

Judicial mediation in employment discrimination (2010)

A summary of evaluation report of a pilot offering judicial mediation in employment discrimination claims. Details of how to find the full report can be found at the bottom of the page.

“Evaluating the use of judicial mediation in employment tribunals”, Ministry of Justice Research Series 7/10, March 2010

What is it about?

The research was an independent evaluation of a pilot scheme offering mediation by tribunal judges in discrimination cases at the employment tribunal.

The aim of the research was to explore to what extent judicial mediation was able to resolve cases without the need for a formal hearing, did it result in lower costs, and what were the benefits for claimants and employers, both in terms of outcomes and improved process?

Who did it?

The evaluation was carried out by a team of researchers from the University of Westminster and University of Wales, Swansea. The research involved a telephone survey and in-depth interviews.

About the pilot

The pilot was carried out in three regions of England – Newcastle, Central London and Birmingham – by the Employment Tribunal Service. The pilot was for discrimination cases starting in the employment tribunal between June 2006 and March 2007.

Other criteria for identifying cases in which to offer judicial mediation were:

- single claimant
- one strand of discrimination only
- a hearing length expected of three or more days

Mediation was offered at the initial case management discussion with the tribunal judge. Judges mediated cases that were not in their own caseload – in other words, they did not go on to hear cases that they had mediated.

There were 868 cases identified as eligible for the pilot. Of these:

- 672 declined an invitation to mediate (referred to as ‘unmediated/uninterested’)
- 80 accepted the invitation to mediate but did not have mediation (‘unmediated/interested’)
- 116 accepted the invitation to mediate and had mediation (‘mediated’)

Key findings

- Parties in about 23% of the eligible cases accepted the mediation offer, and only 13% did mediate.
- Female claimants were more likely to accept the offer to mediate
- Employers were more satisfied than employees were with mediation
- There was no impact on the percentage of cases resolved without a hearing or on the rates of cases settled within a set time period.
- There were additional costs to the tribunal and the parties, and it was an expensive process to administer.

Take-up of mediation offer

Characteristics of cases in which parties were most likely to accept the mediation invitation were:

- female claimants
- jobs with longer hours
- claimant still in the same job
- employer not legally represented
- estimated longer hearing length

The gender difference in terms of claimants accepting the invitation to mediate was marked: 64% of cases in which mediation was accepted involved a female claimant, compared to only 51% of cases in which mediation was rejected. In addition, 44% of cases in which mediation was accepted involved a sex discrimination claim, compared to only 37% of cases in which mediation was rejected.

Cases settled at mediation

The direct rate of success amongst those cases that experienced judicial mediation was 57%. ('Success' in this case meaning resolved at mediation.) This finding is in the context of mediation being offered as an additional process in the employment tribunal environment where approximately 60% of cases are resolved before a full hearing and where a variety of ADR techniques are already available. In the pilot:

- 57% of 'mediated' cases
- 61% of 'unmediated/interested' cases and
- 54% of 'unmediated/uninterested' cases resolved before hearing.

Satisfaction levels

There were potential indirect benefits of saving the employment relationship and improved psychological well-being, but they were very hard to estimate. The researchers considered the levels of satisfaction of participants, but found there was no significantly significant impact on the overall satisfaction levels of claimants or employers.

There was evidence that employers were more positive about the mediation experience than claimants. Of those cases that mediated, 60% of employers, but only 39% of claimants, felt the mediation was very effective in bringing the case closer to resolution. Some

claimants liked in particular the non-financial aspects of the mediation settlement, such as a reference.

There were generally positive comments made about the judges acting as mediators. Characteristics that added to participants' positive view of the mediation judge included being seen as a good listener to the parties, communicating clearly about the process and the other sides' position, and being reassuring. One interviewee claimed the mediation judge was good at 'summarising and questioning', and they had authority, but were human at the same time. Negative comments about judges related to them being seen as too distant or detached. Interestingly, there was some indication that some participants would have preferred a more interventionist approach.

Cost

The average cost per case was found to be:

- £3,738 for claimants and respondents in terms of time involved, but set against an estimated saving of £822 when the case resolved early led to a net cost to parties of £880.
- £908 risk-adjusted net cost to the Employment Tribunal.

The findings in relation to cost were that it was an expensive process to administer, and the additional costs were not offset by estimated benefits, both direct and indirect. Therefore, it was not recommended that the service be rolled out to other areas of the employment tribunal service.

The average duration for a judicial mediation event was five hours and twenty-three minutes.

Given the higher rates of satisfaction among employers as opposed to claimants, the possibility was raised that employers might be charged for judicial mediation in future.

Conclusions

The finding that mediation did not save time or money is not surprising given findings of other empirical research on mediation (including Hazel Genn's studies of mediation at Central London County Court and Public Law Project's research on mediation in judicial review claims). In addition, in the context of employment tribunals, in which a significant number of claims are resolved before hearing anyway, and in light of the use of tribunal judges as mediators in this pilot, the specific context indicates that mediation will not be less expensive than hearings and will not reduce the numbers going to hearing.

As with other studies of mediation, the benefits appear to be less easy to quantify and relate to higher satisfaction with the process and with the opportunity mediation provides to maintain ongoing relationships.

One omission from this pilot is a comparison of mediation settlements with tribunal awards. This is surprising given that the authors refer to research findings that indicate lower

financial settlements are achieved in mediation. For example, they state: 'An interesting phenomenon observed in some studies where a non-mediated control group was available (e.g. Genn, 1998) was that the financial settlement was typically lower in mediation (in Genn's study this difference was of the order of £2,000).'

The authors note that 'it was possible that mediation might have resulted in different case outcomes to the tribunal cases' and they also note that 'The comparison of claimants' and employers' levels of satisfaction with outcome, provided some insights into this, but details of settlement were not considered explicitly.' Indeed, is there a clue to settlement levels achieved in the fact that employers were noticeably more satisfied with the outcomes in mediated cases than in those that went to hearing?

Key Website: [Evaluation report on judicial mediation pilot](#)