Ministry of JUSTICE

Evaluation of Early Neutral Evaluation ADR in the SSCS Tribunal

Summary to Ministry of Justice Research Series 2/10

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January 2010

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First Published 2010

ISBN: 978-1-84099-349-3 (Summary to full report)

The aim of the project was to evaluate a pilot testing the use of Early Neutral Evaluation (ENE) (a type of Alternative Dispute Resolution (ADR)) in the Social Security and Child Support (SSCS) Tribunal. The evaluation was conducted by ECOTEC Research and Consulting, in partnership with Professor Trevor Buck, of Leicester De Montfort Law School, De Montfort University.

Context

The primary objective of the pilot was to identify and test the success and cost-effectiveness of alternative mechanisms for resolving administrative appeals without the need for a full tribunal hearing. The Alternative Dispute Resolution technique trialled in this pilot was Early Neutral Evaluation of Disability Living Allowance (DLA) and Attendance Allowance (AA) appeals. The pilot operated as follows:

- ENE was conducted where the papers were read by one of two nominated District Tribunal Judges (DTJs) in each of the four pilot areas. This formed stage one of the ADR process. The DTJ assessed the likely outcome of the appeal based on the information in the submission. The DTJs in the pilot had one dedicated day per week for ENE work.
- The DTJ then contacted by telephone the party who in his or her opinion was likely to lose the appeal: the appellant or representative, or the Pension, Disability and Carers Service (PDCS). This formed stage two of the ADR process. The DTJ explained the merits of the case and what decision they thought the tribunal was likely to make and why. They then invited the PDCS to reconsider the benefit decision, or in the case of appellants their decision to appeal. The potential losing party then had the choice to accept the DTJ's advice and the case either lapsed or was withdrawn,[1] or the advice was ignored and the case proceeded to a hearing. The DTJ may also have issued directions, such as potential further evidence, or the option of an oral hearing.
- Alternatively, having read the papers at stage one, the DTJ might have concluded that he or she was unable to form a view of the likely tribunal outcome. These cases went forward for hearing in the normal way, although directions[2] might have been issued at this stage. Where cases proceeded to a hearing, the DJT who had conducted ENE did not chair the tribunal panel. The tribunal panel was not aware that cases were part of the ADR pilot and had no information on the potential outcome identified by DTJs at the ENE stage.

The pilot initially began operating in two areas: Sutton (outer London Borough) and Bristol from September 2007 and January 2008 respectively. Cardiff and Bexleyheath joined the pilot areas from August 2008. The pilot ran until the end of January 2009 and dealt with 2,081 cases concluded during the pilot period.[3]

1 An appeal lapsed when a decision was revised by PDCS in the appellant's favour before the appeal was heard. If an appellant wished to stop their appeal at any point they could ask for the appeal to be withdrawn.

2 The most common direction issued in opt-in cases was to request a medical examination report or to convert the hearing from paper to oral, both of which could serve to enhance the evidence available to the tribunal panel.

3 Only cases concluded by the end of January 2009 were included in the analysis of this report.

Evaluation approach

The overall aim of the evaluation was to determine the extent to which the ADR arrangements resulted in any benefits or efficiencies for the parties involved. More specifically, the evaluation sought to explore the following.

- The cost-effectiveness of ADR.
- Whether ADR (as deployed in this context) resulted in swifter and more proportionate resolution of appeal cases. Proportionate resolution in this context is defined as resolving disputes earlier and more effectively through strongly evidenced cases and opportunities to settle appeals outside of a tribunal.
- The effect on appellant satisfaction with the process.
- The impact on and views of other stakeholders such as PDCS and user groups.

The approach to evaluating the ADR pilot comprised a number of strands. This included:

- manipulation and analysis of data collected from the pilot;
- 107 interviews with Tribunals Service and PDCS staff, appellants or representatives[4] (including both those who opted in to the ADR process and those who did not), and representatives from professional welfare rights groups or support organisations; and
- development of average unit costs for different elements or key staff in the pilot.

Key findings

This report presents findings of comparisons of cost and time taken for case resolution for opt-in versus opt-out cases. The underlying assumption of these comparisons was that, apart from the decision to opt-in or not, these cases had similar characteristics and therefore were directly comparable. While there was no evidence to suggest that this assumption was not valid, the study design did not allow for a thorough investigation of whether the groups were indeed comparable. Therefore, it is important to interpret these findings with caution. Any apparent differences in cost and time taken for case resolution for opt-in and opt-out cases might be due to differences in case characteristics (e.g. appellant's certainty of appeal outcome etc.) between opt-in and opt-out cases rather than as a result of the alternative dispute resolution intervention.

Pilot process

Almost a quarter of the total opt-in cases (249 cases) were subject to both stages of the ADR process, i.e. the case went through ENE, had a losing party identified and a telephone call was made by the DTJ to the losing party. A higher proportion of opt-in cases (71% or 697 cases) were subject to only the first stage of the ADR process because the outcome from the case was unclear and a losing party could not be identified with confidence. Where cases were subject to only the first stage of the ADR process it still had clear benefits for cases, especially if directions were issued. There were only a small number of opt-in cases (32 cases or three per cent of the total

4 Appellants could nominate a representative to act on their behalf during the appeal process to receive the telephone call from the DTJ and make decisions on the case. As such they were included in the sample of qualitative interviews.

opt-in sample) that were subject to no aspect of the ADR process because of a lack of time or resources.

The following sections examine the effectiveness of the different elements of the ADR process in turn.

Appellant opt-in

Participation in the pilot was optional, so appellant opt-in was achieved through a letter explaining the process and an ADR opt-in form which appellants were asked to return if they wanted to opt-in. Overall this worked well. Just over three-quarters (78%) of the appellants who received the ADR letter and opt-in form, opted into the ADR process between September 2007 and the end of January 2009.

Evidence from the interviews suggested that some appellants made active decisions to opt-in, focused on specific potential benefits of the process, including speeding up the appeal outcome and having an independent eye over their case. Other appellants opted in to avoid the hearing for a variety of practical and psychological reasons, or because they were willing to try any approach they felt would help their case. Another group of appellants made a passive decision to opt-in. These appellants had obviously signed the opt-in form, as their case was going through the ADR process. However, they were not clear that they had done this, or why they had opted in. Inconsistent distribution of the opt-in letter in the early part of the pilot and the amount of paperwork received at the start of an appeal meant some appellants reported they had not seen the opt-in letter and this was mentioned as a reason for non-opt-in. For others, ADR was seen as a less attractive option compared to an oral hearing, as it potentially did not offer the opportunity for them to present their case in person. Therefore, they had actively chosen not to opt-in.

ENE review

The first stage of the ADR process was the ENE review, which involved the appeal papers being read by one of two nominated DTJs in each pilot area. The DTJ identified whether intervention either through a telephone call where a clear losing party was identified, or in the form of issuing directions, would advance the case. The purpose of the ENE element of the ADR process was interpreted by DTJs to have a dual function: firstly, to identify opportunities for early resolution without a hearing; and secondly to quality check the evidence to achieve a fairer and more informed hearing.

In practice, an initial ‘skim read’ of the papers played a key role in identifying cases which were viewed as ‘suitable’ for the second part of the ADR process. Those cases identified as suitable for stage one and two of the ADR process by the DTJ were typically those that displayed clear and outright weaknesses on the part of either the PDCS or the appellant to determine the likely losing party. In contrast, those deemed unsuitable, either after the initial review or following a more in-depth ENE, were those where it was unclear on which side the weakness lay.

The interviews with DTJs and Tribunals Service staff indicated that an important ‘added value’ element of ADR observed through the pilot had been the greater than anticipated impact of the ENE reviews, plus

subsequent directions. This had increased the proportion of cases where further and clearer evidence was available to the tribunal panel. Specifically, a highly important finding from the analysis was that a high proportion of opt-in cases (42%) had directions issued before the hearing, compared to less than one per cent of non-opt-in cases which were not typically reviewed before a hearing. The most common direction issued in opt-in cases was to request a medical examination report, or to convert the hearing from paper to oral, both of which could have enhanced the evidence available to the tribunal panel. Interviews with Tribunals Service administrative clerks suggested that there were initial concerns that the issuing of directions at the ENE stage could have had a negative effect on achievement of the hearing date listing target,[5] as cases were not listed for hearing until this additional information was received. For all opt-in cases, the average time between the pre-enquiry form being received and the appeal listing date was 19 working days. For cases that had directions of any kind issued, the average time between the pre-enquiry form being received[6] and the appeal listing date was 29 working days compared to 19 working days for all cases. This increased to 41 working days for cases where the direction was to request a medical examination report. However, there was little evidence from the pilot that this affected overall case resolution times. In non-opt-in cases, additional supporting evidence would often be requested anyway, but typically not until the hearing stage. If the pilot were rolled out, directions at the ENE stage would have the potential to add to case loads at an earlier stage in the appeal process.

5 The listing target refers to entry of the case details into the system to generate a time and date for a hearing; the target for the Tribunals Service is to list a case within seven days from receipt of the pre-enquiry form.

6 The Tribunals Service pre-hearing enquiry form, the TAS1 form, must be returned by all appellants within 14 days of receipt to proceed with their appeal.

Telephone calls to the losing party

In the pilot scheme, following the ENE review, the DTJ contacted the party who in his or her opinion was likely to lose the appeal. This formed stage two of the ADR process. In the case of the PDCS, the DTJ invited the PDCS to reconsider the benefit decision. In the case of appellants, the DTJ explained that their case was likely to lose at the tribunal hearing. Analysis of the pilot data revealed there was a slightly higher proportion of calls made to the PDCS as the losing party (54% of stage one and two ADR process cases), rather than appellants or their representatives (46%).

Overall, the telephone calls were largely positively received by both parties. PDCS staff members were positive about the opportunity to speak to a DTJ and recognised it as having benefits in terms of improving the consistency of decision-making and quality assurance. Generally, appellants who had a telephone call were satisfied with the process for the call, even if they did not agree with what the DTJ said. The confidential nature of the call, the sympathetic tone and manner adopted by the DTJs and the opportunity to simply have someone to talk the case through with, were areas identified by appellants as factors that contributed to their satisfaction. This desire for someone to speak to and listen to their story was commonly reflected in the appellant interviews.

Where dissatisfaction was expressed with the DTJ's telephone call, it tended to be because appellants did not like the advice being given, or disliked the impersonality of process. In some cases there was effectively also a secondary purpose of the call to appellants or their representatives. DTJs mentioned that, in some circumstances, they had utilised the telephone call to discuss the benefits of attending an oral hearing, where the appellant had opted for a paper hearing, or to clarify any misunderstanding appellants may have had about the tribunal hearing. However, there was some concern from DTJs about whether these wider aspects of the telephone call were cost-effective, particularly where telephone calls were made when it was clear that the hearing would not be avoided.

Pilot outcome and impact findings

There was evidence from the pilot to suggest that ADR resulted in more proportionate resolution of cases. Analysis of the outcomes of opt-in cases compared to all non-opt-in cases suggested that benefits were achieved by the ADR process in reduced numbers of cases that proceeded to a hearing. Some 23% of all opt-in cases were resolved without the need for a tribunal hearing, as the cases were lapsed or withdrawn, compared to only nine per cent of non-opt-in cases. Although 77% of all opt-in cases were still resolved at a hearing, this represented a 14 percentage point lower rate of hearings amongst all opt-in cases compared to non-opt-in cases. The analysis of adjournments also illustrated some potential benefits from the ADR process. There was also a nine percentage point lower rate of adjournment for all opt-in cases subject to ENE compared to non-opt-in cases, although the sample sizes on which this figure was based were relatively small, so some caution is needed with this finding. Looking at the figures for cases which were subject to both stages of the ADR process only, 50% or 125 cases still proceeded to a hearing, but 43% (107 cases) were lapsed and seven per cent (17 cases) were withdrawn.

Cases that were subject to the ADR process were, overall, resolved more slowly than non-opt-in cases, in an average of 46 working days for all opt-in cases compared to 42 working days for non-opt-in cases. The delay in listing opt-in cases until after the ENE had been conducted was likely to account for this being a higher average than that for non-opt-in cases. Although the opt-in cases took longer on average, those subject to both stages of the ADR process were resolved in an average of 34 working days. The removal of the hearing appeared to be the key achievement of the ADR process which impacted on speed of resolution. Therefore, faster resolution for all ADR cases would require a higher proportion of all ADR cases not going to a hearing and/or changes to the listing process for hearings.

There was little difference found between non-opt-in cases and all opt-in cases in the change in the level of benefits awarded between the original PDCS decision and the final outcome. This suggested that the ADR process as a whole did not impact significantly on the levels of benefits achieved by appellants. The recommended actions given to the potential losing party following ENE did not have to be followed,

however, and in various cases appellants or the PDCS had ignored the advice of the DTJ and the case proceeded to a hearing. For these appellants, between a quarter and a third won their appeal, or gained a higher settlement than the DTJ had thought would be agreed. It was possible, however, that appellants supplied additional information which was not available to DTJs at the time of the ENE, and this affected the outcome.

Other beneficial outcomes emerged from the ADR pilot. Tribunals Service staff, DTJs and the PDCS recognised that the ADR process had helped to establish a level of liaison and effective working relations between the different stakeholder organisations which would not otherwise have existed. Opportunities for professional development for some Tribunals Service staff and support for general performance improvement by the PDCS were identified as outcomes. Reduced stress of a hearing was a further outcome identified by many appellants as a benefit of the ADR process. This was achieved by either the hearing being avoided, or appellant's increased confidence in their case because they had discussed the case with an independent and knowledgeable person.

Cost-effectiveness

For the period between September 2007 and January 2009 when the pilot came to an end, in total, the cost to the Tribunals Service of delivering the ADR process to 946 cases was estimated to be £210,076, compared to £222,867 for dealing with 1,103 non-opt-in cases across the same period. This equated to an average unit cost of £222 per case for all opt-in cases and £202 for non-opt-in cases. This calculation was based on unit costs of £80.05 to deal with cases that were subject to both stages of the ADR process cases, £60.25 for stage one ADR process cases and an additional £182.90 cost per hearing. Overall, therefore, the ADR process was less cost-effective than dealing with non-opt-in cases. Opt-in cases incurred higher costs to deliver the process than for non-opt-in cases but also generated lower costs as a result of hearings and adjournments being avoided. Looking specifically at the different types of opt-in cases, however, it was calculated that cases that were subject to both stages of the ADR process cost on average £188 per case, as these cases were more likely to avoid subsequent hearing and adjournment costs, given the rate of withdrawn and lapsed cases.

Changes introduced under the Tribunals, Courts and Enforcement Act (TCE) increased the time DTJs spent reviewing cases. As such, the £54.45 cost for the time DTJs spent conducting the ENE potentially might not be incurred as an additional cost through the ADR process in the future operation of the process. However, this change in operating context occurred too late in the evaluation of the pilot to allow collection of data to ascertain whether this was a robust assumption. Further analysis will be needed to ascertain the true impact of the TCE Act on DJT time to provide evidence as to whether this assumption is true. Likewise, it is possible that operation of the process in other geographical locations and by different staff might generate more variable outputs. It is possible that a pilot effect may be seen and any subsequent roll out may not generate the same results as seen in the pilot. The costs also do not

include potential hidden costs associated with the ADR process, such as backfilling DJT time spent undertaking ADR activities, which would increase if the process was used more widely. The tendency seen in the pilot for DTJs to use the ENE reviews and the telephone call to strengthen the case evidence, if continued, would also probably generate a different profile of outputs and, thus, costs and savings.

Conclusions and recommendations

As noted earlier, the findings in this report were based on the assumption that opt-out and opt-in cases had similar characteristics. There remained a risk that this was not the case, and therefore findings related to the differences between the two groups should be treated with caution.

Overall, the pilot generated mixed results in respect of the key research questions.

There was some evidence that suggested ADR resulted in more **proportionate resolution of cases**. Specifically, some 23% of all opt-in cases were resolved without the need for a tribunal hearing and there was a nine percentage point lower rate of adjournment for cases subject to ADR compared to non-opt-in cases. Achievement of proportionate resolution of cases in terms of presenting a full and properly evidenced case was identified as a key outcome from ADR. There was mixed evidence from appellants directly about whether ADR had achieved more proportionate resolution of cases. In cases where appellants did not achieve the outcome they wanted, there was acceptance by a number of them that their case had been dealt with fairly. However, the examples of cases where the potential losing party had ignored the advice of the DTJ and had subsequently won their appeal or gained a higher settlement, undermined the achievements of ADR in respect of proportionate resolution of cases.

The findings suggested that the ADR process as a whole did not achieve **swifter resolution of cases**. Cases that were subject to the ADR process were, overall, resolved more slowly than non-opt-in cases, in an average of 46 working days for all opt-in cases compared to 42 working days for non-opt-in cases.

Overall, the evaluation findings suggested that the ADR process was **less cost-effective** than the traditional process when looking at opt-in cases as a whole, as shown by the average unit costs of £222 per case for all opt-in cases and £202 for non-opt-in cases.

A number of areas of **appellant satisfaction** with the ADR process as part of the appeal were evident. There were higher levels of satisfaction with the ADR process as a whole where appellants had wanted to avoid the stress of a hearing, or the cost and time of travel to a hearing. ADR offered the opportunity to do that. More specifically, appellants who had a telephone call were satisfied with the process for the call, particularly the independence and manner adopted by the DTJs and the opportunity to simply have someone to talk the case through with.

A number of **other more qualitative impacts**, which were less tangible than

the quantitative outputs, were identified from the ADR pilot. These related to the appellants' experience of the appeal process, specifically in terms of reducing the stress which appellants often reported they felt as a result of participating in the appeal process. There were also positive outcomes generated for staff involved in pilot delivery in terms of professional development and liaison with other agencies.

There was evidence to suggest that ADR **impacted on PDCS** in terms of contributing to a stronger sense of shared responsibility between PDCS and the Tribunals Service for the efficient and proportionate conclusion of appeals. There was also a small cost implication for PDCS participation in the ADR pilot, estimated to be £3,224.

Welfare rights groups overall held positive views on the ADR process, and typically focused on the benefits that the process yielded for appellants, which was reflected in the advice they gave to appellants to encourage opt-in. There was some evidence, however, that some welfare rights groups were not as familiar with the process as others. There was limited evidence that this impacted negatively on appellant opt-in, as the agencies did not have sufficient knowledge to support appellants to make decisions to opt-in.

Given the mixed findings concerning the operation and outputs achieved by certain elements of the ADR process, the overall conclusion was that there is a recommendation for a limited roll out into a wider and geographically diverse set of areas. This would need, however, to be accompanied by continuous testing and monitoring before stronger conclusions could be made about potential complete national roll out. This approach would also allow changes to the existing model based on a number of improvements and the capacity to deliver ADR on a larger scale to be tested over a longer period. Any future use of the ADR process would also need to consider how to enhance explanation of the ADR process to aid opt-in, minimise administration tasks associated with the process, monitor the capacity of DTJs to undertake ADR, enhance communication with appellants during the ADR process, and disseminate good news from the process' achievement.