCarthy (2014:xii) makes the point – as regards her writing on female diplomats – that 'it struck me that my outsider status could bring advantages, as I would be studying this intriguing, alluring world with fresh eyes and an open mind, free from any fixed notions'.

- allow the researcher to observe them when they are mediating; and

- complete tick sheets on their mediations, in an attempt by the researcher to quantify what styles of mediation were being used in cases, what techniques at what mediation stage, and what theories

but, to be blunt, he (the researcher) has had a very limited response! The researcher accepts that Acas colleagues have been extremely busy for some time now and that his priorities are unlikely to be theirs. He has, therefore, been grateful for the co-operation he *has* received, particularly over time for interviews.

Types of observation

What does the literature tell us about the position of being an insider and the advantages (or not) for researchers? The term makes one think of such academics as W F Whyte and his book *Street Corner Society*, alluded to above, 'a classic community study and sourcebook on participant observer method' (Rose 1978:152). Whyte 'spent three and one-half years in a slum district in Boston, living as a quasi-member of various street-corner groups, participating in their day-by-day activities' (Krech et al 1962:387). He was not, however, some sort of undercover agent. It was known by group members that Whyte was a graduate student 'interested in learning what life in a congested urban neighborhood was like', and he (Whyte) is quoted by Krech et al (1962:389) as describing his role as follows:

> It is well to play a semidetached role: to join in social activities, to bowl, to play ball, to eat and drink together, and so on, but still to have it recognized that you are interested in research . . . [Group members] did not expect me to behave just like them . . . On the other hand, it was extremely important that I accepted with interest everything they did and whatever they said.

Some researchers may, though, go beyond Whyte's 'semidetached' role and end up 'going native', a description which

> . . . refers to a plight that is supposed sometimes to afflict ethnographers when they lose sense of being a researcher and become wrapped up in the world view of the people they are studying. The prolonged immersion of ethnographers in the lives of the people they study, coupled with the commitment to seeing the social world through their eyes, lie behind the risk and actuality of going native (Bryman and Bell 2003:325).

There is, therefore, a range of roles for researchers who choose what is called the participant observation method. Burgess (1984:80) says that 'the basic typology is that

devised by Gold (1958) in which he distinguished four ideal typical field roles: the complete participant, the participant-as-observer, the observer-as-participant and the complete observer'. At least the second and third of these labels, steps on what is 'a continuum of degrees of involvement with and detachment from members of the social setting' (Bryman and Bell 2003:323), would seem to call for some sort of explanation.

Burgess (1984:80) explains, 'The complete participant conceals the observer dimension of the role with the result that covert observation is involved', while 'the participant-as-observer role involves situations where the researcher participates as well as observes by developing relationships with informants'. Burgess (1984:81) quotes Roy (1970) as saying that the participant-as-observer 'makes no secret of his investigation; he makes it known that research is his overriding interest. He is there to observe.'

Burgess (1984:82) goes on to look at the observer-as-participant role, 'which is used to refer to situations where contact with informants is brief, formal and openly classified as observation', while the complete observer role 'is identified with eavesdropping and reconnaissance in which the researcher is removed from sustained interaction with the informant'. Unless we are talking about remote eavesdropping and reconnaissance (increasingly possible, of course, although ethically rather dubious), it is hard to see how the complete observer role can be other than an open one.

Bryman and Bell (2003:324) report:

> . . . most writers would take the view that, since ethnography [the term they suggest is preferred to participant observation, nowadays] entails immersion in a social setting and fairly prolonged involvement, the complete observer role should not be considered as participant observation or ethnography at all, since participation is likely to be more or less entirely missing. Some writers might also question whether research based on the observer-as-participant role can genuinely be regarded as ethnography.

Vinten (1994:30) suggests, anyway, that the participation-observation continuum, which he actually attributes to Junkers (1960), 'can be confusing and it may be more helpful to classify such research roles as: researcher as employee; research as explicit role; interrupted involvement; and observation alone'. Besides the work of Junkers (1960), Lofland and Lofland (1984:20) mention that of Schatzman and Strauss (1973),

who 'distinguish watching from the outside, passive presence, limited interaction, active control, the observer as participant, and participation with hidden identity'.

Most appealing to the researcher is, however, Lofland and Lofland's (1984:21) own categorisation, which distinguishes 'the unknown investigator' from 'the known investigator'. The former may operate in public and open settings and 'serious ethical debate seldom lingers on this research situation . . . The serious ethical questioning about covert research begins when the researcher moves out of the public realm and into the private,' into so-called closed settings. Lofland and Lofland (1984:22) note:

> . . . some persons argue that an investigator who takes a position for the purpose of secretly researching the setting is committing the most unethical research act in the naturalistic tradition. Interestingly enough, however, if the research project arises after you have become part of the setting - a frequent corollary of 'starting where you are' – the moral onus seems less severe.

Turning to the known investigator, Lofland and Lofland (1984:24) suggest that the 'distinction between open and covert research is a useful one. However, it is also essentially artificial.' They quote Roth as saying:

> All research is secret in some ways and to some degree – we never tell the subjects 'everything' . . . [T]he gathering of information will inevitably have some hidden aspects even if one is an openly declared observer.

For Lofland and Lofland (1984:24), the known investigator role subdivides into the 'participant researcher' and the 'outside researcher'. The former would seem to equate to Burgess's (1984) participant-as-observer role mentioned above and the latter to his complete observer role. The outside researcher may, of course, use research methods other than participant observation.

Roles adopted by the researcher, and the ethical considerations

The researcher has, in practice, operated as an *unknown/covert investigator* in open settings (for example, when attending mediation conferences and training courses while described/listed as a mediator rather than an investigator); and also operated as an unknown/covert investigator in closed settings, in that - while working as a mediator - he has inevitably witnessed, reflected upon and analysed the behaviour of disputing parties, without first warning them that he has broader interests and might be doing something other than just mediating.

Should the researcher deny himself the benefit of that 'covert' experience? Can he realistically do so? Can he forget/ignore what he has experienced? What would have been the implications of his alerting disputing parties at the very beginning that, while he was a mediator, he was also a researcher? Should/can the researcher deny himself the benefit of his experience as a mediator in that period of time before he became a researcher? Regardless of whether mediation notes are destroyed, the researcher still has his memory (not necessarily perfect). The researcher reflected on these various questions in the course of his research.

Constant guiding principles emerged for the researcher of not lying to those with whom he was dealing and of not doing anything in his research that might on the face of it embarrass, harm or threaten any individual – or, indeed, of not doing anything that might obviously damage Acas, an organisation that has after all been a good employer to the researcher for over 30 years. Whyte (1955:342) talks of the researcher carrying

> . . . a heavy responsibility. He would like his book to be of some help to the people in the district; at least, he wants to take steps to minimize the chances of it doing any harm, fully recognizing the possibility that certain individuals may suffer through the publication.

Interestingly, Whyte's (1955:344) main contact, Doc, 'did everything he could to discourage the local reading of the book [*Street Corner Society*] for the possible embarrassment it might cause a number of individuals, including himself'.

At the same time that the researcher has operated as an unknown investigator (vis a vis disputing parties) in closed settings, he has also operated to some extent as a *known investigator*. He has, for example, fulfilled the known investigator, participant researcher, role when co-mediating (to a greater or lesser degree) with Acas colleagues who knew of his (the researcher's) research interests – even if the disputing parties did not.

The researcher has also fulfilled the known investigator, participant researcher, role when, for instance, formally observing - in a pilot exercise on behalf of Acas National - Acas colleagues' mediations in three cases (both separate and joint meetings in each). The pilot was connected with the possible introduction of formalised reflective practice into individual mediation. The observation work illustrated Roth's point above about never telling the subjects everything: the disputing parties may well have been told that

the researcher (not described to them as such but simply as a 'fellow Acas mediator') was 'observing', but not necessarily that the purpose of the observation for the researcher went beyond merely ensuring for Acas that its quality standards were being maintained. Indeed, the researcher's Acas colleagues may well have forgotten this!

The observations in the pilot exercise on behalf of Acas National presented a challenge for the researcher in that, while he could 'sit back' in one case (which resulted in a written, albeit short-lived, agreement), he felt compelled to intervene in the other two, particularly when the mediation appeared to be going off track and there seemed to be a danger, for example, of one of the disputing parties walking out and of the mediation collapsing. Here the Acas mediator role clearly took over from that of investigator. The observer brief from Acas allowed for such an intervention but, on reflection, should the researcher have stood back and let matters take their course, however disastrous and harmful to the disputing parties that course might have been? How far should even an interpretivist researcher go? The researcher's interventions were not, it is fair to say, challenged by the disputing parties as inappropriate to his role. Whyte (1955:337) has noted the difficulty of remaining 'solely a passive observer', and Haynes said there are 'times when the particular dynamics of a couple do not allow the mediator to remain an observer' (Haynes and Haynes 1989:316).

Even if a researcher does not consciously intervene in a mediation, s/he may nevertheless have some impact on the parties. In one mediation in the observations mentioned above, one of the disputing parties suggested that the researcher had shown bias in favour of the other party, not because of anything he (the researcher) had said but because he had been perceived to have nodded in agreement at a critical stage. The researcher could not recall having done so and suspected that any nod − if it had happened - might have been occasioned by weariness (as the disputing party returned, time and again, to the same argument), but that was not how things were perceived!

Burgess (1984:88) contends that one can make:

> . . . assumptions about the researcher . . . [that s/he] merely takes or develops a role in research. Yet we need to consider the extent to which experience, age, sex and ethnicity will influence the field researcher's role, field relations and the research process . . . [T]he range of roles that the researcher can take on, and the relationships that are established, are intertwined with personal characteristics.

Without necessarily thinking through all the implications, however, the researcher took the decision at the beginning of his research to alert Acas National, and those operational staff with whom he came into contact over mediation, as to what he was doing, sending the former a copy of his initial research proposal. That decision may have rather determined the researcher's research role in the eyes of Acas National and operational staff as one of known investigator, participant researcher (using Lofland and Lofland's (1984:21) categories). Although, to be blunt, Acas National has not shown a great deal of interest in what the researcher is doing; and Acas operational staff may forget until reminded!

So, there are challenges but also clear benefits for researchers in using participant and non-participant observation. Perhaps the obvious advantage of observation in any context, but an advantage not yet spelt out, is suggested by Tidwell (1998:61), when – as indicated in chapter three - he reflects on people operating under different types of theory: theories-in-use and espoused theories. Theories-in-use are often not articulated while espoused theories 'are those we can state'. Espoused theories 'may often vary from the reality of action'. Hence, one of the values of observation, to check out and record what mediators are *actually doing*. On the other hand, of course, 'people may, consciously or unconsciously, change the way they behave because they are being observed' (Foster 1993:41).

Potential for bias

As indicated above, participant observation has advantages since it affords the researcher the opportunity to be immersed in the dynamics of the field under scrutiny. Nevertheless, it is not unproblematic. This thesis has already mentioned the ethical dilemmas involved, and a further key problem in respect of observation generally, and participant observation in particular, is the potential for bias. The researcher earlier quoted Bryman and Bell (2003:325) on the risk of the ethnographer/participant observer 'going native'. This is a potential problem for several reasons, not least because the participant observer in question might abandon a scientific stance and lose objectivity.

A related problem when acting as a participant or non-participant observer is data recording, specifically what to record. The researcher is aware that, in recording, he

was making choices. In his participant and non-participant observation, the researcher was guided by works such as Lofland and Lofland (1984:62) and Wolfinger (2002) when writing many of his field notes, and alerted by the latter's view that, 'irrespective of any formal strategies for note-taking, researchers' tacit knowledge and expectations often play a major role in determining which observations are worthy of annotation' (Wolfinger 2002:85).

The researcher tried to guard against the potential for bias when observing mediations (or when interviewing, or indeed when using any research method). This is, of course, easy to say but harder to carry out. Gaylin (2001:246) suggests that 'it is unlikely that any scientific activity, or human activity of any moment, can be totally free of values'. The variety of research methods that the researcher has utilised should, however, provide some reassurance that his values have not skewed his research. Working occasionally with a co-mediator (see below) also provides a check against bias. The researcher has reflected too on his watchword as a mediator, and on the writings of authors such as Haynes (see page 78 of this thesis), about the need to avoid bias in dealings with disputing parties, and he has attempted to carry the lessons over into his research.

Lest this suggests a rather antiseptic end result, Lofland and Lofland (1984:66) say that, besides 'providing a record of the setting and of analytic ideas, field notes are for recording your impressions and feelings'. The researcher may note down 'personal opinions of people, emotional responses to being an observer and to the setting itself'. Further,

> A concurrent record of your emotional state at various past times can, months later, away from the setting and in a cooler frame of mind, allow you to scrutinize your notes for obvious biases. You become more able to give the benefit of the doubt in cases where you were perhaps too involved or uninvolved in some incident.

Also as noted above, and made clear in Table 5.1, observation (participant and non-participant) was only one method of data collection, so the researcher's subjective choices as an observer were balanced by, for example, the views of disputants and commissioners (through their evaluation sheets) and EARS records capturing how mediators (rather than the researcher) had viewed mediation events.

Note-taking on observations

Note-taking when mediating runs the risk of distracting clients, of not fully listening to them, missing clues from their body language, and generally appearing disrespectful, hence the value of co-mediation/double-handed mediation work, where one mediator might in practice lead and the other support, including taking notes as unobtrusively as possible. Very occasionally in the PhD research period (but on more occasions earlier), the researcher has so worked (double-handed) and, when in supporting rather than leading mode, has been able to 'sit back' and really observe, reflect and take notes (see the following 'case numbers' sub-section). Whether in family or workplace mediations, where note-taking was difficult during an actual mediation, the researcher would make notes within the following 24 hours, if not immediately afterwards.

As indicated in Table 5.1, the researcher still holds contemporaneous, comprehensive notes on many of the family and workplace mediation cases that he has observed, usually as a participant, over several years. These notes reflect a strategy to 'systematically and comprehensively describe everything that happened during a particular period of time' (Wolfinger 2002:90) rather than one to record only what appeared the most noteworthy. When being made, the notes were anonymised to a large extent, but that process has been completed by the researcher for the purposes of this thesis. In most cases, there are notes on separate/pre-mediation meetings with the disputing parties and notes on one or more joint meeting.

In most cases, too, the notes on the separate meetings are fuller/longer than those on the related joint meeting(s), understandably, because it is harder to keep up detailed note-taking while mediating single-handed with all disputing parties present, particularly when the debate between them gets into full swing. To look at the very last, but typical, workplace mediation in which the researcher was involved for Acas (a mediation involving two senior officers in a county fire and rescue service, in 2015): the notes on the separate meetings ran to nearly nine and seven A5 pages respectively, but – for the reasons indicated - those on the joint meeting ran to only five pages.[58]

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[58] The researcher's notes indicate that the separate meetings lasted about two and a half hours each while the joint meeting went on for nearly three hours.

The contemporaneous notes made by the researcher follow the course/chronological sequence of each mediation meeting. Early on in his PhD study, the researcher devised a pro forma for his non-participant observation of mediations, to use in an attempt to quantify what styles of mediation were being used (by other mediators) in cases, what techniques were being practised at what mediation stage, and what theories. As indicated, however, the researcher has not been able to undertake much non-participant (as opposed to participant) observation, and – when he was so able - the pro forma did not prove to be particularly useful and was abandoned. In its place, a less prescriptive form of note-taking was adopted.

The researcher was guided, too, in his participant and non-participant observation, by Lofland and Lofland's (1984:132) thoughts on the kinds of files that a researcher should keep: mundane files, where information is 'grouped under the most obvious categories, the better to locate it again'; analytic files, which are 'an emergent coding scheme'; and fieldwork files, where 'material on the process of doing the research itself is accumulated'.

Case numbers

Table 5.1 categorises the observation (and other) data on which this PhD is specifically based. By 2003, the date from which there are contemporaneous observation notes extant, the researcher was already an experienced mediator and in a position to make sophisticated notes: he had worked as an Acas individual conciliator on over 350 cases in 1981 and 1982, and had done occasional pieces of individual conciliation (that is, evaluative mediation) work after that; he had worked as a volunteer (facilitative) mediator for the then Milton Keynes Neighbour Dispute Mediation Service (MKNDMS) in the 1990s;[59] he had undertaken an All Issues Core Training Programme in (facilitative) family mediation in 1999 and had then worked as a (paid) family

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[59] Because of safety concerns (raised by visits to disputants' homes), among other reasons, MKNDMS mediators worked double-handed, so there were opportunities for the researcher both to mediate himself and to observe a colleague mediating, and, for some of the time, therefore, to sit back from the 'cut and thrust' of mediation and reflect on what was happening.

mediator for Milton Keynes Family Mediation (MKFM);[60] and, from the 1990s, the researcher has, as indicated in chapter two, been responding to requests to Acas for (facilitative) mediation in situations not involving actual or potential Employment Tribunal claims.[61]

As indicated in Table 5.1, the researcher holds contemporaneous notes on some 10 mediations in which he participated between 2003 and 2006; and, according to EARS, he has been involved in nearly 40 individual mediations since 2006. Also, as indicated earlier in this chapter, the researcher formally observed (and, to some extent, participated in) Acas colleagues' mediations – in 2011 - in a pilot exercise on behalf of Acas National. He observed one colleague in one mediation (involving separate meetings with the two disputing parties and one joint meeting) and another colleague in two mediations (both involving separate meetings with the two disputing parties and a joint meeting).

All of this experience has, as suggested earlier, contributed a great deal to the researcher's understanding of mediation, in general, and to his understanding of what people said in interview with him and in their archival records, in particular.

Focus groups of Acas mediators

A further case study research method used in this project was focus groups. These are:

> . . . basically group interviews, although not in the sense of an alternation between the researcher's questions and the research participants' responses. Instead, the reliance is on interaction within the group, based on topics that are supplied by the researcher, who typically takes the role of a moderator. The fundamental data that focus groups produce are transcripts of the group discussions (Morgan 1988:9)

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[60] Initially, this work was double-handed (with, therefore, opportunities to sit back) but, for cost reasons, working on one's own soon became the order of the day.

[61] As indicated, some of the researcher's Acas mediation work included co-mediators (at least six of them), whose work the researcher had an opportunity to observe. By their nature, these co-mediations and the double-handed MKNDMS and MKFM work had elements of 'investigator triangulation' and provided a check against researcher bias.

Advantages and disadvantages

Morgan (1988:15) says that 'the two principal means of collecting qualitative data in the social sciences are individual interviews and participant observation in groups . . . [F]ocus groups combine elements of both of these better-known approaches.' Compared to participant observation, focus groups have the *advantage* of offering an 'opportunity to observe a large amount of interaction on a topic in a limited period of time'. Their *disadvantage* as opposed to observing interaction in a naturalistic setting is, however, that 'focus groups are limited to verbal behaviour, consist only of interaction in discussion groups, and must be created and managed by the researcher'.

Compared to individual interviews, an *advantage* of focus groups is that 'the participants' interaction among themselves replaces their interaction with the interviewer, leading to a greater emphasis on participants' points of view'. Also, focus groups require 'less in the way of a prepared interview' and '[t]he same number of participants can be interviewed in much less time in a group format and with a further saving in analysis time because fewer transcripts are required'. A *disadvantage* is that less data may well be produced in focus groups than in interviews with the same number of individuals; that data may be 'relatively chaotic'; and, on some topics, groups may inhibit (rather than inspire) discussion.

Supplementary thoughts on focus groups come from Lofland and Lofland (1984:14):

> Group interviewing may be most productive on topics that are reasonably public and not matters of embarrassment. It . . . [allows] people more time to reflect and to recall experiences; also, something that one person mentions can spur memories and opinions in others. Moreover, by allowing moments of being able to listen to others, group interviewing allows each person to rethink and amend any initial account . . . Finally, people may not agree . . . , providing instances of interchange between contrasting perspectives.

A sort of built-in triangulation.

Use

As to the use of focus groups, this may be 'either to explore new research areas or to examine well-known research questions from the research participants' own perspective' (Morgan 1988:24). However, focus groups may be used in combination with other methods, for example, to 'guide the later construction of [individual] interview questions', or 'to explore issues that came up only during the analysis of

[individual] interviews', or 'to provide an initial exposure to the typical experiences and perspectives of those one is about to observe'. The purposes of the focus groups run by the researcher are outlined later in this section.

Recording

Hoinville, Jowell and Associates (1982:23) advise:

> Tape-recording a group discussion allows the leader to concentrate on listening to and controlling the group and probing people's views where necessary. Relying on one's memory of what people have said can lead to distortions.

Furthermore: 'Factors in the location itself that might affect the recording should be taken into account'; and 'By whatever means the interview was recorded, the record should be examined as soon as possible afterwards'. An initial, 'largely impressionistic analysis may be backed up by a more systematic content analysis of sections of the [group] interview'.

Analyzing focus group data

On this last point, Morgan (1988:64) says that the 'two basic approaches to analyzing focus group data are a strictly qualitative or ethnographic summary and a systematic coding via content analysis'. The former approach

> . . . relies more on direct quotation of the group discussions, while the content analysis typically produces numerical descriptions of the data . . . These are not, however, conflicting means of analysis, and there is generally an additional strength that comes from combining the two. Thus a largely ethnographic approach may benefit from a systematic tallying of one or two key topics, while a basically quantitative summary of the data is improved immensely by including quotes that demonstrate the points being made.

Silverman (2001:123) cautions, however, that 'the theoretical basis of content analysis is unclear and its conclusions can often be trite'.

Acas research

The researcher held four exploratory focus groups, in Birmingham, Bury St Edmunds, Leeds and London, attended by some 18 Acas individual mediators in all. The mean time per group was 112 minutes. Fairly typical as regards process was the first (focus group), where there were five Acas mediators present besides the researcher, all of them volunteers. They had been recruited by the researcher, through e-mails; they had been employed by Acas for between seven and 29 years; four of them had substantial experience of individual mediation and the other had been trained by Acas as a

mediator although had not had a chance to participate in a mediation; four of the five had undertaken the Greenwich University Post Graduate Certificate in Individual Employment Dispute Resolution (PGC IEDR) course; and all of them also worked, or had worked at some stage in the past, as individual conciliators.

The agreement of line managers to the mediators' participation in the focus group was sought, either by the researcher or by the individuals themselves. No extrinsic reward for participation was offered in advance or given the individuals on the day (other than drinks and some chocolate biscuits!). The researcher's hope was, however, that the focus group experience - a (surprisingly) rare opportunity for the individuals to discuss their operational work in detail as opposed to discussing financial and other performance targets - would be a stimulating one for those concerned.

It had originally been decided to record the proceedings of the focus group. A digital recorder (and additional microphone) was purchased for this purpose but, after some problems with it in advance, the researcher had considered reverting to taking manuscript notes (at the same time as facilitating the focus group). This did not happen in the event and the digital recorder was used - fortunately, since the researcher found it difficult enough to 'really listen' to the participants whilst simply facilitating, let alone making notes as well.

Stewart et al's (2007:90) thoughts on seating participants around a table were followed. As suggested by Hoinville, Jowell and Associates (1982), factors in the location that might affect the recording (something as simple as the noise from water glasses) were taken into account; and the record was briefly examined on the focus group's conclusion, to check the recorder had worked. The researcher noted down as many thoughts as possible immediately after the focus group. Because of his other commitments, however, it was not until nearly three weeks later that the researcher first had the time to listen to the recording in full.

A consent form was devised and e-mailed to participants in advance of the focus group. The five participants readily signed the form, after the researcher's introduction on the focus group. As befits an interpretivist researcher, this introduction went into considerably more detail on the proposed research than the e-mails. The researcher had

kept these e-mails fairly general so as not to unduly 'lead' the participants before the focus group actually met.

The researcher adopted an interviewing style 'somewhere between the two extremes' of a directive and a nondirective approach (Stewart et al 2007:91). Slightly to his surprise, the researcher got through most of his proposed content in the two hours for which the focus group had been set. The researcher's concern, that he had rushed too quickly through the material and not allowed enough time for discussion, did not seem to be borne out by the recording. The researcher attempted to be flexible in his facilitation, and not stick rigidly to the planned sequence of the questions/prompts in his interview guide, but, in being flexible, missed a couple (of questions/prompts). Coincidentally, the researcher was helped in his facilitation by being a participant himself in a focus group for an MBA researcher, shortly before his own focus group.

Purpose of Acas focus groups

The purpose of the exploratory focus groups was, primarily, to investigate which theories, styles of practice and techniques associated with mediation the Acas mediators espoused; which theories, styles and techniques they actually used, and why; which theories, styles and techniques their clients (commissioners and disputing parties) found most successful, and in what situations; and, indeed, what was success. These exploratory focus groups enabled the researcher to develop the research questions outlined earlier.

The researcher had intended to establish further focus groups in as many Acas Areas as possible. As with the exploratory focus groups, each group would have comprised up to eight volunteers, with - ideally - a mix of experience. The researcher would have facilitated the meetings and, again to avoid the need for a helper taking detailed notes, recorded the proceedings. The purpose of these further focus groups would have been, primarily, to examine the researcher's model about success, in an Acas context, and to explore his measure of success in mediation derived from Bercovitch's (2006:295) conflict management impacts.

In this regard, the researcher would have used vignettes, among other techniques, to explore choices of dispute impact, and variables contributing to those choices and to

their achievement or not. Vignettes are 'sketches of fictional (or fictionalized) scenarios' (Jenkins et al 2010:175) and 'the aim of qualitative vignette interviewing should be to achieve insight into the social components of the participant's interpretative framework and perceptual processes'. What is sometimes 'sensitive data can be obtained in an indirect, non-confrontational manner'. Lest this all seems rather nebulous, an example vignette, produced by the researcher and based on one of his own mediations, is contained in Appendix Two. This picks up the dispute impact approach and the researcher's success model.

In the event, the researcher came to believe – from his experience with the first four focus groups - that his trying to find further groups of interested mediators in any Acas Area, and getting those mediators all released at the same time for interview (especially when the work pressures on them were high and rising), would prove extremely difficult, and would not be the best use of his time. The researcher decided therefore that he would focus on one-to-one interviews (see below). He did, however, try out the vignette contained in Appendix Two in a training session on mediation with some local authority staff (seven people in all). The vignette worked well enough to justify the researcher's intending to use it with further focus groups, should these be held as part of any further research (once this particular study is completed).

Individual interviews with Acas mediators

The researcher held exploratory, face-to-face interviews with 10 Acas individual mediators, based in London, Manchester and Nottingham. The 10 were chosen by the researcher on the basis that, judging by their entries in EARS, they had had a fair measure of experience in individual mediation in different parts of the country. Full and informed consent for the interviews was sought from, and given by, all the individuals concerned. With their agreement, the interviews were recorded and the results transcribed.

Purpose

The purpose of the interviews (as with the exploratory focus groups) was, primarily, to investigate which theories, styles of practice and techniques associated with mediation the mediators espoused; which theories, styles and techniques they actually used, and why; which theories, styles and techniques their clients (commissioners and disputing

parties) found most successful, and in what situations; and, indeed, what was success. These exploratory interviews were, to be honest, somewhat disappointing as to what emerged, but they did enable the researcher to develop the research questions outlined earlier.

The interviews did not comprise 'a tightly structured set of questions . . . asked verbatim as written, accompanied by an associated range of preworded likely answers', but 'a list of things to be sure to ask about when talking to the person being interviewed'. So, the interviews 'might more accurately be termed guided conversations' (Lofland and Lofland 1984:59).

The researcher conducted further face-to-face interviews with another 17 Acas individual mediators, chosen from as many different Acas Areas as possible. These interviews broadly drew on critical incident technique, 'a method for collecting data about a defined activity or event based on the participant's recollections of key facts' (Collis and Hussey 2009:147). The technique 'helps interviewees to talk about issues in the context of their own experience and discourages them from talking about hypothetical situations or other people's experiences'. Potential problems include, however, that they may have forgotten important facts or rationalise after the event.

The researcher asked each interviewee to
'Think about an occasion when you achieved the dispute impact that you were attempting in a mediation case, be it to
manage the dispute, that is, contain, limit, if not de-escalate , it;
settle the dispute, that is, establish a framework that eliminated at least overt conflict; or
resolve the dispute, that is, address its root causes, negating the threat of further conflict-generating behaviour.

'Talk about that occasion and what you accomplished.

'What variables (either contributed by you or of a more situational nature) do you believe led to your choice of dispute impact; and what variables, to that choice's being achieved?

'With hindsight, was your choice of dispute impact appropriate? - or not, in which case, was it too ambitious or not ambitious enough?'

Any mediator being interviewed was assisted, by the researcher, in answering the above (particularly the question about appropriateness of choice of conflict impact) with prompts on lines suggested by Bercovitch (2006:292) - as to whether the mediator had any sense that the disputing parties perceived their mediation experience to be fair; whether the disputing parties appeared satisfied with what had happened; whether the mediation had some positive impact or effect on the conflict; and whether the whole process smacked of efficiency, for example, in terms of costs to the commissioning party and/or Acas.

The researcher accepted that much depended on his interview skills (developed over many years of Acas operational work, some of which specifically involved interviewing clients as part of 'survey' exercises) and his knowledge of Acas mediation, and on mediators' honesty; and that a focus on mediators' views might be criticised on the lines of Bercovitch's (2006:298) concerns about success and failure being 'given totally to mediators to define' and objective outcomes being 'assessed by reference to mediators' subjective evaluation of their goals'. The researcher was, however, trying to steer a course between simplistic measures of success and those which were theoretically appealing but difficult, if not impossible, to operationalise. Although the views of commissioning and disputing parties were not being sought directly, they were nevertheless an integral part of the context of any particular dispute.

Each interviewee was also asked to
'Think about an occasion when you did not achieve the dispute impact that you were attempting in a mediation case.

'Talk about that occasion and what transpired.

'What variables (either contributed by you or of a more situational nature) do you believe led to your choice of dispute impact; and what variables, to that choice's not being achieved?

'With hindsight, how appropriate was your choice of dispute impact?'

The purpose of these further 17 interviews was, primarily, to examine the researcher's model about success, in an Acas context, and to explore his measure of success in mediation derived from Bercovitch's (2006:295) conflict management impacts. As with the exploratory interviews, full and informed consent for the further interviews was sought from, and given by, all the individuals concerned; and, with their agreement, the interviews were recorded and the results transcribed. The mean time per interview for the 27 (10 exploratory and 17 further) interviews was 101 minutes. A schedule in respect of the 27 interviews is at Appendix Three.

A learning point for the researcher (and, indeed, for other researchers of mediation) from the very early interviews for this study was to press research participants as to exactly what mediation experience they had really had, and to check – through EARS – as to what mediations they were actually recorded as having conducted. As a result of this, the researcher realised that, in some cases, mediators had exaggerated the amount of work they had done;[62] also, that, in recalling their work, even mediators with seemingly the strongest memory had sometimes accidentally confused/conflated mediations.

The researcher had hoped for other triangulation, in that it might sometimes have been possible – for instance - to compare the perceptions in interview of the responsible mediator about a particular case with the participant and commissioner feedback contained in evaluation forms returned to Acas. This did not, however, prove to be practicable. There are relatively few evaluation forms returned (see, for example, Acas 2013c:2).

The exploration of Acas's archival records, especially those in its Events and Advisory Recording System (EARS) and client evaluation forms

Since at least the 2004/2005 operational year, Acas mediators have been able to record their mediation activity on EARS. The system gives a breakdown by activity (for

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[62] In one case, someone who had offered himself for interview appeared not to have done any mediations at all!

example, Advice, Collective Conciliation, Individual Mediation, Workplace Project, and Workplace Training), by staff member, and by office. For each individual mediation case, the mediator is expected to record time spent and income earned (early on, there was often a disparity between the two but, nowadays, Acas National expects income to more closely reflect time recorded as spent).

There is also an opportunity for the mediator to give a 'brief case history' and to note 'problems, issues or any learning points'. Neither of these is, however, a mandatory field and they are quite often barely completed, if completed at all. EARS is nevertheless a valuable resource for any researcher (it has a record of some 2,000 mediation cases once 'record cancelled' cases are disregarded), and, as will be seen in chapters six and seven, the researcher has drawn heavily on the system. He has, however, been careful to anonymise the EARS information presented in this thesis, in line with his guiding principle of not doing anything that might embarrass, harm or threaten any individual.

Evaluation forms are sent out to the commissioner of a mediation and the disputing parties, once a mediation is closed down on EARS by the mediator concerned. Those completed forms returned are summarised by Acas's Research and Evaluation section in annual reports on *Individual Mediation: responses from participants and commissioners*. Again, the researcher has drawn heavily on these summary reports and, also, directly on some of the returned evaluation forms (courtesy of Acas's Research and Evaluation section).

Other case study research methods

In addition to participant and non-participant observation, focus groups and individual interviews of Acas mediators, and the exploration of Acas's archival records, as well as a review of relevant, mediation literature, the researcher's approach has included:

- a review of Acas's internal documentation on mediation, over recent years, where this has been available to the researcher;
- some (limited) telephone follow-up of his (the researcher's) Acas mediation clients;

- face-to-face interviews with five mediators outside of Acas, one working for the then New Zealand Department of Labour[63] but on secondment to Acas, another working for a private sector mediation provider (Consensio), another for a local authority, another for a university, and the fifth (accompanied by a couple of colleagues) working for a police force; and an interview with an HR manager on her dispute handling, if not officially mediation, work in her company;

- a telephone interview with an Employment Judge about judicial mediation;

- as and when appropriate, attempting to gather the views, on mediation, of at least some trainees from outside Acas attending Acas mediation courses, whether its five-day Certificate in Internal Workplace Mediation (CIWM) course or shorter courses. Such trainees have varying degrees of experience and knowledge of mediation and, often, valuable insights - although sometimes their promises to come back to the researcher with further information have not been honoured; and

- reflection by the researcher on the Acas work that came to him because of his mediation experience outside of Acas: the researcher was involved from mid-2002 in the Acas focus group that met under the *Today and Tomorrow* products and services strand; he co-developed and co-tutored an Acas pilot public seminar on in-house mediation, in November 2002; he conducted an early mediation for Acas (January/February 2003); he co-developed and co-tutored three-day courses for in-house mediators at the then Commission for Racial Equality, in April and May 2003; he was involved in a working group that developed what became Acas's CIWM course; and he co-developed and co-tutored several internal training events for potential Acas mediators, starting in September 2003. What the researcher learned in all of these activities helped inform this thesis.

This research has also used:
- reflections by Acas mediators on their mediation practice that the researcher has been able to collect (although the researcher had hoped at one stage to recruit a cadre of Acas mediators to complete diaries relating to their mediation work on

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[63] Now integrated into the Ministry of Business, Innovation and Employment (MBIE).

the lines suggested by Burgess (1984:128) for teachers, he had to settle for rather more ad hoc contributions from a small number);

- evaluation forms returned by clients that Acas mediators were willing to share with the researcher;

- other opportunistic collection of data from Acas mediators, for example, by getting some of them to complete 'personal debrief' forms (devised by the researcher) after mediations; by asking another who had undertaken a secondment to the then New Zealand Department of Labour for material she had written on her experiences; and, as suggested earlier, by drawing on their e-mails about mediation ;

- a review of videotapes of actual or simulated mediations, produced mainly by practising mediators, for example, the late John Haynes using facilitative mediation (both with a family (transcript at Haynes and Haynes 1989: 49) and also in two workplace situations (transcripts at Haynes et al 2004:23)); two Acas co-mediators using facilitative mediation (see page 125);[64] Tony Whatling using facilitative mediation in a family dispute (within the Shia Imami Ismaili Muslim community); the Community Mediation Consultancy and Training Service in Edinburgh using facilitative mediation in a neighbour dispute, and an earlier BBC film on a similar theme; Gerald Monk and Alison Cotter using narrative mediation between neighbours; Robert Baruch Bush using transformative mediation between neighbours (transcript at Bush and Folger 2005:131); peer (child) mediators using facilitative mediation in their Leicestershire school; a Bond University video showing facilitative mediation in a workplace dispute, in Australia; and the then Mediation UK, in 2004, with victim-offender mediation;

- the researcher's networking with Acas and other mediators, to share information, discuss ideas, and try out some of them, some of this networking done at the several Acas symposia held at Greenwich University in connection with the PGC IEDR course, some done – as suggested earlier – in Acas corridor

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[64] One of the Acas co-mediators told the researcher that, working on the same dispute scenario, the transformative mediation had seemed very different from the facilitative one. Unfortunately, as indicated earlier, while a copy of the facilitative mediation recording was available to the researcher, a copy of the transformative mediation one was not.

discussions, and some done at events such as a team meeting of West Midlands Police internal mediators; and

- the researcher's drawing on what he had learned from his attendance at Acas, and other, conferences, courses and seminars with relevance/transferability to workplace mediation. For many years, for instance, the researcher was required to complete a certain amount of continuous professional development training each year in order to be allowed to continue doing publicly-funded family mediation. The researcher has also attended courses at Woodbroke Quaker Study Centre. In addition, the Institute of Family Therapy in London used to put on one or two day seminars/workshops run by visiting US workplace mediators, such as Stephen Littlejohn and Bernard Mayer (another illustration of the 'crossover' referred to in chapter one), several of which the researcher attended. More recently, the researcher attended two seminars in the ESRC 'Reframing Resolution – Managing Individual Workplace Conflict' series (2012-2013). These are just examples.

As indicated earlier, this multi-method approach has provided rich data and opportunities for triangulation

Analytical procedure

Collis and Hussey (2009:169) outline a general analytical procedure for qualitative data, which 'can be used with any interpretive methodology'. The elements of the procedure are as follows: the researcher should convert any rough field notes into a written record understandable later on; then, add thoughts and reflections, distinguishing interpretation and speculations from factual field notes. The researcher should ensure that any material collected from interviews, observations or original documents is properly referenced; then, start coding data as soon as possible. A particular word, character, item, theme or concept identified in the data may be allocated a specific code.

The researcher, continue Collis and Hussey (2009:170), should start grouping the codes into small categories according to patterns or themes which emerge; then, compare new items of data, as they are collected, with existing codes and categories, and modify the codes and categories as required. At various stages, the researcher should write

summaries of findings, using the summaries to construct generalizations, for use in confronting existing theories or constructing a new theory. The researcher should continue until satisfied that the generalizations are sufficiently robust to stand the analysis of existing theories or the construction of a new theory.

The researcher has, broadly, tried to follow these suggestions of Collis and Hussey (2009:169), in this study. Specifically, in his focus group work (with four groups, involving a total of 18 Acas mediators) and in his initial individual interviews (with 10 Acas, and three other, mediators), both backed up by his review of the relevant EARS case entries, the researcher explored theories, styles and techniques associated with mediation: those espoused by mediators; those actually used, and why; those found by clients to be most successful, and in what situations; and, indeed, what was success. The resulting data were analysed by comparing responses to the issues put to the mediators concerned; and what emerged from this exploratory work prompted the researcher to amend/refine what had been tentative research questions, and to settle on those of what is success in workplace mediation and how might mediators achieve it.

In his later individual interviews (with 17 Acas, and four other, mediators), backed up by a review of the relevant EARS case entries for the 17 Acas mediators, the researcher explored these amended/refined research questions through mediators' stated conduct of their cases. He brought into his exploration the beginnings of what he has labelled the dispute impact approach and the beginnings of the model outlined at Figure 5.1 (see interview outline at pages 142-144 of this thesis). Again, the resulting data were analysed by comparing responses to the issues put to the mediators concerned, and the researcher's dispute impact approach and success model were amended/refined, accordingly.

The researcher did not send his transcripts of focus group meetings and individual interviews to those involved, for approval. This was done to save time/work for the researcher but, on reflection, it was perhaps a mistake on the researcher's part. He might have benefited from suggested additions and corrections. At various stages of his study, however, verbally and/or in writing, the researcher has – as suggested by Collis and Hussey (2009) - shared summaries of his findings and conclusions with Acas colleagues (including with some focus group and individual interviewees, two senior

members of Acas's Research and Evaluation section, and a cohort of Acas PGC IEDR students), among others.

As for <u>Acas's archival records,</u> after his individual interviews with Acas mediators, the researcher - as indicated earlier - explored the relevant <u>EARS entries</u> for the cases discussed by interviewees. This was not to try to catch out the latter (although, again as indicated earlier, the researcher realised afterwards that, in some cases, mediators had exaggerated the amount of work they had done; also, that, in recalling their work, mediators had sometimes accidentally confused/conflated mediations). Rather, it was done to increase the researcher's understanding.

The researcher also explored various other EARS entries, simply because they seemed likely to be of interest, for example, cases conducted by particularly active mediators or in prolific Acas areas, or cases involving particular organisations, or cases suggested by corridor discussions with Acas colleagues or by comments made at an Acas staff meeting. One EARS entry often led the researcher to another. Among other issues, the researcher looked to see whether/how the dispute impact approach and his success model might fit in.

There was not much in the way of ready-made tables in EARS, which the researcher could extract in order to, then, draw conclusions, for this thesis. To explore particular themes suggested by his literature review and empirical work, the researcher himself had to analyse EARS and manipulate EARS data to construct simple tables such as 7.1 (on individual mediations opened, cancelled, closed and closed as unprogressed in 10 operational years, in Acas as a whole); more complex tables such as 7.3 (where he calculated the mean number of cases per mediator in each Acas office over an eight and a half month period); or, more complex still, tables such as 7.9 (where the researcher identified from EARS those mediations in Acas closed as unprogressed in a nine and a half month period; then, explored the relevant EARS entries as to why they were unprogressed).

With regard to <u>client evaluation questionnaires,</u> the researcher was able to draw upon analyses already done and reported in the yearly Acas reports on *Individual Mediation: responses from participants and commissioners*, for example, the analyses used by the

researcher in Table 7.7 to consider the variable of mediation ripeness. The researcher did, however, also carry out analyses of his own, of client evaluation questionnaires. He compared – for instance - the information from the yearly Acas reports, and the data from disputing parties' questionnaires contained in spreadsheets forwarded to him (by Acas's Research and Evaluation section), with that in EARS. The end result of this comparison for five operational years is reproduced in Table 6.2, with a more detailed analysis of the 89 questionnaires and the corresponding EARS entries for 2012/2013 being outlined at Appendix Five.[65]

In addition, the researcher returned to the contemporaneous notes he had accumulated over the years through <u>observation of mediations</u>. He re-read the notes with his research questions in mind, thinking especially whether/how the dispute impact approach and his success model might fit in. The researcher focused particularly on his notes on workplace mediations (backed up by a review of the EARS case entries), especially on those notes which he had made before the idea of his PhD research materialised and which were not therefore to the forefront of his mind. As already indicated, the researcher holds extensive notes, typically about 20 A5 pages, on each of his workplace mediation cases.[66]

As for <u>videotapes of actual or simulated mediations</u>, these were viewed/re-viewed by the researcher throughout the period of his PhD research. The researcher holds over 12 videotapes (detailed at page 147) and viewed some several times. The purpose was mainly to get ideas as to what variables lead to mediation success, but also to keep the researcher 'grounded', so that he did not lose touch with the subject of his research when – for whatever reason – he was not mediating as such.

Whatever the research method, however, in his analytical work the researcher has been mindful of the 'systems' theoretical framework in which this study is set and has used

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[65] There were not sufficient questionnaires returned from commissioners in respect of the 68 cases referred to in Appendix Five to warrant the inclusion in the appendix of the information they contained, for example, about commissioner satisfaction with the Acas mediation service.

[66] The 20 A5 pages includes separate/pre-mediation and joint meetings.

this framework to shape his analysis. He has been mindful, too, of Morgan's (1988:64) comments quoted earlier about analyzing focus group data:

> . . . a largely ethnographic approach may benefit from a systematic tallying of one or two key topics, while a basically quantitative summary of the data is improved immensely by including quotes that demonstrate the points being made.

The researcher trusts that what Morgan is suggesting as regards blending an ethnographic with a quantitative approach is evident in chapters six and seven of this thesis.

Summary

This chapter has looked at the research approach used to seek answers to the questions of what is 'success' in workplace mediation and how mediators might achieve success. The researcher worked at the interpretivist end of the continuum of research paradigms and chose, primarily, the case study methodology, Acas mediators being the single case selected. Besides the research questions, the study's propositions and the unit of analysis were identified. A preliminary theory, a model predicting success (or not) in workplace mediation, was set out. A variety of research methods was used in the study, in particular, participant and non-participant observation, focus groups, individual interviews, and examining archival records. As regards analysis of collected data, the researcher drew upon/tried to follow Collis and Hussey's (2009:169) general analytical procedure for qualitative data, and he has indicated the technique adopted for each type of data.

Next two chapters

The next chapter outlines the findings as to what is success in mediation that have come out of the researcher's empirical work. Findings as to *how* mediators achieve success, and the relative significance in this of mediator and situational variables, are outlined in the following chapter, seven.

CHAPTER SIX: FINDINGS - WHAT IS SUCCESS?

Introduction

This chapter begins with a brief recapitulation - about this study's research questions, concerning success in workplace mediation; about a potential measure of success, building on Bercovitch's (2006) work; and about a model predicting success, emerging from the literature on mediation. The chapter then outlines the findings as to what is success in mediation that have come out of the researcher's empirical work. Findings as to *how* success is achieved are outlined in the next chapter, seven.

Recapitulation

The research questions for this study were

- What is 'success' in workplace mediation? and
- How do mediators achieve success?

and the researcher built on the work of Bercovitch (2006), in particular, to construct a potential measure of success - that it might be judged according to reflection, after closure of a case, on:

- what the mediator had been trying to do - manage, settle or resolve the dispute;
- whether s/he achieved what s/he had been attempting; and
- whether this was, with hindsight, an appropriate choice of dispute impact, or whether it was too ambitious or not ambitious enough.

As to how mediators achieve success, the researcher was left in chapter four with an emerging model predicting success (or not) in workplace mediation. The propositions of this model were that success (or not) in any mediation is a function of the interplay between the mediator's stage of development (and associated mediator variables) and the tractability of conflict (and associated situational variables). This interplay of variables, it was argued, contributes significantly to the mediator's choice of dispute impact, as defined above, and to that choice being achieved (or not). In the researcher's empirical work, the model was set within a framework of systems theory and then examined in an Acas context.

This chapter

Accordingly, in this chapter the researcher focuses on how success is defined while in the next he focuses on the variables leading to success, and, in doing so, places his findings in a systems framework. Consideration of the implications and significance of the findings in this chapter and in chapter seven will be left to chapter eight ('Discussion and Conclusions') of this thesis.

The findings in this chapter and the next stem from the sources indicated in Table 5.1, primarily from the researcher's individual and group interviews with a total of some 45 Acas mediators and seven others from outside the organisation; and from samples of the 2,000 plus entries in Acas's Events and Advisory Recording System (EARS) made by mediators after each mediation event. In addition, to further triangulate the findings, the researcher has drawn on a selection of the evaluation questionnaires returned to Acas each year. (There were, for example, 134 participant, and 104 commissioner, questionnaires returned in 2013/2014.)

To a lesser extent, the researcher has also drawn on his participant and non-participant observation of mediations over the years and his review of videotapes. The researcher has indicated in the text below the respective sources of the data reported. The previous chapter has details of the contribution of each research method.

Success

Acas does not appear to have defined for its staff what it regards as 'success' in individual mediation. It has not done so either explicitly or implicitly (the latter by, say, defining, for the purposes of EARS, what is encompassed by the categories of Dispute Resolved, Progress Made, etc in individual mediation). Not surprisingly, therefore, there is a lack of certainty among staff on this issue. As will be seen below, their definitions of success related to the dispute between the parties in isolation, that is, not in a systems framework.

Main criterion of success: getting an agreement

Of the 45 Acas mediators interviewed, individually or in groups, most - at root - appeared to define success in mediation as 'getting an agreement', achieving a 'mutual

understanding', between the disputing parties (although one experienced mediator was perhaps not alone when he admitted, 'I've never asked myself that question' as to what is success). The mutual understanding might be written down, or it might remain a verbal agreement, or it might be a mixture of both - although it was recalled by Acas interviewees that their (and their colleagues') initial mediation training had placed great emphasis on *written* agreements.[67]

While initial Acas mediation training placed great emphasis on getting a *written* agreement, it also suggested – according to interviewees - that a mediator should be aiming at reaching some sort of agreement, written or otherwise, in most, if not all, cases. The latter may seem obvious and uncontentious, but it is worth remembering Della Noce's (2001:77) thoughts about agreements in mediation being 'but one possible outcome', and Mayer's (2009:21) suggestion that some conflict is not amenable to resolution efforts. However, according to one Acas interviewee, 'we're bogged down with getting an agreement'.

Also, a small number of mediators interviewed acknowledged to the researcher that valuable (in their eyes) mediation objectives, such as bringing clarity to a dispute situation, or identifying the disputing parties' needs and interests, or allowing them to 'off-load' onto an outsider, might be under-appreciated, if not virtually ignored – at least, by less experienced mediation practitioners - as a result of too much focus on agreements. Such a focus actually led one interviewee to say that 'we're not there to do anything but get an agreement'. Another Acas contact who, because of her grade, focuses on group mediations always goes for a written agreement with such mediations. These points will be discussed further in chapter eight of this thesis.

Some of the 45 Acas mediators interviewed look for a written agreement always, as - said one interviewee - 'something for a mediator to go back to/work from, if things

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[67] For the researcher as mediation trainer, the emphasis on written agreements flowed to a great extent from his own training and work in the area of family mediation, where one goal was a written 'memorandum of understanding' between the parties. The emphasis on written agreements was also consonant with the typical background of Acas mediation trainers - in Acas individual conciliation, where agreements are always reduced to writing at case closure.

break down', or as - said another interviewee - something 'psychologically quite good for disputing parties to take away from a mediation'. Other Acas mediators interviewed (a similar percentage) look for a written agreement rarely, producing one only if the disputing parties specifically ask for it. One police mediator interviewed said that, although his previous mediation co-ordinator used to push for more *written* agreements, he did not think disputing parties necessarily wanted this. It was the opportunity to talk, and to discuss how they might better work together in the future, that was important to them.

The view was even expressed that sometimes trying to write down an understanding reached by disputing parties may risk 'spoiling' things between them. Certainly, the researcher as a participant observer in workplace mediations has, as confirmed by his contemporaneous notes, been involved in situations where he has found a seemingly positive mediation discussion between disputing parties very difficult to capture in verbal summaries at the time, and almost impossible to spell out in writing afterwards. The discussion will usually have been about intangibles as opposed to something concrete, like whether an office window should be open or not. 'Trying to shoehorn a mediation discussion into a few points [in an agreement] is not helpful,' in the eyes of one mediator.

In one Acas office, the mediators interviewed – who were the two most experienced there - had completely opposite views and practice on this question of written or verbal agreements. In spite of individual preferences within Acas (as to written or verbal agreements), however, no mediator suggested that, if her/his preference was not to be met, s/he would not proceed with the agreement. At the end of the day, the parties' wishes, even on what is after all a procedural matter (and, therefore, usually in the facilitative mediator's hands), were deemed to be paramount by mediators.

On the face of it, written agreements are much more certain of execution than verbal ones and, therefore, to be preferred. As is stated in Acas's *Mediation explained* booklet (Acas 2008:9), however, 'Agreements reached in mediation are not normally legally binding unless both sides specifically ask for this.' There are no Acas statistics on this but, in the researcher's experience and to his knowledge, written agreements in Acas

mediations are not - by and large - intended by the parties to be legally binding and may be no more certain of execution than verbal agreements.

Far from denoting success, a written agreement might sometimes be a cover for a lack of success. Drawing on his contemporaneous notes, the researcher as a participant observer has found, when mediating, that it is not too difficult to get some sort of written agreement – albeit, perhaps, on issues peripheral to a dispute - even out of mediation situations that might otherwise be seen as/feel relatively unsuccessful. In these cases, the researcher's motivation has not been to claim, and revel in, counterfeit success, but rather to contain the dispute and to encourage and motivate disputing parties who might otherwise think they had wasted their time with mediation.

In this regard, the researcher (as Acas mediator) has also borrowed, from community and family mediation, the idea of the mediator writing a 'session summary' for the disputing parties, after any joint meeting (see, for instance, Beer (1997:59)). An example summary is at Appendix Four. The disputing parties are asked to review these session summaries and to agree/amend them, as appropriate. In the researcher's experience, however, suggested amendments are rare and the disputing parties usually accept the mediator's draft without change.[68] Because of the confidentiality promised them, any summary would go to a commissioner only with the agreement of *all* the disputing parties.

One Acas mediator in London, when interviewed, indicated that, in a case in 2008, for a business services company, in trying to settle the presenting problem, she had inadvertently uncovered in a joint meeting a previously unknown but serious breach of discipline, by one of the disputing parties. However, the mediator said she had effectively 'parked' that breach of discipline and had pressed on to get a written agreement on the original, presenting problem - leaving the breach to be tackled, presumably, by the parties on their return to the workplace, with all the difficulties this would throw up for the settlement just reached in mediation.

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[68] In one case that the researcher observed in 2011, however, it proved impossible for the mediator to get one of the disputing parties to agree even the blandest of session summaries.

In another (school) case, in Wales, in 2011, the Acas mediator interviewed said that she had spent a lot of time in the joint meeting working on the terms of a caretaker's return to work, after sickness. She indicated that she had ignored what she (the mediator) had been told by the other party, the estate manager, in his separate meeting, that he had CCTV evidence of the caretaker going through confidential papers, without authority, and that he did not therefore trust the caretaker any longer. Both cases suggest that the lure of a written agreement can sometimes lead even an experienced mediator to neglect the realities of a situation and the further mediation work s/he should be doing before even thinking about an agreement.

A focus on written agreements was also found in the following entry in EARS, made in 2013 by a mediator in respect of a dispute between two administrative assistants working for a trade union:

> Progress Made: An agreement was reached on the day but, upon reflection, one of the parties refused to sign the agreement when written up neatly. Learning point: do not request the parties [to] sign the agreement. Draw it up and present to them.

The researcher did not interview this particular mediator, but there is no indication that he recognised he had more work to do with the parties in this case, and no record in EARS of his having any further contact with them. The vision of the holy grail of a written agreement seems to have blinded him to all else!

One interesting technique practised in the area of written agreements, mentioned by one Acas mediator interviewed, is the approach whereby he (the mediator) asks the disputing parties, separately, what would be a positive outcome to mediation for them. He translates their comments into bullet points, which he next melds into a draft document containing obligations for all the parties. He then looks to 'sell' the draft document/agreement to the disputing parties in a joint meeting.[69] The Acas mediator concerned backs up the approach by encouraging the parties to include in their written agreement the name of a manager who will be asked to act as a sort of arbitrator, should things go wrong with the agreement. By contrast, another mediator, when confident of agreement, leaves the disputing parties together, alone, to draft its terms.

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[69] The approach sounds similar to the 'one-text' approach practised by some well-known mediators (see Fisher et al (1996:126)) and used occasionally by the researcher as mediator, **f**or example, in an Essex voluntary sector case in 2011 which was part individual conciliation, part individual mediation.

As to the content of agreements that mediators seek, most interviewees talked of mutual understanding on 'a way forward'. When probed on this, several mediators spoke of the parties 'being able to resume their working relationship, not necessarily becoming good friends again', that is, if they ever were good friends – or, in the same vein, of the parties being able to resume enough of their working relationship that future contact between them would be mutually tolerable. Also, some mediators interviewed spoke of empowering disputing parties to handle future problems that would inevitably arise between them, as they would between any work colleagues.

The 45 Acas mediators interviewed sometimes spoke of at least one of the disputing parties in a case deciding to literally move on, from the workplace in question. The imminence of a mediation session might have induced, or at least contributed to this. EARS records show some mediations not progressed because one or other party had resigned their employment immediately before a mediation, for example:

> Brief Case History: Employee took out grievance concerning his line manager which has been through company grievance procedure. Grievance not upheld but employee [has] been off sick for 6 months now and [has] requested to return with a different line manager. This is not possible owing to company losing some contracts - employee agreed to mediation to try to resolve outstanding issues. Both parties willing.
>
> Outcome: Mediation Unprogressed
>
> Problems, Issues Or Any Learning Points: Commissioner emailed me to say . . [E] had resigned the day before the mediation.

Or it might be that there was a realisation during mediation, or when the parties were back in the workplace (perhaps even after an agreement to resume their working relationship), that there really did need to be a parting of the ways. One mediator instanced, in interview, an actual agreement between disputing parties to part company, 'a successful outcome because both parties wanted it'. A variation on this theme was to be found in one of the researcher's own mediation cases, in Hitchin in 2014. According to his contemporaneous notes, one of the disputing parties had resigned before the mediation started but wanted this kept confidential because of ongoing talks on improved terms and conditions to retain him as an employee; the mediation went well; the retention talks did not, however, succeed and the employee therefore announced his

impending departure, to the disillusionment of the other party - with whom he had been in dispute but who now said he would look to leave too!

Sometimes, according to interviewees, these agreements on a way forward addressed a number of specific issues between the parties. Such agreements varied, they said, in that some covered only some of the issues that the parties brought to mediation (perhaps because agreement could not be reached on the rest), while in other cases agreements were much more comprehensive. In some instances agreements (or, rather, the issues they tackled and the way they tackled them) were fairly superficial, while in others they appeared to get to the root of dispute situations.

A useful commentary/summary as to what Acas mediators try to achieve in their work is that they:

> . . . employ a facilitative approach that encourages the recognition of the respective needs and interests of the disputants in an attempt to identify areas for agreement. The focus is on enabling participants to work together in the recognition of needs and future interests rather than resolving personality-based issues (Acas 2013b).

Never specifically adduced by those Acas mediators interviewed was the measure of success from the transformative mediation model, of helping the disputing parties 'change the quality of their conflict interaction from negative and destructive to positive and constructive' (Bush and Folger 2005:65).

Nor did any interviewee mention any measure from the narrative mediation model, where, as indicated earlier:

> The mediator's task is to work with the participants to explore the narratives behind their conflict story, and then to identify and develop alternative, preferred stories. In this way, mediation provides an interactive space in which non-adversarial narratives can be advanced (Winslade et al 1998:26).

It is, however, a point for discussion as to how much of the transformative and narrative models' measures of success is contained in what Acas interviewees have indicated to be their measure of success – when they speak, for example, of the parties' being able to resume a working relationship. Chapter eight of this thesis will look at this.

Indicators as to likely mediation success (or not); and reinforcers of mediation agreements

In the course of any mediation, there will be various indicators for the mediator(s) as to likely success (or not), success encapsulated - as we have said – in an agreement; and there will be what might be called, perhaps clumsily, reinforcers of agreements reached. These indicators and reinforcers include (the sequence is roughly that of a typical mediation):

- getting through the mediation process;
- a 'light bulb' moment, including the disputing parties' body language;
- apology;
- a mediator's 'feelings' of success;
- the disputing parties shaking hands;
- the disputing parties leaving mediation together;
- evaluation questionnaires; and
- repeat business for the mediator.

Most of the above measures are objective ones, as are written agreements, but some of the above are more subjective, for example, a mediator's perception of a 'light bulb' moment, and a mediator's 'feelings' of success. Evaluation questionnaires will be completed subjectively by the mediation parties but the collated results might be seen as an objective measure. Each of the above measures will now be discussed in turn.

Getting through the mediation process

For several mediators - either interviewed and/or whose entries in EARS have been reviewed by the researcher - getting through (or most of the way through) the facilitative mediation process, particularly achieving a joint meeting, is seen as an indicator of likely success. It may even be seen as success in itself, almost regardless of the final outcome of a mediation. As one mediator interviewed said: 'Success is when I've been able to complete the whole process. I might have some misgivings that it's all sorted out but . . .' The facilitative mediation process typically involves

- separate meetings with the parties

then, with the parties jointly,

- hearing the issues
- exploring the issues

- building and writing agreements
- closure and follow-up.

(The first joint meeting(s) may be used to continue the pre-mediation phase started with the separate meetings, to 'make whatever changes are necessary so that the couple may engage in productive negotiation' (Irving and Benjamin 2002:99) – although none of the researcher's interviewees had ever done this.)

Linked to this, some Acas mediators interviewed said that several of their colleagues had a very inflexible, 'mechanical' approach to mediation. As one added: 'You can be quite superficial with the [mediation] process' and, effectively, just go through the motions. Another interviewee argued that 'just having a conversation [with the parties] is not enough'. A handful of Acas mediators interviewed or spoken to less formally, though, really do not want to mediate, do not feel comfortable with the emotional side of mediation. They have, however, indicated that they are still doing (the occasional) mediation, at least going through the motions, because they judge it will be better for their careers in Acas to do so – which strikes the researcher as being a very instrumental attitude.[70]

This is not, however, to belittle the mediator's substantial achievement - in many cases - in getting what may be very hostile parties to sit down together and really talk, something they may not have done for quite some time (20 years in one extreme instance reported to the researcher by a university mediator interviewed, and where it was two hours before the parties would turn their chairs to face one another!). Nor is it to belittle the importance and value of the mediation process in general. In one of the videotapes viewed by the researcher, the film *Nice Neighbours (*BBC 1993), one of the Bristol community mediators featured suggests that 'too often, we believe something hasn't been successful until we can say, "Here's the answer"', whereas 'the process in finding the answer is often the healing thing'.

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[70] Roberts (2007:208) quotes the experienced mediator Lorraine Schaffer as being critical of any mediator 'who doesn't think or read or reflect on their practice, or try and find new ways of working or having a new understanding, and just does a case in the same way every time . . . You just apply a model pedantically whatever the situation.'

Several Acas mediators interviewed talked of the 'magic of the mediation process',[71] the sometimes surprising results that ensue from the parties sitting down together. Such a view seems, though, to have led most interviewees to launch into joint meetings without the 'formulations' or 'hypotheses' that Lang and Taylor (2000) and Haynes and Haynes (1989) suggest are essential. Some interviewees use the language of deciding to 'think on my feet, wait and see what comes out', as one typically said. The companion of this is that those interviewed rarely analysed rigorously why a particular mediation does, or does not, work out seemingly successfully.

The 'magic of the mediation process' view also seems to have led some of the mediators interviewed to abandon mediation when they realised they could not get easily, quickly, to a joint meeting in a particular dispute, and perhaps (led them) to abandon work altogether on the dispute, rather than try a less 'pure' version of mediation or go with some other dispute resolution process. For example, some Acas mediators interviewed said that, while they saw caucus (separate meetings of the disputing parties) and shuttle (by the mediator between the disputing parties) as an integral part of Acas's collective conciliation work, they had not applied that technique to individual disputes which they had instead abandoned for want of getting to a joint meeting.

On this theme, in a Fire and Rescue Service case, in East Anglia in 2005, the researcher as mediator had to deal with two women who job-shared but who could no longer bear to sit together in the same room. According to the researcher's contemporaneous notes, the breakdown in their relationship was having a negative impact throughout their station. A mediation was conducted by the researcher 'shuttling' between the parties in two separate rooms, and his helping them to come to an agreement on a way forward, an agreement, however, that inevitably owed much to the mediator as opposed to the parties.

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[71] Interestingly, Bercovitch (1997:126) says that, for many years, 'Practitioners of mediation . . . were keen to sustain its image as a mysterious practice taking place behind closed doors', but that, now, 'there is very broad agreement that this particular ghost should be exorcised. Mediation can, and should be, studied properly.'

In a further mediation case, in a firm of architects, in Hertfordshire in 2009, the researcher, according to his contemporaneous notes, was faced with two women in support roles, one of whom wanted to be friends at work while the second wanted to keep a distance - quite literally in that she professed privately to being physically frightened of the other. The latter woman refused to sit down with the former but, again, the researcher 'shuttled' between two rooms and helped draw up a detailed set of (nine) ground rules by which the parties' working relationship would be governed. A typical rule was:

> . . . neither of us will go into the kitchen (or the corridor leading to it), if we know that the other is already there. If either of us comes across the other in the kitchen (or the corridor leading to it), she will withdraw.

As far as the researcher knows, the agreement held.

Mediator inexperience and inflexibility is confirmed to some extent by Acas's report *Individual Mediation: responses from participants and commissioners 2012-2013*, where it is noted that Acas mediators tend to score less highly with commissioners of mediation on 'discussing other options' to mediation than they score on other aspects of their mediation service (Acas 2013c:10). Examples, extracted by the researcher from EARS entries by Acas mediators, of what might be seen as an over-reliance on the Acas five-stage facilitative mediation process, or at least the joint meeting, include the following:

- Investment management company - 'Mediation Unprogressed [that is, abandoned]: One party insisted she did not want to sit in the same room as the other party, so any joint meeting unlikely.'
- Bank - 'Mediation Unprogressed [abandoned]: Couldn't progress to round table [ie joint meeting] as E wouldn't meet or speak to . . [N].'
- Local authority education function - 'Mediation Unprogressed [abandoned]: One party was insistent she wouldn't go forward to a joint meeting with other members of the team.'
- Police force - 'One of the parties believed they were being forced to attend mediation, and if it was their option they would not participate, and they would under no circumstances attend a joint meeting. On this basis, I felt mediation was not appropriate [and it was not even attempted by the mediator]. Updated . . . [L in Human Resources] – they shall use internal procedures (which may include disciplinary action) to progress this matter.'
- Further education college – 'Dispute Not Resolved [and no further Acas action of any substance]: Difficulties too entrenched, parties unable to consider resolution, unwilling to meet in joint session in any form.'
- School – 'Dispute between employee and manager, one of the parties does not want a joint meeting. Progress Made. Learning point - whether the

commissioner wants the mediation, when one party confirms from the start that they will not participate in a joint meeting, I would be reluctant to proceed.'

In addition, the researcher sat in on a presentation in 2013 by an Acas colleague at an Area meeting (on which he still holds contemporaneous notes), focusing on an individual mediation case that she had conducted a short while before. The mediation in question had been triggered by the behaviour of two brothers who ran a company that operated in the food industry. The mutually antagonistic behaviour of the brothers was seen as threatening what was a profitable business. The wife/partner of one brother had also got involved in the dispute. A non-executive director of the company had, therefore, commissioned Acas mediation. The mediator met all three parties separately and arranged an early joint meeting. A business problem, however, led to that meeting's cancellation. Another joint meeting was arranged but this too was cancelled. In the event, the joint meeting never happened.

The impression the mediator gave in her presentation was that she had, therefore, seen her work at the company as finished. She also gave the impression that she might have regarded her work as unsuccessful but for a discussion with the non-executive director. He had indicated to her that, following the mediation, there had been some behavioural change on the part of one of the brothers, such that the work situation was more promising than it had been. The outcome of the case was written up in EARS as Progress Made, with the comment:

> Initial meetings with all three [parties] (with the partner being the last in the process) and one of the brothers pulled out after that separate meeting with his partner – so the process went no further. In retrospect, it might have been beneficial to have [had] the joint meeting with the brothers before agreeing to see the . . . [partner].

Again, the mediation process, particularly the focus on a joint meeting, seems to have taken over.

'Light bulb' moment, including the disputing parties' body language
The researcher has experienced, and mediators interviewed have said to him, how – at some stage in a mediation, perhaps one that appears to be going nowhere, with the parties reluctant even to address one another directly – there may come a moment 'comparable to a light bulb being switched on', when the parties do start to talk to one another seriously about the issues in question. As one interviewee typically said, 'as a

mediator, you may not know why this has happened, what was the trigger, but you'll suspect at this moment that you're on the path to agreement'. The secret often then is to recognise the value of mediator silence in the situation, letting the parties do most of the talking, and not feeling that you are a lesser mediator because of that.

Mediators interviewed said that part and parcel of any 'light bulb' moment might well be the parties' turning toward, and engaging with, one another, rather than continuing to avoid eye contact with one another and insisting on addressing their comments to the mediator. One explanation of these 'light bulb' moments is suggested by so-called tipping theory, the idea that a build-up and combination of what may be, in themselves, quite small events may 'tip' a situation over into a particular direction, in this case, tip the disputing parties into talking to one another seriously about the issues in question.

A different explanation of these 'light bulb' moments was suggested by another mediator in respect of one of her cases, in a medical practice in a Welsh market town, in 2009. In that case, which involved a young employee in IT refusing to be managed by the practice manager, the mediator when interviewed said that there had been a 'revelation' in the joint meeting. It had suddenly become clear to all present that the conflict was really nothing to do with the workplace but related to family tensions outside the workplace, involving, of all things, the playing of badminton (see the systems diagram at Figure 4.1, page 63, in this connection)! Some authors would talk of an epiphany (for example, Friedman 2013:48).

Apology
The researcher as mediator often tells disputing parties that facilitative mediation is not about their raking over the past, with perhaps one or other of them apologising for what has happened, but about their looking forward; and he has on occasion tried to dissuade, as being unrealistic, the party who believes s/he should get an apology as a condition of participating in mediation. The researcher's contemporaneous notes indicate that sometimes, in the course of mediation, one party will volunteer what is effectively an apology, even though the actual word may not be used.

This will often be an indicator of likely success in the mediation, often but not always. One mediator interviewee recalled a nurse who had received what appeared to be a

'heartfelt apology' in the course of mediation but who had said that it was not good enough. What she had been through before the mediation – treatment allegedly resulting in her suicide attempt and psychiatric care - called for more. Often, although not necessarily in this case, that 'more' will be some sort of retribution against a perceived wrong-doer.

Mediator's 'feelings' of success

As one mediator interviewed said: 'You just know when you walk out of the door whether you have been successful or not'; and several others made similar remarks. This may be a positive experience. On the other hand, it may involve a realisation that there is unlikely to be an agreement between the parties, or a recognition that an agreement reached by them 'is not going to work' and 'won't change anything when . . . [the disputing parties] go back to work', or an acceptance that an agreement 'may not last'. A mediator's initial 'feelings' may be a reliable indicator as to likely success in a case, or the mediator may be genuinely mistaken. In this regard, we shall see later in this chapter that mediators' perceptions as to success, as recorded in EARS, do not always tally with the views of mediation participants, as noted in the evaluation questionnaires they returned to Acas. Mediators have often been much more optimistic.

An interviewee who is a mediator outside of Acas, working for a local authority, outlined to the researcher a Fire Service mediation she had conducted where her initial feelings about the results of the mediation were clearly mistaken. After a couple of joint sessions, with lots of 'you're not listening to me' from each party to the other, she (the mediator) 'just had to end [the mediation]'. She said: 'I thought one or other [of the parties] would [then] put in a formal grievance [against the other party].' In the event, a grievance did not materialise, and a chance meeting six months later revealed to the local authority mediator that the 'working relationship [between the disputing parties] had never been better' than they had been since the mediation! The mediator suspected that it had been the opportunity for the parties to speak their mind directly to one another in mediation that had been crucial.

The researcher himself noted contemporaneously a situation when his initial feelings were quite mistaken. The mediation took place in a Hertfordshire college, in 2010, where he helped defuse a dispute between the Examinations Officer and a member of

her team, an outcome he happily reported to the college's HR Director. However, a chance encounter with the HR Director some five months later brought the researcher crashing down to earth, in that it transpired that the team member, while accepting the progress made in mediation on her dispute with the Examinations Officer, had decided to pursue grievances against other members of staff, before eventually resigning and leaving the college. The researcher had neglected the HR Director's initial, rather vague thoughts when she had commissioned the mediation, that 'broader work' (than the main mediation) might be needed with other team members, thoughts the HR Director had unfortunately not repeated when the researcher reported back to her on the mediation. The researcher had certainly not been thinking in 'systems' terms about the situation, but had, wrongly, limited himself to the two main protagonists.

Furthermore, in a mediation in a Bedfordshire waste disposal company that the researcher and a colleague conducted in 2010 between two women, whose working relationship had deteriorated, the joint meeting resulted in a speedy acceptance by the disputing parties that, to quote their agreement:

> . . . the best that might be hoped for at this stage was a working relationship with only as much contact as their respective jobs demanded. Whatever contact there was should, however, be as professional as possible; and colleagues should not be dragged into any disagreements.

The two women:

> . . . further thought that, if - in future - any matter did arise that caused concern to either of them, the individual concerned should raise it straightaway with her line manager. The expectation would be that an early meeting of the two would then be arranged, facilitated by the two respective line managers, to sort things out.

According to the researcher's contemporaneous notes, shortly after this 'successful' mediation, one of the disputing parties called the mediators to say that she wanted, after all, to leave the company, in which case she would want a financial package. Discussion between her and the researcher as to what that package might be, however, eventually fizzled out, and the researcher had to e-mail the human resources consultant who had been acting for the company:

> Unless and until you or I hear otherwise from . . . [C], I suggest we keep her concerns in confidence and proceed on the basis that she has decided to stick with the mediation 'agreement'/stay with . . [the company] for the time being.

Interestingly, the consultant reported that the behaviour of the other party to the mediation was perceived by her colleagues in the company to have generally improved towards them, following the mediation.

The consultant had become almost an additional mediator in the case and, over two and a half years after the mediation, in 2013, she was to ring the researcher again to say that, while C had in fact stayed with the company, she now did want to leave, with a financial package. So, the researcher's feelings about the case have swung over time from success, to mistaken/perhaps spoke too soon about success, to successful after all, at least for the last two and a half years.

To complete the story: at the consultant's request, the researcher arranged for an individual conciliator colleague to undertake what Acas used to call pre-claim conciliation, that is, conciliation to try to settle a potential (as opposed to an actual) Employment Tribunal claim. The Acas conciliator was successful, in that a financial settlement around C's departure from the company was agreed. The whole story does, however, indicate how difficult it is to judge 'success' in mediation: a mediator's initial feelings may be mistaken, dispute situations are dynamic/ever-changing, mediation is not just a 'one shot' activity, and mediation may lead on to other dispute handling methods.

Disputing parties shaking hands

For another mediator interviewed, feelings of success on at least one occasion were reinforced by the disputing parties' literally shaking hands towards the end of the mediation. The researcher understands from the mediator interviewed that this was a spontaneous act on the part of the disputing parties. However, an EARS entry that the researcher has come across, for another case, has a hint of something more contrived, instigated by the (different) mediator concerned: 'Dispute resolved. At the end of the [mediation] process . . . [the parties] were willing to shake hands.'

Disputing parties leaving mediation together

As suggested earlier, part of a mediator's script for disputing parties is often to stress that s/he is not looking to make them the best of friends. However, a couple of the Acas mediators interviewed mentioned instances of disputing parties leaving mediation

hand-in-hand; another talked of the parties sharing a taxi back to work; and another interviewee told of the parties going off together for lunch after their mediation, all of these scenarios reinforcing the idea of success. As with shaking hands, however, there may be dangers for a mediation if the parties feel manoeuvred into particular actions regarding meals. Saundry et al (2013:26) say that, in one case, 'the mediator asked the participants if they wanted to have lunch together. This was highly problematic.'[72]

In one of the researcher's mediations (in a funeral service company), in 2010, where the disputing parties had appeared to have been holding back and not saying all that they really felt, the parties ended up together on the same lunch table after the mediation, with the researcher very conscious of the risk that an incautious comment might lead to all those unsaid things finally coming out. The researcher feared that this might in turn derail what he saw as a very fragile rapprochement between the parties. On re-reading his contemporaneous notes, the researcher now is of the view that he should have pushed the parties more than he did in the actual mediation to say all those unsaid things. Or did the parties have a better grasp of the situation than the researcher was giving them credit for?

Evaluation questionnaires

Acas sends evaluation questionnaires to participants i.e. the disputing parties, and to the commissioners of, mediation, once a case is closed. The participants' questionnaire asks them, among other things, to judge the extent to which issues had been resolved in mediation and to express satisfaction (or not) with any agreement reached. Information from evaluation questionnaires from the last few years is set out below (page 175 and on). It will be seen that sometimes the evaluation questionnaires reinforce a mediator's perception of success, sometimes not. Whether a mediator gets to see a returned questionnaire relating to her/his work depends very much on the Acas Area concerned.

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[72] On the other hand, at least one Acas mediator with whom the researcher has trained and worked believes strongly that disputing parties taking food together may well have a healing element; and Webb and Webb (1926:242) think that '[t]he excellent luncheon which Lord Rosebery provided for owners and workmen alike [when mediating in the 1893 Midlands coal dispute] was probably more effective in creating harmony than the most convincing arguments about "the living wage"'.

Most of the Acas mediators interviewed said they had never seen a returned questionnaire relating to their work.

Repeat business for mediator

For yet other mediators interviewed, the perceived success of a mediation was reinforced by their (the mediators') being 'invited in/used, again' by a commissioning party. Without wishing to anticipate his discussion of findings in chapter eight, the researcher would say that two of his mediation clients (one a local authority and the other a non-profit distributing company limited by guarantee) immediately spring to mind. With both, agreement in a first case led to an early call to mediate in a second case. But limited success in each second case seems to have ended the researcher's mediation career with both clients!

This would appear to echo/reinforce Latreille's (2010:2) point, mentioned earlier, that 'success or failure in (a single) mediation can influence [clients'] perceptions of its value more generally', and that 'attitudes towards mediation are in many instances only as positive as the last experience'. Acas's report on *Individual Mediation: responses from participants and commissioners 2012-2013* points out:

> . . . a strong link between resolution of the underlying issue and willingness to take part again in the mediation process, with those who felt the underlying issue had been resolved more likely to indicate that they would take part in mediation again in the future (Acas 2013c:10).

To look at some figures on repeat business: there were 237 mediations started by Acas in 2012/2013, involving 215 different organisations (Wainwright 2013). Of these 215 organisations, 195 undertook one mediation in 2012/2013, 18 each undertook two, and two organisations each undertook three (hence 237 mediations). Of the 215 organisations, 176 (82%) had not previously commissioned an Acas mediator (that is, were new to the service during 2012/2013) while the remaining 39 (18%) had previously commissioned at least one individual mediation in an earlier year. In short, less than a fifth of Acas's mediation work was repeat business. The full breakdown is as follows:

Table 6.1 Amount of repeat business, Acas individual mediation, in 2012/2013

Number of previous Acas individual mediations commissioned prior to 2012/2013	Frequency	Percentage
None (ie new service user)	176	82%
One	18	8%
Two	14	7%
Three	2	1%
Four or more	5	2%

Base: unique organisations utilising Acas individual mediation in 2012/2013

Source: Wainwright (2013)

Finally, one Acas mediator reported an arrangement whereby, with the agreement of his line manager, he had effectively become the mediator of choice for one organisation, that is, the mediator whom they would always go to in the first instance.

Other findings relating to success

Other findings relating to success that have emerged from the researcher's empirical work concern:

- Establishing objectives with commissioning parties
- EARS
- EARS v evaluation questionnaires
- Follow-up of mediation agreements
- The dispute impact approach to success.

Each of these will be discussed in turn.

Establishing objectives

One mediator interviewed generalised that success for a commissioning party would be 'the problem going away'. For none of the researcher's Acas interviewees, however, did success involve clearly establishing with the commissioning party, at the start, what her/his objectives for the mediation were (other than in the vaguest terms), in order to then judge the mediation outcome against those objectives and set it against a system. This may seem surprising, given that – for other work such as advisory projects or workplace training – Acas staff will usually check out at the start, with those paying the bill, what their expectations are for/of the end result.

Surprising, too, given that commissioners do report on objectives for mediation in their responses to the evaluation questionnaires sent to them once a mediation case is closed. Some Acas mediators interviewed said that objective-setting by commissioners could be problematic. It endangered the mediator's impartiality/independence; and, if/once set objectives by a commissioning party, the mediator would then have to go back at the end of the mediation to report what had been achieved, and confidentiality might be compromised.

Any contact by the mediator with the commissioning party – according to those interviewed - was, therefore, usually limited to gleaning background information on the dispute in question. One mediator interviewed did, however, keep commissioning parties completely at arm's length, since he found contact with them 'uncomfortable'. He seemed to think that *any* contact, let alone discussion of objectives, would somehow endanger the confidentiality promised the disputing parties. Even the respective Acas mediation 'gatekeepers' for Acas Areas (as opposed to the actual mediators), when responding to mediation requests, do not appear to push commissioning parties as to their objectives for mediations – judging by the comments of the mediators who then have to deal with those mediation requests.

One mediator interviewed said, not completely facetiously, that – as opposed to exploring clients' objectives – rather more time is probably spent by Acas in telling them (mediation clients) what they will not get, for example, a detailed report on any mediation. There is, in fact, little in the way of promises given by Acas to mediation clients, according to interviewees. It is almost a case of Acas saying, 'Trust us, we'll do our best.' Some mediators interviewed were surprised that they were not held more to account by clients. For many commissioners, mediation seems to be the 'next stage in the procedure' and/or a way of protecting their organisation, should there ever be an Employment Tribunal complaint. Or mediation may appear to be the last chance of a way out of a difficult situation, where all else has failed. There may not be any great expectations of Acas, but gratitude that at least someone is prepared to help. There is often an almost blind faith that, given its reputation, Acas will achieve 'something'. An interviewee reported that one commissioner had said to him, 'You can sort out the London Underground, so you should be able to help us.'

The finding about 'last chance of a way out of a difficult situation' would seem to be confirmed by Acas's report on *Individual Mediation: responses from participants and commissioners 2012-2013*, which points out:

> Mediation commissioners were surveyed on what steps had been taken prior to the mediation intervention. The most commonly taken initial steps were an informal grievance meeting (in 43% of cases), a formal grievance meeting (in 42% of cases) and the involvement of trade union or other employee representatives (in 39% of cases) (Acas 2013c:5).

The next most commonly taken initial step was the final stage of a disciplinary or grievance procedure (in 26% of cases).

Events and Advisory Recording System (EARS)

The lack of clarity within Acas as to what is success is not helped by the organisation's recording system, EARS. This has, as noted earlier, a very limited range of mediation outcomes that may be input by a mediator - Dispute Resolved, Progress Made, Dispute Not Resolved, and Mediation Unprogressed - and there are no clear explanations for any of these categories. Occasional definitions can leave as many questions as answers, for example, the statement in the 2012/2013 Acas Annual Report that 'Unprogressed cases are where no meaningful mediation activity took place even though the parties formally agreed to mediation' (Acas 2013a:38). What counts as meaningful mediation activity? Inputting into EARS by mediators can therefore become quite subjective (although, as with evaluation questionnaires, the results might be seen as an objective measure).

For example, for one mediator interviewed, 'agreement on a/the way forward' equalled Dispute Resolved, and anything less than such agreement was Progress Made, at best. But what appears to be agreement on a way forward, and therefore Dispute Resolved, to that one mediator may seem like only (the more limited) Progress Made to another; and one person's claim of Progress Made may seem rather tenuous to others. In one (college) case recorded on EARS, in 2013, the mediator commented:

> . . . [A] not keen on mediation, but will do it. . . . [But, later, A] pulled out of process when I telephoned to arrange venue because she said that she was afraid that . . [S] would launch a tirade during mediation. Was not prepared to meet . . . [jointly with S] under any circumstances . . . [But A] committed to enabling . . . [S] to return [to work], although it is doubtful that she will be able to do that as she does not wish to clear the air.

The outcome of the case was noted by the mediator concerned as Progress Made but other mediators may well have seen things differently, less optimistically.

On the other hand, for another mediation recorded on EARS, the mediator concerned noted the outcome as Dispute Not Resolved, yet he stated, 'One party initially reluctant to meet jointly. Agreed to do so but no progress made other than an understanding of the differences between them.' Another mediator might have written this up as Progress Made and noted that at least some of Boulle and Nesic's (2001:8) 'secondary objectives of mediation' were achieved. One mediator interviewed said that he tried to deal with the subjectiveness of EARS by always asking the disputing parties at the end of a mediation how successful he had been, 'otherwise you could always put at least Progress Made in EARS'.

The researcher suggested earlier in this chapter an undue emphasis on the part of Acas mediators on getting a joint meeting, and the cases where a joint meeting is not achieved are sometimes, as a result, entered on EARS as Dispute Not Resolved, sometimes as Mediation Unprogressed, sometimes as Record Cancelled - but occasionally as Progress Made.

EARS v evaluation questionnaires

To compare the figures in EARS on individual dispute resolution entered by Acas mediators since 2007/2008, with those from the evaluation questionnaires returned to Acas by mediation participants, that is the disputing parties (as opposed to commissioners), remembering that the evaluation questionnaire results are based on relatively small numbers of mediations and completed questionnaires:

Table 6.2 EARS and evaluation questionnaire figures on individual dispute resolution

	2007/08 %	2008/09 %	*	2010/11 %	2011/12 %	2012/13 %
FULLY RESOLVED						
Eval'n Q'res	32	24		24	19	14
EARS	63	67		65	60	62
PART RESOLVED						
Eval'n Q'res	53	60		49	40	48
EARS	25	24		26	29	28
NO RESOLUTION						
Eval'n Q'res	15	15		27	41	38
EARS	12	09		10	11	09

* 2009/2010 excluded since a complete set of evaluation questionnaire data for that year is not available.
The figures are rounded and so, in some cases, do not add up to 100%.

Eval'n Q'res = Evaluation questionnaires returned from mediation participants. The figures have been extracted from Acas's reports on Individual Mediation: responses from participants and commissioners'. They are percentages of the total number of participant questionnaires returned to Acas for the years in question.

EARS = Events and Advisory Recording System, completed by Acas mediators. The EARS figures are percentages of the 'Total mediations closed in the period' after 'Mediations closed as unprogressed' have been deducted.

It will be seen that mediators' perceptions as to success, as recorded in EARS, have been much more favourable, optimistic, than those of the participants, as noted in their evaluation questionnaires. It will also be seen that, over the years, while the EARS figures have been fairly consistent, those in the evaluation questionnaires have, in general, shown a decline in complete and partial resolution and a corresponding increase in issues being 'not at all resolved'.

The researcher has taken the figures for 2012/2013 and noted, for each of the 68 evaluated cases, what the returned questionnaires say about resolution compared with what the mediators concerned have entered in EARS. The results are at Appendix Five. It will be noted, first, that, where more than one of the disputing parties chose to return a completed evaluation questionnaire, views may well differ – perhaps not surprisingly

– between the parties as to the extent to which issues had been resolved, and as to the participants' degree of satisfaction with any agreement reached. This makes the concept of 'success' even more problematic.

In one case (number 24), two participants considered the issues 'completely resolved' (one participant 'very satisfied' with the agreement reached, and the other 'fairly satisfied') whereas a third participant considered the issues 'not at all resolved'. Two other participants in the case did not return questionnaires. Interestingly, the mediator logged the case outcome on EARS as Dispute Not Resolved, perhaps because the mediation 'did not proceed to joint meeting(s)'.

As the overall figures in Table 6.2 would lead one to expect, there are other instances of difference between the evaluation questionnaires and EARS in respect of particular cases - some that one would expect from the overall figures, such as 'Issues partly resolved' rather than 'Dispute Resolved', or 'Issues not at all resolved' rather than 'Progress Made'.   But there are other differences much less to be expected, such as 'Issues not at all resolved' compared with 'Dispute Resolved', or - less often, as exampled above - 'Issues completely resolved' compared with the mediator's saying 'Dispute Not Resolved'.

The participants' evaluation questionnaires also show that a written agreement does not necessarily equate with 'Issues completely resolved' in all participants' eyes; and, indeed, in one case (number 13), there had apparently been a written agreement even though a participant thought the 'Issues not at all resolved'. In some cases, a mediator's claim in EARS of 'Dispute Resolved' was hardly borne out - to the researcher's mind - by that same mediator's narrative in EARS.

Follow-up

There is little follow-up by Acas of mediation agreements, written or otherwise, to ascertain how well they have actually fared; little follow-up, either, of mediations where there has been no agreement as such or only partial agreement.[73] One Acas

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[73] As indicated in the next chapter, however, a few Acas mediators do follow *through* on mediations, going beyond the 'usual boundaries' to speak – with the disputing

mediator had 'never felt it was appropriate to contact . . . [the disputing parties], again'. Another revealed 'we're actively told [by Acas line management] not to go back'. Yet another actually said that he would 'try to avoid . . . [follow-up] like the plague' and that he would 'never, ever offer' it. He spoke of a 'can of worms waiting to be opened'.

Other mediators interviewed about follow-up made such comments as, 'I just assumed we don't do it', 'I never really thought about going back' and 'I don't think we can go back, once it's over'; while another mediator, when asked about encouraging the parties to ring her following mediation, said 'Absolutely not! As an individual conciliator [too], I've got enough people ringing me.' One mediator drew an analogy between mediators and television engineers: 'Once an engineer had fixed your TV, you wouldn't want them to keep calling back to see how things were going; likewise with a mediator.' A regional colleague of hers said, however, that he does offer to go back, but had never been asked;[74] and a fairly positive reason for not following up came from the mediator who thought it emphasised that the joint meeting was just the start of things and that 'it's [then] down to . . [the disputing parties] to make it work'.

Follow-up of mediations has not been particularly encouraged in the training Acas has given its staff, not least because of the policy that the client should really pay for the time involved in the mediator's going back. Lack of follow-up may, however, lose Acas business. In one report on EARS where the outcome is given as Mediation Unprogressed, it is stated: 'Employer [a management consultancy] got back in touch to say that he has decided to use another company [for the mediation] because of their offer of on-going support.'

Not least because of the researcher's learning by chance that some of his seemingly successful mediations had in fact gone awry, he has started to follow up his own mediations, dealing with the question of charging for his time by recording the work as 'advisory' (uncharged) on EARS. There are very few examples of mediator follow-up in the 68 2012/2013 evaluation questionnaire cases at Appendix Five. One rare

parties' agreement - to commissioners about, say, the shortcomings of employment procedures.

[74] A police mediator and a university mediator both said, when interviewed, that follow-up did not really happen in their areas but that they would welcome it.

example was case number 37, a mediation in a veterinary practice between a surgeon and nurse, which was first reported on EARS as 'Progress Made. Maybe [mediator will] return for a half day maintenance.' The 'maintenance' was a half day's training by the mediator for the surgeon and nurse, which did happen, the next month, according to a further EARS entry.

Acas's report on *Individual Mediation: responses from participants and commissioners 2012-2013* notes commissioners of mediation as wanting follow-up contact (Acas 2013c:12); and, from their study of workplace mediation participants (with 15 of the 25 cases mediated by Acas), Saundry et al (2013:27) conclude:

> An important issue that emerged from interviews was the lack of any follow-up after the mediation process, either from the organisation or the mediator. A number of respondents thought that this could have been useful, particularly given the concerns over the sustainability of agreements.

On the other hand, several mediators pointed out to the researcher that disputing parties had been given their contact details, but had never come back to them.

Dispute impact approach to success

So far, this chapter has focused on objective measures of success, including getting an agreement and the disputing parties shaking hands, and – to a lesser extent – on subjective measures, such as a mediator's perception of a 'light bulb' moment and a mediator's 'feelings' of success. We now turn to look not just at the end result of mediation in isolation, but in relation to the mediator's objectives. The researcher has termed this relative measure, which he outlined earlier in this thesis, the dispute impact approach.

The dispute impact approach seemed to resonate with Acas mediators,[75] in that interviewees were - albeit with some prompting – able to relate what they had done in their cases to the various dispute impacts. At the time of any mediation, of course, they were not necessarily using the language of dispute management, dispute settlement and dispute resolution, although some appeared to have effectively been thinking in these

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[75] However, a police mediator interviewed admitted that he 'wouldn't try to go too deep' (i.e. dispute resolution); while a university mediator interviewed said that she had not really thought in terms of levels of intervention, always going for what the researcher has called dispute resolution.

terms. Mediators also appeared to recognise that the approach gave ideas as to how they might best tackle disputes and – afterwards – reflect on their actions.

Further, mediators appeared to recognise the value of judging success according to a mediator's reflection on what dispute impact s/he had been attempting, whether this had been achieved, and whether, with hindsight, it had been appropriate – although they perhaps envisaged more freedom of action for the mediator than the researcher has suggested. One mediator, however, said, 'I don't think you know what you're trying to achieve in mediation until you come out of it, sometimes, until you've walked out of it and assess what you've achieved.'

An example of the application of the dispute impact approach to a mediation case is the following, drawn from an interview with the Acas mediator concerned and from his EARS entry on the case. The mediation took place in a school, between the Head Teacher and the Examinations Officer (EO), who was also a Staff Governor. There had been a falling-out between the two and, then, due to sickness followed by a suspension pending potential disciplinary action, the EO had been off work for some two years. The mediation was 'about easing the . . [EO's] return to work and starting to rebuild trust and confidence between the Head and . . [the EO]'.

The separate meetings went well, but the mediator was concerned about the joint meeting because he was bringing together - in his view - two totally different personalities who also had status differences. In the event, the joint meeting 'went much better than expected' although it was 'difficult to put your finger on why' (a point the researcher will return to in chapter seven). It would seem that 'both parties realised that something had to be done' and accepted they should not dwell too much on the past. To some extent, the mediator had primed them on the latter but '*they* made the choice that they really didn't want to go there' (the past). The parties were 'more comfortable talking about the practical issues around [the EO's] return' than about the emotions generated when previously working together.

While he got some sense of what might be behind/beneath the dispute, led by what he perceived to be the parties' wishes the mediator did not go for dispute resolution – 'addressing and dealing with the root causes of the dispute, in order to negate the threat

of further conflict-generating behaviour'. The mediator looked, instead, for dispute settlement, that is, 'establishing a framework that eliminates at least overt conflict'. The EARS report notes Dispute Resolved and that the mediation 'was successful in resolving a number of issues and paving the way for a return to work. The intention was to hold a follow-up meeting but this was not requested.' On the face of it, the dispute impact that the mediator had been attempting was achieved, and it had been appropriate, so the mediation might be said to have been successful.

A further example of the application of the dispute impact approach to a mediation case (an example drawn from the same Acas mediator interview and from the relevant EARS entry) concerned a (male) manager and (female) team leader in a university. The EARS report notes: 'Dysfunctional behaviours, attitude and performance have led to a breakdown in their relationship. Mediation requested to re-establish effective working relationships.' In interview, the mediator said that, after separate meetings with the two parties, he had thought dispute settlement a real possibility, not least because the manager had 'seemed to say all the right things'. Once the parties had come together, however, the manager chose to focus on the team leader's capability whereas she wanted to talk about his management style. At some stage, the mediator thought, 'This isn't going to work,' and abandoned the idea of dispute settlement in favour of leaving the situation 'as positive as you can'. The mediator suspected, on reflection, that the manager had never been serious about mediation and the flexibility it calls for.

So, the dispute impact that the mediator had been attempting, initially, turned out to be inappropriate (overly ambitious). The mediator had to change tack and opted instead for a limited sort of dispute management. This was appropriate and was achieved to some extent, in that the parties acknowledged at the end, 'We tried it [mediation] but it just didn't work.' So, in terms of the researcher's dispute impact approach, what had started as an unsuccessful mediation became successful. The outcome of the mediation was given on EARS as Mediation Unprogressed whereas the researcher would probably have labelled the case as Dispute Not Resolved.

A final example of the application of the dispute impact approach to a mediation case (drawn from an interview, backed up by the mediator's EARS entry) concerned two occupational therapists in Exeter. They had got on well at one stage but something had

gone wrong on one particular visit they had made, something that had generated a complaint by a client. One of the therapists had not felt supported by the other and the relationship had deteriorated. After separate meetings with the parties, the mediator approached the joint meeting with the idea of dispute settlement. This was, however, adjusted to dispute management when - at one point - the mediator began to realise that the mediation was not going at all well.

Midway through the afternoon, however, there was one of the 'light bulb' moments mentioned earlier as a success indicator. The parties started to smile at one another and talk about how to handle future difficult situations, how to deal with things that might go wrong. In consequence, the mediator adjusted his approach to a dispute resolution one, which he felt he achieved. So, dispute settlement was adjusted to dispute management, then to dispute resolution, as it became appropriate. Since the last mentioned dispute impact was achieved, the mediation might be said to have been ultimately successful.

What is 'failure' in mediation?

We have already seen that a mediation can achieve many things, whether or not the disputing parties reach some sort of agreement. Regardless of any agreement, a mediation may bring clarity to a situation, overcome or reduce communication problems between the parties, identify and acknowledge parties' needs and interests, promote constructive negotiations, reduce tension, and so on (see Boulle and Nesic 2001:8). As already indicated, Acas mediators may well regard such situations as Progress Made when making EARS entries.

Indeed, those interviewed largely suggested that most mediations did move dispute situations 'forward' in some way, at the very least, and, therefore, usually resulted in some sort of progress; that most dispute situations benefited from a mediator's intervention; and that mediators usually left matters in a better state than they had found them. Therefore, when the suggestion was perhaps provocatively made by this researcher to mediator interviewees that it was surely 'hard to muck up' a mediation, and when they were specifically asked whether a mediation could ever 'fail' (and, if so, how/what was failure in mediation), many mediators struggled to answer.

'Not getting [the parties] together to talk about things' was a failure to one interviewee; and worsening a situation was a failure to another. A university mediator said that having to stop a mediation and leave one disputing party 'in a vulnerable state' was a failure for her. 'One definite failure' for a further Acas mediator was:

> . . where one party went off into a separate room and never really got back together [with the other party]. It petered out, really. It was a horrible mediation, one of those things where it's on your mind afterwards.

The mediator's 'impression was that, for both [of the individuals in dispute], mediation was an opportunity to collect information on the other person', for use against her/him in other fora. The mediator 'went back and forth for a long time to try to get them back together' but was unsuccessful. The more junior of the two parties had 'made lots of notes [during the mediation] and wanted to take them with her' at the close. The mediator had to insist on the notes being left behind, for destruction. 'That's what it was all about [collecting information], horrible.'

A 'complete disaster' for another mediator involved a senior consultant and an administrative manager in an NHS Trust. There had been a breakdown of communication between the two. Although the consultant had been charming with the mediator in his separate session, when the joint meeting started, he 'turned on' the administrative manager. It appeared that 'he wanted to say as many hurtful things to her [as he could] while he had the opportunity'. He was quite 'venomous'. The mediator never went back, to the disputing parties. Interestingly, although the mediator saw 'no success out of it at all', she did not see the mediation as 'a failure on my part, [I've] done what I can'.

In the light of all that has been said, it should come as no surprise that the researcher believes a Dispute Not Resolved entry in EARS does not necessarily denote failure in mediation. It may simply indicate that a dispute was not 'ripe' for settlement, let alone resolution, and that dispute management may have been the best that could be achieved by the mediator in the short term – if anything. The researcher has, however, looked at the EARS entries for those mediations closed as unresolved 1 April 2013-30 September 2013, to see what might be learned.

There were only eight cases in the whole of Acas in the first six months of the 2013/2014 operational year where the mediations were closed as unresolved (eight out

of 102 closed cases, 10 of which were closed as Mediation Unprogressed). Acas often 'complains' that many disputing parties, whether in a collective or an individual dispute situation, come to it too late in the day for it to effectively help them (an issue the researcher will return to in chapter eight). So, to have only 8.7% of closed cases (eight out of 92) unresolved is surprising, even allowing for one or two unresolved cases perhaps having been 'wrongly' classified as Mediation Unprogressed. That aside, the commentary in EARS on the eight cases was as follows:

Table 6.3 Acas unresolved mediation cases, 2013/2014 (first six months)

Case	Reasons suggested in EARS as to why case unresolved
A	'. . . serious allegations [by one party] about the other . . . [E]xtremely difficult to explore underlying issues without the allegation having been proven or disproven. Only able to agree a process for taking forward that issue . . . employer unhappy with the outcome.'
B	'Difficulties too entrenched, parties unable to consider resolution, unwilling to meet in joint session in any form.'
C	'. . . became clear that parties were unable to commit to mediation, ie their positions were fixed, they had demands which could not be achieved through mediation' but 'impossible to identify this before embarking on the mediation. Joint meetings did not go ahead.'
D	'Not huge issues, but . . [C] unwilling to sit down alone with manager to discuss without someone else there. Unable to get face to face; shuttle mediation failed. Two days later . . [C] resigned.'
E	'Breakdown in relationship. Relationship needs to improve' but, otherwise, no detail as to why case unresolved.
F	One disputing party (out of three) wanted all three parties at any joint meeting but, it seems, the commissioning party, if not the other disputing parties, would not agree this.
G	Mediation to repair the working relationship between a manager and team member following an ET complaint by the latter. Team member wanted an apology, and admission of being in the wrong, from the manager. In the event, the manager decided to resign. Commissioner 'is hopeful this matter has been sorted out by [this] unexpected turn of events'.
H	Relationship, between two senior staff, 'had never worked. Despite the failure to reach an agreement about [the] return to work [of one of the parties], it did help to clarify things for the parties. There was a very frank exchange of views, and both clearly wanted to look at a settlement agreement as soon as possible and not draw things out any longer.'

Source: EARS

A point to be drawn from these eight cases is that the disputing parties, in most of the cases, could not – for whatever reason - commit to the concept and demands of mediation, even as regards the mediation process (not outcome). This lack of

commitment chimes with a mediation in which the researcher was involved in 2008 with an Acas colleague, in Cambridgeshire, where a church committee had expressed anxiety about the behaviour of their vicar and had gone to the media, publicising their concerns. According to this researcher's contemporaneous notes, although the committee members protested that they sincerely wanted mediation and were open to the compromises the process suggested, the researcher always had the impression that they simply wanted the resignation or dismissal of the vicar, an impression reinforced by their repeated questioning of, and reluctance to follow, whatever aspect of the mediation process was suggested to them.

Summary

This chapter began with a brief recapitulation about the study's research questions, about a potential measure of mediation success, and about a model predicting success. The chapter then outlined the findings as to what is success in mediation that came out of the researcher's empirical work: most mediators interviewed appear to see success purely in terms of the parties' dispute outwith any system and to define it as 'getting an agreement', not necessarily a written one.

In addition, in the course of any mediation, there will be various indicators as to likely success, and there will be reinforcers of agreements reached. Most of these measures are objective ones but some are more subjective. The measures include getting through the mediation process, a 'light bulb' moment, apology, a mediator's 'feelings' of success, the disputing parties shaking hands, their leaving mediation together, evaluation questionnaires, and repeat business for the mediator.

These findings were discussed in turn. The chapter then examined other findings relating to success, around

- mediators not establishing objectives, other than in the vaguest terms, with commissioning parties;
- mediators' entries in EARS as to success often diverging, by being much more positive, from the comments in disputing parties' evaluation questionnaires;

- a lack of follow-up of mediation agreements, although commissioners and disputing parties would welcome this; and

- the relative measure of success of a dispute impact approach seeming to resonate with mediators.

Finally, this chapter looked briefly at the idea of 'failure' in mediation, with many mediators struggling to admit that a mediation could ever 'fail'.

CHAPTER SEVEN: FINDINGS – HOW SUCCESS IS ACHIEVED

Introduction

The previous chapter outlined the findings as to what is success in mediation that have come out of the researcher's empirical work. This chapter examines *how* success is achieved, and the relative significance in this of mediator and situational variables, the former including the mediator's experience, stage of development, ambition, and attributes, and the latter including the tractability of the conflict, the parties themselves, and their commitment to mediation. In looking at these mediator and situational variables, the researcher has been mindful of the system(s) in which the Acas mediator is located, and the system(s) in which the commissioning and disputing parties are situated. Consideration of the implications and significance of the findings in this chapter, and in chapter six, will be left to chapter eight ('Discussion and Conclusions') of this thesis.

Mediator variables

As indicated above, this section looks, first, at the mediator's experience; then, at associated variables such as the mediator's stage of development, ambition, and attributes. The mediator is located within the system(s) suggested at Figure 4.2.

Experience of the mediator

This sub-section focuses on the 'experience of the mediator' variable and its impact on mediation success. It looks at the overall number of Acas mediations, a breakdown of mediations by Acas office, the number of Acas mediators, and the value of experience in conducting mediations.

When the researcher first planned this study, he knew that there had not been a great deal of individual mediation activity, as opposed to statutory individual conciliation, in his own Area of Acas (Bury St Edmunds). What the researcher had not fully appreciated, however, was the paucity of individual mediation activity in Acas *as a whole*. The surprise that the researcher received from his early Acas interviews, that many interviewees did not have much individual mediation experience, led him to

review the statistics in Acas's Events and Advisory Recording System (EARS). The results of this review are outlined below. As an aside, and as already mentioned in chapter five, lack of experience was not always *immediately* obvious when talking to Acas mediators. Some Acas people 'talk a good mediation' that they have not always experienced!

Overall number of Acas mediations

Looking, first, at the number of individual mediations conducted by Acas over the last ten years:

Table 7.1 EARS figures on individual mediations in Acas as a whole

	Opened	**Cancelled***	**Closed**	**Closed as unprogressed****	
2004/2005	17	0	0	0	0.00%
2005/2006	65	0	0	0	0.00%
2006/2007	167	3	5	2	40.00%
2007/2008	236	62	162	11	6.79%
2008/2009	304	81	230	33	14.35%
2009/2010	293	60	210	25	11.90%
2010/2011	236	29	219	33	15.07%
2011/2012	273	34	212	38	17.92%
2012/2013	257	21	228	33	14.47%
2013/2014	301	43	249	19	7.63%
Total	2,149	333	1,515	194	12.80%

Note: A word of warning about EARS is that mediator entries that may be thrown up by one way of going into the system may not be shown by another way (of going into the system). Also, entries by a mediator who has left an Area may no longer show up on that Area's figures; likewise, entries by a mediator who has left Acas completely. That said, the EARS figures quoted in this 'experience' section of the thesis give, in the researcher's view, a fairly accurate picture of what has happened in Acas as regards individual mediation.
* Cancellation is sometimes down to an inputting (into EARS) error, a common error being the duplicate entry.
** The percentage figures show 'closed as unprogressed' cases expressed as a percentage of 'closed' cases.

Judging by this table, the net figure of mediations opened (that is, after cancelled cases have been deducted) would appear to have plateaued in the last six years, in the region of the 200s. As to why, this will be explored in the next chapter. Not all 'individual mediation' work conducted by Acas is recorded as such on EARS. There are some 'workplace project' entries which concern what appear to be effectively mediations, for example,

- one in respect of five to nine employees in a housing association, where the project's objectives are given as 'Resolve workplace relationship issues using facilitative mediation' and the description of planned work and outcomes states, 'Individual one to one interviews followed by group workshop'; and

- another in respect of 10-49 employees in a police authority, whose objectives were 'Meet all members of Financial Crime Team to discuss working relationships'.

Breakdown of mediations by Acas office

Turning to a breakdown, by Acas office, of the first two columns in the table above:

Table 7.2 Breakdown by Acas office of EARS figures on individual mediations opened, less those cancelled

	Birm	Brist	BSE	Card	Glas	Leeds	Lon	New	NW	Nott	SE	All
04/05	3	1	0	0	0	0	11	0	2	0	0	17
05/06	2	6	0	7	3	10	23	0	3	4	7	65
06/07	24	12	7	6	10	28	32	6	16	11	12	164
07/08	12	19	8	14	14	9	34	16	22	17	9	174
08/09	16	26	19	9	14	18	43	24	20	24	10	223
09/10	24	21	20	4	34	11	31	21	28	15	24	233
10/11	17	12	27	17	11	11	33	12	24	20	23	207
11/12	24	24	29	10	9	22	42	12	15	19	23	239
12/13	23	21	12	26	12	23	38	10	35	14	22	236
13/14	28	16	29	21	26	24	38	9	30	14	23	258
Total	173	158	151	114	133	156	325	113	202	138	153	1,816

Acas offices: Birmingham, Bristol, Bury St Edmunds, Cardiff, Glasgow, Leeds, London, Newcastle, North West, Nottingham, and South East.

It will be seen that, for the 11 Acas offices, over a period of 10 years, the median number of the individual mediations opened (less those cancelled) by them was only 153.[76] The relatively high number of cases opened in the London Area pushes the mean to 165.09. The researcher will consider in the next chapter why Acas London's number of mediations is running so far ahead of the other Areas. It will be obvious from these figures that, in any particular office, unless there has been only a handful of working mediators there, no one mediator will have accrued much experience, much practice.

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[76] The median rises to 234.5 if the years 2004/2005 to 2007//2008 are excluded.

Acas mediators

As to how many mediators there have actually been in Acas, in the last ten years or so, the researcher does not know of a definitive list. Any current list of mediators would, of course, exclude mediators who worked on the 1,816 cases referred to above but who have since left Acas. There is, currently, an Acas 'mediators' internal e-mail group, of some 79 names. The researcher can, however, see from even a cursory inspection of the list that the names of several current Acas mediators are missing, while included are one or two people who have never mediated according to EARS.

We might approach a list of active Acas mediators through an EARS 'CDD [Customer Delivery Day] Report by Product' (Individual Mediation), which would list mediators and cases worked upon, by office. The researcher ran off such a report for 1 April to 14 December 2013 and this shows:

Table 7.3 CDD Report by Product (Individual Mediation), 1 April to 14 December 2013 (extracted from EARS 14 December 2013)

Office	No. of different mediators recorded as being used	No. of cases recorded as being worked upon **	Mean no. of cases per mediator
Birmingham	8	23	2.9
Bristol	5	11	2.2
Bury St Edmunds	7	17	2.4
Cardiff	12	16	1.3
Glasgow	4	14	3.5
Leeds	8	20	2.5
London	11	27	2.5
Newcastle	4	7	1.8
North West	5	23	4.6
Nottingham	5	12	2.4
South East	10	18	1.8
All	79*	188	2.4

* It is a complete coincidence that this figure matches that of the number of people in the Acas 'mediators' internal e-mail group, many of the names in the two being quite different.
** The figures in this column may slightly overstate the number of cases because any double-handed working by mediators leads to the case in question being counted twice. On the other hand, some cases do not appear because no CDDs had been logged for them by the time this EARS report was produced.

Besides mediators and cases worked upon, what the report also shows is that some erstwhile relatively active Acas mediators have now become anything but, which is a huge waste of experience by Acas and surprising for an organisation that claims to value Investors in People (IiP) accreditation. The researcher will discuss these figures and issues in the next chapter. Suffice to say, at this stage, that it is remarkable that 79 mediators were used in only 188 cases, in eight and a half months in 2013, with the resulting lack of experience for most of them. What did the Cardiff office hope to achieve by using 12 different mediators on only 16 mediations, in the eight and a half months? One Cardiff interviewee suggested – perhaps with some exaggeration, that only one out of some 20 or so individual conciliators in the Cardiff office had *not* received mediation training, but that some of those trained had not then done any mediations at all!

As suggested earlier in this section, a few Acas staff are not shown on EARS as having conducted individual mediations but have effectively done so, for example, an Area Director who, among other work on EARS, lists a 'workplace project' concerning 'Conflict/Mediation/Relationship Issues' in an international retailer. The objectives of the project are described as

> Work with two senior managers, following one being on extended sick leave and the other returning from an overseas secondment. Issues regarding ongoing communication and ability to work with each other.

The 'description of planned work and outcomes' for the project states,

> 1-1 sessions – mediation based approach, but not pure [individual mediation. Myers-Briggs Type Indicator] and other feedback approaches used. Outcome – the managers have continued to work together and relations have improved, to the benefit of themselves and their staff.

The researcher will discuss in the next chapter the wisdom (or not) of Acas Regional and Area Directors doing an occasional mediation.

The researcher next focused on 26 individual mediators that EARS suggests are among the most experienced in Acas. From 2004/2005 until the end of September 2013, these 26 mediators opened a net of 878 cases (1,005 opened less 127 cancelled), just over 52% of the net of 1,688 cases opened in Acas as a whole. Of the 26 mediators, the four most active (from 2004/2005 until September 2013) opened a net of nearly 15% of the 1688 total. But that still meant that the most experienced mediator in the whole of

Acas, in the period from 2004/2005 until the end of September 2013, had opened a net of only 70 cases.

It is clear from these figures that very many Acas mediators will have opened only a handful of mediations in their career. To look at the experience of individual mediators in the Bury St Edmunds (BSE) office (to which the researcher is attached):

Table 7.4 Number of individual mediations opened, less those cancelled, by Bury St Edmunds mediators (listed as A-N), as shown on EARS

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	Total
06/07*	5	2	4	2	2	1									16
07/08	3	3	3	1			2	1							13
08/09	3	1	6	2		5	3	2	1	1					24
09/10			6			6	4	1	2	2					21
10/11	2		6			5	7			2	2	2	1		27
11/12	3		3			4	7		1	1	3	1	2	4	29
12/13	2		2			1	2		1	1	2		1		12
13/13#	1					3	2			2	1		1		10
Total	19	6	30	5	2	25	27	4	5	9	8	3	5	4	152

* EARS has no record of any mediations opened by BSE mediators prior to 2006/2007.
\# Until the end of September 2013.

It will be noted that the figures for the first four years in the above table differ by a total of 20 cases from the BSE figures in Table 7.2. Three of the 20 are down to the vagaries of EARS referred to earlier but most of the difference, 17, relates to mediators (B, D, E and H) who no longer work in the Area. The figures for the years from 2010/2011 in the two tables are consistent. If we focus on these years, the picture in BSE is one of cases being spread widely, and thinly, among mediators. For instance, 'L' opened two mediations in 2010/2011 and one in 2011/2012 but none in the subsequent 18 months; and 'N' opened four mediations in 2011/2012 but none in the subsequent 18 months. This reflects the practice in the Area, for some time, of allocating mediation referrals turn by turn.

The wisdom of this practice will be considered in the next chapter. However, it is worth mentioning now that an experienced US mediator suggested, at a 2010 Greenwich University symposium for Acas on resolving conflict at work, that mediating three or four times a year was simply not enough: she mediated three or four times a week!

Even allowing for some exaggeration on her part, that is quite a gap between her experience, and what she recommended, and the experience of Bury St Edmunds mediators.

A regular complaint from the researcher's Acas interviewees, whatever their office, was that they did not get enough experience as mediators. A handful of cases each year was not enough. One interviewee spoke out to the researcher on this and on the mediation job being an adjunct to the individual conciliation one:

> If you're going to have a mediation service, don't have mediator/conciliators – just have people who are going to be mediators rather than do a mediation every few months. Let 'mediators' do all the mediations because they like it and are good at it. Take away their other jobs. Booking rooms [for mediations], putting the stuff on EARS, getting the [mediation] contracts out: all of that paperwork takes time and, when you're [an individual] conciliator, with the 'phone ringing constantly, it becomes an inconvenience.

A relatively small number of cases for a mediator each year might, of course, be compensated for by a considerable length of time spent on each case. One way of checking this is to look at the fees charged to clients by mediators, given that these should roughly correspond to time spent ('roughly' because the researcher knows from personal experience that clients are often undercharged to some extent for time spent on their behalf). So, early on in his research, between 14 and 21 January 2011, the researcher conducted a review of fees (recorded on EARS) charged in individual mediations started in the six months between 1 April 2010 and 30 September 2010.

The review indicated that, of the 114 entries where a charge was shown, the (three) smallest invoices were for £280 and the largest was for £8,075. Fifty-seven entries showed £835 as having been invoiced, 17 entries £1,355, 13 £520, and 8 £1,670. £835 was both median and mode while the mean was £1,070. £835 was, and still is, Acas's charge for one day's mediation work, and £520 for a half day. All of which points to less than two days as the mediator time spent on the vast majority of cases, hardly an amount to compensate a mediator for dealing with only a small number of cases.

To be fair, the above understates to some extent the experience of the typical Acas mediator (if there is such a person), in that s/he will probably have observed Acas colleagues mediating, at least early on; or, in her/his early days, s/he may have worked

double-handed on a mediation, with the main credit for the case(s) on EARS perhaps going to a colleague. (Double-handed work is now discouraged by Acas unless it can be justified on training grounds or unless it can be charged to the client.) Also, a handful of Acas mediators have experience of other types of mediation, for example, community and family mediation. 'Experience' may also come from training courses, secondments, etc, more on which will be said in the 'stage of development' section of this chapter.

Without jumping ahead too much, it is unfortunate that any outside mediation experience people bring to Acas has not usually - to the researcher's knowledge - been valued anywhere near as much as experience gained *within* Acas, a closed systems approach. This is also true of Acas functions besides individual mediation but, to stay with the latter, one mediator spoke strongly to the researcher about mediation training he had undertaken outside of Acas. While he was using what he had learned on the outside in his Acas mediations, he did not feel that Acas really valued what he had done. It had, for example, never sought to capitalise on the professional membership he had gained as a result of his training. All in all, he felt 'very let down' and hurt.

Even successful completion of the Greenwich University Post Graduate Certificate in Individual Employment Dispute Resolution (PGC IEDR) course, which ran from 2008-2013 and for which Acas paid course fees and gave paid study leave to its staff, appeared to bring little reward from Acas for trainees, other than a brief letter of congratulation. As for experienced mediators leaving Acas, there do not seem to have been any attempts of late to capture their knowledge in the ways that there were, however imperfectly and unsuccessfully, with individual conciliation early leavers some years ago.

The value of experience
One Acas mediator interviewed told the researcher about a case that had been 'the worst, the hardest, but with the most satisfying result' that he had ever had. The case concerned a senior manager and someone he managed. There had been an affair resulting in a pregnancy, which had been terminated. The senior manager was alleged to have subsequently harassed the woman, and her father was constantly ringing up and had come into the company to confront the senior manager. A third party, a middle

manager, had not helped the situation; indeed, it became clear to the disputing parties in the course of the mediation that he had been deliberately causing trouble between them. Although the mediator did not use the language of a 'systems' approach to the researcher, he could not in practice have ignored its implications in this case.

The mediation joint meeting was difficult, with a lot of 'history' coming out. It got to a point around lunchtime where the senior manager stood up, with a view to walking out and not returning. The mediator believed that if he had been less experienced, he would have stopped the mediation at that stage, not least because of the time the parties had spent rehearsing the past (while facilitative mediation, the style in which the mediator had been trained, was supposed to be about 'looking forward'). However, the mediator persevered and, after lunch (which gave an opportunity for reflection), the parties 'turned to one another, talked to one another, and discussed . . [their] future [working relationship]', what the researcher has called a 'light bulb moment'. It was, according to the interviewee, an 'amazing result'.

The parties took one (20 minute) break in the afternoon, 'when emotions [had] got high' again, but, by and large, they were able to talk to one another calmly. They 'left the [mediation] room amicably'. Applying the researcher's dispute impact approach (to success) to this case: dispute settlement, if not resolution, at the start was probably adjusted to dispute management (the mediator's 'hanging on'), then perhaps back to dispute resolution, as it became appropriate. The last mentioned dispute impact looks as though it may have been achieved, so the mediation might be said to have been ultimately successful.

Conversely, another mediator interviewed described a case where she believed that her lack of experience prejudiced a mediation: the situation involved a supervisor and supervised person in a university, in 2011. The interviewee recounted that there had been relationship problems between the two and the more junior had been off work with stress. The mediator met the two separately and 'thought there was some common ground'. However, the supervisor turned up at the joint meeting with an opening statement of some ten sheets of paper and it was difficult for the mediator to hold him back ('He just wouldn't listen'). A settlement ('surface stuff', for example, about the parties meeting weekly) did, however, emerge from what became a two hour meeting.

The settlement was drafted by the mediator and the two parties, but the supervisor changed his mind once a typed draft was sent to him. In fact, at one stage, towards the end of the joint meeting, the two parties had 'seemed to be having a good conversation', only for the supervisor to get up, saying 'I've had enough, now.' The mediator believes that, with more experience (this was only her third mediation), she would have structured the meetings differently and, perhaps, better 'managed' the supervisor - with more eventual success. It may, however, be that the mediation would always have foundered on the personality of the supervisor.

Stage of development of the mediator

This sub-section focuses on the 'stage of development of the mediator' and its impact on mediation success. It looks at models of development that might be considered when defining 'stage of development', at Acas examples that fit into those models, and at the finding that many mediators have become 'stuck' in their development. This sub-section of the chapter should be read in conjunction, particularly, with that above on the 'experience of the mediator'.

Models of development

First, as to what is meant by 'stage of development of the mediator', there are - as indicated in chapter four - various models of development that might be considered in this respect: among others, the four stages of skill development (Adler 2003:63), Lang and Taylor's (2000:11) dynamic four-part model of professional development, and Bowling and Hoffman's (2003:15) three stages of mediator development. To start with the first of these, the *four stages of skill development*, the researcher believes that he encountered examples of all four stages in his interviews and observation: unconscious incompetence, conscious incompetence, conscious competence, and unconscious competence.

Focusing on conscious incompetence, several Acas mediators expressed their unease about dealing with cases where the parties displayed a high degree of emotion. Typical were the following comments from one mediator:

> I'm not sure I've got those skills, to deal with raw, personal emotions. If Acas . . . [gave me appropriate training] and I felt comfortable, safe for myself and . . .

> [confident] I won't leave the parties in a pickle, then I would comfortably do it. But with what I have now, I'm not comfortable doing it.

Another interviewee was relaxed about mediating over the 'tangible' things (she actually gave the example of having a window open or not) but less happy 'if it's deep-seated, disliking one another'.

On the other hand, those – often very experienced – Acas mediators who suggested to the researcher that they went into mediations with little plan, and simply 'played mediations by ear' or 'flew by the seat of my pants', were probably revealing elements of unconscious competence, in most instances. The researcher mentioned in chapter four the concept of heuristics, and said that one mediator interviewed early on referred to his successfully using, as a mediator, a lot of experience(s) learned from previous Civil Service jobs, outside Acas. This is probably more conscious, than unconscious, competence.

Turning to Lang and Taylor's (2000:11) *dynamic four-part model of professional development*: the researcher suggested in chapter four that their novice category appeared of limited use in an Acas environment as did their artist category, but that the apprentice and practitioner categories did seem usable. Acas apprentices might be those Grade 9 (G9) individual conciliators who had attended an Acas National (AN) mediation day (or something longer) and/or the Greenwich University PGC IEDR course; and had observed a colleague mediating, or even co-mediated to some extent, but not gone out on their own. Acas practitioners might be found among those G9 individual conciliators who had attended an AN mediation day (or something longer) and/or the PGC IEDR course, and had gone out/mediated on their own; or they might be more senior, Grade 8s (G8s) who were able to mediate on their own, perhaps because of their collective conciliation experience.

The researcher considers that he encountered examples of both apprentices and practitioners in his interviews and observation. For instance, a G9 'apprentice' accompanied the researcher on a mediation involving four female employees that he carried out for a voluntary sector organisation. Three of the employees were at odds, to varying degrees, with the fourth, their manager. The researcher conducted initial, pre-

mediation meetings with the four employees (1x2 employees and 2x1 employee), then joint meetings with various combinations of the four.

The apprentice sat in on all the meetings and contributed considerably to the initial ones but, although told there was no restriction, she did not in the event contribute very much to the joint meetings: in the researcher's experience, less experienced and developed mediators do sometimes 'freeze', get a sort of 'stage fright', at the joint meeting stage. She did, however, make valuable input to discussions with the researcher, on strategies and tactics, in-between the various meetings. She expressed surprise at the end of the whole process, at the variation adopted by the researcher from the standard mediation process taught on Acas mediation training.

An example 'practitioner' was a G8 who, besides being a mediator, was also a collective conciliator, an Acas internal trainer in mediation, and an Acas Certificate in Internal Workplace Mediation (CIWM) trainer. One case he described in his interview and which demonstrated his level of development involved three disputing parties, two female and one male, and all members of the same (security) team at an airport. The male employee had had a relationship with one of the female employees, and then with the other. There was also a husband on the sidelines! Work relationships had, understandably, been undermined.

Into this already complex mediation situation came one of the commissioning organisation's HR professionals, who turned up unexpectedly and wanted to be involved in the mediation. A less developed mediator might have taken fright and denied her any involvement, on the grounds, say, of confidentiality; but the practitioner felt able to incorporate her, with the parties' agreement, into the mediation, implicitly drawing on a systems approach, and to successfully use her at the joint meeting stage, which resulted in written agreements.

In chapter four, the researcher suggested that Bowling and Hoffman's (2003:15) *three stages of mediator development* might be the most useful of all models of development for exploration in an Acas context of the argument that the more 'developed' the mediator, the more likely s/he was to be successful. The researcher certainly encountered examples of both first and second stage mediators in his interviews and

observation, that is, many mediators who had at least developed a variety of mediation techniques (first stage), and others who had reached a stage of 'deeper understanding' of why and how mediation operates (second stage). It is fair to say, too, that the researcher saw some Acas mediators at the third stage, but noted others who seemed likely to struggle 'to reach [such] a deeper level of personal connection with the parties'.

One interviewee was bold enough to say that he had reached this third stage of potential personal connection but, interestingly, he did not see a linear progression through the three stages: he felt much more advanced in terms of being able to make a personal connection with disputing parties than in terms of grasping mediation techniques and a deep understanding of mediation's operation. Another mediator, without the benefit of having read Bowling and Hoffman (2003), summarised as if he had:

> When we do mediation first, it's all about techniques. Unless you do enough mediations after training, it'll take you a long time to move on from being able to apply techniques to being able to do some of the other things.

Stuck

From a good number of the Acas mediators whom the researcher interviewed and observed, he gained the clear impression of people having become 'stuck' in their (mediator) development, and stuck at a relatively early stage, say, Bowling and Hoffman's (2003:15) second stage, if not their first. Many people had not advanced much from their initial mediation training, assuming, that is, that they had done some sort of mediation training in the first place. (The researcher understands that some Acas staff started mediating without any training as such, to gain experience in order to bolster their credibility as Acas CIWM trainers.) Mediator 'stuckness' was manifest in several ways, for example, limited knowledge about, and use of, styles and theories connected with mediation, or negligible movement from the 'myths' of mediation, or undue optimism about the chances of resolving disputes, all of which have a potentially negative impact on mediation success.

The researcher's attempts to broach and discuss theory with interviewees largely drew a blank. There did not appear to be any overt use of, or reliance on, theories associated with mediation. Indeed, as suggested earlier in this section, going into a mediation 'without any pre-conceptions' and 'thinking on your feet' would appear to be fairly

typical. The general approach to mediation appears to be a pragmatic, 'what will work?', rather than an approach driven by theory. In some instances, there is almost a pride in being so practical. One interviewee said, 'I don't plan what I'm going to do before I get there. As I'm talking to people, I think this is what I'm going to do.' But 'mediators must have a theory underlying their practices, no matter how . . . obscured' (Della Noce et al 2002:41), so, Tidwell's (1998:61) theories-in-use would seem to be relevant here. The researcher will return to this in the next chapter.

There was, however, some awareness acknowledged of styles of mediation other than the facilitative (or interest-based or problem solving) one. That awareness seemed restricted, however, to those mediators who had undertaken the PGC IEDR course and/or who had been involved in some way with Acas's CIWM course, say, as tutors. Even where there was awareness of styles other than the facilitative, however, there was not a lot of knowledge about them. For example, in one focus group, one person (whose main Acas job was individual conciliation) readily admitted to not really knowing what evaluative mediation was, while transformative mediation was, misleadingly, to the researcher's mind, described by another person in the group (without challenge by the others) as being about trying to influence people's values.

Some Acas mediators (usually those who had undertaken the PGC IEDR course) did talk about importing transformative mediation into their practice; but the researcher believes they were, often, really referring to undertaking, on occasion, a less controlling and less directive version of facilitative mediation than they usually practised. For instance, one individual interviewee said the he devoted 'half of the mediation, if necessary, to getting out the past', and another that he might give the disputing parties more 'time to get things out', both instead of keeping trying to 'move forward', as seemingly demanded by the facilitative model. The researcher also found from his interviews that styles other than facilitative mediation, such as the transformative, had not been internalised by Acas mediators to the extent that they felt particularly confident about saying that they practised them.

As for negligible movement from the 'myths' of mediation (see Kolb and Kressel 1994:459): from his participant observation of the early years of Acas's internal mediation training and from his review of the current training material (Acas 2012c),

the researcher would argue that much of the initial view of the subject that trainees are given is really 'myth', for example, that mediation should be a completely voluntary process on the part of the disputing parties, or that the mediator should be totally neutral. The researcher would have hoped that, over time, trainees were encouraged by managers and colleagues to construct a more sophisticated and realistic view of mediation. Not all mediators make that move, however, and that appeared to be the case with several of the researcher's interviewees.

One mediator who clearly seems to have moved beyond the myths of mediation mentioned in her 2013 interview a local authority case involving a manager and an employee he managed. Because of an alleged disciplinary breach, the latter had been suspended, for – in the event - a long time. When the parties eventually got together in mediation, there was 'a lot of agreement between them. A written agreement was not necessary, they shook hands.' The mediator 'agreed to speak to . . . [the local authority] and put forward ideas around suspensions. HR took it on the chin. So, I [the mediator] went way beyond my boundaries.' In short, this mediator, like the mediators on pages 194/195 and 198, implicitly adopted a systems approach.

As noted in chapter six, most Acas mediators interviewed said that they approached disputes with the aim of getting an agreement and resolving the dispute. The researcher has discussed earlier the content of those agreements, and how an initial aim of getting an agreement might be tempered in the light of experience as a mediation progresses, so that a mediator might end up working simply to manage a dispute, that is, to contain, limit, if not de-escalate it. But initial undue optimism about resolution, in the sense of always expecting it before knowing much about a mediation situation, does strike the researcher as indicating 'stuck' development and naivety.

The initial training that Acas mediators have received started with an internal two-day course, linked to other training, in September 2003. The two days grew to a discrete five-day course, before becoming a shorter add-on to individual conciliation training. In 2015, Acas is now back with a discrete, three-day mediation course. Early on, there were also sporadic one-day events (facilitated by such luminaries as Kenneth Cloke and Tony Whatling). Latterly, there has been the Greenwich University PGC IEDR course (currently suspended). There has, otherwise, been nothing to systematically build on

initial mediation training, to make staff think beyond it, unless an individual has taken the initiative on her/his own (as a few have).[77] This flies in the face of what Acas tries to do for its other functions and, as indicated earlier, sits uneasily with Acas's stance on IiP.

One of the few Acas colleagues to respond positively to the researcher's request to keep a mediation work diary subsequently wrote to him as follows:

> My thoughts are at this time that the initial training did not give me sufficient tools to know how to deal with people who come along with lever arch files of paperwork or how to deal with parties when mediation has been suggested after the grievance procedure has been completed and there is formal documentation on the allegation of bullying. There does not appear to be enough thought given to training after the initial sessions (I am told there is no money – yet we charge for this service, so surely we should be up to scratch?). No formal network for sharing thoughts/concerns. Personally I feel that once we are trained we are put out there without sufficient tools/knowledge.

and, shortly afterwards, this mediator, who had been building up quite a lot of mediation experience (EARS shows over 10 cases), gave up the work, saying:

> I have decided to stop mediation. I think it was a mistake not to provide further workshops for mediators – although nothing can change my mind now (my confidence is severely dented). I wonder if a national support network would be of benefit for mediators.

In the present climate of planned public expenditure cuts, it is hard to envisage that we shall see, say, regular 'experienced individual mediator' courses of the type that have been held for collective conciliators, and which one focus group called for. Funding is not even necessarily assured for the (currently suspended) PGC IEDR course, which it had originally been planned that all Acas conciliators/mediators should attend according to the tutor, and which drew praise from all of the researcher's interviewees who had attended it. As someone who was involved in much of Acas's initial mediation training, the researcher is only too aware of its limitations. It was good for starters but it did need systematically building upon, which, as indicated, has not really happened.

Furthermore, in some Acas Areas, there have been only occasional good practice discussions arranged between mediators, although, to be fair, in a couple of Areas they seem to have been more frequent. Also, although Acas has evaluation arrangements for

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[77] One mediator said in a focus group that, after their initial training, Acas mediators were more or less left to their own devices. 'All sorts of things might be going on!'

individual mediation, the results have been fed back to mediators mainly in generalised form. While this may protect the feelings of particular mediators, it does not tell them what clients thought of their performance on a particular occasion. The researcher would be the first to admit that it is easy for a mediator to delude her/himself as to how things went in a mediation, in the absence of hard evidence in the form of evaluation sheets or whatever.

It was not surprising to learn that mediators who were not getting much mediation experience (see above on the 'experience of the mediator'), and who were not getting much training either, were sticking with, and limiting themselves to, the method of mediation that they had gleaned from their initial training and that they had used last time out, rather than experimenting whenever faced with a new (and rare) mediation. But the researcher has a sense of even some of the more experienced Acas mediators also being stuck in their development. 'Every single time [that I get a mediation], I get my [training] folder out/refer back.' The researcher himself is not now doing the amount of mediation that he has done in the past and would admit to feeling, as a consequence, less confident and less adventurous than he has previously, more reliant on earlier notes.[78]

Haynes et al (2004:21), in dealing with the criticism of so-called 'cookbook' mediation, say:

> As in any recipe, ingredients can be mixed in various order and amount without affecting the outcome. But the novice cook (mediator) needs a clear recipe from which to deviate as experience and competence grow.

Continuing this analogy, the researcher's impression is that most Acas mediators have not deviated much from the original 'recipe', unless it is to be interventionist and directive and to lead the parties more than one would expect of a facilitative mediator. Albeit unintentionally, Acas may have provided - in Haynes et al's (2004:21) words - a 'lock-step' model, that is, a model from which there is little deviation.

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[78] The researcher earlier cited Roberts (2007:208) quoting Lorraine Schaffer, as being critical of any mediator who 'just does a case in the same way every time' and who seeks to 'just apply a model pedantically whatever the situation'.

Ambition of the mediator

This sub-section focuses on the 'ambition of the mediator' and its impact on mediation success. After consideration of what is meant by 'ambition', the section looks at how it is bound up with mediator experience and development, the constraints on a mediator's ambition, and what EARS figures reveal.

What is meant by 'ambition'?

By the 'ambition' of the mediator, the researcher is referring to the level of service that a mediator aims to provide in any particular case; indeed, whether s/he really wants to be involved in mediation at all. The latter may seem a strange thing to say, given Acas's priding itself on being a 'can do' organisation and given the extremely positive response of Acas staff, generally, to questions in their annual *People Survey* as to whether they are interested in their work, whether they are sufficiently challenged by their work, and whether their work gives them a sense of personal accomplishment.

However, by way of illustration and explanation of this apparent contradiction, one mediator told the researcher quite firmly: 'If I could not do [that is, was allowed not to do] mediation, then I would not [do it].' It seemed that she felt obliged to do (the occasional) mediation, but that she found it extremely stressful having to do the work (for which she felt barely, and inadequately, trained by Acas, anyway) in conjunction with carrying a heavy individual conciliation caseload.

Another mediator said:

> An awful lot can put you off mediation. All the paperwork is a real hassle. Then, there's [having to make entries on] EARS! If you're a bit nervous, anyway, [in the first place] about mediation . . .

The suggestion was that - in such circumstances - potential mediations might be less than enthusiastically progressed by the mediator. Clients could be subtly dissuaded from pursuing mediation by a mediator who was not particularly keen on the job. As yet another mediator interviewed said: 'If you're not comfortable sitting down and talking to people, you won't make a good mediator. You've got to want to do mediation.' The inference drawn by the researcher was that there were some Acas mediators who really did not want to do mediation.

Ambition bound up with experience and development

Going back to ambition as 'referring to the level of service that a mediator aims to provide in any particular case': the researcher's empirical work has confirmed his original belief that ambition/level of service is bound up with the experience and development of the mediator (on which there are separate sections in this chapter). So, less experienced and developed mediators will usually offer what might be termed for convenience a basic, straightforward service, which sees the mediator's aiming at what is a quick fix of the presenting dispute, and the disputing parties' not being encouraged to stay in contact with the mediator once a case has been completed.

The researcher had thought that most of the more experienced and developed mediators would usually offer a relatively sophisticated, more tailored service, which could see the mediator's aiming sometimes as high as the reconciliation of the parties. But, the researcher had thought, the more experienced and developed mediators would be realistic as to what any mediation might achieve, recognising, for example, that not all conflict was amenable to resolution efforts, at least in the short to medium term. The mediator might also encourage the disputing parties to stay in contact with her/him, once a case had been completed. This higher level service would inevitably take more time than the basic.

The researcher's empirical work indicates, however, that the more experienced mediators will often offer only a basic service, even when something more would seem to be called for. The likely reasons for this (including 'stuck' mediator development) will be discussed in the next chapter, but an example was of a case handled by an experienced Acas mediator which involved two lawyers of African ethnic background working for a local authority.

According to the mediator interviewed, although the disputing parties had worked together for many years, their relationship had deteriorated rapidly in the 18 months leading up to the mediation. A major problem had been the belief developed by one of the two, the more junior, that the other, her manager, was a witch who had some sort of spiritual hold on her. She talked about a 'snake on my back, biting me, sucking my blood'. While the manager knew of this belief, the mediator said that he (the mediator)

had 'discouraged' the more junior lawyer from raising and discussing it at the joint meeting, not least because there was 'no proof'.[79]

Instead, the mediator said that he saw the two 'big issues' for the mediation as being around the junior's recording of her meetings with her manager (in the context of the manager's allegedly not developing her), and the strong influence on the junior of her latest church (a system outside work of which the junior was very much part) and its pastor (who was much less forgiving and less in favour of mediation than her former pastor). Even then, however, although the mediator was clearly aware of the church system in which one of the disputing parties was placed, he did not appear to have incorporated this aspect into the mediation.

In the joint meeting, the mediator attempted a 'partial, four point agreement, two points from each side', but without success, presumably because the 'elephant in the room', the 'witch issue', had not been tackled, nor the negative influence of the pastor. Since the unsuccessful joint meeting, the mediator's only contact with the disputing parties has been the junior lawyer's contacting him to try unsuccessfully to get him involved in a grievance. The researcher expected more from this experienced mediator.

The researcher has suggested elsewhere in this thesis, indeed the essence of the thesis is, that the more appropriate (to a mediation situation) the level of service offered by a mediator, the more successful in reality s/he will be. The mediator who offers only an attempt at settlement of the presenting problem in a dispute situation that calls for more in-depth work may sometimes appear successful at first, but that impression will not last for long. Likewise, the mediator who eschews that 'quick fix' may appear unsuccessful initially, but the commissioning and disputing parties may come to better appreciate that mediator's efforts in the longer term.

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[79] 'No proof' suggests that the mediator had perhaps slipped into the evaluative mode associated with his 'individual conciliation' work. There may also have been an element of embarrassment on his part, being himself of African ethnic origin, about what he described as 'a belief in black magic'.

Time constraints on mediation

This thesis has argued that the mediator should not be seen in isolation. S/he is part of various systems, which impact on her/his work, and a later section of this chapter will focus on 'the Acas context/system'. It is sufficient at this juncture to note that the mediator does not have unlimited time to do her/his work. For example, the contract letter which Acas mediators are encouraged, if not instructed, to send out to commissioning parties, at the start of a mediation, states that the mediation service 'will be for up to two days. Further services will only be provided by agreement with you.' This echoes the assurance regularly given commissioning parties by Acas regional 'gatekeepers', that they will not be charged for more than two days' work unless any extra is cleared with them first.

Furthermore, one of the CIWM handouts (that Acas gives to the outside mediators it is training), the handout on 'preparing for mediation', states:

> . . . it should normally be possible to reach a resolution by the end of one joint meeting. However, there will be times when clients need breathing space and a second (rarely more) joint meeting can be arranged. Sometimes, however, extra meetings just prolong the dispute (Acas 2011a:H21).

Again, this reinforces in the minds of Acas staff (as well as those of CIWM trainees) the short and sharp, quick fix idea about mediation. Occasionally, commissioning parties will 'expect' a mediation to be wholly completed (separate and joint meetings) in a day;[80] and the mediators in at least one Acas Area set themselves such a target.

EARS figures

In the 'experience of the mediator' sub-section of this chapter, the researcher reported upon a review he had conducted in January 2011 of fees charged in Acas individual mediations (all those mediations started in the six months between 1 April and 30 September 2010). The detail of the review was given in the 'experience' section in the context of assessing the amount of mediator time spent on cases, but its results give a clue at the same time as to the level of service being offered by Acas mediators. It will be recalled that, of 114 EARS entries, £835 (Acas's charge for one day's mediation

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[80] Just occasionally, however, it may be difficult for the mediator to 'escape' from the parties. This was the researcher's experience on one occasion, involving a small voluntary sector organisation in Bedford. In the days before Acas started charging for mediation, one of the disputing parties, who was also the commissioner, kept coming back to the researcher as mediator for guidance.

work) was both median and mode while the mean was £1,070 (not even one and a half day's work - £1,355). This points to a basic service being offered by most mediators, regardless of their office location – assuming, that is, that the researcher is correct in suggesting that a higher level service will take more time, and cost more, than the basic.

The following table, drawn from EARS, looks at how the different Acas offices compare over time (Customer Delivery Days - CDDs) and cost (income) logged for mediations:

Table 7.5 Completed individual mediation cases, 1 April 2004 to 14 December 2013 (figures extracted from EARS 14 December 2013)

Office	No. of cases	Total time (CDDs)	Total cost (income), £	Mean CDDs per case	Mean income per case, £
Birmingham	125	215.95	141,797.37	1.7	1134.4
Bristol	130	192.94	115,232.5	1.5	886.4
Bury St Edmunds	124	205.46	148,350	1.7	1196.4
Cardiff	87	139.76	89,690	1.6	1030.9
Glasgow	110	126.36	103,340	1.1	939.5
Leeds	105	159.56	97,419.85	1.5	927.8
London	256	327.36	253,558.8	1.3	990.5
Newcastle	103	140.63	110,560	1.4	1073.4
North West	158	229.04	174,731.75	1.4	1105.9
Nottingham	120	180.43	113,825	1.5	948.5
South East	117	188.75	107,555.45	1.6	919.3
All	1435	2106.24	1,456,060.72	1.5	1014.7

Although the points will be discussed more fully in the next chapter, it might be noted now about Table 7.5 that, by and large, it appears to suggest some consistency between the different Acas offices over time spent, including their not exceeding the two-day per case limit referred to earlier. In the table, the overall mean of the CDDs logged was only 1.5. The main divergence from this was Glasgow, at 1.1 CDDs. Bristol surprisingly shows a mean of 1.5 CDDs per case but a mean income of £886.4 (little over the charge for a day's work, £835).

<u>Attributes of the mediator</u>

This sub-section focuses on the 'attributes of the mediator' and its impact on mediation success. It looks at four mediator attributes, in particular: listening, building rapport, readiness, and the use (or not) of ground rules. As indicated in chapter four, the researcher has cast this variable in broad terms because it often appears difficult, in practice, comprehensively to distinguish attributes/qualities from skills, and in turn skills from techniques.

The material that Acas uses to train its own mediators (Acas 2012c) includes a list of 'skills, qualities and knowledge'. The list identifies 22 skills, 11 qualities and 11 areas of knowledge. Even then, the list is far from comprehensive; and it is not prioritised. It is copied from/identical to the list contained in Acas's *Certificate in Internal Workplace Mediation (CIWM) Course Manual* (Acas 2011a:H12), which in turn was lifted from Mediation UK's *Training Manual in Community Mediation Skills* (Mediation UK 1995), with some additions being made in a none too rigorous way.

The researcher believes it is unarguable that a mediator's attributes will impact on mediation success, for better or for worse. It might be asked which of many attributes are more significant for success than others. In theory, the researcher could survey each Acas mediator on this, and sum up the, likely disparate, results for what they would be worth. In the absence of such quantitative work (and the researcher has explained, in chapter five, his choice of research paradigm), the researcher will focus now on four attributes that appear to be significant from his interviews, observation and own mediation experience over the years: listening, building rapport, readiness, and the use (or not) of ground rules.

Listening

Listening emerged from the researcher's interviews and participant and non-participant observation as a significant attribute of the mediator, as did its concomitant of – using one interviewee's words - 'you do need to let . . . [people] sound off, even if it doesn't seem relevant'. The point was made in one Acas focus group that it was surprising how many people said to mediators, 'Thanks for listening.' The mediator needs the patience to listen and, having listened, needs to be articulate and to have drafting skills, to make good use of what s/he has heard.

Charlton and Dewdney (2004:193) divide listening into passive and active listening. 'Passive listening in mediation occurs when the mediator listens in silence to what parties are saying and responds in a passive way.' Active listening, on the other hand, 'occurs when the mediator listens and feeds back in an active way, reflecting an appreciation of the significance of what the parties have said, including the underlying emotional content.' From his observation of mediations, and attendance at Acas training and other events, the researcher is of the view that Acas mediators utilise both types of listening. The material that Acas uses to train its own mediators (Acas 2012c) includes a note on 'active listening and questioning skills', copied from/identical to the note contained in Acas's *CIWM Course Manual* (Acas 2011a:H16). The note is not particularly enlightening and is rather a disappointment if you think listening is a significant attribute of the mediator.

One of the first formal mediations in which the researcher was involved (back in the 1990s) was on behalf of the then Milton Keynes Neighbour Dispute Mediation Service (now Milton Keynes Community Mediation Service). It concerned a woman locked in dispute with her neighbour. After visiting the woman and listening at some length to her story, the researcher and his mediator colleague asked her whether she was happy for them to contact her neighbour, and – if both parties were willing – to then arrange a joint meeting on neutral territory. The woman indicated, however, that it was sufficient that she had been able to speak her mind to the mediators and that someone had really listened to her. She did not want any approach to her neighbour, let alone an attempt made to set up a joint meeting.[81]

This situation, fairly common in the researcher's experience of mediating in neighbour disputes in Milton Keynes in the 1990s and a situation not uncommon in a workplace mediation context nowadays, illustrates the importance people attach to being heard/listened to. (It perhaps also illustrates, in some cases, a fear by at least one of the disputing parties of making a bad situation worse.) The corollary is that not feeling heard/listened to can be extremely frustrating. Ironically, the researcher himself felt

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[81] Although, as indicated in chapter five, the researcher no longer holds contemporaneous notes of any substance on this mediation (or on any pre-2003 mediations), the situation left a lasting impression on the researcher.

badly treated by Acas over the running of, of all things, a CIWM course in 2011; and it was the sense of not being heard/listened to (but, instead, of being rather brushed aside), when he raised his concerns with colleagues and manager, that led the researcher to institute the one and only formal grievance in his Civil Service career.

If mediators are going to listen and allow people to 'sound off', they must give the disputing parties some space. A mediator doing a lot of the talking when with disputing parties is far from ideal. The ability to stay silent becomes therefore a related attribute. In this regard, the researcher as participant observer involved a colleague in a mediation concerning four members of the support staff in an Academy school, in 2012. The colleague, who had had experience of Acas individual conciliation work but not, up to then, of individual mediation, volunteered afterwards that she was surprised at how little the researcher as mediator had spoken in the various sessions, and the space he had given the parties.[82]

Building rapport

The ability of a mediator to build rapport was identified by interviewees as another significant attribute of the mediator. Acas's *CIWM Course Manual* (Acas 2011a:H13 and H14) has two handouts in this area. These betray some uncertainty as to the difference between the mediator's building rapport with the disputing parties, inspiring trust, and benefiting from showing empathy. Among the 'Helpful behaviours' listed for building rapport is, however, 'active listening'.

Building rapport was judged by interviewees to be a crucial goal of the separate mediation meetings (the value of which is often underestimated).[83] However, with the best will in the world, it is not always possible to build rapport. In a

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[82] It is important, too, that the mediator does not jump to the conclusion that a disputing party's story which s/he is about to hear is one that s/he has heard many times before, and that s/he does not in consequence stop listening. This danger is heightened if Haynes is correct in suggesting that the stories disputants bring to any mediation always have the same three parts: how reasonable I am; how unreasonable the other party is; and how the 'problem' can be solved only through a change in the other's behaviour (see Haynes's 'Michael and Debbie' family mediation video and Haynes and Haynes 1989: 83).

[83] The researcher was, however, told in interview of a private sector mediation provider who conducts these 'meetings' only over the telephone.

family mediation case, the researcher as mediator (as his contemporaneous notes indicate) felt for the first and only time physically threatened by one of the parties, who clearly thought that he (the researcher) would be biased in favour of his wife: because of the suit the researcher happened to be wearing, the husband associated him with the social class of his wife. Also, in a recent mediation involving four university cleaners, the researcher believes he built good rapport with the main protagonist, but that did not stop her calling a halt to the mediation because, she realised, it was not going to be a comfortable experience for her.

Interviewees pointed out that there had to be limitations to building rapport. Otherwise, client expectations might be inordinately built up at pre-mediation meetings, only to be disappointed at the joint meeting stage, when the mediator had to be extremely careful as regards impartiality/not to be seen to be taking sides. The point was also made that the disputing parties might well feel let down when, after the establishment of rapport up to and including the joint meeting(s), the mediator quits the scene, never in most cases to return!

Readiness

Turning to readiness, chapter four quotes Crocker et al (2004:110) as saying that, to be effective (successful), mediators must be 'ready in every sense of the word', including having the necessary resources for a mediation and being prepared to give a dispute's settlement a central place in their world. This area verges into the 'Acas context/system' variable that will be discussed later, since that inevitably impacts on the readiness of the mediator. The latter is not a completely free agent, far from it.

To give an instance of lack of readiness, one mediator whom the researcher interviewed mentioned his very first mediation and how he had spoken to the parties only on the telephone at the pre-mediation stage, because it would have been 'too far for him to drive' to meet them. The mediator was then spared the drive at the joint meeting stage because the mediation did not progress that far, in the event. Whether that lack of progression was down to the mediator's initial lack of readiness is a matter for conjecture.

In addition, the researcher has learned from his interviews that in spite of what they were told, and encouraged to do, in their Acas training, other new mediators also looked to save time early on by trying to conduct pre-mediation work over the telephone, even when there was not the excuse of avoiding lengthy travel. The mediators concerned admitted to having since learned that they had been mistaken. They had lost so much in terms of building rapport with the parties and understanding their stories by trying to save on pre-mediation meetings.[84]

A further instance of lack of readiness was provided by another Acas mediator whom the researcher interviewed, who in a particular case arranged two pre-mediation meetings and a joint meeting, all for the same day because of the distance he had to travel to carry out the mediation. The mediator further indicated to the researcher that he had not been looking to stay too late on the day of the mediation because of his domestic commitments. All very logical and sensible, perhaps, from that mediator's point of view, and from the aspect of minimising costs to Acas.

These were not, however, actions appearing to indicate a great deal of mediator 'readiness' – nor actions necessarily conducive to mediation success. When the mediation, perhaps not surprisingly, started to falter, the mediator did not particularly push the commissioner for more meeting time because he (the mediator) 'had a lot of other work anyway'. The mediator subsequently finished off the mediation over the telephone to avoid further travel.

Because they have responsibilities other than individual mediation (usually, but not always, statutory individual conciliation), responsibilities that are extremely time-consuming, Acas mediators sometimes struggle to fit in their non-statutory individual mediation work. The researcher has certainly worked with colleagues who would 'claim' a particular mediation, but not really have the time to do it because of their other commitments. Rather than let the mediation go to someone less busy, however, they would hold onto it since it was, say, in their 'patch' and/or they wanted the kudos that came with the related CDDs (Customer Delivery Days) and income. Progress on

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[84] A police mediator interviewed said that, although he typically has only one pre-mediation meeting with each disputing party, he had in one case met a party several times before he deemed her/him ready for a joint meeting.

the mediation would, therefore, be delayed to fit in with their diary. The researcher himself has not been completely innocent in this respect and has, for example, had a colleague point out to him, after they had co-mediated, that they had not actually had the chance to talk very much about the case beforehand.

Mediators will often defend their slowness in getting involved in any particular dispute on the grounds that the dispute has doubtless been going on for some time and that delaying mediation a bit longer will not hurt. In the researcher's experience with Acas, however, a mediation commissioner may have sat on a potential mediation request (or, rather, a potential mediation situation) for quite some time; but, when s/he finally comes to Acas for assistance, that commissioner will be expecting a speedy response. If that is not forthcoming, the potential mediation may be offered elsewhere (to a private sector provider) or may well 'evaporate' (in the sense that the 'moment' for mediation passes and the parties move on to other dispute handling processes).

Finally, a potential mediation that did not, in the event, materialise as such but which illustrates aspects of 'listening' and, particularly, 'readiness'. This case is an example of how, to quote from chapter five, 'when visiting Acas's Bury St Edmunds office . . . [the researcher] has been drawn into discussions about mediation and learned information that he would not otherwise have been privy to'. The researcher supplemented those original discussions about this case with e-mail and telephone questions to the mediator, and exploration of the relevant EARS entry.

The organisation involved was a large processor of food and the disputing parties were its Financial Controller (A) and a Financial Assistant (D), with the complication of D's sister being the organisation's HR Director. At one point, D had had a lot of time off work on the grounds of stress. On her return, she had alleged that A:

> . . . had made her life hell, forced her off . . . [a particular] project and made disparaging remarks about her family . . . [He] had promised to make her a supervisor but didn't keep that promise.

The allegations had resulted in A, for his part, 'having sleepless nights and showing signs of extreme stress'.

The mediator, newly trained by Acas, had 'brief telephone contact with the commissioner' before telephone discussions with both parties, prior to – hopefully -

meeting with them. The conversation with D was short and 'very business like'; the other was 'lengthy' and A 'was very emotional and had difficulty with composure throughout'. Towards the end of this discussion, according to the mediator interviewed, A said to the mediator that:

> . . . just being able to talk about the impact this whole situation has been having on my life to someone who clearly is experienced in these matters and understands how devastating this can be, is a huge relief. I already feel that at last I will be able to sleep a bit better tonight knowing I can contact you further and that there is a process where at least the issues can be aired in confidence.

A 'repeatedly thanked me [the mediator] for my contact and for taking the time to listen'.

The mediator said that A rang him the next morning to, again, thank him for his contact and to say 'how beneficial he had found it, talking through his feelings and the potential benefits of mediation'. He did, though, ask about 'moving the process forward', that is, meeting up before the January date planned. That was not, however, possible and, the mediator later found out, matters were then 'brought to a head . . . [that] afternoon . . . [The HR Director] had a meeting with . . . [A and D] together and the matter [was] resolved.' Both parties then wrote to the HR Director to confirm that they no longer required Acas mediation. When asked by the researcher about the content of the 'resolution', the mediator said that the HR Director had not given

> . . . any detail, other than . . . [that the disputing parties] had met together with her and at the end of that meeting had agreed the whole thing had been totally over blown and they were going to put it behind them.

The whole process above lasted only from 5 to 13 December 2013, but it reinforces the points made earlier about the contribution of listening (even by an inexperienced mediator) and about a mediator's needing to be 'ready in every sense of the word', including having the necessary resources for a mediation and being prepared to give a dispute's settlement a central place in her/his world. If the mediator had been able to bring the mediation meetings forward, the dispute might have been resolved in Acas mediation.

It might, of course, be argued that it is irrelevant *who* helped resolve the dispute, Acas or the HR Director. *How* it was resolved is, however, extremely important. Did the HR Director perhaps bring about a resolution by issuing some sort of explicit or implicit

ultimatum to the warring parties, rather than mediate between them? Should the mediator have contacted the disputing parties to check out that they really were happy, as the HR Director suggested, 'to put . . [the dispute] behind them'?

Use of ground rules

The researcher encountered differing views on the use of ground rules in mediation, that is, 'guidelines for how people should behave, rules to keep people as reasonable as possible' (Acas 2011a:H18). In one focus group, for example, it was pointed out to the researcher that, while Acas trainers spent a lot of time on the CIWM course on encouraging trainees to establish ground rules in their mediations, in 'real life' (that is, actual mediations) ground rules fell rather flat. It could be seen as insulting and patronising for a mediator to tell people not to shout, swear or talk over one another, not to stand up threateningly, and so on.

In another focus group, however, a mediator could 'not envisage a situation without doing ground rules, first'. Another mediator in the same group said that 'the one thing we'd all do is ground rules'. Others in the group explained that not only did ground rules give mediators 'a measure of protection', they also reassured the disputing parties too: 'sometimes, people will only agree to go forward to mediation if there are ground rules'. A way round the danger of being seen as insulting and patronising, it was suggested, was for the ground rules to be generated (with mediator encouragement) by the disputing parties themselves and incorporated in their 'agreement to mediate' (example at Appendix Six).

In yet another focus group, a mediator said that ground rules helped her and the disputing parties 'to settle in'. By this, she meant that the start of a joint session in mediation was often tense, with the mediator being rather nervous as the initial focus of attention, and the disputing parties also being nervous at what was usually a wholly new experience for them. (The researcher, as mediator, has been told on several occasions by one or other of the disputing parties that s/he had had little sleep the night before, thinking about the forthcoming mediation.) The mediator's taking time to work through ground rules about behaviour enabled everyone to relax, to some extent.

While this whole area of ground rules might seem at first glance rather trivial, it does link in to, say, models of mediation (what the mediator is trying to do in a mediation) and the stage of development of mediators (less 'developed' mediators perhaps needing the protection of ground rules more than the disputing parties). The researcher will say more on this in the following chapter.

Situational variables

This section looks, first, at the tractability of any conflict; then, at the parties themselves (including their attributes and behaviour and the extent of their relationship breakdown), and their commitment to mediation. The parties are situated within the system(s) suggested at Figure 4.1. Finally, and perhaps less obviously, this section returns to the context/system of which mediators are part, Acas in this particular study.

Tractability of conflict

In chapter four, the researcher quoted Mayer's (2009) and Zartman's (2005) (similar) thoughts on intractable conflict. If we focus, for convenience, on Zartman, it will be recalled that he argued:

> Five internal characteristics combine to identify intractable conflicts. They are protracted time [and the effects of that duration], identity [of the other party] denigration, conflict profitability [to someone], absence of ripeness [as a pressure toward negotiation], and solution polarization [that is, the competing pulls of salient solutions] (Zartman 2005:48).

Time

On the question of time, Acas's summary of its evaluation questionnaire data shows the following for the length of time that issues had been ongoing prior to mediation, in the view of commissioning parties, in cases in the last few years (sources: Acas 2009d, 2011b, 2012b and 2013c):

Table 7.6 Length of time issues had been ongoing prior to Acas mediation*

	<3 months	3 to <6 months	6 to <12 months	= or >1 year
2008/09	19% of cases	24% of cases	30% of cases	27% of cases
2010/11	22% of cases	19% of cases	29% of cases	30% of cases
2011/12	14% of cases	27% of cases	25% of cases	34% of cases
2012/13	17% of cases	30% of cases	36% of cases	16% of cases

* 2009/2010 excluded since a complete set of evaluation questionnaire data for that year is not available.

It is noticeable that the percentage of cases where the issue had been ongoing for a year or more had been increasing from 2008/09 to 2011/12 but declined considerably in 2012/13, while the percentage of cases where the issue had been ongoing for between three and 12 months increased in 2012/13. The researcher will consider, in the next chapter, what the reasons for this might have been. Over half (52%) of the cases in 2012/13 had still, however, been ongoing for at least six months, with the implications this has for mediation.

Ripeness

On ripeness, Acas's summary of its evaluation questionnaire data on the appropriateness of the timing of mediation interventions shows the following, in the view of disputing parties, for the last few years (sources: Acas 2011b, 2012b and 2013c):

Table 7.7 Appropriateness of timing of mediation interventions

	Too early	**About right**	**Too late**
2010/11	No cases	41% of cases	59% of cases
2011/12	4% of cases	35% of cases	61% of cases
2012/13	4% of cases	37% of cases	60% of cases

Of those who felt the timing was about right:

2010/11	16%	felt the issue had not
2011/12	11%	been resolved at all*

while, **of those who felt the timing was too late**:

2010/11	28%	felt the issue had not
2011/12	53%	been resolved at all*

*The Acas research paper in respect of evaluation questionnaires received in **2012/13** does not, unfortunately, give comparable analyses for that operational year.

It appears from the above that a clear majority of disputing parties in each operational year felt that their mediations had occurred too late, and that in turn a large percentage of each clear majority felt that the underlying issues had not been resolved at all. The researcher believes any late intervention is unlikely to have been primarily Acas's fault but, rather, have been down, mainly, to the commissioning and/or disputing parties, who would have principally determined the timing of third party interventions.

On the basis of views expressed by Acas colleagues during operational work and comments made by them in Acas internal training courses and in promotional events for Acas customers, over his years in the organisation, the researcher would suggest that it is a commonplace in Acas that the parties to most disputes (whether individual or collective disputes or something in-between) do not involve Acas early enough; and that, if only they had, the outcomes might have been very different and much better for the parties. Certainly, Acas staff in the researcher's office claim to regularly remind/plead with potential clients to involve Acas early on in any future disputes.

It is understandable that parties emerging from dispute, particularly if that dispute has been bitter, may think, on reflection, that mediation might best have occurred earlier than it did. But too heavy an emphasis by *Acas staff* on their early involvement per se, as, for example, in 'Mediation top tips' on Acas's website:

> It is unlikely that the issue will go away on its own so it's always better to nip things in the bud and start dealing with the problem early on. Mediation can be used at any stage in a dispute but is most effective before positions become entrenched.

perhaps suggests too simplistic a view of conflict.

As indicated in the chapter four, Fisher et al (2000:19) claim that conflict 'comprises five different stages, which generally occur in the order . . . [of pre-conflict, confrontation, crisis, outcome, and post-conflict] and may recur in similar cycles'; and the argument is that some stages of conflict will be more conducive to mediation success than others. (That said, again as indicated in chapter four, the reality for Acas mediators is that, if the parties want or, at least, the commissioning party wants to go ahead with a mediation, the mediator will be expected to comply, regardless of perceived stage of conflict.) No Acas interviewees suggested, however, that they had used stages of conflict analysis to guide their interventions in disputes.

From his mediation experience, and the interviews for this thesis, the researcher is of the view that there is, nowadays, a general view of conflict by Acas staff which says that there is a most appropriate stage for third party intervention ('early on'); and that, if it is missed, it will not return, and that – for ever after – the mediator and her/his efforts will be disadvantaged. So, for example, in a London NHS Foundation Trust case from 2013 extracted from EARS, the mediator says:

Brief Case History	Conducted joint meetings with the parties on 4th and 15th April.
	Poor working relationships between the parties arising from communications issues.
Outcome:	Progress Made
Problems, Issues Or	
Any Learning Points:	Suspect the mediation left too late to be able to resolve the difficulties. We acted as soon as we got the request from the employer. However, it appears that mediation was first mooted long before but employer had difficulty getting clearance for it.

The researcher will discuss this in the next chapter, and also the idea of the different stages of conflict calling for different choices of (attempted) dispute impact by the mediator.

In working through their 5-stage facilitative mediation process, Acas mediators ask people at stage one, in separate/pre-mediation meetings, for their 'story' and usually give them a lot of time to tell it: two pre-mediation meetings alone may, in consequence, take the best part of a day. As we have seen, disputing parties tend to be very grateful for being listened to at stage one, perhaps in their view for the first time. But the researcher has not come across any evidence of Acas mediators having seriously questioned, after stage one, whether a joint meeting was appropriate (unless, of course, the parties had explicitly said they would not attend such a meeting).

As indicated in chapters four and five, the researcher has developed a set of questions (see Appendix One) that a mediator might put to each disputing party at the pre-mediation stage, to enable the mediator to judge whether moving on to a joint meeting is likely to be productive. A salutary thought, however, comes from Wilson (2005:164), that 'there is yet no reliable assessment tool regarding ripeness in any conflict domain'. Also as indicated earlier, the set of questions has been offered for trial to several Acas mediators, always with a positive reaction but without any obvious use so far.[85]

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[85] One response was that 'I recently conducted a mediation between two female solicitors, and with hindsight I should not have taken them into the joint meeting. Having read your questionnaire . . . if I'd had . . . [this] before I went to do the mediation I'd have tackled it differently.'

At the risk of reading too much into the situation (the lack of use of the researcher's questionnaire), the researcher would suggest that it reinforces the impression, already mentioned in chapter six, that most Acas mediators launch into joint meetings without the 'formulations' or 'hypotheses' that Lang and Taylor (2000) and Haynes and Haynes (1989) suggest are essential. They will run stage two/the joint meeting(s) and onwards and 'see what comes out', relying on what several Acas mediators interviewed referred to as the 'magic of the mediation process'.

The researcher also noted in chapter six that those interviewed rarely analysed rigorously – after a mediation – why a particular mediation had, or had not, worked out seemingly successfully. One of the most experienced individual mediators in Acas, someone who has also been involved in many CIWM courses, made the point to the researcher that some mediations had gone well for him, some had not, but that 'it was difficult to put your finger on why this was'. This does, of course, indicate a potential difficulty for the researcher's suggested measure of mediation success: some mediators may find too difficult the idea of reflection, after closure of a case, on appropriateness of dispute impact.

Identity, conflict profitability and solution polarisation

As to the identity, conflict profitability and solution polarisation characteristics of intractable conflict, a workplace dispute in which the researcher himself recently mediated, as Acas staff member, illustrates these characteristics (as well as time and ripeness).[86] The dispute had arisen between two employees in a veterinary charity. A new Chief Operating Officer (A) had started at the charity, with the brief as he saw it of saving the organisation from the financial ruin toward which it was drifting. One of those reporting to him was the Contracts Manager (B), who very soon complained that she was finding A difficult and that she was upset and angry with the way he was behaving toward her. For his part, A said that B had been aggressive toward him and had lied to him. He believed that she was unwell, mentally.

In this escalating situation, in 2014, six months after A had started at the charity, the researcher was asked to mediate, with the broad objective of helping A and B work

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[86] The dispute may also illustrate Moore's (1988) point, mentioned in chapter one, about 'unrealistic and unnecessary' conflict.

successfully together. The charity's Head of HR acknowledged that B could be 'challenging' and admitted, 'I think this [mediation] could be a tricky one, however the . . . [charity] really needs these two employees to work successfully together.' In the event, the separate meetings with the two parties went surprisingly smoothly as did the joint meeting, which lasted a couple of hours. What had looked as though it might be an intractable dispute turned out to be otherwise.

The explanation may well be that, in the joint session, the parties did not, to paraphrase Zartman (2005:48), denigrate the identity of each other, far from it (they were, in fact, quite complimentary about each other's abilities); also, they seemed to see no profit in their conflict, indeed they accepted that they could very much help one another in the future; and a potential/threatened 'solution polarisation', with each party seeking an apology from the other, did not materialise. In addition, the dispute had, as intimated, lasted less than six months.

At the parties' request, the researcher drafted a session summary for A and B, for their eyes only, which included the following paragraph:

> Both of us accepted that there had been nothing deliberately malicious in the earlier behaviour of the other, and that a line should be drawn under the past. We should start afresh. We discussed how best to handle any problems that arose between us in the future, and agreed that the way to do this was to surface issues straightaway and work through them, rather than let them fester.

Whether the rapprochement lasts may well depend considerably upon those around the parties, and their encouragement or not – systems, again.[87] From what B had said in her separate meeting, the researcher was particularly concerned about those around her and attempted to alert her to the potential danger.

The parties themselves

In this sub-section of the thesis, the researcher will report his findings on the impact on mediation success of the disputing parties themselves (including their attributes and behaviour and the extent of the breakdown of their relationship). The sub-section looks specifically at the mental fragility of some disputing parties, and workplace friendship deterioration.

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[87] Unfortunately, the researcher omitted to pursue a further systems issue: A's saying to him early on that he might need mediation also with the charity's Chief Executive, over the latter's perceived lack of support in the dispute with B.

Mental fragility

In chapter four, the researcher noted the examination by Ettner et al of a representative sample of working adults in the United States which found that 18% of men and 16% of women in the sample had at least one personality disorder, and that such men and women were more likely to experience problems in interactions with co-workers and bosses (Sidle 2011:76). The researcher asked the officer who has been leading on mental health matters in Acas whether she could point him towards some comparable figures/work for the UK or, alternatively, something that suggests the US figures are unlikely to be replicated here. Unfortunately, she could not, which perhaps reinforces the point suggested later in this chapter about Acas culture tending to celebrate and focus upon the practical.

There is, however, an Acas guide on mental health at work, the Foreword to which makes the following points (Acas 2014e:2):

> The 2011 Absence Management Survey from the Chartered Institute of Personnel and Development (CIPD) has reported that stress is now the most common cause of long-term sickness absence for both manual and non-manual workers.

> This will come as no great surprise to many people. It's not hard to make the connection between the economic climate and the nation's mental wellbeing. When jobs are under threat, pay packets are being frozen, and workloads are increasing, employees' mental health is always likely to be affected.

> Over the last ten years, we have all noticed the increasing impact of mental ill health in the workplace. Stress, anxiety and depression, albeit not all work-related, have led to higher rates of absenteeism and lost productivity due to presenteeism.

It does not seem too fanciful to extrapolate that many of the parties directed to Acas mediation by their employers (perhaps after those employers have tried coaching in team skills) will be suffering from some sort of personality disorder. These parties may be difficult, if not impossible, to deal with in mediation.[88] In this connection, the researcher can recall several situations over the years where individuals found it impossible to 'move forward' in mediation, but would return again and again to some

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[88] Whatling (2012:41) suggests 'the mediator will encounter prospective clients who, by reason of mental health problems . . . may be unsuited to mediation'.

perceived slight(s) that, first, had to be acknowledged by the other disputing party/parties, and, then, atoned for, something that rarely happened! Many of the researcher's Acas interviewees had had similar experiences of what might be termed, albeit by the researcher, a non-medical person, 'mentally fragile' parties.

To give just a small selection of the researcher's own examples, one of the first individual conciliation (evaluative mediation) cases that the researcher (as Acas officer) dealt with – in 1981/1982 – is reviewed here.[89] The researcher met with the applicant/claimant and her representative, to try to explore the strengths and weaknesses of her alleged unfair dismissal case, and what it might take to settle it. In the event, it proved to be impossible to make any real progress on these points. Eventually, the representative spoke privately, and with some embarrassment, to the researcher and acknowledged the mental fragility of his client, admitting in effect that the conciliation attempt was a waste of time, would get nowhere.

Many years later, in 2009, the researcher (as a facilitative mediator) had to deal with an intra-office dispute in an agricultural merchant's business. The commissioner's objective for the mediation was for Acas to help P and S try to improve/rebuild their working relationship. P was one of a team working to S. The researcher met with her first, but what was intended to be a morning meeting, lasting a couple of hours, stretched over the lunch period, eventually finishing after four hours. As far as P was concerned, there was no fault at all on her part for the poor relationship with S. The blame was solely down to S, who – she claimed - treated the other team members quite differently than she did P. P herself had 'never had unhappiness anywhere else'. The meeting finished with P's refusing to sign a standard 'agreement to mediate', because she did not know what would come out of any joint meeting and she wanted the freedom to use, outside of mediation, anything said by S (and not, therefore, to be bound by a mediation confidentiality clause).

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[89] Once again, although the researcher no longer holds contemporaneous notes of any substance on this mediation, the situation was one that left a lasting impression on him such that he can recall the essentials some 30 years later.

The pre-mediation meeting with S was short by comparison, lasting a couple of hours. S painted a picture of a fractious relationship with P, a relationship which she might have tolerated had P been good at her job. Unfortunately, she suggested, P was out of her depth in her job but would not listen to anything told her, which made training for improvement difficult, if not impossible. S said that P had alienated a lot of others at the company. The researcher discussed the option of a 'capability' approach to S, which could have ended in dismissal, but he sensed a reluctance to go down this route.

After consulting her trade union, P did agree to sign the 'agreement to mediate', claiming to have misunderstood what the researcher had said about confidentiality; and the joint meeting went ahead. Some actions/changes were agreed at the meeting, but the researcher came away with no feelings of success and no real confidence for the future relationship of P and S. At best, the researcher had helped manage the dispute. A further joint meeting was planned for about three months on but, when the researcher wrote to the HR Manager in advance of this, he was told:

> Regrettably, things have got worse with P bringing grievances against S and myself, we are currently working our way through this but I fear that too much damage has been done for us to recover from. S understandably is incredibly stressed which is having an impact on her health, of which I am very concerned about.

The researcher heard no more from the company and he had little idea, anyway, about how to progress matters further in mediation. In spite of what mediation providers' literature tells us, mediators are sometimes stumped as to what to do in a case. On reflection, the researcher believes that, after the pre-mediation meetings, he should have employed a systems approach and discussed P's mental state with the HR Manager or should have accepted that, whatever the way forward on the case, it was probably not through the standard mediation process. The researcher will say more on this in the next chapter.

Much more recently, the researcher was asked to mediate in a dispute at a school. An employee (W) with ten years' service, one of the secretaries, had been accused of amending some pupils' reports without the authority to do so, in order to spite the parents of those pupils, parents who were colleagues of hers. W had also been accused of sending malicious (anonymous) letters to colleagues. W denied the accusations and,

at the time that the researcher (as mediator) met with her, her representative (a consultant) (K), and W's husband, she had been off work, 'sick with depression', for the best part of a year. In the course of a two hour meeting, W and her companions steadfastly maintained her innocence; and she said she was looking for an apology from the Head (A) and four of her (W's) colleagues, who had 'wanted me to lose my job'. In addition, W wanted a planned return to work, or a financial package to leave. She did not want to act in mediation without the close involvement of her representative.

When the researcher met with A, he was told that the investigation into the accusations against W had been inconclusive, that apologies 'were not an option', and that the school was not prepared to make a financial settlement. The whole matter had been 'very costly already'; the school had made a 'huge investment' as it was. The Head was, however, prepared to meet with W in mediation, to discuss her return to the school. He would not accept K's being at the meeting as such but did agree to her being in a nearby room, for W to consult as necessary. He also agreed to see whether, if W did not return, she might be entitled to some sort of ill-health or retirement payment. After about an hour and a quarter, however, A had to rush off to another meeting, a surprising lack of commitment – in the researcher's view - given what A had suggested about the cost and importance of the case to the school.

After these two pre-mediation meetings, there was some delay because of the parties' holiday commitments. Before a first joint meeting (let alone the several meetings suggested by a systems approach) could be arranged, however, A brought the mediation to a close when it transpired that W had been arrested and questioned by the police, and had accepted a caution for making masses of silent telephone calls to the school, at times calculated to cause maximum disruption. Even then, she had not been honest, at first, with her representative as to what had happened with the police, and had encouraged K to continue seeking a financial settlement, of some two years' salary! The last the researcher heard was that W had decided to resign. The researcher was left with the thought that there might well be merit in the idea of a mediator working with a therapist (the so-called Conjoint Mediation and Therapy model) on certain cases. Might a therapist have picked up more from W than the researcher/a mediator, and have identified a need for psychological help rather than, or at least before, any mediation? This will be explored in the next chapter.

Workplace friendship deterioration

When the researcher worked in the 1990s as a volunteer mediator for the then Milton Keynes Neighbour Dispute Mediation Service, it was not uncommon to find that the neighbours in dispute had, at one time, been the best of friends. It was obviously less surprising for the researcher to learn, from his Milton Keynes Family Mediation Service work in the next decade, that separating couples had once been very close. This mediation experience from outside the workplace, of disputing parties often having had a good relationship once, is something that the researcher has found inside the workplace too.

Acas's report on its 2012-2013 individual mediation activity gives the following table (Acas 2013c:4) on the relationship between parties involved in mediation, based, albeit, on a relatively small number of mediations and completed evaluation questionnaires:

Table 7.8 Relationship between parties involved in mediation (%)

	2012-2013
An employee and his/her line manager	58
A group of employees and their line manager	08
An employee and another individual who has authority over him/her in the organisation	13
A group of employees and another individual who has authority over them in the organisation	03
Two individuals where there is no authority relationship	13
An individual and a group where there is no authority relationship	00
Two groups of employees	03
Other	03
Base	*72*

Yet, of the nearly 40 instances of individual mediation activity listed on EARS for the researcher (as lead or support mediator) since 2006, and other instances not listed on EARS, the vast majority have concerned situations where the parties had 'come to know and treat each other as whole persons, rather than simply workplace role occupants' (Sias et al 2004:321), but friendship had deteriorated due to one or more of five primary causes of workplace friendship deterioration: personality, distracting life events, conflicting expectations, promotion, and betrayal. Further, the researcher's experiences as a mediator have been not dissimilar to those of his Acas colleagues whom he interviewed.

It is, therefore, probably not unreasonable to speculate that many of the mediations on which Table 7.8 above is based (and similar tables in earlier years) had involved relationships with a personalistic focus, and that friendship had deteriorated due to one or more of Sias et al's (2004)/Sias and Perry's (2004) 'primary causes'. So, workplace friendship deterioration will have contributed to the quality of relationship of many disputing parties with whom those operators had dealt, and that quality of relationship will in turn have contributed to the tractability of disputes (arguably, the major situational variable in predicting success in workplace mediation).

None of the mediation actions of the operators interviewed by the researcher appear, however, to have been consciously informed and influenced by the concepts of workplace friendship deterioration. It may be that Acas mediators should deliberately bring into their separate meetings with disputing parties the concepts of workplace friendship deterioration and use the results when deciding what 'dispute impact' to attempt in a case – manage, settle, or resolve the dispute. The researcher will consider this more fully in the next chapter.

Commitment of the parties to mediation

In chapter six, the researcher said that there were only eight cases listed on EARS as unresolved for the whole of Acas, for the first six months of 2013/2014. Further, that in looking at the reasons suggested in EARS for the lack of resolution in the eight cases, a point to be drawn was that the disputing parties, in most of the cases, could not commit to the concept and demands of mediation. They would not put themselves in the hands/control of the mediator concerned, even as regards the mediation process (not outcome).[90] For most of the eight cases, therefore, the suggestion in the EARS entries was that it was the parties themselves who were mainly responsible for the lack of resolution, remembering, of course, that EARS entries are made by the mediators concerned and may not, therefore, be totally objective.

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[90] Irving and Benjamin (2002:99) outline the work mediators might do at the pre-mediation stage, to get disputing parties ready to engage in productive negotiation; and Miller and Seibel (2009) discuss legal practitioners preparing their clients for mediation. One of the researcher's BSE colleagues has started 'coaching' disputing parties at the pre-mediation stage. Might other Acas mediators also do more to prepare disputing parties?

The researcher decided to look also at the category of cases of 'Mediation closed as unprogressed', not least because EARS shows there is a grey area in terms of categorisation between Dispute Not Resolved and Mediation Unprogressed, in the minds of Acas mediators. The researcher looked at the period (1 April 2013 to 12 January 2014) when reviewing cases of 'Mediation closed as unprogressed'. EARS suggests there were 20 such cases for the whole of Acas. Following through the Area breakdown of these 20 cases (for example, two for Birmingham, one for Bristol, etc), the researcher has been able to identify EARS entries for 18 of them. Two cases have, however, eluded him (the researcher). Of the 18 cases identified, it would seem that, in at least 14 of them, the lack of progress was down to one of the parties, as follows:

Table 7.9 Acas mediations closed as unprogressed, 1 April 2013 to 12 January 2014

Case	Reasons suggested in EARS as to why mediation unprogressed
A	M 'did not wish to mediate. No interest in resolving or trying to resolve, previous in house activity had the same result.'
B	Dispute between C and T but mediation unprogressed because T 'was not prepared to work with . . . [C] ever again'.
C	W 'informed HR before the pre meeting and . . [the mediator] during the meeting that he did not want to proceed to a joint meeting and wanted to try and resolve this with . . . [U] himself informally'.
D	'2nd party meeting - did not want mediation after full and frank discussion, cannot work with other party and cannot face being in same room.'
E	'One of the parties . . . [R] called after the start time of the mediation . . . [pre meeting] to call off (via voice mail) . . . [W]hen [mediator] phoned . . . [R] she was on voice mail each time.'
F	'. . . [Commissioning party] rang – one of the . . . [disputing] parties doesn't want mediation.'
G	'Fall out between manager and member of staff. All seemed ok but the member of staff decided on the day before that she would not attend' the joint meeting.
H	'Not going ahead with mediation as after initial meeting with . . . [SJ] it was agreed she wasn't looking for mediation.'
I	'One of the . . . [disputing] parties stated that internal grievance to be investigated and completed before mediation can take place.'
J	'Mediation will not go ahead as one of the . . . [disputing] parties was not aware from employer of potential contact from Acas, and stated that he doesn't want to hear anything from the . . . [other party whom] he reported as a safeguarding issue.'
K	'The head of IT wanted the warning letter . . . [removed], the . . . [school's] deputy head will not countenance that. Inappropriate for mediation.'
L	Mediation involving manager and employee proposed in connection with employee's return to work, but 'the employee is very nervous about returning in general given the history'.
M	'. . . one party flatly refused mediation – she said employer had told her she had to attend but she will resign sooner than accept.'
N	'After several chase ups the other party had not contacted . . . [the mediator].'

Source: EARS

In three of the other four unprogressed cases, the reasons for lack of progress are not clear from EARS. In the final, 18th case, the commissioning party 'got back in touch to say that he has decided to use another company [than Acas] because of their offer of on-going support'. This appears to be the only 'mediation unprogressed' case, in the nine months in question, where the responsibility for lack of progress clearly did not rest mainly with the parties themselves.

Dispute sub-system

Case D above is of particular interest since it illustrates the idea of disputing parties being part of a dispute sub-system, which is – in turn - part of a wider system that will be subject to environmental influences (such as family and friends). The mediator's notes on EARS indicate that, after coming to a decision in her pre-mediation meeting that she did not want mediation, one of the disputing parties had nevertheless 'spoken to friends and family' on the subject over the weekend. They had reinforced her decision. The mediator commented in the EARS notes:

> I believe this was a case where family resentment had hindered the mediation process – [the] parties were linked via family and there was an ongoing monetary dispute that was impacting on their ability to work together.

Also, the researcher recently conducted a mediation between two (male) managers at a company providing IT services. According to his contemporaneous notes, the commissioning party (in HR) had apparently asked the local Acas mediation co-ordinator whether she might sit in on the mediation because, she felt, much of the anger of one of the managers was against the company (and people in it) as opposed to the other manager, and she might be able to usefully contribute to a 'broader' debate in the mediation. The Acas mediation co-ordinator had, however, refused the request, essentially because that was not how mediations were conducted by Acas (or, indeed, by most other providers). But, on reflection, the case, which rather fizzled out with the resignation of one of the managers, might have been better dealt with, had the initial focus of the researcher's intervention been (perhaps quite explicitly) on the dispute sub-system rather than just on the two individuals.

Why mediate if not committed?

It may seem strange to suggest that some people end up in the 'voluntary process' of mediation less than fully committed to the concept, to the idea of working together to find a way forward out of the difficulties in which they find themselves. But that has been the researcher's experience in community, family and workplace mediation, and the experience of many of those workplace mediators he has interviewed for this study. For example, the researcher did voluntary work as a community mediator in Milton Keynes in the 1990s and encountered a variety of degrees of commitment/non-commitment to mediation, exemplified by such types as:

- the party originating a mediation who wanted to tell her/his story to mediators but who did not want any approach made to the neighbour whose actions were the subject of complaint;

- the neighbour who was prepared for mediators to visit her/him but who did not want to sit down in mediation with the party originating the complaint; and

- the originating party and the neighbour who agreed, in their separate meetings, to meet jointly but at least one of whom did not turn up, or who both turned up but (one or both) with little intention – in the event - of moving away from the positions that they had adopted, perhaps mainly wanting to give the other 'a piece of their mind'.

In addition, the researcher worked as a family mediator in Milton Keynes for about 10 years, up to 2009, helping separating or divorcing couples 'to discuss and, where possible, decide for themselves any issues that arise from the separation or divorce' (Stevenson 2000:39). Increasingly, however, when mediation was discussed with those turning up, they would indicate that they had only come to mediation because they had been directed to do so by their legal representative. The latter had, for instance, told them that the financial summary they needed to progress their separation or divorce could be produced more cheaply within mediation than outside. Once the summary had been done, the lack of commitment to mediation as such would often become obvious.

In family mediation, the researcher also encountered disputing parties who used the mediation process and its joint meeting(s) primarily as an opportunity to verbally attack their former partner, and to attack the researcher when he tried to intervene to enforce previously agreed ground rules prohibiting abuse. The researcher was told on more than one occasion to 'be quiet, I'm talking to my wife'! The researcher experienced, too, at least one disputing party who used the joint meetings to try to persuade the ex-partner who had left him to come back home. In that case, the researcher brought the mediation process to a close when the motive became patently clear after two or three joint meetings, and it was clear the ex-partner did not want to return to what had been a controlling environment. (Had *both* parties wanted to reconcile, the researcher would have encouraged an approach to, say, Relate.)

These community and family mediation situations are not wholly transferable to the workplace but they do, at the very least, remind us that not everyone has the same enthusiasm for, is as fully committed to, mediation as the rest of us, at least at the beginning of their mediation 'journey'. (Some parties less than committed to mediation at the start may develop, or be encouraged to develop, a commitment.) There are, as suggested earlier, degrees of commitment to mediation, which will be determined by a variety of factors including the disputing parties' attributes, the history of their relationship (and its breakdown), and their reaction to the mediator(s) (whether, for example, s/he is perceived to be impartial).[91]

Going through the motions

In chapter three, the researcher quoted Newman and Richmond (2006:102) on some parties being part of a peace process but not seriously interested in making compromises or in committing to a peaceful endgame. In the researcher's experience, in an Acas workplace mediation context, some disputing parties do not openly express hostility to mediation but simply 'go through the motions', for example, a manager at a school in 2014 only able to find one short slot in a whole week for an important joint mediation meeting; while, as earlier indicated, some commissioning parties use mediation in an attempt to buy some time.

Or, one mediator suggested, commissioning parties – while having a degree of commitment to mediation - are often looking deep down for some sort of vindication of steps they have taken (and the end results of those steps). So, that mediator said:

> When I haven't been able to do much, commissioning parties will say, 'That's alright then. We haven't made a mistake, missed anything.' It's almost a relief [to the commissioning parties] that Acas hasn't found anything. They don't expect Acas to make a great deal of difference. Their expectations are fairly low: 'We're not holding our breath.'

Slightly differently: in the researcher's experience, some commissioning parties appear to quickly lose interest once Acas has taken on their case, perhaps an indication that they are not expecting very much from the mediation or that they feel the problem has been taken from them.

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[91] In one (police) case observed by the researcher, in 2011, the mediator told him that the officer actually commissioning the mediation had admitted he was doing it, unwillingly, under instruction from above, and that he did not think mediation was the way forward in the dispute!

To be fair to any disputing parties who are simply going through the motions: the supposed voluntary nature of mediation is a variable feature (Boulle and Nesic 2001:8), if not a myth (Kolb and Kressel 1994:460) – put simply, mediation is not always truly voluntary. The disputing parties may have been instructed – explicitly or implicitly – by a senior manager, or by a disciplinary or grievance panel, to attend the mediation. When stressing to one of the disputing parties in a pre-mediation, separate meeting, that mediation is a voluntary process, it has not been uncommon for the researcher as mediator to be met with a quizzical look and to be told that s/he (the disputing party) had been instructed to turn up. Acas's latest report on those individual mediations conducted by its staff shows:

> Just over one fifth (22 per cent) [of disputing parties] said that they felt pressured to take part [in mediation] and that it would have been difficult to say no, with five per cent reporting that they were given no choice. Of those who felt pressured to take part or were given no choice at all in participating, eight in ten (81 per cent, 17 out of 21) said that most of the pressure came from their employer (Acas 2013c:7).

Complexity

One mediation reported on EARS illustrates both the complexity of some workplace mediations and also the differing degrees of commitment to mediation that may be found among the disputing parties in any one case. The case concerned a primary school and had originated in an Employment Tribunal claim, alleging disability and race discrimination, brought against the school and its (retired) Head Teacher by a Teaching Assistant. The claim had been dismissed at tribunal but it had 'named certain other members of staff apart from the retired Head Teacher, who all had to attend the ET and give evidence'. These others felt 'bruised and upset by the experience and on all sides trust, confidence and respect [had] been severely damaged if not destroyed'.

Mediation was 'seen as a way of rebuilding working relationships' between MA (the Teaching Assistant), on the one hand, and JP (the Acting Head) and AS and NB (both teachers), on the other. The mediator reports on EARS that he held separate meetings with the four individuals:

> AS felt that she was unable to move to a joint meeting. Joint meetings were held between MA and the Acting Head and [between] MA and NB. The meeting with NB was successful but the meeting with the Acting Head was difficult and reached an uncomfortable compromise.

So, as suggested, a complex case; and with differing degrees of commitment to mediation by the disputing parties – leading to very different results for the same mediator in the three mediations making up the case: first, no joint meeting and no other obvious progress; next, an 'uncomfortable compromise'; and, third, a 'successful' meeting.

Other cases reported on EARS also illustrate the point, to quote Svensson and Wallensteen (2010:8) again, that 'Often outcomes do not just reflect the achievements of the mediator, but also the ambitions of the primary parties', and that these ambitions may be complex. One case reported in EARS in 2012, concerning a Northern orchestra:

> . . . involves a situation where the relationship with 3 musicians has broken down with a fourth. In initial phone calls the 3 made clear that unsure of whether to proceed with mediation at all and even if so would only be on basis of a mediation with all four of them together. Say that have made clear to their manager their position re group mediation. 4th musician only willing to proceed with 1:1 mediation. Explained situation to commissioner who wanted [pre-mediation] meetings to take place. At [these] meetings the three all reaffirmed [they] would not do 1:1s, and the key individual of this group confirmed that he would not be prepared to do any mediation, group or individual.

The disputing parties in the orchestra were not, then, so committed to mediation that they were prepared to forgo questioning the mediation process that would be used, and the mediator was unable to overcome that lack of commitment. It will be recalled that, in looking at cases closed as unresolved in the first six months of 2013/2014, the researcher identified a similar reluctance by parties to put themselves in the hands/control of the mediator concerned, even as regards mediation process (not outcome).

As already indicated by the researcher, when looking in chapter six of this thesis at the strong desire of several Acas mediators to get through the mediation process, some disputing parties are quite open about not being interested in mediation, particularly if it means sitting down with the other party. The researcher will discuss in the next chapter whether that lack of interest, of commitment, should signal the end of efforts at dispute resolution (as it often does) or whether it should lead to a search for alternative methods of dispute resolution.

<u>The Acas context/system</u>

Applying systems theory, the researcher looked not only at the mediators themselves but also at the organisation from which they operate. Accordingly, this sub-section focuses on the Acas context to this study and its impact on mediation success, and starts from the premise that the organisational context or system in which a mediator operates is going to be influential on, but not always helpful to, her/his work. It (this sub-section) should, of course, be read in conjunction with the researcher's earlier chapter (two) on Acas.

We have already seen how Acas determines the experience of the mediator and her/his stage of development, attributes and ambition, and seen the impact these variables will have on mediation success. In addition, other aspects of the Acas context will impact on mediation success, as follows:

Culture

Acas culture tends to celebrate the practical and virtually ignores the theoretical. In this regard, the researcher can vividly remember, from his time as staff training manager for Acas in the late 1980s, a training session that had proved extremely unpopular with the participants. It had been run by a psychologist from Acas's then Work Research Unit, on an Acas internal collective conciliation training course. The psychologist had apparently attempted to get the hard-boiled collective conciliators present to undertake some artwork – to draw pictures to illustrate their feelings and thoughts on particular points that had been raised. The conciliators' reported negative reaction brought to mind the (fictional) Reggie Perrin character CJ, with his catchphrase, 'I didn't get where I am today by . . .'

The researcher can also recall, from those Acas staff training days (spanning two and a half years), that the more popular training courses and sessions were generally those where Acas staff learnt 'concrete' matters and processes they could then apply in their work. The corollary was that Acas staff appeared to have a suspicion, if not a distaste, for anything that smacked too obviously of the theoretical. The researcher believes that still to be the case today. There still seems now, as there very much has been in the past, a 'search for the Holy Grail' of a technique or training event that will prove irresistible to clients and bring Acas lots of business, whether chargeable or not. In this

connection, at the moment, 'mock mediation' training events have resurfaced and are being promoted across the country. (As indicated in chapter four, there is, nevertheless, a theoretical grounding to all mediation practices.)

Outside of staff training, as an Acas adviser and conciliator, the researcher has always been aware of the eagerness with which anything concrete, that might be used with clients, is greeted by his colleagues when shared with them. Also, there have been several 'how to do it' manuals issued by Acas for internal use, over the years: for conducting industrial relations audits in organisations, for mounting attitude surveys, for problem solving, for running mediation training, and so on. At one stage, attitude surveys by interview, later by self-completion questionnaire, were very popular in Acas; then, the fashion became workshops to look at participants' visions for the future, potential barriers to those visions, and ways of overcoming those barriers; and, latterly, there has been the so-called Acas Model Workplace tool, initially in hard copy, now launched as an electronic device, which helps people to check how good their organisation is at people management from recruitment to performance management.

It has also been noticeable that the '[all] field operators' e-mails that Acas operational staff send out fairly regularly to their colleagues will rarely, if ever, raise theoretical issues for consideration and discussion. Almost always, they will be seeking something immediate and tangible such as an example policy, procedure or agreement, or a training programme, or a set of PowerPoint slides, or a summary of the law on some matter or other. In this regard, one of Acas's Area Directors wrote out to field operators recently, as follows:

> Some of the response to the 'Acas at its best' exercise suggested that we're not as good as we could be at sharing knowledge, market intelligence and materials etc across the Areas. There is a lot of online activity these days using various tools to enable people to share knowledge, documents and generally network in a virtual sense, [and] one of the tools used is called Yammer. We'd like to experiment using this tool to see if it can be of use and with that in mind I'm seeking volunteers from across the country to take part.

In addition, in the researcher's experience, Acas clients appear more likely to give negative feedback on training sessions with a fair dose of theory than on those sessions which mainly give them some definite additions to their skill base, a client preference which will obviously have influenced trainers. The attraction of the CIWM course to

clients will not be unrelated to its being a techniques/how-to-do-it, rather than theory, course.

Unlike in his previous family mediation work (where he regularly received both individual and group supervision), the researcher has never had a supervision session within Acas, in some ten years of mediation work. All of the Acas mediators interviewed similarly said that they had never had a mediation supervision session. As indicated in chapter five, there was a small experiment in 2012, in the Acas London, Eastern and Southern England Region, where some mediators were observed at work by experienced colleagues and their work discussed with them. Other Acas regions were not, however, keen and there do not appear to be any moves to implement the experiment permanently, and more widely. The resource cost of observation, set against the small number of Acas mediations, and the lack of promotion of mediation appears to have discouraged Acas senior management.

The researcher was told by some interviewees that, after a mediation, they might discuss the case in question with a colleague, ideally another mediator, in their Area, if only to offload some of the emotion generated. (One example of emotion, according to an interviewee, came from a mediation between staff in a 'secure' school, where the mediator was upset by seeing some of the children resident there: 'They looked like normal children, just like my son.') The researcher was not, however, told by interviewees of any structured approach to reflection on what they had done in mediation, and on why certain things had worked (or not) for them. There seems to be something of a blind faith in the Acas five-stage facilitative mediation process, that if followed, it will usually see the mediator alright, so making reflection on mediation results appear less necessary than otherwise, almost superfluous.

The facilitative/problem solving mediation model is firmly established in Acas's mind. Acas has trained its own mediators in it, they appear comfortable with it, and Acas churns it out on CIWM and shorter mediation courses, with a view to trainees then practising it themselves. Yet as suggested in chapter two, Acas may have slipped into the model without a great deal of thought, and authors such as Whatling (2012) are now starting to question it. It *can* handle workplace relationships (the poor relationship becomes the 'problem' to be tackled), but is it better suited to 'quick fixes' of more

concrete matters? Is the mediation of relationships best left to models such as the transformative one? Are Acas mediators working, anyway, with a rather simplistic interpretation of the facilitative model? These points will be considered in the next chapter.

The researcher has indicated earlier how much Acas values its Certificate in Internal Workplace Mediation (CIWM) course, not least because of the revenue it generates. Ironically, while some CIWM tutors have done very little actual individual mediation work (or none at all), and other Acas staff have on their own admission started mediating without any specific training to do so, in order to bolster their credibility as mediation trainers, many of the more experienced mediators in Acas do not appear to be used much, if at all, by their Areas to do mediation training. Of the 79 names in the current Acas 'mediators' internal e-mail group, only about a quarter appear to have been involved as CIWM tutors. The most experienced mediator in Acas (according to EARS) said, when interviewed, that she had never been asked by her Area to be involved in any CIWM training.

Rightly or wrongly, a lot of the time at get-togethers of CIWM tutors over the years has been spent on administrative matters, such as the consistent marking of trainees' portfolios, and less time than one might expect on expanding the mediation knowledge of the Acas tutors. This sometimes spills over, accidentally, onto the CIWM courses themselves, with some trainees reminding tutors that their main purpose in attending is to learn about mediation and not about how best to complete a portfolio! Revealingly, when the researcher was recently asked to contact tutors about a possible revision of the suggested reading list for CIWM trainees, the response from tutors was almost non-existent, with one of the only four who replied volunteering that he had never read any of the suggested books/articles even though he had helped run several courses.

To what is already in his Acas chapter, that Acas does not publicly 'push', to any great extent, its own individual mediation work, the researcher would add that there has been no obvious interest/attempt of late by the organisation to analyse why so many mediation enquiries have not materialised in actual mediations. Further, that Acas senior managers have not appeared to make much attempt to discuss with their mediators the implications of, say, Acas research reports on mediation; it is almost as

though these were for 'other people', outside Acas. Also, in the researcher's experience, they have shown no great interest in advancing mediation in general. To be fair to senior managers, they may get trapped in a quest for so-called customer delivery days and for revenue, and if, say, individual mediation does not seem to be 'producing the goods', they perhaps feel pressured to quickly focus on other Acas functions that might. This will, however, be considered further, in the next chapter.

The researcher's experience of Acas has, therefore, been that its culture is one that values the knowledge, and the use, of techniques and tools over the knowledge, and the obvious use, of theory. There is, of course, nothing wrong as such with being enthusiastic and knowledgeable about techniques and tools (for mediation, in the current context), and it may be that, for whatever reason, Acas has been heavily staffed over the years by people whose learning styles favour this (Kolb's 'pragmatists' (Honey 1988:103)). However, their preference may well have been at the expense of valuable learning from theory. 'I've never really thought about it' has been a common response to the researcher's more theoretical questions in the interviews he conducted. This point and those that follow in this section will be discussed in the next chapter.

Emphasis on impartiality/neutrality

Whether it is referred to as impartiality or neutrality, Acas has always emphasised that it does not take sides when dealing with parties at work. 'Not taking sides' is particularly emphasised in potential mediation cases. One problem, however, with what might seem, at first sight, an unimpeachable approach is that the desire not to appear biased has sometimes led to questionable (and, potentially, less successful) mediation practice. For example, as intimated earlier, Acas mediators have often entered dispute situations with only minimal background information/briefing and little knowledge about commissioners' objectives because to seek/obtain more in advance of actually meeting the disputing parties might, in the mediators' view, have compromised their impartiality/independence, and led to problems over confidentiality. Making a virtue of a lack of background knowledge is, however, questionable and not something that happens with other Acas functions.

Also, in a paper investigating intake calls to community mediation services, there is an argument that 'Mediators' displays of impartiality [have] resulted in the rejection [by parties] of mediation as a course of action' (Stokoe 2012:1). To elaborate:

> Robert Benjamin (2010) argues that people do not want to negotiate a dispute or accept that there are two sides to a story; they want a third party to establish that they are right and that the target of their complaint is wrong (Stokoe 2012:9).

This may help explain why so many mediation enquiries to Acas have not converted into actual mediations (that is, Acas mediation co-ordinators stressing that their mediators would take a strictly impartial line). Further research would, however, be necessary to confirm or refute this.[92]

To give a small illustration of the lack of conversion: in June 2013, the researcher reviewed the 'Business Development' activities on EARS for Acas's Bury St Edmunds (BSE) office, started between 1 April 2013 and 12 June 2013. There were 76 entries, three of which were 'record cancelled'. All of the entries for BSE's mediation co-ordinator were checked and 13 were identified as relating to mediation. Of these 13 enquiries, however, only one had led to an actual mediation. There were, of course, other sources of potential mediations for Acas BSE in that April-June 2013 period, but the point remains that only one mediation seems to have emerged from 13 supposedly 'warm' enquiries dealt with by the specialist charged with converting them.

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[92] One Acas mediation co-ordinator/gatekeeper told the researcher that, in his Area, 'we don't ever follow up the reasons why' mediation requests do not convert, 'but I suppose there are a variety of reasons:
1) Disciplinary proceedings are going ahead.
2) Cost (especially in the voluntary sector).
3) When employers realise the extent of the confidentiality and that they will not find out about why, if the mediation 'fails'.
4) When they realise that the parties can walk away at any stage and they won't know why.
5) The matter can be better dealt with by a different Acas service.
6) When the parties realise that mediation isn't a magic wand, they go away.
7) Sometimes parties want us to tell the other party that they are right (ie be judgmental).
8) The commissioner believes that one of the parties won't be sufficiently strong, emotionally, to go through with it.
9) Occasionally things have got so bad in the time between the call to us and the [mediation] contract coming back, that one of the parties has left.'

Further, the researcher's view, gleaned over the years, is that with any topic/activity, Acas will often spend a lot of time discussing administrative matters such as how best to record the topic but much less time discussing, say, any ethical issues thrown up by it. So, when Banks and Saundry (undated:10 and 14) suggest that mediation might be a management process and a means of controlling dissent, and that organisational issues get recast as personal disputes, the researcher would think it fair to suspect that Acas has given little thought as to how these comments square with its proclaimed impartiality/neutrality. A commissioning party's decision that a dispute is an individual rather than collective one is rarely challenged and accordingly the Acas mediator is effectively briefed to disregard the system.

Of the EARS entries that he has reviewed, the researcher cannot recall many that indicated the mediator's grappling with the potential conflict between the imperative of impartiality/neutrality and the correction of power imbalances between the disputants (both demanded by facilitative mediation). The researcher has not, however, read all of the 2,000 or so mediation entries in EARS and, as has been suggested already, EARS entries are often lacking in detail since there are few mandatory fields. The researcher as mediator has contemporaneous notes on an early, pre-EARS, voluntary sector mediation case (in Hertfordshire, in 2003), where one of the disputing parties refused to go on to a joint meeting because she feared retribution by the other party (her superior) if she was open and honest at that stage. The researcher had to accept this; it would have been unethical to offer guarantees on which he could not deliver.

Much more recently (summer, 2014), the researcher as mediator (participant observer) found himself in a similar situation but with disputing parties in a Suffolk school. The more junior, a teacher, was reluctant to go into a joint mediation meeting with her Director of Learning, again because she feared retribution if she was open and honest. And, again, the researcher could not offer any guarantees, but in this case the teacher believed she had no option but to go ahead if she wished to keep her job. Any danger of retribution has, however, been pre-empted by the compromise agreement that the teacher sought, and obtained, through her trade union.[93]

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[93] In the researcher's Acas experience, and according to Acas's research, there are few individual mediation cases where a disputing party is represented at all, let alone by a trade union, perhaps because Acas's mediation co-ordinators/gatekeepers and its

Time constraints

Ideally, a mediator will be allowed whatever time s/he judges necessary to succeed in a mediation; but, in practice, the amount of time s/he can spend helping the disputing parties – even in a seemingly intractable dispute - is often limited because the commissioning party is not willing to fund more than, say, a couple of days' work in aggregate. Particularly if the commissioning party has come to Acas as a last resort in a dispute on which, in that party's view, not too much more resource should be expended.

Perhaps mediators in Acas collude in this by routinely volunteering that, if a mediation looks like taking more than a couple of days, they will first check out with/seek authority from the commissioning party. Acas mediation co-ordinators, when dealing with enquirers, and Acas's mediation 'contract' letter talk in terms of a maximum of two days (in aggregate), initially, to mediate at least a two-disputants case, a maximum of two days regardless of the complexity of the case. One mediator remarked in interview that 'we live for years with some people and yet still don't really know what drives them'. So, it was then argued, 'what can a mediator achieve in one or two days' in terms of getting to know the root cause of a dispute, with a view to preventing its throwing up further conflict?

promotional literature discourage representation of any sort. Bennett (2012:482) says that 'despite a general support [among the union representatives interviewed] for the potential benefits of mediation, this was still tempered by a concern that as a process it could be in conflict with their traditional role of representing their member in a dispute'.

Union representatives may therefore find the mediation process difficult to adjust to. One time (late 2011), the researcher handled a local authority case which straddled individual conciliation and individual mediation. The employee was represented by a full-time official (FTO) and, although the FTO was complimentary afterwards, the researcher suspects he was frustrated by the mediation process and the restrictions it placed on him. At one stage, he told off his member (in a caucus meeting) for 'not making enough' of a situation where management had behaved badly. Another time, he came into a meeting that the researcher was having with the member, to complain that the meeting was going on too long.

Many Acas interviewees recognised that a period of two days was not long enough to do other than touch the surface of many disputes, although several thought that commissioning parties would often be resistant to a longer period, which led to discussions with the researcher about whether commissioning parties really wanted anything more than a 'quick fix' in cases. This will be considered in the next chapter.

The concept of mediator 'readiness', covered in chapter four, suggests among other things that a dispute must warrant a central place in the mediator's life. Yet Acas mediators will sometimes try to do everything (that is, separate meetings and joint meeting) in a day, usually because of their other commitments. 'I'd find it difficult to fit in more than a day [on a mediation] around my other work' was one comment, the other work being, typically, statutory individual conciliation and training.

Closing thoughts

This chapter concludes with points from a table drawn from EARS, examining the 18 facilitative mediations started in a nine month period (1 April 2013 to 31 December 2013) in one Acas Area; a directive mediation has been excluded. The table is shown in Appendix Seven. The points taken from it and mostly made in this chapter include the following:

- a lack of detail in the recording of many cases, which makes it difficult for managers reviewing mediation work through EARS to ascertain where help is needed by their mediators;
- those organisations using mediators being in the public sector in the majority of cases (about 12 of the 18);[94]
- not a great deal of mediator experience, four of the seven active mediators not having handled ten cases each;
- little obvious involvement of newly-trained mediators by their more experienced colleagues (only two clear examples out of 18 cases and, even then, the lead mediators in the two cases were far from being the most experienced in the Area);

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[94] This ties in with research such as that reported upon by Bennett (2012:483), which 'found that the public sector tends to have a more developed model of grievance and discipline procedures, which lends itself well to mediation'.

- at least a couple of examples of mediation involving former friends who had fallen out;

- a reluctance by some disputing parties to put themselves in a mediator's hands;

- no evidence that mediators are recognising that the duration of a dispute and the stage it has reached should help determine the mediator's approach;

- perhaps too rigid an adherence by mediators to Acas's favoured mediation process/unwillingness to consider other dispute resolution approaches;

- little obvious follow-up of mediations; and

- a suspiciously high percentage - at least, to the researcher's mind - of Dispute Resolved outcomes (61% of the 18 cases and 65% of those 17 cases where an outcome is recorded).

Several of these points will be discussed in the next chapter.

Summary

This chapter has looked at the researcher's findings in relation to how mediators achieve success and the relative significance in this of mediator variables, and of situational variables relating to the dispute and to wider systems. It has explored the mediator variables of

- experience, giving such details as the number of mediations conducted by the respective Acas offices, and the number of Acas mediators;

- stage of development, including the idea of some mediators being 'stuck' in their development;

- ambition, and how even the more experienced mediators will often offer only a basic service, even when something more would seem to be called for; and

- attributes, focusing on listening, building rapport, readiness, and the use (or not) of ground rules.

The chapter has also explored the situational variables of

- the tractability of conflict, focusing on the characteristics of protracted time, identity (of the other party) denigration, conflict profitability (to someone), absence of ripeness (as a pressure toward negotiation), and solution polarisation (that is, the competing pulls of salient solutions);

- the parties themselves, including what the researcher has labelled as 'mental fragility' and the concept of workplace friendship deterioration;

- the parties' commitment to mediation, including the impact of the dispute sub-system and the researcher's experience of people ending up in the 'voluntary process' of mediation less than fully committed to the concept; and

- the Acas context/system, starting from the premise that the system or organisational context in which a mediator operates is going to be influential on, but not always helpful to, her/his work.

Finally, the chapter included some closing thoughts based on an EARS analysis that reinforces many of, but also adds to, the points made in this chapter.

CHAPTER EIGHT: DISCUSSION AND CONCLUSIONS

Introduction

This chapter will discuss and draw conclusions from what the researcher has learned from his review of the relevant literature, and his empirical work, in respect of his research questions as to what is success in workplace mediation, and how mediators achieve success. The chapter will start with a reminder of the theoretical framework in which this study is set and, then, look in turn at success in mediation; at mediator variables important in achieving success; at situational variables, both those relating to the dispute and those relating to the Acas context/system; at mediation as the neglected function of Acas; at the model predicting success (or not) in workplace mediation that was first mentioned in chapter four; and at the generalisability of the findings about the Acas context/system. There will be a number of recommendations for action by Acas throughout the chapter, recommendations summarised, for convenience, in chapter nine, along with some proposals for further research.

Theoretical framework

To recap, the theoretical framework in which this study is set is that of 'systems', a system for these purposes being a bounded collection of linked, inter-dependent components or elements (human or otherwise) with a particular purpose, the components being affected by being in the system and likely to change the system if they leave it (Carter et al, 1984:4 and 113). An organisation within which a workplace dispute occurs might be seen as such a system.

Some components of a system may be grouped into sub-systems and this study regards those typically involved in a workplace dispute as a dispute sub-system of the wider (host organisation) system. There will be environmental influences outside the wider system that will impact on the components of that system; and components such as the disputing parties may be located simultaneously both within a dispute sub-system yet also within the rest of the wider system (and its other sub-systems).

One of the environmental influences on the wider system may be an Acas mediator intervening to try to achieve an agreement/mutual understanding between the disputing parties. The mediator will in turn be particularly influenced – in what s/he does – by her/his experience, stage of development as a mediator, ambition, and attributes. The mediator will also be influenced by the Acas context/system in which s/he operates, and influenced by any other systems of which s/he is a component.

Other environmental influences outside the wider system, which include the family and friends of the disputing parties (often highly influential but rarely accessible to the mediator), and the economic, labour market, legal, political and social contexts in which the system is located, will also be part of, components of, other systems. The components of any dispute sub-system will interact to influence the nature and the results of a mediator's intervention and, ultimately, the outcome of a dispute. All of this has been put into graphic form in chapter four (pages 63 and 64).

It has been stressed already that any mediator looking to intervene successfully in any system should not neglect the linked, inter-dependent nature of its components. Interviews indicated, however, that the reality of Acas mediators' interventions appears in most cases to be simply contact with the disputing parties, after relatively brief contact with the commissioning party. Time pressures may well contribute to such a narrow, 'closed' systems, if not a non-systems, view.

A lack of application of the systems approach perhaps explains why some mediation agreements quickly collapse. The disputing parties are taken, temporarily, out of some of their usual systems for the purposes of mediation, only to be returned to them. A less limited approach, a wider focus for the mediator, would seem to be called for, for example, the mediator also speaking to work colleagues of the disputing parties, and literally asking more questions of commissioning parties and HR.

Wider focus for mediator
By way of analogy, the family mediation service for whom the researcher used to work ran a 'Listening to Young People' (LYP) scheme, which envisaged the mediator speaking directly to the children of the separating couple, but with the couple not present, so long as both (parents) agreed. The aim was to get at what the children really

thought on some aspect or other and/or to give them a feeling of involvement in what was happening in their lives. There was no question of expecting the children to make any decisions.

It may be that this LYP scheme has some transferability to Acas's workplace mediation work. There may not always be people in the workplace dependent on the decisions of the disputing parties in the same way that most children are dependent on their parents. But there may well be people whose working lives are 'touched' by the actions and behaviour of disputing parties, for instance work colleagues, and who want their say to the mediator, and/or people to whom disputing parties would like the mediator to speak.

In these circumstances, it might be appropriate for the Acas mediator to speak to those other parties, with the agreement of the disputing parties. The mediator would have to make it clear that s/he was not conducting any sort of investigation, with a view to determining right or wrong. If the LYP analogy is pursued, after the mediator meets separately with those other parties, they might feed back directly to the disputing parties (with the mediator present), or the mediator might feed back for them (to an agreed script). Obviously, there would be follow-on implications from Acas mediators' taking such a less limited approach, not least more substantial interventions, with clients paying more for Acas's services as a consequence.

The researcher accepts that, often, a commissioning party may not want the mediator's focus to be on other than the disputing parties. However, the researcher recommends that Acas reviews the approach its mediators take to individual disputes and the related training it offers them (including training in handling group mediations), with a view to their taking on board the idea that disputing parties will be part of a dispute sub-system that, in turn, is part of a wider system.

Success in mediation[95]

Writers on mediation, for example, Saundry et al (2011:7) argue that it is too simplistic to judge success (or not) merely in terms of dispute settlement. They suggest that, while mediation can have a direct effect in improving the outcomes of disputes, it can also have an indirect impact in improving the ability of organisations to resolve disputes outside of mediation. This is sometimes referred to as an 'upstream effect' (Banks and Saundry undated:8).

This research focuses, however, on the direct effect of mediation, which begs the question of how one measures 'improving the outcomes of disputes'. As noted in chapter four, many authors, for example, Latreille (2011:49), argue that there is no one index of success and have adduced a number of measures, including the degree of movement by the disputing parties from the positions they initially adopted; the proportion of the issues in dispute that were resolved; the extent of compliance with any agreement(s) reached; the fairness of the outcomes agreed; and the degree of improvement in the post-mediation relationship.

These measures are, however, difficult to operationalise: for example, it is not always easy to determine what were the parties' initial positions, let alone calibrate degrees of movement from them; to decide whether an issue has actually been resolved; to accurately ascertain the degree of compliance with an agreement; to say what is a fair outcome; and to judge improvement in a post-mediation relationship. Perhaps because of these difficulties of measurement, much of the mediation literature, and not just the so-called cookbook genre, tends to fall back on equating success in mediation with a written agreement being reached between the disputing parties, a rather basic measure of success.

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[95] Success, in this thesis, has been viewed very much through the eyes of Acas mediators. As for the commissioning and disputing parties in conflict situations, what is probably most important to them is that their problem is reduced or goes away, whatever form 'going away' takes. They do not necessarily want to be asked to do further work themselves. Perceptions of past 'success', however defined, may, of course, influence whether a commissioning party returns to Acas for further mediation help, or goes to another provider.

However, as indicated in chapter four, an author such as Ross (2000:29) advocates 'good-enough' conflict management, which is 'not about achieving a settlement of all outstanding issues' but helping the parties 'develop institutions and practices so that . . . [issues] can be addressed constructively in an ongoing manner'. The concept recognises 'the importance of many small self-sustaining steps . . . to improve a situation without necessarily getting everything right at once'.

Getting an agreement

Acas does not appear to have defined for its staff what it regards as success in mediation and, not surprisingly, there is a lack of certainty among mediators on this issue. In the main, however, those mediators interviewed defined success as 'getting an agreement', an agreement which might be written, verbal, or a mixture of both. The researcher has indicated in his findings some potential shortcomings of this reliance on agreements, including the under-appreciation, at least by less experienced mediation practitioners, of other potential mediation objectives, such as bringing clarity to a dispute situation or allowing the disputing parties to 'off-load' onto an outsider.

Some Acas mediators look for a written agreement always; others do so rarely. The researcher concludes that written agreements may be no more certain of execution than verbal ones, and that, far from denoting success, a written agreement might sometimes be a cover for a lack of success. As to the content of agreements that mediators seek, most Acas interviewees talked of mutual understanding on 'a way forward'. When probed as to what this actually meant, several mediators spoke of the parties 'being able to resume their working relationship', or enough of it that future contact between them would be mutually tolerable. Sometimes, these agreements addressed a number of quite specific issues between the parties, to a greater or lesser breadth and depth.

Never specifically adduced by Acas interviewees were the measures of success associated with the narrative and transformative models of mediation, measures respectively of developing alternative non-adversarial narratives, and of changing the quality of conflict interaction between the disputing parties. But the latter, changing the quality of conflict interaction between the disputing parties, would seem to be implicit in what several mediators said when probed about 'a way forward'. And, although they might not use the language of 'non-adversarial narratives', Acas's facilitative mediators

do often try to get disputing parties to reflect and draw upon previous situations when they have worked together productively.

Relative success

As indicated earlier, the researcher decided to include - in his attempt to define success in mediation - not only the views of the research population (that is, primarily Acas mediators) on the matter but also an exploration with that research population of an approach based on Bercovitch's (2006:295) 'conflict management impacts'. The researcher asked each interviewee to reflect for any one mediation case discussed on:

- what s/he had been trying to do - manage, settle or resolve the dispute:

  (i) dispute management – containing, limiting, if not de-escalating, a dispute;

  (ii) dispute settlement – establishing a framework that eliminates at least overt conflict; and

  (iii) dispute resolution – addressing the root causes of a dispute, negating the threat of further conflict-generating behaviour;

- whether s/he had achieved what s/he had been attempting; and

- whether this had been, with hindsight, an appropriate choice of dispute impact or whether it had been too ambitious or not ambitious enough.

In other words, instead of success being seen as an absolute, it might be judged relatively, that is, relative to what the mediator had been attempting to do.

Indicators of likely success and reinforcers of agreements reached

In the course of any mediation, there will be various indicators for the Acas mediator(s) as to likely success, success encapsulated - as we have said – in an agreement; and there will also be what might be called reinforcers of agreements reached. Some of these indicators and reinforcers were detailed in chapter six. Most of the measures are objective ones, but some of them are more subjective. The fact that mediators see certain events as indicators or reinforcers does not, of course, necessarily make them such, objectively. For example, a mediator might get through the mediation process and see that as an indicator of likely success, yet without her/his getting seriously near, in reality, to resolving the parties' dispute.

Getting through the mediation process may even be seen by a mediator as success in itself, almost regardless of the final outcome of a mediation. Conversely, if mediators realise they cannot get through all the stages of the Acas five-stage facilitative mediation process in a certain dispute, in particular, realise they cannot get to a joint meeting, they may wrongly abandon work altogether on the dispute rather than try a less 'pure' version of mediation, or go with some other dispute resolution process.[96] This is perhaps an example of mediator 'stuckness', which the researcher addresses later in this chapter.

Of the indicators and reinforcers mentioned in chapter six, the researcher judges that among the most significant are the mediator's feelings, and any returned evaluation questionnaires. For several mediators interviewed, 'you just know when you walk out of the door whether you have been successful or not'. As noted in chapter six, this may be a positive experience, or it may involve a realisation that there is unlikely to be an agreement between the parties, or recognition that an agreement reached by them is not worth very much. Or it may be something less 'black and white': the situation may be rather 'messy' and the mediator may have mixed feelings about her/his achievements, neither despair nor elation but elements of both.

A mediator's feelings when s/he walks out of the door will often be a reliable indicator as to likely success in a case, but the mediator may prove to be genuinely mistaken, to a greater or lesser extent. In this regard, we saw that mediators' perceptions as to success, as recorded in EARS, have generally been much more optimistic than those of mediation participants, as noted in the evaluation questionnaires they returned to Acas. Occasionally, but only occasionally, however, a returned evaluation questionnaire will pleasantly surprise a mediator.

The researcher thinks that, if Acas allows its staff to claim 'success' in mediation work, it should reflect upon what the measure of that success is to be and then incorporate

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[96] By way of analogy, in talking about what was then called family 'conciliation' (rather than 'mediation'), Richards (1990:11) said 'it may be appropriate to offer support prior to conciliation to individuals who are temporarily too disturbed by the ending of the marriage to engage effectively in the conciliation process'. Also, that there were 'cases where it is not possible [at all] to engage both parties in the conciliation process and counselling can be offered to one of them'.

that measure into EARS - restricted at the moment to the categories of Dispute Resolved, Progress Made, Dispute Not Resolved, and Mediation Unprogressed, unfortunately with no definitions of any of them. Perhaps not surprisingly, the researcher would recommend that Acas adopts as its measure of success a relative measure such as the dispute impact approach (which resonated with Acas mediators): success in any one mediation might be judged according to the dispute impact that had been attempted, whether that impact had been achieved, and whether the choice of impact had been, with hindsight, appropriate.

Into the dispute impact approach, the views of commissioning and disputing parties (if sought at the appropriate time) could be fed when deciding whether the mediator had achieved what s/he had been attempting, and whether this had been, with hindsight, an appropriate choice of dispute impact. Further research could throw light on how the dispute impact approach is adjudged to cope with some of the less definite, rather indeterminate situations often encountered in mediation.

In looking at 'appropriate choice of dispute impact', the researcher's suggested measure of success would embrace the situation (host organisation system) in which the mediator had to work, including the tractability of the dispute and the commitment of the disputing parties to mediation. The tiny number of mediations dealt with by Acas each operational year should make this nuanced measure of success manageable. If there were a lot of mediations, seeking the views of commissioning and disputing parties (on achievement and appropriateness) might become overly time-consuming. The results of any such enquiry into success, and lessons to be learned, should be fed back to the Acas mediator concerned, and more widely.

Follow-up
As to the other findings relating to success that emerged from the researcher's empirical work, the lack of follow-up of mediation agreements (written or otherwise), or of situations where there was no agreement as such or only partial agreement, strikes the researcher as being of particular significance. Some mediators interviewed do go back or, at least, appear genuinely to encourage the parties to come back to them; but most do not. At best, the lack of follow-up is something that happens by default/has not really been thought about by the mediator; often, however, it is a deliberate act.

Saundry et al (2013:27) suggest that a number of their respondents would have welcomed follow-up, one saying, for example, 'it would afford another forum for somebody to go in or both colleagues to go in and say "look, this hasn't worked, how do we move forward?"' That is not, however, to say that follow-up is *always* welcomed by the parties: in a recent mediation case, the researcher's e-mail offers of further meetings (with disputing parties from whom he parted very amicably) have simply been ignored! Mediators, ideally, can recognise when the disputing parties have had enough of mediation.

The lack of follow-up ties in with the notion of Acas individual mediation often being in reality a band aid approach (Weeks 1994:26), a relatively 'quick fix', bounded product that the mediator delivers, a product which either 'works' or it does not but, after which, the mediator does not hang around. Some commissioners of mediation are, of course, more than happy with this.

Failure in mediation

One final area that emerged from the researcher's enquiries into success was the question of what was failure in mediation. The researcher found that those interviewed largely suggested that most mediations did move dispute situations 'forward' in some way, at the very least, and, therefore, usually resulted in some sort of progress; that most dispute situations benefited from a mediator's intervention; and that mediators usually left matters in a better state than they had first encountered them.

The researcher further found that, when mediator interviewees were specifically asked whether a mediation could therefore ever 'fail' (and, if so, how/what was failure in mediation), many mediators struggled to answer, although a few could clearly recall mediation situations that had felt quite unpleasant to them and that, with the best will in the world and whatever the definition, could hardly be described as successful. Unless one can take a longer-term look, by going back to the parties, however, it is difficult to be sure in many cases of mediation about success or not. The seeming disaster may turn out well eventually, while the apparent success may dissipate over time (sometimes very quickly).

The researcher therefore recommends that Acas encourages, or even insists upon, its mediators' adoption of the practice of following up situations in which they have mediated. It simply cannot be right for mediators not to know for sure the results of work they have done. Follow-up could at the least take the form of a telephone call to the commissioning party. One consequence of following up would be that Acas individual mediation would inevitably start to move away from being the relatively 'quick fix', bounded product referred to earlier. Acas would, then, have to determine whether and, if so, how it would charge for this follow-up.

Variables determining success (or not)

The reading that the researcher did on and around mediation identified various factors/variables that might be seen as leading to success. The list of those variables was a long one, the variables were not necessarily discrete, and several might simply have been reflecting the same or similar matters under different names. The researcher grouped these variables broadly under two headings: those contributed by mediators and those that are situational, relating to the commissioning and disputing parties and what they might bring to mediation (particularly the character of their dispute). The researcher was left with an emerging model predicting success (or not) in workplace mediation.

Mediator variables

The main proposition of the model (which will be further considered later in this chapter) was that success in any mediation was a function of the interplay between mediator variables and situational variables relating to the actual dispute. Although the researcher initially judged that the primary mediator variable leading to success was the stage of development of the mediator, he now considers that the primary mediator variable is, in fact, the mediator's experience. The mediator's stage of development is an associated variable along with the mediator's ambition and her/his attributes. Experience appears to be necessary to allow mediators to move through the stages of development, although for reasons discussed below not all experienced mediators achieve all developmental stages.

Experience of the mediator

Despite the mediator's experience now being considered the primary mediator variable in success, what the researcher came to better appreciate from his empirical work was the paucity of individual mediation activity in Acas as a whole. The net figure of mediations opened has plateaued in the last few years, in the region of the 200s. A major factor contributing to this is likely to be the decision taken at the higher levels of Acas to continue promoting the use of mediation and ADR by other organisations, but not to 'push' Acas's own mediation services. The motive has, apparently, been the desire not to antagonise private sector mediation providers.

Acas's fear seems to have been that upsetting private sector mediation providers might lead them to approach Acas's sponsoring department, the Department for Business, Innovation & Skills (BIS), to seriously question/challenge Acas's monopoly of mediation provision in respect of Employment Tribunal claims (what it calls its individual conciliation work), a much bigger prize for Acas than chargeable, individual mediation work. Although 'independent', Acas is very much part of the BIS 'system', the major part of its funding coming from that department. Judging by her 'blogs' on Acas 'Cassie' (Intranet), Acas's current Chief Executive sees it as important to stay very close to BIS.

Within the overall figures, Acas London's number of mediations usually runs well ahead of the other Acas Areas. The sheer size of Acas London's catchment area will have a lot to do with the difference, but the researcher would nevertheless recommend that Acas reviews practices in London, to see whether there is anything from which other Areas might learn. However, when Area/Regional differences in output in other Acas functions have been explored in the past, the differences have often come down to different ways of recording practices and outcomes that were otherwise not radically different.

Mediation is usually carried out by Acas Grade 9 and, for more complex cases, such as group mediations, Grade 8 staff. There appears to have been a huge waste of experience by Acas in allowing some erstwhile relatively active Acas mediators to have become anything but. Also, the researcher finds quite staggering the large number of mediators used by Acas in a chosen year, 2013, with the resulting lack of experience

for most of them. The researcher recommends that, so long as Acas's policy remains one of not promoting its own individual mediation work, it restricts the allocation of its individual mediations to a small cadre of trained mediators, including those already well-experienced.

A small cadre of trained mediators would still not each get a huge number of cases each year, but they should get sufficient to maintain and develop their expertise. The researcher has not encountered anyone contending that it is a good thing for mediators that they get little or no mediation work, most of the time. Although a small cadre of mediators is recommended, there should, however, be sufficient that there is a state of 'readiness' in Acas, such that, when clients rightly or wrongly want a mediator straightaway, Acas can comply.

There are occasional mediations conducted by Acas Regional and Area Directors. For example, a difference between two senior managers working for an international retailer has been mediated by an Area Director, and a local authority Chief Executive and Assistant Chief Executive in dispute were helped by a Regional Director. Some of this work has been recorded on EARS as mediations, but some has been listed as, say, workplace projects.

To some extent, it is valuable that Acas staff at Grade 6 (Regional Director) and Grade 7 (Area Director) level get involved in operational work and conduct mediations. After all, some mediations, we are told, call for mediators of a senior rank since, it is alleged, some senior people in dispute simply will not entertain a mediator they know to be otherwise of a relatively low grade, however skilled as a mediator that person might be. One example quoted to the researcher, when he helped train police mediators, was that a police constable would never be accepted as a mediator by Inspectors and Superintendents, let alone by the Chief Constable!

However, the researcher has not come across many examples of such non-acceptance of a lowly-graded mediator. Indeed, as a mere Acas Grade 8 himself, he has, for example, mediated in a dispute between a local authority's Chief Executive and its Head of Legal Services. More important, the reality of Acas Regional and Area Directors doing occasional mediations is that people with little or no mediation training

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and with little or no prior individual mediation experience (and, possibly, little other recent operational experience of any kind) will be mediating in situations that we are led to believe are demanding and sensitive, and calling for expert handling.

Whether disputes involve senior or junior people, their mediation is, as this thesis shows, a demanding task, not one that should be picked up and dabbled in by someone with little relevant training and/or experience. There is, however, something of a belief in Acas that anybody can tackle anything that crops up in their geographical area of responsibility, if only they can have a little preparation time, and that, as more than one interviewee put it, 'you just have to keep one step ahead of, know a little bit more than, the client'. On top of this, in spite of the occasional use of a mediator of a senior rank in a particular case, individual mediation is not a highly regarded function in Acas (more on which later in this chapter).

The researcher believes that, subject, of course, to urgent exceptions, no Acas person should be conducting individual mediations unless they can honestly claim to have been properly trained in mediation (as a minimum, a five day course?), and their experience stretches to, say, at least five cases a year. This leads back to the practice, in several Areas, of allocating mediation cases to a large number of mediators (large relative to the number of cases), with the result that most (mediators) receive only a tiny number of cases each year. The researcher instanced, in his findings, Bury St Edmunds, where some 30 cases a year were being allocated, supposedly, on the basis of a rota between 10 mediators, and Cardiff, where some 12 mediators shared only 16 mediations in eight and a half months in 2013.

The comments about Regional and Area Directors apply equally here. Mediating in individual disputes is a demanding task and not one to be dabbled in, although outside of Acas that may happen in what is a largely unregulated field. Many people in Acas appear to enjoy doing individual mediation, and many others say they would like to do it, if only they had the chance, but that does not mean that they all should be accommodated. As a new, young, enthusiastic operator in Acas London, many years ago, the researcher expressed a wish to do collective conciliation work, only to be told rather brutally that the number of cases in London called for just one collective conciliator and that one person had already been appointed!

As noted in chapter seven, any outside mediation experience that people bring to Acas has not usually been valued anywhere near as much as experience gained *within* Acas. Even successful completion of the Greenwich University Post Graduate Certificate in Individual Employment Dispute Resolution (PGC IEDR) course, for which Acas pays course fees and gives paid study leave to staff, appears to bring little reward from Acas for successful trainees, other than a brief letter of congratulation. But, on the other hand, as regards experienced mediators leaving Acas, there do not seem to have been any attempts of late to capture their knowledge in the way that there were with individual conciliation early leavers, some years ago. Both situations should be corrected.

Stage of development of the mediator

It was seen in chapter four that there are various models of development that might be considered in respect of the 'stage of development of the mediator'. To start with Adler's (2003:63) *four stages of skill development*, the researcher believes that he has encountered examples of all four stages: unconscious incompetence, conscious incompetence, conscious competence, and unconscious competence. Turning to Lang and Taylor's (2000:11) *dynamic four-part model of professional development*, as noted above their novice and artist categories appear to be of limited use in an Acas context, but their apprentice and practitioner categories do seem usable. The researcher considers that he encountered examples of both (apprentices and practitioners).

As pointed out in chapter four, Bowling and Hoffman's (2003:15) *three stages of mediator development* might, however, be the most useful of all the models of development, in an Acas context. The researcher has certainly encountered examples of both first and second stage mediators, that is, many mediators who have at least developed a variety of mediation techniques (first stage), and others who have reached a stage of 'deeper understanding' of why and how mediation operates (second stage). It is fair to say, too, that some Acas mediators were at the third stage (having 'the ability to reach a deeper level of personal connection with the parties'), but others seemed likely to struggle to attain that deeper level.

'Stuck' mediators

From a good number of the Acas mediators whom the researcher interviewed and observed, he gained the clear impression of people having become 'stuck' in their (mediator) development, and stuck at a relatively early stage, say, Bowling and Hoffman's (2003:15) second stage, if not their first. Many people had not advanced much from their initial mediation training, assuming, that is, that they had done some sort of mediation training in the first place. Mediator 'stuckness' was manifest in several ways, for example, limited knowledge about, and use of, styles and theories connected with mediation, or negligible movement from the 'myths' of mediation, or undue optimism about the chances of resolving disputes – all of which have a potentially negative impact on mediation success.

As to why many mediators are 'stuck', a lack of training beyond their original, basic course (assuming they have received even that) will have contributed, as will limited experience of actually mediating and little relevant reading.[97] It may be, too, that some mediators almost choose to be stuck/do not want to advance: they are comfortable with basic facilitative mediation and have neither time nor inclination to launch out into something different and more demanding. In this connection, the researcher wonders about the decision to drop, from the CIWM course, discussion of mediation models other than the facilitative: for whose benefit, trainees or tutors, was the decision made?

In particular, the researcher's attempts to broach and discuss theory with interviewees largely drew a blank. There did not appear to be any overt use of, or reliance on, theories associated with mediation. Indeed, going into a mediation 'without any pre-conceptions' and 'thinking on your feet' would appear to be more typical. The general approach to mediation appears to be a pragmatic, 'what will work?' one, rather than one driven by theory. In some instances, there is almost a pride in being so practical. But 'mediators must have a theory underlying their practices, no matter how . . . obscured' (Della Noce et al 2002:41), so, Tidwell's (1998:61) point about theories-in-use as opposed to espoused theories would seem to be relevant here.

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[97] What many Acas mediators need is suggested in the Preface to Folberg and Milne (1988:x): 'No book can, by itself, transform the reader into a mediator. This book [*Divorce Mediation: Theory and Practice*] is intended to provide the foundation on which personal training and experience can be stacked to build a mastery of mediation theory and practice.' So, Acas mediators need study, training and experience.

The awareness of different styles of mediation seemed restricted to those mediators who had undertaken the PGC IEDR course and/or who had been involved in some way with Acas's CIWM course, say, as tutors. Even where there was awareness of styles other than the facilitative, however, there was not a lot of knowledge about them, certainly not to the extent that Acas mediators felt particularly confident about practising them. All of this would seem to call for more, and higher-level, training for the small cadre of mediators that the researcher has suggested that Acas establish, and the researcher so recommends.

Ambition of the mediator

By the 'ambition' of the mediator, the researcher is referring to the level of service that a mediator aims to provide in any particular case, indeed, whether s/he really wants to be involved in mediation at all. The researcher has confirmed his original view that ambition/level of service is often bound up with the experience and development of the mediator. So less experienced and developed mediators will usually offer what might be termed a basic, straightforward service, which sees the mediator's aiming at what is a quick fix of the presenting dispute, and the disputing parties' not being encouraged to stay in contact with the mediator once a case has been completed.

The researcher had thought that most of the more experienced and developed mediators would usually offer a relatively sophisticated, more tailored service, which could see the mediator aiming sometimes as high as the reconciliation of the parties. The mediator might also encourage the disputing parties to stay in contact with her/him, once a case had been completed. This higher level service would inevitably take more time than the basic. The researcher's empirical work indicates, however, that the more experienced mediators will often offer only a basic service too, even when something more would seem to be called for. The likely reasons for this include 'stuck' mediator development and an Acas context/system that does not really encourage more than a band aid approach, an approach that – to be fair and as already indicated - may often be all that the commissioning party wants.

It will be recalled that, of 114 EARS entries relating to mediations started in 2010, £835 (Acas's charge for one day's mediation work) was both median and mode while

the mean was £1,070 (not even one and a half day's work - £1,355). Also, the mean of Customer Delivery Days (CDDs) logged for completed individual mediation cases, from 1 April 2004 to 14 December 2013, was only 1.5. All of which indicates that a basic service is being offered by most mediators, regardless of their office location, assuming, that is, the researcher is correct in suggesting that a higher level service will take more time, and cost more, than the basic.

Attributes of the mediator

Four mediator attributes, in the broadest sense, have impressed the researcher as significant from his interviews, observation and own mediation experience over the years:

- listening (and observing),
- building rapport,
- readiness, and
- the use (or not) of ground rules.

Listening

Listening emerged as a significant attribute of the mediator, as did its concomitant of – to use one mediator's words - 'you do need to let . . [people] sound off, even if it doesn't seem relevant'. The point was made in one Acas focus group that it was surprising how many people said to mediators, 'Thanks for listening.' Not just in a dispute setting, we often do not really listen to people nowadays, take the time to find out about them. Acas mediators utilise both active and passive listening.

Not only does the mediator listen, her/himself, s/he encourages the disputing parties to listen to one another. As indicated in chapter four, Kressel (2006:742) talks of a mediator potentially acting in either a problem-solving or relational style, and that the latter mode focuses 'less on agreement making and more on opening lines of communication and clarifying underlying feelings and perceptions'. Relational styles include transformational, narrative and victim-offender mediation, and to take just the last-mentioned, the 2004 BBC/Mediation UK video on victim-offender mediation (used in early Acas internal training) brings home the need to let people sound off. In an actual (as opposed to simulated) joint meeting between Andrew, a burglar, and Susan,

the burgled: after 'extensive preparatory work', including separate meetings, and after the mediators' fairly lengthy introduction to the joint meeting, Susan remonstrates: 'Just let me speak, please. I've waited for six months . . .'

Building rapport

The ability of a mediator to build rapport was identified by interviewees as another significant attribute of the mediator. The researcher himself increasingly believes from his own mediation experience that rapport built by the mediator with the disputing parties, separately, at the pre-mediation stage makes a major contribution to success at joint meetings.[98] This links in to Bowling and Hoffman's (2003:15) mediator 'ability to reach a deeper level of personal connection with the parties'. Interviewees pointed out that there had to be limitations to building rapport. Otherwise, client expectations might be inordinately built up at pre-mediation meetings, only to be disappointed at the joint meeting stage, when the mediator had to be extremely careful as regards impartiality.

The point was also made that the disputing parties might well feel let down when, after the establishment of rapport up to and including the joint meeting(s), the mediator quits the scene, never to return! Bennett, one of the authors of Saundry et al (2013), confirmed at the Swansea 2013 ESRC-funded seminar that this was indeed the case. This links into the recommendation earlier, that mediators follow up situations where previously they have mediated.

Readiness

To be effective (successful), mediators must be 'ready in every sense of the word', including having the necessary resources for a mediation and being prepared to give a dispute's settlement a central place in their world. At a symposium for Acas at Greenwich University in June 2014, Ray Flaherty[99] talked of his dropping everything else if a mediation came along. Because they have responsibilities other than individual mediation (typically, individual conciliation and training), however, responsibilities

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[98] The researcher would, therefore, question the wisdom of some Acas mediators sending out a stencil to disputing parties about 'the problem you want the mediator to help with', for completion in advance of the pre-mediation meeting, 'to save time'.

[99] Consulting Director with Baker Tilly Ryan Glennon

that are extremely time-consuming, Acas mediators sometimes struggle to fit in their individual mediation work. Mediators will often defend their slowness in getting involved in any particular dispute on the grounds that the dispute has doubtless been going on for some time and that delaying mediation a bit longer will not hurt.

In the researcher's experience with Acas, however, a mediation commissioner may have 'sat' on a potential mediation request (or, rather, a potential mediation situation) for quite some time; but, when s/he finally comes to Acas for assistance, that commissioner will be expecting a speedy response. If that is not forthcoming, the potential mediation may be offered elsewhere (to a private sector provider) or may well 'evaporate' (in the sense that the parties move on to other processes).[100] Ideally, there will be 'readiness' on the part of Acas and its mediators, in particular, their being prepared to give a dispute's settlement a central place in their world, leading to quick involvement whenever a call to mediation comes. If Acas will not, perhaps cannot, do that, it maybe should question its continuing to offer (however timidly) the individual mediation function.

Use of ground rules

The researcher encountered differing views on the use of ground rules in mediation, that is, 'guidelines for how people should behave, rules to keep people as reasonable as possible' (Acas 2011a:H18). Ground rules do not, perhaps, feature as much in actual mediations as is suggested in Acas mediation training. While this whole area (of ground rules) might seem at first glance rather trivial as noted above, it does link in to, say, styles of mediation (what the mediator is trying to do in a mediation, and her/his attitude to the disputing parties) and to the stage of development of mediators (less 'developed' mediators perhaps needing the protection of ground rules more than the disputing parties). These implications of using ground rules are not, however, seriously discussed in Acas.

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[100] Even if there is a speedy Acas response, the request for mediation assistance nevertheless disappears sometimes.

Other

Interestingly, reframing, a narrow view[101] of which is given a lot of emphasis in Acas mediation training, did not figure much in interviewees' comments and Wilson (2014:1) questions whether it 'still warrants the essentialism attributed to it in practice'; and non-violent communication (see Rosenberg 2003), talked about a lot in family mediation, did not figure at all.

Situational variables

The main proposition of the model predicting success in workplace mediation that emerged in chapter four was that success in any mediation was a function of the interplay between mediator variables and situational variables relating to the actual dispute. The researcher initially judged that the primary situational variable leading to success was the tractability of the conflict in question, and that the parties' attributes, the quality of their relationship, and their commitment to mediation would prove to be the most important of associated variables.

As a result of his empirical work, however, the researcher came to believe that, while the primary situational variable relating to the dispute was indeed the tractability of the conflict, the associated situational variables were better cast as the parties themselves (including their attributes and behaviour and the extent of their relationship breakdown), and the parties' commitment to mediation.

Tractability of conflict

Zartman (2005:48) argued that five internal characteristics combined to identify intractable conflicts: protracted time, identity denigration, conflict profitability, absence of ripeness, and solution polarization.

Time

Acas's summary of its evaluation questionnaire data shows the length of time that issues had been ongoing prior to mediation: <3 months, 3 to <6 months, 6 to <12 months, and = or >1 year. It is noticeable that the percentage of cases where the issue

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[101] A much wider view of reframing may be found in McCartney (2007).

had been ongoing for a year or more had been increasing from 2008/09 to 2011/2012 but declined considerably in 2012/13. As to why this is, it may be that 2012/13 was just some sort of 'blip', or it may be that Acas's message to make early contact with it over disputes had finally seeped through to clients. The relevant Acas research paper (Acas 2013c) does not offer any reasons (for the decline in 2012/13) and the researcher has not had any suggested to him. It will be interesting to see the figures for 2013/14.

Ripeness

It appears that a clear majority of Acas mediation participants in each of 2010/11, 2011/12 and 2012/13 felt that their mediation occurred too late. The researcher believes any late intervention is unlikely to have been primarily Acas's fault, but rather have been down mainly to the commissioning and/or disputing parties, who would have principally determined the timing of third party interventions. It is understandable that parties emerging from dispute, particularly if that dispute has been long and bitter, may think, on reflection, that mediation might best have occurred earlier than it did. But too heavy an emphasis by *Acas staff* on their early involvement per se, as, for example, in 'Mediation top tips' on Acas's website, suggests too simplistic a view of conflict.

The researcher believes there is nowadays a general view of conflict by Acas staff which says that there is a most appropriate time for third party intervention ('early on'); and that, if it is missed, it will not return, and that for ever after the mediator and her/his efforts will be disadvantaged. As the researcher has suggested, this is perhaps too simplistic a view of conflict. The researcher would question, perhaps a little provocatively, whether it really matters when a mediator is invited in, so long as what s/he then attempts to do is appropriate.

Acas mediators would benefit from a reminder of the concept of there being different stages of conflict, some of which will be more conducive to mediation success (however defined) than others; benefit, too, from an examination of the idea of the different stages of conflict calling for different choices of (attempted) dispute impact by the mediator, assuming, that is, the researcher's recommendation that Acas adopts his dispute impact approach is accepted. At the moment, some Acas mediators may be trying the same dispute impact regardless of the stage reached in a dispute.

The researcher has developed a set of questions that a mediator might put to each disputing party at the pre-mediation stage, to enable a judgement to be made as to whether moving on to a joint meeting is likely to be productive (see Appendix One).

Identity, conflict profitability and solution polarization

Finally on tractability, a workplace dispute in which the researcher himself mediated was used to consider the identity denigration, conflict profitability and solution polarisation characteristics of intractable conflict.

The parties themselves

Mental fragility

The researcher mentioned, in his findings, the mental fragility of some disputing parties and how developments in a particular case had left him with the thought that there might be merit in the idea of a mediator working on some cases with a counsellor or therapist. (Boardman (2013:101) suggests that 'the terms *counselling* and *therapy* are often used interchangeably in public, with not much difference in meaning'.) This joint work would be on cases where preliminary contact had indicated such an approach would be of value. It might, for example, enable the mediator to get beyond the 'presenting' problem, that is, 'a problem that can be openly expressed as socially acceptable, but which is in fact a symptom of the real underlying problem that can only be uncovered by hard work between analyst and client' (De Board 1978:121).

Articles such as Curtis and Bailey (1990) and Jaffe Consulting (2008) illustrate how such 'conjoint mediation and therapy' might work in practice. To take the first of these references: as its title suggests, Curtis and Bailey's (1990) article concerns marital mediation but its proposals are in the researcher's view relevant to workplace mediation, too. Curtis and Bailey (1990:145) outline a model which 'proposes that carefully sequenced mediation and counselling interventions be merged into a single process for optimal conflict resolution'; and they suggest that, because resolution 'is achieved through a number of distinct stages, specific tasks need to be accomplished at each stage by the mediator and the counsellor'. Curtis and Bailey (1990:145) say that the mediator and the counsellor 'work the model back and forth (between mediation and counselling), finding the process that is in the best interests of the parties and most acceptable to them'.

So that it is clear what we are talking about when we mention counselling/therapy, Brown and Pedder (1991:4) state that there have been two major approaches to psychotherapy, psychodynamic psychotherapy and behavioural psychotherapy. It is the former to which the researcher is referring, and of which Brown and Pedder (1991:4) say:

> The dynamic psychotherapist is more concerned to approach the patient empathetically from the *inside* in order to help him to identify and understand what is happening in his inner world, in relation to his background, upbringing, and development.

Furthermore, Brown and Pedder (1991:203) state:

> In its *general* sense, the practice of psychotherapy should not be restricted to full-time psychotherapists. Everyone in the helping professions should have a psychotherapeutic attitude, be familiar with the simpler psychotherapeutic methods, and be aware of the scope and availability of more specialized forms of psychotherapy.

A common objection to the idea of a mediator working with a counsellor/therapist is its likely cost: clients will often be reluctant to pay even for a mediator, let alone for a mediator *and* a counsellor/therapist. There is no easy answer to this, but the cost might be lessened by Acas's training a small group of its operators to each be able to act as both mediator and basic counsellor/therapist (basic as opposed to some sort of West End of London specialist).[102] Therapy is not, of course, easy to grasp. Jung (1995:158) said that he was:

> . . . in favour of non-medical men studying psychotherapy and practising it; but in dealing with latent psychoses there is the risk of their making dangerous mistakes. Therefore I favour laymen working as analysts, but under the guidance of a professional physician. As soon as a lay analyst feels the slightest bit uncertain, he ought to consult his mentor.

An analogy to what the researcher is proposing might be found in the practice of Haynes, referred to earlier in this thesis. Although he changed his views somewhat over time, initially Haynes (1981:10) – when talking about family mediation – said:

> When the emotional blocks are severe and seriously impede the couple's work on the separation, the mediator calls for a 'time-out' from the mediation for a specified number of sessions. I usually ask for a three-session time-out and the couple understand that during that time my role will switch from mediator to

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[102] The police mediator whom the researcher interviewed said that he had been trained as a mediator and, at another time, also as a therapist, and that he drew on both disciplines when handling disputes.

> therapist and the focus of the session will be on an examination of feelings rather than on problem solving. Once the couple has been helped by the mediator-therapist to overcome their resistance to dealing with the emotional problems, they can begin to focus on the economic issues.

Not a quick fix!

Acas mediator-counsellor/therapists would also have the potential to work in twos, one focusing on mediation and the other on counselling/therapy. This unique service would not get a huge amount of work, particularly if in line with current practice it is not heavily promoted; and it would therefore be unlikely to antagonise private sector mediation providers by 'taking their bread and butter'. The service would call for a small cadre of Acas mediator-counsellor/therapists, just large enough to be able to respond quickly and meaningfully to requests for help.

There would, of course, be nothing to prevent the individuals concerned from acting just as mediators, when the occasion called for this, although it might be difficult for them not to drift into counselling/therapy, too. At one point, when working as a family mediator, the researcher used to co-mediate with a woman who had originally been a counsellor. The researcher always felt that her origins surfaced in the course of mediation and – wrongly, with hindsight – would get impatient that she did not push on more quickly towards written agreements.

A key point in all of this is for Acas to be realistic about resources. There would be no need to train large numbers in counselling/therapy, only to give each of those working in this area a regular supply of work. The researcher so recommends.[103] Although mediation is not therapy, mediators can learn from counselling/therapy, for instance, as to the amount of time that might be necessary to get disputing parties to a better place. Also, (mediators can learn) that mediation, like therapy, does not have to end neatly, with everything tied up, indeed, therapy often does not.

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[103] There are, of course, a variety of approaches to individual psychotherapy in (one of) which an Acas person might be trained (see Dryden (Ed) 1984). Of these approaches, the person-centred therapy associated with Carl Rogers seems to sit well with facilitative mediation (see Thorne 1984: 102, particularly the section on 'therapeutic style'). The police mediator mentioned in Footnote 102 said that he had been trained in a Rogerian approach.

By way of caveats to the above: in an article on divorce mediation but with relevance to workplace mediation, Brown (1988:139) questions whether it is ethical 'to function as both therapist and mediator with the same couple'. Acas would obviously have to explore this point. Also, Acas has started to run a one-day training session entitled 'Managing Persistent and Difficult Workplace Behaviours', which 'considers how and why some people exhibit persistent and difficult workplace behaviours, and explores strategies for the best way to handle those behaviours'. There is a one-day follow-up, 'Practical Skills in dealing with Extreme Persistent and Difficult Staff Behaviours'.

In both workshops, the Acas trainer works with a psychotherapist. Unless the researcher misunderstood what that psychotherapist was saying in the training session he attended, there are a small minority of people whose behaviour will not be amenable to therapy; 'managing' that behaviour is the best that can be hoped for. Mediation, in that it calls for two receptive parties, will not therefore achieve much. It may be that these people are what Boddy (2006) calls organisational psychopaths.

Workplace friendship deterioration
Reviews of EARS entries in respect of mediation cases logged as Dispute Not Resolved and as Mediation Unprogressed indicate that it was the parties themselves who were mainly responsible for the outcomes, remembering, of course, that EARS entries are made by the mediators concerned. Also, of the nearly 40 instances of individual mediation activity listed on EARS for the researcher (as lead or support mediator) since 2006, and other instances not listed on EARS, the vast majority on reflection have concerned situations where the parties had 'come to know and treat each other as whole persons, rather than simply workplace role occupants', but friendship had deteriorated due to one or more of five primary causes of workplace friendship deterioration: personality, distracting life events, conflicting expectations, promotion, and betrayal (Sias et al 2004:321).

The researcher's experiences as a mediator have been not dissimilar to those of his Acas colleagues, according to those interviewed. None of the mediation actions of the Acas operators interviewed by the researcher appear, however, to have been consciously informed and influenced by these concepts of workplace friendship deterioration. But, it is probably not unreasonable to speculate, workplace friendship

deterioration will have contributed to the quality of relationship of many disputing parties with whom those operators had dealt, and that quality of relationship will in turn have contributed to the tractability of disputes.

It may be that Acas mediators should deliberately bring into their separate meetings with disputing parties the concepts of workplace friendship deterioration and use the results when deciding what 'dispute impact' to attempt in a case – manage, settle, or resolve the dispute. Acas should certainly incorporate the concept in the training of its own mediators and those in client organisations, the researcher recommends.

Commitment of the parties to mediation

Community and family mediation situations are not wholly transferable to the workplace but they do, at the very least, remind us that not everyone has the same enthusiasm for, is as fully committed to, mediation as the rest of us, at least at the beginning of their mediation 'journey'. (Some parties less than committed to mediation at the start may develop, or be encouraged to develop, a commitment.) There are, as suggested earlier in this thesis, degrees of commitment to mediation, which will be determined by a variety of factors including the disputing parties' attributes, the history of their relationship (and its breakdown), and their reaction to the mediator (whether, for example, s/he is perceived to be impartial) and the stance of their organisation on mediation.

In chapter four, the researcher quoted Newman and Richmond (2006) on some parties' being part of a peace process, but not seriously interested in making compromises or in committing to a peaceful endgame. In the researcher's experience, in an Acas workplace mediation context, some disputing parties do simply 'go through the motions'; and some commissioning parties use mediation in an attempt to buy some time before/delay a likely employment tribunal, at which they will be able to argue that they 'even tried mediation to sort things out'. Or, one mediator suggested, commissioning parties – while having a degree of commitment to mediation - are often looking deep down for some sort of vindication of steps they have taken (and the end results of those steps). Sometimes, managers have been reluctant to have 'difficult conversations' with staff over what is euphemistically termed performance

management and they hope that such conversations will be easier in mediation; indeed, that the mediator will get the message across for them!

As already indicated by the researcher, when looking in the 'Success' section of chapter six at the strong desire of several Acas mediators to get through the mediation process, some disputing parties are quite open about not being interested in mediation, particularly if it means sitting down with the other party. The researcher does not believe that that lack of interest, of commitment, should signal the end of efforts at dispute resolution (as it often does) but that it should lead to a search for alternative methods of dispute resolution. The researcher recommends later in this chapter that those who are currently Acas individual *mediators* be further trained, to think, broadly, in terms of dispute resolution rather than simply mediation, and to think in terms of using whatever dispute resolution process is judged appropriate in the circumstances of a dispute.

Boulle and Nesic (2001:108) comment:

> Unlike civil/commercial or family mediation, community mediation services frequently work with one of the parties, in an attempt to deal with a dispute, where it is not possible to work with both parties.

They add in a footnote that 'recent statistics show that, in that case, partial or complete resolution is likely to be reached in 50% of cases, compared with 80% when both parties agree to participate'. The researcher wonders whether Acas might draw on this in its mediation work and continue working with at least the party who does want to go ahead (and, of course, continue charging for that work).

As to what Acas would be doing with that willing party, Mediation UK (1996:3) stated:

> For a variety of reasons, several 'first parties' do not wish to proceed to mediation. Many Mediation Services find that their services are useful in helping that party to discuss more constructive ways of approaching their conflict. This can empower individuals to be more able to cope with conflicts without the need of third-party intervention.

Acas might also think on Boulle and Nesic's (2001:7) 'secondary objectives' of mediation, for example, bringing clarity to a dispute situation by identifying and defining which matters do, or do not, require decisions to be made. One of the challenges for Acas would, of course, be maintaining impartiality.

The Acas context/system

Both the mediation literature and the researcher's empirical findings emphasise the importance to mediation success in any particular case of such factors as the mediator's qualities and skills, the parties' attributes, and the tractability of the dispute in question. The literature, however, fails to adequately consider the mediator's own organisation, in this case Acas; this research has shown its importance to mediation success. We have seen how Acas determines the experience of the mediator and her/his stage of development, attributes and ambition, and seen the impact these variables will have on mediation success. In addition, other aspects of the Acas context/system will impact on mediation success, as follows:

Culture

The researcher's experience of Acas over more than three decades of employment has been that its culture is one that values the use of techniques and tools over theory. There is, of course, nothing wrong as such with being enthusiastic and knowledgeable about techniques and tools (for mediation, in the current context), and it may be that, for whatever reason, Acas has been heavily staffed over the years by people whose learning styles favour this (Kolb's 'pragmatists' – Honey 1988:103). However, their preference may well have been at the expense of valuable learning from theory, with a negative impact on mediation success.

Impartiality

Whether it is referred to as impartiality or neutrality, Acas has always stressed that it does not take sides when dealing with parties disputing at work. 'Not taking sides' is particularly emphasised in potential mediation cases. One problem, however, with what might seem, at first sight, an unimpeachable approach is that the desire not to appear biased has sometimes led to questionable (and, potentially, less successful) mediation practice, for example, minimal background briefing for mediators and little exploration of commissioning parties' objectives, although the police mediator whom the researcher interviewed does like to 'go in cold'.

Also, there is an argument, from the community mediation area, that 'Mediators' displays of impartiality [have] resulted in the rejection [by parties] of mediation as a

course of action' (Stokoe 2012:1), in that, what mediators may say – quite accurately - about their not taking sides, may be not at all what the parties are hoping to hear, at least at the start. This may help explain why so many mediation enquiries to Acas have not converted into actual mediations. On the other hand, Banks and Saundry (undated:10 and 14) suggest that mediation might be a management process and a means of controlling dissent, and that what are really organisational issues get recast as personal disputes. Acas has not, however, ostensibly considered how this critique squares with its proclaimed impartiality/neutrality.

Narrow focus

It does seem not unreasonable to suggest that some 'individual' disputes will have been occasioned by organisational issues beyond the control of the individuals in dispute (see, for instance, West and Markiewicz 2004:116). Nevertheless, the researcher has not found much evidence of mediations being abandoned because they have thrown up factors beyond the control of the disputing parties; nor of mediators going back to commissioners (of mediation) to explore such situations. However, in his recent mediation involving the five members of a police recruitment team, the researcher did contact the commissioning party after the joint meeting about the team's 'belief that many of the relationship difficulties experienced by . . [it] derived from demands, events, etc beyond its control'; and the researcher did then arrange a meeting of the team with the commissioning party to discuss the situation.

In general, however, Acas mediators might be taking too narrow a focus in their work, ploughing on with an individual-focused response in some situations that call for a broader approach, perhaps because of the absence of a 'systems' outlook; or perhaps because the mediators do not believe that Acas and/or the commissioning party will pay for the time necessary to adopt a broader, systems approach; or perhaps because they do not have many other 'tools in their box' than a standard individual mediation response; or perhaps for lack of courage; or perhaps because of stuckness.

Mediation styles

As the researcher commented earlier in this thesis, the facilitative style, widely used outside Acas, is now firmly embedded inside. Acas's own mediators are trained in it, and Acas's trainers roll it out on the organisation's Certificate in Internal Workplace

Mediation (CIWM) and shorter mediation courses. But it might be queried whether the style is the most appropriate one to use, at least all the time. If the workplace 'problem' is something tangible such as whether an office window should be open or not, and if so when, facilitative mediation might well fit the bill; but, if the issue is around a poor relationship, it may be that other styles would be more useful, such as the narrative and transformative ones, or a style that seems to bridge the problem-solving and relational divide, for example, insight mediation.[104]

There is an argument that the most that any mediation style can do is to give the disputing parties a moment in time that they seize, or not, and that it is the parties' commitment to dealing with their problem(s), particularly after the mediator has moved on, that is crucial. As one might expect, there are differences in the practice of what is nevertheless labelled facilitative mediation: one mediator outside Acas said that the facilitative mediation she had learned from her initial mediation training with the researcher, working for Acas, was very different from the facilitative mediation she had later been taught by a private sector provider.

Facilitative mediation, or at least a simplistic interpretation of it, is certainly being questioned nowadays outside of Acas (see, for example, Whatling 2012:34 on the 'Haynesian legacy' and its discouragement of the expression of emotion and of the exploration of historical accounts of a dispute). Under its alternative titles, interest-based or problem solving mediation (Boulle and Nesic 2001:28), there is an emphasis on win-win outcomes. As Tidwell (1998:26) has, however, argued:

> For some conflict there simply is no way to create a mutual gain; one side may have to 'win', while the other 'loses'. The question may be more how to design an agreement that leaves open the possibility for building relationships in the future. Yet to glibly term that kind of tough situation win-win or even mutual benefit is to make the situation appear trivial.

In some cases, one party to mediation may just have to 'grin and bear' a less than desirable outcome, what one mediator called an 'Uncle Vanya' situation.[105]

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[104] The researcher accepts that a dispute as to whether a window should be open or not might not be straightforward but might be a symptom of a poor relationship.

[105] At the end of Chekhov's eponymous play, Uncle Vanya bemoans that he has wasted his life. His niece, Sonya, however, says: 'Well, what can we do? We must go on living . . . When our time comes . . . we shall say . . . that we've had a bitter life, and God will take pity on us. And then . . . we shall have rest' (Chekhov 1954:150).

The researcher would certainly recommend that Acas reviews whether its choice of the facilitative mediation style (as opposed to other styles) is wholly appropriate in every situation to the individual disputes work that it does.[106] That review might show, for example, that facilitative mediation does not necessarily lead to an attempt at a 'quick fix' of a problem, and that it is how Acas mediators have been trained to regard the facilitative style, and what their 'ambition' in any case is, that has helped determine the direction in which Acas mediation has gone. It might show, too, that Acas's involvement in running short 'mediation skills for managers' courses (often, little more than some sessions extracted from longer facilitative mediation courses) compounds the idea of facilitative mediation as a quick fix.

Furthermore, neither the typical Acas mediator nor the Acas five-stage facilitative mediation process (and the fee charging associated with it) appears geared up to the idea of a third party intervention in a dispute that is just the start of what may be a lengthy dispute resolution process. Accordingly, the researcher recommends that what are currently Acas individual *mediators* be further trained to think broadly in terms of dispute resolution rather than simply mediation, and to think in terms of using whatever dispute resolution processes are judged appropriate in the circumstances of a dispute.

That may mean taking a slightly different approach to the 'confidentiality' currently associated with mediation. One mediator told the researcher: 'I know we can't do it but I often feel we might give commissioners something' more in terms of feedback. 'It might come back to bite us, I understand the difficulties, but if we could share some of the . . . [reasons] as to why things have gone wrong . . .' As Tyrrell (2002:21) puts it in a peer mediation (in schools) context, 'there may be occasions when the mediators will have to tell a teacher'.

Not quite the same thing but related, Saundry et al (2014:10), in drawing together the key findings from an ESRC-funded seminar series, suggest that one of the main findings was:

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[106] The researcher believes that the dispute impact approach is compatible with mediation styles other than the facilitative.

> . . . the piecemeal adoption of mediation is not a panacea for workplace conflict. Instead, participants pointed to the need for organisations to adopt more integrated approaches which locate conflict management as a central element of HR strategy.

This brings us back to the dispute impact approach to success in mediation. The researcher said in his findings that the approach did seem to resonate with mediators, in that interviewees had – albeit with some prompting – been able to relate what they had done in their cases to the various dispute impacts. Where the approach will not, however, work in Acas, unless there are changes in practice, is where an attempted impact such as, say, dispute management calls for a mediator to stay engaged with a dispute, to try to settle or resolve it once it has been initially contained. This obviously calls for more than the typical Acas intervention of an aggregate of two days' work, maximum, with no follow-up.

Lack of supervision

There appears to be a lack of formal supervision for Acas mediators. Unlike in the family mediation work previously undertaken by the researcher (where he regularly received both individual and group supervision), the researcher has never had a formal supervision session within Acas in well over ten years of mediation work. All of the Acas mediators interviewed similarly said that they had never had such a session. The researcher would recommend that Acas institutes a system of formal supervision for its mediators. The researcher was told by some interviewees that, after a mediation, they might discuss the case in question with a colleague in their Area, preferably, another mediator and, ideally, one who had co-mediated with/observed them on the case, if only to offload some of the emotion generated. When questioned, however, none of the interviewees for this research reported using any structured approach to reflection on what they had done in mediation, and on why certain things had worked (or not) for them.

Time constraints

Acas mediation co-ordinators/'gatekeepers', when dealing with enquirers, and Acas's mediation 'contract' letter talk in terms of a maximum of two days (in aggregate), initially, to mediate at least a two-disputants case, a maximum of two days regardless of the complexity of the case. Many Acas interviewees recognised that even two days

was not long enough to do other than touch the surface of many disputes, and to be fair EARS indicates a handful of 'big' exceptions to a two-day maximum. Several interviewees thought, however, that commissioning parties would often be resistant to a longer period and that often they just wanted a 'quick fix'. Bearing this in mind, the researcher nevertheless recommends that Acas reviews both its practice in dealing with mediation enquiries and its 'contract' letter.

The researcher mentioned earlier in this chapter (and previously) the concept of mediator 'readiness'. It suggests - among other things - that a dispute must warrant a central place in the mediator's life if it is to be successfully dealt with. Yet Acas mediators will sometimes try to do everything (that is, separate meetings and joint meeting) in a day, usually because of their other commitments. 'I'd find it difficult to fit in more than a day [on a mediation] around my other work' was one comment, the other work being - typically - individual conciliation and training. Concentration of mediation work on a small, more dedicated cadre of mediators, with the time to give a bespoke response to conflict situations, would help here.

Mediation: the neglected function of Acas

Of the various functions of Acas, individual mediation does seem to the researcher to be the 'poor relation' nowadays, the neglected activity. In the early days of Acas's individual mediation service, the then National Conciliator/Mediator, Terry Lippiatt, appeared to be very much a champion. Since his retirement, however, no Acas person of any senior rank seems to have been obviously pushing the function. Ultimate responsibility within Acas National for individual mediation appears to rest now with the Chief Operating Officer, who sits as Acas's representative on the Civil Mediation Council (see chapter three). It is certainly noticeable to Acas staff that the close attention and encouragement he gives to other Acas functions, such as workplace training, is missing as regards individual mediation.

There has been little obvious interest of late, by the organisation, in exciting its staff about the mediation function. For example, other than what is included in the (now suspended) PGC IEDR course and related Greenwich symposia, there has been no advanced training on mediation in Acas, in recent years, except for the occasional

external course agreed for some particularly enthusiastic individual. The space given to individual mediation in Acas annual reports has declined considerably of late, contrast the four plus pages in the 2005/06 report (Acas 2006:19-22 and 24) with the half page in the 2013/14 report (Acas 2014a:15). Senior Acas managers visiting Area offices, and addressing staff gatherings, rarely mention the function. With the introduction of Early Conciliation in 2014, and the case numbers involved, some Acas Areas have effectively pulled Grade 9 staff back from individual mediation work, to cope with the new function.

Further, Acas managers have not appeared to make much effort to discuss with their mediators the implications of the recent stream of Acas research reports on mediation (it is almost as though these reports were only for 'other people', outside Acas); and in the researcher's experience, Acas managers have shown no great interest for some time in advancing knowledge of mediation in general within Acas. There does not seem to have been any attempt, say, to analyse why so many mediation enquiries have not materialised in actual mediations. As the researcher has indicated there is extensive literature on mediation but, the researcher would speculate, hardly any of it has been read by most of Acas's mediators. The researcher recommends that Acas encourages mediators and their managers to read Acas's own research reports on mediation and then to discuss their implications.[107]

To be fair to them, to protect their careers, Acas managers perhaps get trapped in a quest for so-called customer delivery days (CDDs) and for revenue; and if, say, individual mediation does not seem to be 'producing the goods', managers may feel pressured quickly to focus on other Acas functions that might, particularly if they feel forbidden to proactively 'sell' mediation. In this regard, the researcher did hear of one Area Director who considered that s/he had been 'told off' by her/his line manager for seeming to publicly promote Acas mediation!

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[107] A small exception to the gloomy picture painted by the researcher is the mediation project being conducted by one of the current Acas Developing Future Leaders (DFL) participants, the purpose of her project being '[t]o review current individual mediation products (IM as delivered by Acas staff, not the CIWM training product) and develop recommendations' for the Acas Business Management Group. However, the DFL participant readily admits that 'mediation is a new area for me' (Virk 2014).

There is a belief among many Acas staff to whom the researcher has spoken that, if individual mediation were publicised a bit more, the amount of Acas individual mediation work would increase quite considerably. An indication of the low profile, and resulting lack of knowledge about Acas's individual mediation work, is Gould et al's (2010:6) statement that Acas 'is well known as adopting the evaluative style of mediation'. There have been occasions over the years when a national push on individual mediation did seem to be about to take place, but it has never really happened. Acas staff have suggested privately to the researcher that the organisation needs to decide whether the individual mediation function is important, or not.

Although there has been talk along the lines of 'We could not cope with the rush of cases that would come from our strongly publicising our individual mediation service', it is in the researcher's view more likely that Acas senior management are fearful of the reaction from private sector mediators (and, in turn, from their friends and allies in Government) if Acas were to start pushing for and garnering much more individual mediation business. The researcher can well recall the outraged reaction from private sector mediators, at a national mediation conference organised by Acas in 2005, when – without first acknowledging and deferring to *their* services - an Acas speaker suggested that Acas could provide workplace mediation to organisations.

In response to the charge of neglect, it might be argued 'so what?' What does it really matter if Acas chooses not to push its individual mediation services? The Government is, however, keen on the use of mediation in the workplace; and, as indicated in chapter two, one of Acas's strategic aims is to 'resolve disputes at work at the earliest stage and help avoid conflict in the future'. Also, the researcher hopes that he has shown the implications immediately for mediator experience and development, ultimately for mediation success, of such neglect and (the implications) of the Acas context/system generally. In dealing with mediators working for mediation services (as opposed to working on their own account), we should not ignore the context from which they operate and its implications for their work.

Model predicting success in mediation

Initially, a process model predicting success (or not) in workplace mediation was adopted. A proposition of this model was that success in any mediation was a function of the interplay between the mediator's stage of development (and associated variables) and the tractability of the conflict (and associated variables). This interplay of variables, it was argued, contributed significantly to the mediator's choice of dispute impact, and to that choice being achieved (or not). The model was set out in graphic form in chapter five (page 118).

As indicated earlier in this chapter, however, the researcher now considers that the primary mediator variable is, in fact, the mediator's experience. The mediator's stage of development is an associated variable along with the mediator's ambition and her/his attributes. Also, the researcher now believes that, while the primary situational variable is indeed the tractability of the conflict, the associated situational variables are better cast as the parties themselves (including their attributes and behaviour and the extent of their relationship breakdown), and the parties' commitment to mediation.

There is, also, to take into account the 'systems' approach discussed earlier, and the important variables which have emerged from this research: the participants/disputing parties' context or system and, importantly, the Acas context/system. The crucial nature of the organisational context of the mediator in influencing (both in the immediate, short term and over time) the outcome of mediations has been demonstrated in this study. In the light of all of this, a revised, systems model has now been adopted:

Figure 8.1
A revised model predicting success (or not)
 in workplace mediation[108]

Host organisation and other influences#

Acas context/system and other influences*

Acas mediator
comes to a dispute situation bringing her/his experience and
associated variables such as
- stage of development
- ambition
- attributes

Dispute situation
includes the tractability of the conflict and associated variables such as
- the parties themselves
- their commitment to mediation

Reflection by mediator and others as to
- whether her/his choice of dispute impact achieved or not

and
- whether that choice of dispute impact appropriate or not

the results of which (reflection) the mediator will draw upon in future dispute situations

Interplay of mediator and dispute sub-systems
will contribute significantly to
- mediator's choice of dispute impact: dispute management, settlement or resolution

and to
- whether that choice of dispute impact achieved or not

Lack of reflection

Outcome of mediation
may involve
- acceptance that the parties cannot 'move forward' or
- a written agreement or
- something else

* See systems diagram in chapter four,
    Figure 4.2, page 64
See systems diagram in chapter four,
    Figure 4.1, page 63

Source: Researcher

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[108] A mediator is not necessarily limited to one 'shot' at a dispute situation (although that is often the reality in Acas); and the interplay of variables the second or third time around may well contribute to a choice of dispute impact, and a mediation outcome, different to that on the first occasion. In the course of any mediation, the choice of dispute impact may change; and, in multi-issue situations, various dispute impacts may be attempted.

Generalisability of findings about the Acas context/system

While the findings on the importance of the mediator's own organisation to mediation success may not be relevant to mediators who are self-employed/work on their own account, they (the findings) may well be transferable to other employed mediators, especially where their organisation employs a large number of them, for example the United States Federal Mediation and Conciliation Service (FMCS), the New Zealand Ministry of Business, Innovation and Employment (MBIE) mediation services, the Irish Workplace Relations Commission, and private sector providers in the UK such as Consensio. There might, fruitfully, be further research on the importance of a mediator's own organisation to mediation success, and on whether the researcher's findings on the significance of the Acas context/system are transferable (see chapter nine).

Summary

This chapter has discussed and drawn conclusions from what the researcher learned from his review of the relevant literature, and his empirical work, in respect of his research questions as to what is success in workplace mediation, and how mediators achieve success. The chapter started with a reminder of the theoretical framework in which this study is set, that of 'systems'. A lack of application of this approach in mediation may explain why some agreements quickly collapse.

The chapter then looked at success in mediation. For Acas mediators, this meant 'getting an agreement', and there were indicators of likely success and reinforcers of agreements reached. The researcher recommended that Acas adopts as its measure of success, a relative measure such as the so-called dispute impact approach. The chapter next considered mediator variables important in achieving success, particularly the experience and stage of development of the mediator; then, situational variables relating to the dispute, especially the tractability of the conflict and the mental fragility of some parties.

The chapter went on to look at the Acas context/system and how the literature fails to adequately consider a mediator's own organisation, whereas this research has shown its

importance. The chapter explained why mediation might be seen as the neglected function of Acas; and it then revised the process model predicting success (or not) in workplace mediation that was first mentioned in chapter four, recasting it as a systems model. The chapter finished by looking at the generalisability of the findings about the Acas context/system.

There have been a number of recommendations for action by Acas throughout this chapter, recommendations summarised, for convenience, in chapter nine, along with some proposals for further research.

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CHAPTER NINE: SUMMARY OF RECOMMENDATIONS FOR ACTION AND SOME PROPOSALS FOR FURTHER RESEARCH

Introduction

This chapter summarises the recommendations for action made in chapter eight and makes some proposals for further research, whether by the researcher or by others.

Summary of recommendations for action

In this thesis, there are various suggestions as to actions that Acas might take. But the researcher specifically recommends that:

- Acas reviews the approach its mediators take to individual disputes and the related training it offers them, with a view to the mediators taking on board the idea that disputing parties will be part of a dispute sub-system that, in turn, is part of a wider system. In handling any dispute, mediators might, for instance, be encouraged to speak not just to the disputing parties but also to those whose working lives are 'touched' by those parties' actions and behaviour;

- Acas adopts as its measure of success in mediation, a relative measure such as the dispute impact approach: success in any one mediation should be judged according to the dispute impact (management, settlement or resolution) that had been attempted, whether that impact had been achieved, and whether the choice of impact had been, with hindsight, appropriate. The chosen measure of success should be incorporated, with definitions, into Acas's Events and Advisory Recording System (EARS);

- Acas reviews whether its choice of the facilitative mediation style (as opposed to other styles) is wholly appropriate in every situation to the individual disputes work that it does;

- Acas individual *mediators* should be further trained to think broadly in terms of dispute resolution rather than simply mediation;

- Acas encourages, or even insists upon, its mediators' adoption of the practice of following up situations in which they have mediated. Follow-up could at the least take the form of a telephone call to the commissioning party. Acas would have to determine whether and, if so, how it would charge for this follow-up;

- given that Acas London's number of mediations usually runs well ahead of those of other Acas Areas, Acas reviews practices in London to see whether there is anything from which other Areas might learn;

- so long as Acas's policy remains one of not promoting its own individual mediation work, it restricts the allocation of its individual mediations to a small cadre of trained mediators – ideally, including those already well-experienced;

- more, and higher-level, training (including training in *how* success might be achieved, and training in group mediations) be organised for the recommended small cadre of mediators;

- Acas trains, and maintains, a small group of its operators to each be able to act as both mediator and basic counsellor/therapist. Acas mediator-counsellor/therapists would also have the potential to work in twos, one focusing on mediation and the other on counselling/therapy. The service would call for just a small cadre of Acas mediator-counsellor/therapists;

- Acas should incorporate in the training of its own mediators, and of those in client organisations, the concept of workplace friendship deterioration, and also draw more heavily on theories around mediation;

- Acas institutes a system of formal supervision for its mediators;

- Acas reviews both its practice in dealing with mediation enquiries and its mediation 'contract' letter, particularly the suggestion of a maximum of two

days (in aggregate), initially, to mediate at least a two-disputants case – a maximum of two days regardless of the complexity of the case; and

- Acas encourages mediators and their managers to read Acas's own research reports on mediation and then to discuss their implications.

Proposals for further research

There are some proposals for further research into mediation implicit in some of the above recommendations. For example, there would be a need to follow up any implementation of the recommendations that

- Acas adopts as its measure of success a relative measure such as the dispute impact approach developed by this researcher;
- Acas reviews the appropriateness of the facilitative mediation style to all of the individual disputes work that it does; and
- Acas trains, and maintains, a small group of its operators to each be able to act as both mediator and basic counsellor/therapist.

Acas might conduct research on how these recommendations work out in practice. So, for example, Acas might explore with its mediators whether they are able to work with the concept of various dispute impacts, and how practicable it is to judge whether a particular attempted impact was appropriate or not; Acas might check out by its mediators trying them whether, in some situations, mediation styles other than the facilitative are appropriate and, if so, which styles (the transformative, the narrative, or what) for what type of dispute; and Acas might assess whether a cadre of mediator-counsellor/therapists adds anything to what Acas mediators can do at present.

Also, as suggested in this thesis, there might be further research into:

- the adaptability/applicability and practical value to the workplace, and to Acas individual mediation, of tools such as the conflict assessment scale, with its positive and negative indicators for mediation, referred to by Irving and Benjamin (2002:88) and mentioned in chapter four;

- the value and potential use of the 'likely productiveness of a joint meeting' questionnaire developed by the researcher, and reproduced at Appendix One; and

- whether the stress by Acas mediation co-ordinators that their mediators take a strictly impartial line contributes to so many mediation enquiries not converting into actual mediations.

Finally, given the findings of this thesis, there might be further research on the importance of a mediator's own organisation to mediation success, and on whether the researcher's findings on the significance of the Acas context/system are transferable to other organisations, such as the United States Federal Mediation and Conciliation Service (FMCS), the New Zealand Ministry of Business, Innovation and Employment (MBIE) mediation services, the Irish Workplace Relations Commission, and private sector providers in the UK such as Consensio, and the mediators employed in these organisations.

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'MOVING TO A JOINT MEETING' QUESTIONNAIRE

Questions the mediator might put to each disputing party, in pre-mediation, to judge whether moving on to a joint meeting is likely to be successful (the more plusses, the better), or whether this would be premature and more work in pre-mediation is necessary:

(1) How would you describe your relationship with X over the recent past?

                -                 +

       - - - - - - - - - - - - - - - - - -

(2) How do you feel about sitting down with X in mediation?

                -                 +

       - - - - - - - - - - - - - - - - - -

(3) What do you see as the "problem" between you and X?

[Mediator to then judge congruence of parties' perception about the "problem" and its various aspects:

                -                 +

       - - - - - - - - - - - - - - - - - -   ]

(4) How long has this problem been going on?

[Mediator to judge at this stage

(i) how quickly the parties have come to mediation, and whether s/he thinks this time span is a bad or good thing:

                -                 +

       - - - - - - - - - - - - - - - - - -

(ii) how "ripe" the conflict is for third-party intervention

                -                 +

       - - - - - - - - - - - - - - - - - -   ]

(5) How possible is it for X to meet your needs?

<pre>
                    -                     +
          - - - - - - - - - - - - - - - - - -
</pre>

(6) How possible is it for you to meet X's needs?

<pre>
                    -                     +
          - - - - - - - - - - - - - - - - - -
</pre>

(7) To what extent do you believe that you personally can move forward on the issues in dispute?

<pre>
                    -                     +
          - - - - - - - - - - - - - - - - - -
</pre>

(8) How much time are you prepared to give to this mediation, that is, aggregate time and time span?

<pre>
                    -                     +
          - - - - - - - - - - - - - - - - - -
</pre>

(9) What pressures have you experienced/felt when contemplating this mediation? . . .

(10) How much do you think mediation will work for you in this case? . . . . . .
[Mediator to then judge from answers to (9) and (10) how committed party is to the idea of mediation in this case?

<pre>
                    -                     +
          - - - - - - - - - - - - - - - - - -   ]
</pre>

(11) How encouraging about this mediation have the people around you (at work and home) been?

<pre>
                    -                     +
          - - - - - - - - - - - - - - - - - -
</pre>

(12) How comfortable do you feel (so far) about my mediating in your case?

<pre>
                    -                     +
          - - - - - - - - - - - - - - - - - -
</pre>

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Besides reflecting on the answers to the suggested pre-mediation questions, the mediator needs to make a judgement in pre-mediation about the parties' attributes or qualities, and skills, and their likely contribution to success in a joint meeting. The following might help in this:

Irving and Benjamin (2002:119) say that, for the disputing parties to move on to the negotiation/joint meeting phase of mediation, 'they should:

- have some conscious control over the type and intensity of their feelings;

- be able to advance an organized and logical proposal;

- be clear and effective in their communication (ie communication should address specific issues, one at a time, in the present, and express a clear preference or position);

- [if they have met in, say, pre-mediation] be responsive to the other [party], that is, speak to him or her respectfully, make eye contact, allow for reasonable turn taking, consider the other's ideas (without dismissing them outright), and show that he or she has heard what the other has had to say;

- show some willingness to accommodate issues in dispute, that is, display some flexibility and willingness to compromise or at least consider alternate perspective and solutions; and

- be responsive to the mediator, both as regards managerial (who speaks, turn taking) and substantive instructions and suggestions'.

Irving, H. H. and Benjamin, M. (2002) *Therapeutic Family Mediation: Helping Families Resolve Conflict.* Thousand Oaks, Sage Publications.

APPENDIX TWO (SEE PAGE 141):
VIGNETTE FOR POSSIBLE USE WITH FURTHER FOCUS GROUPS

Background

A dispute involving two ladies, Debbie and Jane, and those around them at work and home.

In 2008, Debbie raised a formal grievance against a colleague in her department, Jane, alleging bullying and harassment. Management conducted an investigation and concluded that there was no evidence to support the allegation. However, management required both parties 'to work together on a professional basis going forward'. Shortly after this, though, Debbie commenced maternity leave.

On Debbie's return from maternity leave in 2010, she went into a different department, on a part-time basis. Contact between the two ladies was, therefore, much less frequent than before. However, it became apparent to colleagues that the relationship problems between the two ladies had never been properly resolved and that any requirement about working together on a professional basis was not being adhered to.

Debbie raised a further formal grievance on 12 July 2011. She requested that her 2008 grievance be 'revisited and acknowledged as never having been resolved and be included as part of this latest formal grievance'. Management looked into the matter and concluded that the original grievance had been investigated properly at the time but that the requirement for the two ladies to 'work together' had never been adhered to. Management did not believe that Debbie had been bullied or harassed by Jane since her (Debbie's) return from maternity leave.

'However [continued the investigating manager, to Debbie] I am satisfied that Jane made it known to other colleagues that she will not under any circumstances work with you and she has been witnessed as making derogatory remarks about you in front of work colleagues. It was also apparent that all witnesses were aware of the mutual feud between both you and Jane. Jane also made it clear that any work request for information made by you via email would be ignored. Which I believe is unacceptable

within the workplace, however I acknowledge that this has been condoned by management in the past.

'I also acknowledge that Jane also clearly perceives that she has been victimised by you as you have now raised two formal grievances against Jane, with some of the allegations in the current grievance being of a serious nature, which following my investigation I am satisfied are clearly unfounded (ink on chair and computer disconnection).

'However, you have indicated that you are willing to work on a professional basis with Jane and make an effort to put your past differences behind you both. As I believe you will both need support in order to regain a professional working relationship, we have asked Acas to mediate between you and Jane, to try and bring you both together in order to put the past behind you and work together on a professional basis. Acas is independent, confidential and has the skills/knowledge to mediate impartially.

The investigating manager went on to 'require both you and Jane to make a genuine effort to work together' and he placed obligations on both parties. 'This current situation between you and Jane is unacceptable and will not be tolerated going forward in a working environment, not only from a company point of view, but also the effect it has on work colleagues and ultimately both you and Jane.'

Acas mediation

After separate meetings with the parties on 16 August 2011 (Debbie in the morning and Jane in the afternoon), the Acas mediator brought them together the following week, on 24 August 2011. In between, Debbie had had an appeal hearing (but no decision) in respect of management's initial response to her 12 July 2011 grievance. The joint mediation meeting lasted two hours, including a short break for some drafting by the mediator. At the end, Debbie and Jane agreed that the mediator might e-mail the person who had commissioned the mediation as follows:

'At their joint meeting today, Jane and Debbie discussed how their working relationship had deteriorated and whether a more positive relationship might be restored.

'They thought that the best that might be hoped for at this stage was a working relationship with only as much contact as their respective jobs demanded. Whatever contact there was should, however, be as professional as possible; and colleagues should not be dragged into any disagreements.

'Debbie and Jane further thought that, if - in future - any matter did arise that caused concern to either of them, the individual concerned should raise it straightaway with her line manager. The expectation would be that an early meeting of the two (Jane and Debbie) would then be arranged, facilitated by the two respective line managers, to sort things out.

'Debbie and Jane are happy for you to share the above with their respective line managers and with the Finance Director [responsible in the company for Personnel/HR].'

The mediator had no further contact with the disputing parties other than with Debbie shortly after the joint meeting. She contacted the mediator to say that her appeal against management's initial response to her 12 July 2011 grievance had been rejected and that she did not want to stay with the company, after all. However, the mediator's attempts to explore some sort of severance payment for her to leave the company fizzled out when she stopped responding to the mediator's calls. The mediator assumed that she had decided to press on at the company/make the best of it.

Focus group questions

What 'dispute impact' do you judge the mediator was trying to achieve in this case - manage, settle or resolve the dispute? Or something else? *Explain 'manage, settle or resolve' as follows:*

> *(i) dispute management – containing, limiting, if not de-escalating, a dispute;*
> *(ii) dispute settlement – establishing a framework that eliminates at least overt conflict; and*
> *(iii) dispute resolution – addressing the root causes of a dispute, negating the threat of further conflict-generating behaviour.*

To what extent did the mediator achieve what s/he had been attempting?

How appropriate, in your view, was the mediator's choice of dispute impact?

What factors do you think influenced the mediator's choice of dispute impact and her/his achievement of that choice? What factors, that is, contributed by the mediator personally and what factors related to the dispute's context? *Prompt with some example factors, if need be.*

What do you consider the more important in influencing the mediator's choice (of dispute impact) and her/his achievement of that choice: factors contributed by the mediator personally or factors related to the dispute's context?

As well as running four focus groups involving 18 Acas staff in all (see pages 138-141) and carrying out six face-to-face and one telephone interview with people outside Acas (see page 146), the researcher conducted individual, face-to-face interviews with 27 Acas staff, as follows:

Interviewee	Location	Date	Length of interview	Comments
Grade 9	Manchester	25 Jan 2011	1hr 36m 53s	Ten exploratory interviews, the purpose of which is set out on page 141 and which enabled the researcher to develop his research questions.
Grade 9	Manchester	25 Jan 2011	1hr 42m 55s	
Grade 9	London	31 Jan 2011	1hr 44m 31s	
Grade 8	London	31 Jan 2011	1hr 29m 38s	
Grade 8	London	9 Mar 2011	1hr 30m 20s	
Grade 8	Nottingham	14 Mar 2011	1hr 53m 01s	
Grade 9	Nottingham	14 Mar 2011	1hr 35m 50s	
Grade 9	Nottingham	14 Mar 2011	1hr 07m 27s	
Grade 9	London	29 Mar 2011	1hr 24m 39s	
Grade 9	London	29 Mar 2011	2hr 06m 06s	
Grade 9	Bury St Ed	30 April 2012	1hr 20m 17s	See pages 142-144 for information on these 17 interviews.
Grade 9	London	16 May 2012	1hr 48m 37s	
Grade 9	London	16 May 2012	1hr 36m 23s	
Grade 9	Bury St Ed	21 May 2012	1hr 45m 15s	
Grade 9	East Sussex	18 Oct 2012	1hr 37m 41s	
Grade 9	Bristol	16 Nov 2012	1hr 48m 11s	
Grade 8	Bristol	16 Nov 2012	2hr 04m 59s	
Grade 9	Fleet	10 Dec 2012	2hr 14m 23s	
Grade 9	Fleet	10 Dec 2012	1hr 21m 09s	
Grade 9	Cambridge	8 Jan 2013	1hr 38m 31s	
Grade 9	Liverpool	5 Feb 2013	1hr 58m 23s	
Grade 9	Liverpool	5 Feb 2013	2hr 07m 23s	
Grade 8	Swansea	13 Feb 2013	1hr 33m 36s	

Grade 8	Bury St Ed	25 April 2013	1hr 22m 00s	
Grade 9	Newcastle	10 Sept 2013	1hr 51m 08s	
Grade 9	Newcastle	10 Sept 2013	1hr 31m 50s	
Grade 9	Newcastle	10 Sept 2013	1hr 30m 52s	

Key:
Grade 8 = Senior Adviser/Senior Conciliator who also carries out individual mediation work and/or individual mediation training

Grade 9 = Individual Conciliator who also carries out individual mediation work

APPENDIX FOUR (SEE PAGE 157):
EXAMPLE MEDIATION SESSION SUMMARY

SUMMARY OF MEDIATION MEETING ON 6 MARCH 2014 AT K . . . INTERNATIONAL, INVOLVING DG AND SM

We met on 6 March 2014, along with KM and RW of Acas, to discuss the topics we had identified in our separate meetings with K and R on 27 February 2014, and any other topics that might arise in the course of the joint meeting.

Talking more face-to-face

While we accepted that e-mails were often a convenient and speedy way of 'talking', we agreed on the need for both of us to recognise when an e-mail conversation had run its course, when talking direct would be more productive and would probably help defuse a heated situation. We also agreed that, when any issue calling for action was raised by either of us, the other should acknowledge that perceived need for action, act if possible, and give updates on progress as appropriate.

The use of personal mobiles for work purposes

Although recognising that it might not be an easy task, we agreed to look at how problems in this area could be avoided in future. We thought that such a review might be part and parcel of the 24/7 support service 'tidying up' mentioned below.

Revisiting S's last performance review

We agreed to sit down together, as soon as possible, to revisit S's last performance review, where - inadvertently – the correct procedure had not been followed. We accepted that this might lead to 'difficult' conversations and acknowledged K and R's offer of future help in this regard. With S's agreement, D said that he would ask JR to initiate payment of a lump sum due to S.

The 'tidying up' of issues around the 24/7 support service

We agreed to sit down, just with Sam initially (but probably with others in due course), to try to 'tidy up' the 'rules' around our 24/7 support service, to see if we could pre-

empt some of the disputes that might otherwise arise in future. As indicated above, we shall look at the use of personal mobiles for work purposes as part of this exercise.

Feeling overly challenged by the other

D spoke of the impact that (what he saw as) S's constant challenges were having on him, and S in turn admitted to not feeling particularly valued. We accepted that we had never been great friends but that our relationship at work had deteriorated of late. We agreed that we needed to build up trust between us, again, but that this would not happen overnight. This brought us back to the need to talk more face-to-face.

DG and SM

EARS AND EVALUATION QUESTIONNAIRE COMPARISON, 2012/2013

Case and party /ies	Evaluation questionnaire		EARS: outcome and, in some cases, some of mediator's additional comments
	Issues mediation designed to address resolved?	How satisfied with the agreement reached?	
1	Completely	Fairly satisfied	Dispute resolved. 'Outcome greatly assisted by news that colleague who [had] made allegation [against one of the parties] had resigned.'
2-1	Not at all	Not applicable	Progress made. 'There were four areas of agreement but [the three disputing parties] did not want to write them down. [E-mail received] the next day from [one of the parties] saying that [mediation] had appeared to work.'
2-2	Not at all	Not applicable	
3	Partly	Fairly satisfied	Progress made
4-1	Partly	Fairly satisfied	Dispute resolved
4-2	Partly	Fairly satisfied	
5	Not at all	Not applicable	Dispute not resolved. 'Problems too entrenched. Manager, on the day, refused to meet with team member.'
6-1	Not at all	Not applicable	Dispute not resolved. 'Neither employee or manager prepared to change their opinions or stances. Learning point for next time – spend even more time ensuring that the parties realise that mediation means looking for common ground not expecting the other side to change their views to reflect theirs.'
6-2	Not at all	Not applicable	
7	Partly	Very satisfied	Dispute resolved
8	Partly	Fairly satisfied	Dispute resolved
9	Partly	Fairly satisfied	Dispute resolved

10-1	Partly	Very dissatisfied	Progress made. 'Difficulty of dealing with someone who is emotionally affected by the events leading up to the mediation.'
10-2	Not at all	Not applicable	
11-1	Partly	Fairly satisfied	Progress made
11-2	Not at all	Not applicable	
12	Partly	Neither satisfied nor dissatisfied	Dispute resolved. Written agreement.
13	Not at all	Not applicable	Dispute resolved. Written agreement.
14	Not at all	Not applicable	Dispute resolved
15	Partly	Fairly satisfied	Dispute resolved.
16	Partly	Very satisfied	Dispute resolved
17	Not at all	Not applicable	Progress made. 'Difficult to move to future focus. Would reconsider delivering a mediation where parties may no longer have to work together.'
18	Not at all	Not applicable	Progress made. 'Joint meeting lasted approx hour and a half (and progress made) before JP became obviously distressed. Halted meeting. Both parties agreed, in principle, to meet again.' But did not?
19	Completely	Very satisfied	Dispute resolved. Written agreement.
20	Partly	Fairly dissatisfied	Progress made. Detailed 'way forward agreed'.
21	Partly	Fairly satisfied	Dispute resolved
22	Not at all	Not applicable	Progress made
23-1	Not at all	Not applicable	Dispute resolved. 'Asked parties to identify two things that they were going to change on their return to work.'
23-2	Partly	Fairly satisfied	
24-1	Completely	Fairly satisfied	Dispute not resolved. 'Met separately with all [five] individuals. Mediation did not proceed to joint meeting(s).'
24-2	Completely	Very satisfied	
24-3	Not at all	Not applicable	
25	Completely	Very satisfied	Dispute resolved
26	Partly	Fairly satisfied	Dispute resolved
27	Partly	Very satisfied	Progress made. 'Parties more aware now of their options.'

28-1	Partly	Fairly satisfied	
28-2	Not at all	Not applicable	Dispute resolved
29	Partly	Fairly satisfied	Dispute resolved
30	Not at all	Not applicable	Progress made
31	Partly	Fairly satisfied	Dispute resolved
32	Not at all	Not applicable	Dispute resolved. 'Parties agreed to draw a line under past events and start afresh. However, neither party wanted mediation – the line manager stuck rigidly to a script and was clearly prepped by his director and HR, and the employee was reluctant to move on as no concessions were made and she admitted that she felt pressurised by HR to participate in the mediation. My initial discussion with [commissioning party] left me with the impression that mediation was not the best option in this scenario, and I haven't changed my mind.'
33	Partly	Fairly satisfied	Dispute resolved
34-1	Partly	Fairly satisfied	Progress made. 'Agreement reached re behaviour and how respect will work' but 'majority [of group of six] did not want a written agreement'.
34-2	Not at all	Not applicable	
35-1	Partly	Neither satisfied nor dissatisfied	Dispute resolved
35-2	Partly	Fairly satisfied	
36-1	Not at all	Not applicable	Dispute resolved
36-2	Partly	Neither satisfied nor dissatisfied	
37	Partly	Fairly satisfied	Progress made. 'Maybe return for a half day maintenance.' Which did happen, the next month.
38	Not at all	Not applicable	Dispute resolved
39	Completely	Fairly satisfied	Progress made
40	Completely	Very satisfied	Dispute resolved

41	Partly	Fairly satisfied	Dispute resolved. 'At the end of the process, [the parties] were willing to shake hands.'
42	Not at all	Not applicable	Progress made
43-1	Not at all	Not applicable	Progress made
43-2	Partly	Fairly satisfied	
44	Partly	Very satisfied	Progress made. 'Line manager feels the dispute has been resolved; employee feels that progress has been made.'
45	Not at all	Not applicable	Dispute not resolved. 'It became apparent that this process was not appropriate. I halted the mediation.' No obvious follow-up.
46-1	Completely	Fairly satisfied	Progress made
46-2	Not at all	Not applicable	
47	Partly	Fairly satisfied	Dispute resolved. 'Agreement reached on six areas to improve.'
48	Not at all	Not applicable	Dispute resolved
49	Not at all	Not applicable	Dispute resolved
50-1	Not at all	Not applicable	Dispute resolved
50-2	Not at all	Not applicable	
51-1	Partly	Fairly dissatisfied	Dispute resolved
51-2	Completely	Very satisfied	
52-1	Partly	Fairly satisfied	Dispute resolved
52-2	Partly	Neither satisfied nor dissatisfied	
53-1	Not at all	Not applicable	Dispute not resolved. 'One party did not wish to continue with mediation after lunch break. They felt any changes or agreement made would not be adhered to.' No further action apparent.
53-2	Not at all	Not applicable	
54	Partly	Neither satisfied nor dissatisfied	Dispute resolved. 'Agreement reached between parties.'
55-1	Completely	Fairly satisfied	Dispute resolved
55-2	Not at all	Not applicable	
56-1	Completely	Very satisfied	Dispute resolved
56-2	Partly	Fairly satisfied	
57	Completely	Neither satisfied nor dissatisfied	Dispute resolved
58	Not at all	Not applicable	Progress made

59	Not at all	Not applicable	Dispute not resolved. 'No progress made [in joint meeting] other than an understanding of the differences between [the parties].'
60-1	Partly	Neither satisfied nor dissatisfied	Progress made
60-2	Partly	Neither satisfied nor dissatisfied	
61	Partly	Neither satisfied nor dissatisfied	Dispute resolved
62	Partly	Fairly satisfied	Dispute resolved. 'Agreement achieved.'
63	Partly	Fairly dissatisfied	Progress made
64	Partly	Fairly satisfied	Dispute resolved
65	Partly	Neither satisfied nor dissatisfied	Dispute resolved
66	Not at all	Not applicable	Dispute resolved
67	Partly	Fairly dissatisfied	Dispute resolved
68	Partly	Fairly satisfied	Dispute resolved

Sources: EARS and Wainwright (2013)

APPENDIX SIX (SEE PAGE 216):

EXAMPLE AGREEMENT TO MEDIATE (NOT LEGALLY BINDING)

We . . . and . . . ("the parties"), have decided to use mediation to try to resolve issues between us.

1 <u>Mediator</u>

The parties agree that . . . . . of Acas will be the mediator and they understand that the mediator

- will serve as a neutral intermediary
- will not act as an advocate or representative of any party
- does not give legal advice
- does not "investigate"/produce "findings".

They further agree that they will not make any claim against the mediator in connection with this mediation.

2 <u>Conduct of the mediation</u>

The conduct of the mediation will be in the hands of the mediator but he will broadly follow a model that involves separate meetings with the parties initially, followed by a joint session or sessions, during which there may be further separate meetings. The purpose of the separate meetings is to improve the mediator's understanding of each party's views. Information given to the mediator during such private talks will be confidential unless the party involved allows the mediator to give the information to another party.

3 <u>Confidentiality</u>

No recording or transcript of the mediation will be made. Other than any final written agreement or agreed summary of the mediation, any information the parties produce or receive - whether in a document prepared for the mediation or written or spoken during the mediation - can only be used for the purpose of mediation (this does not apply to any information known to the parties before/outside of the mediation). The information

cannot be either used informally or referred to in any formal investigation or court action. In the latter respect, the parties agree that they will not call the mediator to give evidence in any disciplinary or court action, or ask to see the mediator's notes. It will be for the parties to decide jointly how to use any final written agreement or agreed summary of the mediation. The mediator will not disclose outside of the mediation any information given to him in the course of mediation, unless he reasonably considers that there is a serious risk of significant harm to the life or safety of any person.

4 Principles

The parties will attempt to

- be fair to each other throughout the mediation

- leave fault and blame out of discussions

- be co-operative in resolving disagreements

- consider individual needs and the needs of each other

- work for the least possible emotional upheaval for all concerned.

5 Termination of mediation

If the mediation results in an agreement, this will usually be committed to writing. If the mediation is not successful, in the sense of not resulting in an agreed way forward, any party will be free to take whatever action s/he deems appropriate. The mediator, or any party, may end involvement in the mediation at any time without giving a reason.

6 Support

There may be some exceptional circumstances where - at the discretion of the mediator - a person may accompany one of the parties during the mediation process. Any such supporter will be deemed to agree to abide by the terms of this agreement, particularly those relating to the confidentiality of the process.

Name   Name

Signed   Signed

Date   Date

FACILITATIVE MEDIATIONS STARTED 1 APRIL TO 31 DECEMBER 2013, IN ONE ACAS AREA

Organisation type	Case issues*	Med'r**	Outcome***	Key point(s) for researcher
Local authority	'L (solicitor) relatively recently took over the line mgt of J (legal manager). Issues around her style of management as perceived by J. Example includes turning down request for flexi, J feels victimised, raised grievance. During the investigation both agreed to mediation - investigation put on hold.'	A:26	Progress Made. Joint meeting planned for 13 January 2014 but did not materialise. J said he had not agreed to mediation; Council adamant he had. 'Discussed [J's] current working relationship with [L] and agreed that it was still effective.'	Reluctance of one of disputing parties to put himself in the hands/control of the mediator concerned.
Sea transport company	'Grievance raised by I about G - sexual harassment. Investigated [but] not upheld.'	B:19	Dispute Resolved. 'I did not want a joint meeting with G. Used mediation to relay his position to him.'	Reluctance of one of disputing parties to put himself in the hands/control of the mediator concerned.
Manufacturer (aerospace, defence, etc)	'Long running dispute between 2 employees, mediation used to help the parties work together in the future and to put the issues behind them.'	C:7	Dispute Resolved. 'Lack of breakout room available for joint meeting despite requesting this. Would	Given a 'long running dispute', follow-up would have been useful.

			have been useful as it was required.'	
GP practice	'N is off sick and has been for over a year. She is ready to return to work but does not want to be managed by A as she says A has picked on her and bullied her over performance issues. There is no one else to manage her. A says N has made a lot of errors. They have made all possible adjustments to accommodate her MS. Her performance will still have to meet the requirements of the job.'	B:19	Dispute Resolved. 'N decided to resign.'	Moving on is always an option for one or other disputing party.
Local authority	'Two employees who had been close friends. One brought grievance against the other because she felt that she was being unfairly "pulled up" about issues that others were not questioned about. Agreement reached about behaviour in the workplace when they get back together on the same team and will ask for a private room if needed.'	D:28	Dispute Resolved	An example of 'workplace friendship deterioration'. Follow-up would have been useful.
Local authority	'Difficult working relationship with Town Clerk and Town Councillor. Loss of trust.'	B:19	Dispute Resolved. 'Agreed communications and	Follow-up would have been useful.

			protocols for the future. Some of the issues have been addressed by introducing a HR committee into the Town Council and other people being aware of the issues.'	
Food and drink group	Mediation between Nick and Nigel. Nigel 'is the individual recently reinstated but on a FWW for aggressive and threatening behaviour. The root cause of the "incident" was Nigel's partner who is also employed by [the organisation] and is a direct report to Nick.'	E:9	Dispute Resolved	Not enough detail to comment.
Local authority	'3 party dispute - employee and direct line manager, and employee and senior line manager. Dispute resolved, parties all happy for that to be reported back to the employer.'	C:7 +	Dispute Resolved. 'Both line managers wanted their individual meetings together as the issue the employee had with them was equally proportioned and put in as one grievance. Gave them the option that either could have a private meeting with us	Not enough detail to comment.

			in the afternoon in addition to the 'joint' individual meeting - we had set aside enough time for this to be an option.'	
Local authority	No details given.	F:5	Dispute Not Resolved	Not enough detail to comment.
Building contractor	'Four people having trouble working together - includes wife of owner. One allegedly causing the difficulties, but all involved.'	D:28	Dispute Resolved. 'Two four hour meetings where [mediator] held four individual meetings and then two four hour joint mediations. One woman left [mediation]. 'Mediation involved two joint meetings with one of the parties with each of the two remaining staff. Also some "coaching" of the Director and encouragement for her to attend our new "Conflict" course, which she did. Other factors causing	'Dispute resolved' yet one party left the mediation and 'the son of the Director' never attended. Follow-up would have been useful.

			difficulties was the son of the Director who set different standards from those which she set.'	
College	'Mediation set up after an investigation into B&H not substantiated. Case involves former Head of School (had been on a TP contract) plus two lecturers. Head reverts back to lecturer contract in Sept and will be working closely with at least one of the other parties. Head feels her career has been adversely affected by the claims. Long standing issues - approx 4 years.'	A:26	Dispute Not Resolved. 'Difficulties too entrenched, parties unable to consider resolution, unwilling to meet in joint session in any form.'	Might dispute resolution approaches other than a standard mediation one have been considered?
Defence systems producer	'Parties are H&S Officers, G in B, P in S. Sometimes have to work together on projects, sites. Recent incident between them, P raised a grievance. P was told his behaviour towards G was not acceptable. [Commissioner] has requested mediation as a means of the parties exploring ways of improving their working relationship.'	G:9 +	Dispute Resolved. 'P has a speech impediment when stressed. G's hearing is impaired. Individual meetings 25 July, joint meeting 29 July. They identified changes/improvements to telephone and email communications as they	Rare to see explicit apologies.

			have little face to face contact. Apologies freely given and readily accepted.'	
Health and social care services company	'Difficulties in team over last four years. Possibly weak management, in/out work relationships etc.'	A:26	Dispute Not Resolved. 'Although it became clear that parties were unable to commit to mediation i.e. their positions were fixed, they had demands which could not be achieved through mediation, it is impossible to identify this before embarking on the mediation. Joint meetings did not go ahead.'	Again, might dispute resolution approaches other than a standard mediation one have been considered?
GP practice	'L raised a grievance including that she had been bullied by J. Grievance process complete. Upheld in part but not in relation to bullying.'	B:19	Dispute Resolved	Not enough detail to comment.
College	'Line Manager (A) disciplined Equestrian Manager (S). Appeal on suspension upheld. Verbal warning given. S was then off work	D:28	Progress Made. 'S accepted need to talk to HR although regretted no joint meeting once	Another example of 'workplace friendship deterioration'. Again, follow-up would have been useful.

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	for several months as lost confidence in A, raised grievance, some of which upheld. Solicitor involved for S. A not keen on mediation, but will do it. Re-structure: S's job not under threat at moment. Met both and discussed the situation. A not keen on S returning - worried about grievances. S worried about A blocking her and not contributing. Used to be friends. A pulled out of process when [mediator] telephoned to arrange venue because she said that she was afraid that S would launch a tirade during mediation. Was not prepared to meet under any circs.'		she had steeled herself to do so. A committed to enabling S to return, although it is doubtful that she will be able to do that as she does not wish to clear the air.'	
Hospital Trust	'Issue between consultant and specialist doctor (were two other doctors involved but have since retired). Formal grievance taken out against consultant - unprofessional treatment. Some points upheld, some not. Mediation suggested as part of structured return to work of consultant who had gone sick.	A:26	Progress Made. 'Both parties agreed a list of areas they needed to sort with each other. This was progress; however a further meeting did not take place due to difficulties in scheduling diaries	Lack of commitment by commissioning party and disputing party? And an element of 'unreadiness' on the part of the mediator?

			and then no further contact. It is a judgement call how much to "nag" the parties to agree dates.'	
	'Separate meetings were held followed by a joint meeting. Time available meant that the issues could not be fully dealt with - agreed to approach [Trust] for further funds to meet again. Following little, then no, contact with parties to arrange this further meeting, contacted the Trust who advised to conclude and send invoice in. E mail to both parties to inform them.'			
Probation Trust	No details given.	E:9	Case still open. No outcome given.	No detail to enable comment.
Building society	'Relationship issues. J does not report directly to C, there are two intervening levels of management. J is off sick until 19 April. Feels he is bullied and belittled by C, some comments by C in the workplace have upset J. [Commissioner/HR manager] suggested mediation to take place before J returns to work.'	G:9	Dispute Resolved. 'C had some hesitation in participating but was willing to listen and discuss J's concerns. Joint mtg took place 17 Apr. Outcome, J will have a phased return to work shortly, dates to be finalised with HR. J gave C permission to discuss matters from the mediation with his	Performance management issues. Again, follow-up would have been useful.

| | | | | line-managers and HR manager in the hope that shortcomings in communication will be recognised and not recur. J confirmed his commitment to the Society and welcomed the assurances from C that his role continues and they are keen for J to return to work. Both of them acknowledge that there are performance issues and a plan is being drawn up to support J and improve his skills. J and C felt they had a good understanding and did not feel the need for a written agreement.' | |

Source: EARS

* As recorded on EARS by the mediator involved. ** The letter in this column identifies the mediator responsible for the case in question (key with the researcher); and, as a measure of her/his experience, the number indicates the total number of mediations opened (less those cancelled) by that mediator, as shown on EARS from 1 April 2006 to 31 December 2013. The + sign indicates that a newly-trained mediator accompanied the lead mediator on the two cases in question, for developmental purposes. *** The categories are those used on EARS: Dispute Resolved,

Progress Made, Dispute Not Resolved, and Mediation Unprogressed. The additional comments (if any) are those of the mediator involved, recorded on EARS.