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Evaluating the use of judicial mediation in Employment Tribunals

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Elisabeth Michielsens, Lionel Page, Bernadetta Siara
and Stefan Speckesser with Andrew Boon
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Policy briefing

The study reports the findings of an evaluation of a judicial mediation service piloted in three regions of England – Newcastle, Central London and Birmingham – by the Employment Tribunal Service (ETS). The pilot was for Employment Tribunals' (ET's) discrimination cases starting between June 2006 and March 2007.

The research questions were as follows:

- (i) To what extent was judicial mediation able to resolve cases without the need for a formal hearing?
- (ii) Did judicial mediation result in lower costs to the ETS?
- (iii) What were the benefits for claimants and employers, both in terms of outcomes and improved process?

The study findings are shown below.

- There was no statistically significant effect identified for the impact of judicial mediation on the:
 - rates of cases settled within a set time period;
 - rate of resolution that avoided a hearing;
 - overall levels of satisfaction of claimants or employers.
- There was an estimated cost of £908 to the ETS per judicial mediation case.
- Twenty-three per cent of eligible cases took up the offer of mediation in principle.
- Seventy-six per cent of users would use the judicial mediation process again.
- Positive comments on the Tribunal Judges were common. Many of the negative comments on their conduct related to them being 'too distant/detached'.
- Negative perceptions of the process tended to centre around the lack of communication from ETS.

Implications

- 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.
- There were potential indirect benefits of saving the employment relationship and improved psychological well-being, but they were very hard to estimate.
- Judicial mediation was well received and received positive feedback in terms of the process.
- The possibility of charging employers for the use of a judicial mediation service was suggested.

Summary

Background to the study and existing literature

This study reports the findings of an evaluation of a judicial mediation service piloted in three regions of England – Newcastle, Central London and Birmingham – by the Employment Tribunal Service. The pilot was for ET discrimination cases started between June 2006 and March 2007. The aim was to (i) gauge the extent to which judicial mediation was able to resolve these cases without the need for a formal hearing; (ii) whether this resulted in a lower cost to the ETS; and (iii) if this had benefits for claimants and employers, both in terms of outcomes and improved process.

The research aimed to answer these questions by comparing those who volunteered for judicial mediation and got it (the ‘mediated’ group) and those who volunteered but did not get it (the ‘unmediated/interested’ group).

To assess whether or not judicial mediation resulted in lower costs to the Employment Tribunals, initially the average cost to ETS per judicial mediation case was calculated. Savings to ETS were then calculated in terms of hearing days saved under a number of scenario outcomes for judicial mediation to arrive at a net additional cost per judicial mediation case. From this, an estimate of the annual cost to ETS of a national roll-out (based on similar assumptions as in the pilot) was calculated. Due to uncertainty of the value of wider costs and benefits, only an estimate of savings to employers and claimants was included in the final cost calculations.

To assess whether there were benefits for claimants and employers in terms of outcomes and processes, a combination of telephone survey and in-depth interviews was used to collect the data. This part of the research shed some light on, for instance, what claimants and respondents thought of the judicial mediation process as a means of settling their dispute.

The commissioning of the study reflected a general move within the UK to achieve earlier and more proportionate resolution of legal problems and disputes. As a means of achieving earlier resolution of cases, there had been a focus on a range of processes that could be considered under the heading of Alternative Dispute Resolution (ADR). This included conciliation, arbitration, the use of ombudsmen and mediation.

Employment Tribunals provided access to justice on issues relating to employment rights. Judicial mediation was a form of ‘facilitative mediation’, where the Tribunal Judge acted to facilitate agreement between two parties in a dispute. Members of the judiciary mediated cases that were not part of their own caseload and, as mediators, they should not impose their own views on the nature of any potential agreement.

In the literature reviewed as background to this report outlined in Chapter 2, there were many claims made for the benefits of mediation. These mainly emphasised its flexibility, ability to provide for more imaginative outcomes and the less stressful nature of the process. Another potential benefit was that the participants had control over the process and they often felt empowered by this. However, in schemes where participation was voluntary, there were often problems of lower than expected participation, especially in the UK.

The literature reviewed from the US on judicial mediation raised concerns over the imposition of additional costs and the role of the judiciary. The study here suffered less from the latter as the judiciary did not mediate in cases that they would eventually hear.

For this pilot, cases were prioritised by Tribunal Judges for judicial mediation in the four pilot areas. They selected cases that:

- started between June 2006 and March 2007;
- involved at least one of the discrimination jurisdictions;
- involved a single claimant; and
- had a hearing length expected to be more than three days.

These eligible parties of the cases were then informed by the Tribunal Judge at their initial Case Management Discussion (CMD) of the opportunity to join the judicial mediation pilot, and asked whether they would be willing, in principle, to take part in mediation if selected.

There were three main samples:

- a. Six hundred and seventy-two cases that were not willing to take part in mediation in principle when offered the service at the initial CMD (referred to as the sample of UNMEDIATED/NOT INTERESTED).
- b. Eighty cases willing to take part in mediation in principle when offered the service at the initial CMD, but who subsequently did not receive mediation (referred to as the sample of UNMEDIATED/INTERESTED).
- c. One hundred and sixteen cases where both parties were willing to take part in mediation in principle when offered the service at the initial CMD and who subsequently received mediation (referred to as the sample of MEDIATED).

All discrimination cases were approached by Acas and offered conciliation. A two-week window was allowed for the Acas conciliation and then formal allocation to judicial mediation could take place.

The take-up of judicial mediation

It was estimated from the pilot study that 23%¹ of eligible cases take up the offer of mediation in principle. It must be remembered that this was an estimate and applied to a very specific group of eligible cases.

Cases with the following characteristics were (statistically) more likely to take up the offer of judicial mediation in principle.

- Those involving female claimants (having controlled for jurisdiction).
- Cases with claimants whose job involved longer hours.
- Cases where the claimant was still in the same job at the submission of the claim.
- When the employer was without a representative at the start of the case.
- Cases where the estimated hearing length was higher, if the case were to result in a hearing.

From the more qualitative aspects of the study it would seem that employers and claimant representatives had the most influence on encouraging the take-up of mediation, although employers were less likely than claimants to suggest that their representative had been an influence.

Some employers and claimants participated in judicial mediation because they felt they had nothing to lose, but others saw the potential for earlier resolution and a lessening of the stress associated with the case.

Case outcomes and duration

No discernable, statistically significant effect could be identified for the impact of judicial mediation on the following.

- (i) Rates of cases settled within a set time period (that might include a hearing).
- (ii) Resolution that avoided a hearing. (At the end of the study, 57% of mediated cases and 61% of unmediated interested cases were resolved, without a hearing).

There was little difference (only 13 percentage points) between the percentage of mediated and unmediated/interested cases going to a hearing – 11% and 24% respectively. This was because, among the unmediated/interested survey respondents, 79% of cases were resolved through Acas, privately and/or using ‘other’ methods. However, there was a clear perception amongst 72% of the mediated survey respondents in this study that judicial mediation resolved their case.

¹ In the final three months of the pilot, due to a lack of resources, the paperwork for unmediated cases was not passed on to the project team. Therefore the total number offered mediation was estimated to be 868 cases based on historic information collected in the pilot. See Chapter 3 under *The data* for full details.

From the more qualitative aspects of the study, of those that undertook mediation 60% of employers and 39% of claimants felt that that it was very effective in bringing the case closer to resolution, whether or not they actually settled in mediation. Some claimants seemed to particularly welcome some of the non-financial aspects of any awards that were achieved during mediation.

Satisfaction with ET, case outcomes and mediation

Employers in the survey sample who experienced mediation reported higher levels of satisfaction than claimants. However, the conclusion was that no discernable, statistically significant effect could be identified between the mediated and unmediated (matched sample) for the impact of judicial mediation on overall levels of satisfaction with the process or case outcome for claimants and employers combined).

From the more qualitative elements of the study, there was a high level of agreement that mediations had been carried out in an appropriate fashion and 76% would use the process again. Employers were particularly positive.

Positive comments on the Tribunal Judge were common. However, the delicate balance that Tribunal Judges have to achieve was underlined by the fact that many negative comments on their conduct related to them being 'too distant/detached'. There was some indication that some participants would prefer a more interventionist approach.

Negative perceptions of the process tended to centre around the organisation of the mediation process, with communication felt to be a particular problem. Some participants (especially claimants) seemed to have unrealistic expectations of the process.

Some respondents valued the ability of Acas to start conciliation early on in the life of the case, but in comparison to judicial mediation judges, the Acas conciliators were seen as having less authority. The fact that mediation facilitated face-to-face meetings (compared to much of Acas conciliator's work being over the phone) was also seen as a strength.

Cost implications

There were costs associated with implementing the pilot in ET's. It was expected that these costs would be offset by the benefits to the ETS of cases resolved earlier in the process than without the pilot. There was an estimated £908 risk-adjusted direct net cost² to the ETS per judicial mediation case. The estimated additional cost to the ETS of a limited roll-out of the pilot to 742 cases was £673,000. This was because there was no discernable, statistically significant, effect from the pilot on earlier case resolution.

2 There was an estimated additional cost of £908 per judicial mediation case to the ETS, based on the calculations in Chapter 7.

The average cost per case for the time involved for claimants and respondents was estimated at £3,738. It was estimated that there was a saving of £822 (22% of £3,738) to both claimants and employers for each case that was resolved early. Taking into account the potential savings to employers and claimants only dropped the estimate of net costs of judicial mediation to all parties to £880 per case.

There were many additional potential indirect benefits of saving the employment relationship and improved psychological wellbeing, but they were very hard to estimate. They would however, have needed to be substantial savings to *offset al.* of the estimated cost of £880 per case.

Main conclusions and recommendations

It may seem somewhat contradictory to report the positive experiences of claimants and respondents, alongside a finding that judicial mediation does not seem to make a statistically significant difference to the outcomes measured in this report. However, the positive impression of the process was consistent with a finding that judicial mediation was not adding significantly to rates of resolution that avoid a hearing.

Judicial mediation is an additional process in an environment where the majority of cases (approximately 60% across the ET system) are resolved before a full hearing and where a variety of ADR techniques are already available. Even with a larger sample size for analysis, this makes it less likely that one would see a significant value added from judicial mediation.

Based on the findings of this study, 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.

Finally, there was a variety of evidence that suggests employers are much more positive about the process than claimants. Given the high cost of the process, the positive impressions of employers and the recent moves towards a greater focus of resolution within the workplace, it may be worth pursuing the possibility of charging employers for the use of a judicial mediation service, prior to submission of an employment tribunal appeal form (ET1 form).

1. Introduction

This study reports the findings of an evaluation of a judicial mediation service piloted in three regions of England – Newcastle, Central London and Birmingham – by the Employment Tribunal Service for ET discrimination cases started between June 2006 and March 2007. The aim was to:

1. gauge the extent to which judicial mediation was able to resolve these cases without the need for a formal hearing;
2. see whether this resulted in a lower cost to the ETS;
3. confirm whether or not this had benefits for claimants and employers, both in terms of outcomes and improved process.

This study considered the impact of the pilot on case duration, the types of resolution across mediated and unmediated cases, and the number of cases that proceeded to a hearing despite the application of mediation. Where the report refers to ‘**unmediated cases**’, it covers both those that expressed an interest in mediation in principle but were subsequently not mediated (the ‘**unmediated/interested**’) and those that were not mediated because they turned down the offer in principle (the ‘**unmediated/not interested**’). Consideration was also given to how much it cost to provide mediation services, how much was saved and whether the process resulted in a cost benefit to the ETS. In the process of answering these questions the researchers were also able to shed light on how cases agreeing in principle to mediation differed from those who refused.

The commissioning of the study reflected a general move within the UK to **achieve earlier and more proportionate resolution of legal problems and disputes** (Department for Constitutional Affairs, 2004). As a means of achieving earlier resolution of cases, there had been a focus on a range of processes that could be considered under the heading of Alternative Dispute Resolution. This included conciliation, arbitration, the use of ombudsmen and mediation. Judicial mediation is a form of ADR, but the involvement of the judiciary made it unique within this wider grouping. For instance, ADR was usually seen as taking place ‘outside’ of the main process of litigation. Given the central role of the judiciary in both the process of litigation and judicial mediation, one might expect the parties in a case to view judicial mediation differently to other forms of ADR.

This study evaluated the impact of judicial mediation using statistical techniques that were common in the evaluation literature, see for instance, Heckman, J. *et al.* (1998); Smith and Todd, P. (2005). To our knowledge, these techniques had not previously been used to evaluate the **value added** of a form of ADR.³ Firstly, all claimants and employers in cases that were eligible for the pilot were asked if they were interested in judicial mediation in

3 One possible explanation for the lack of existing quantitative evidence on the effectiveness of ADR was the problem of obtaining sufficient numbers for study and, as we see later in the report, whilst richness of data was not an issue, limited observations were still a factor in this study.

principle. In order to capture the value added of mediation, the outcomes from a sample of mediated cases were compared with an otherwise identical sample of unmediated, interested cases (the latter did not undergo mediation, but had expressed an interest in principle). At the start of the research, those who had expressed an interest in judicial mediation were randomly allocated to one of the two groups ('**unmediated/interested**' and '**mediated**') based on date of birth. This was, however, found to be unfeasible in the early stages of the research due to the small number of volunteers for judicial mediation. It is estimated that the number of cases allocated under random allocation was small but the exact number was not recorded. Therefore, the method of Propensity Score Matching ('PS match' or 'matching') was adopted which is more appropriate for a smaller population where random allocation cannot be achieved. PS match was, therefore, applied at the analysis stage to correct statistically 'after the event' for the fact that the two groups were different. Ideally, the small number of initial cases allocated under random allocation should have been excluded from the analysis. However, given the overall small number of cases involved and difficulties in identifying these cases, the decision was taken to retain these cases in the PS match. The research team, therefore, also excluded date of birth (the variable used for random allocation) from the PS match equation to avoid confounding the two methods. Hence, to achieve this, matching was used to compare the following outcomes for the two groups.

- The proportion of cases resolved or 'promulgated', whether this was by judicial determination, withdrawal or settlement, at two-month periods after the case start date.
- The proportion of cases resolved through means other than a hearing, at two-month periods after the case start date.
- The recorded levels of satisfaction with (a) the process and (b) the outcomes of the Employment Tribunal process.

The approach taken to answer the research question as to whether or not judicial mediation resulted in lower costs to the Employment Tribunals was to initially calculate the average cost to ETS per judicial mediation case. Savings to ETS were then calculated in terms of hearing days saved under a number of scenario outcomes for judicial mediation to arrive at a net additional cost per judicial mediation case. From this, an estimate of the annual cost to ETS of a national roll-out (based on similar assumptions as in the pilot) was calculated. Due to uncertainty of the value of wider costs and benefits of judicial mediation, only an estimate of savings to employers and claimants was included in the final cost calculations.

To answer the research question as to whether there were benefits for claimants and employers, in terms of outcomes and processes, a combination of telephone survey and in-depth interviews was used to collect the data. This part of the research allowed some 'digging down' below the statistical 'headline' findings. This shed some light on, for instance, what claimants and respondents thought of the judicial mediation process as a means of settling their dispute. Again, PS match was used for analysis of outcomes and drew primarily on survey data.

Please note that the sample for the telephone survey was small and the results may be biased as, for example, those cases which went to a hearing were under-represented in this survey. Please also note that when these qualitative findings are presented as percentages, they are not described in terms of statistical significance, as direct comparisons between the groups are inappropriate as they are so different.

The report is set out as follows. The remainder of Chapter 1 is taken up with a background on Employment Tribunals and a brief description of judicial mediation. Chapter 2 provides more detailed context with a review of the existing international evidence on ADR, and a particular focus on critical success factors and various forms of mediation. In Chapter 3 there is a description of the data sources used in the study and a brief overview of the methodology. Chapter 4 describes case characteristics across various sources of the data and considers the drivers of take-up of judicial mediation. Chapter 5 considers case outcomes across mediated and unmediated cases, including the analysis of matched samples. Chapter 6 describes the levels of satisfaction with judicial mediation, the Employment Tribunal process as a whole and the case outcome. Chapter 7 considers the potential cost benefit of judicial mediation and Chapter 8 concludes.

The Employment Tribunal and judicial mediation

Employment Tribunals provide access to justice on issues relating to employment rights. Research on ET's suggested a high degree of satisfaction with the ET system as a whole, both amongst claimants and respondents (Hayward *et al.*, 2004). However, this had been very much a 'shifting landscape', as the last ten years have seen numerous changes to the ET system, its regulations and the agencies charged with its operation. Some of the major changes are shown below.

- Since 1993 the upper limit on tribunal awards in certain jurisdictions has been substantially increased (or even abolished).⁴
- From August 1998, Industrial Tribunals (ITs) were renamed as Employment Tribunals and the grounds for complaint (jurisdictions) extended.
- From October 2004, the period for Acas conciliation⁵ was restricted to a period of either seven or thirteen weeks from the start of a claim to conciliate the case, depending on jurisdiction. For the jurisdiction of discrimination there was no ceiling on the length of this period.
- From October 2004 there has also been a requirement for employers to have internal (pre-acceptance) procedures for disciplinary and grievance matters.

4 For example, the limits in sex and race discrimination cases were abolished in 1993 and 1994 respectively, while the Employment Rights Act 1999 raised the maximum compensatory award in unfair dismissal cases from £12,000 to £50,000 (now £63,000).

5 The Advisory, Conciliation and Arbitration Service has a statutory duty to provide conciliation in cases which are, or could be subject to, tribunal proceedings. Conciliation is usually carried out over the phone, rather than in face-to-face meetings. Firstly, conciliators read all the case documents and then try to find out about the issues and goals from both parties. They tell both sides about the strengths and weaknesses of their cases, and then try to find 'gaps', or areas where a solution might be found that is acceptable to both parties.

- In March 2006 the Employment Tribunal Service (and other tribunals, such as the Social Security and Child Support Appeals Tribunal) joined existing tribunals in the Department for Constitutional Affairs (now Ministry of Justice) to form a new Tribunals Service agency.
- The changes introduced in October 2004 are now in the process of repeal, following the 2007 Gibbons Review (see Chapter 3).

Some changes, such as the increase in the range of jurisdictions, have contributed to an increase in the ET case load. This increase has mainly been driven by an expansion in the number of cases with multiple claimants. According to data extracted from the ET administrative system (ETHOS), these ‘multiples’ now make up more than half of the ET caseload and this has increased the complexity of cases (Latreille, *et al.*, 2007).⁶

The increase in the number of claims and their complexity has placed a strain on the system. Several of the above reforms have been introduced as part of a ‘weed, concede and speed’ strategy. The aim was to: discourage or eliminate cases lacking merit; promote a greater number of settlements between the disputants; and accelerate the flow of cases through the system (*ibid.*).

The perceived role of ADR within this strategy was expressed in the 2004 Department for Constitutional Affairs White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*. The paper “promote[s] the development of a range of tailored dispute resolution services, so that different types of dispute can be resolved fairly, quickly, efficiently and effectively, without recourse to the expense and formality of courts and tribunals where this is not necessary”. The increased use of ADR was a specific policy aim of the Ministry of Justice. In addition, the report of the Gibbons Review, published in March 2007, noted the positive experiences of employment dispute mediation in New Zealand and the US, as well as in UK civil and family disputes.

Judicial mediation is a form of ‘facilitative mediation’, where the Tribunal Judge acts to facilitate agreement between two parties in a dispute. Members of the judiciary mediate cases that are not part of their own caseload and, as mediators, they should not impose their own views on the nature of any potential agreement. They may draw on their experiences to outline the various alternatives, but ultimately it was the parties that must decide on the nature of any agreement. For this pilot, Tribunal Judges were trained by representatives of Acas in July 2006.

The parties to the case were given an explanation of the process that they were being offered. This described how the parties would be brought together for a judicial mediation

⁶ Some suggest (Brown *et al.*, 2000; Drinkwater & Ingram, 2005; Urwin, *et al.*, 2007) that this reflected a supplanting of collective disputes with individual manifestations of conflict. Another view can be found in Healy *et al.* (2004).

event (referred to as a 'judicial mediation CMD') facilitated by a trained Tribunal Judge, 'who will remain neutral and try to assist the parties in resolving their dispute'. It was underlined that the chairman, would, 'not make a decision about the case, or give an opinion on the merits of the case', (Gibbons, 2007, p 9). In addition, the parties to the dispute should have the opportunity to say exactly how they felt without being interrupted and should feel no pressure to take up any of the mediator's or other parties' ideas.

There was an interesting interaction between the process of Acas conciliation and judicial mediation in this pilot. Both were drawing on similar skills and experiences to facilitate early resolution of disputes and all parties would have received an offer of both services. The researchers discussed this interaction, but it should be noted that the study did not aim to compare the relative effectiveness of judicial mediation, compared to Acas conciliation.

2. Existing research evidence on mediation

Key findings

- There were many claims made for the benefits of mediation in the literature. These mainly emphasised its flexibility, ability to provide for more imaginative outcomes and the less stressful nature of the process. The implication of this being that mediation could better provide for 'win-win' outcomes, when compared to adversarial approaches. One of the stronger findings on benefits was that the participants had control over the process and that they felt empowered by this.
- Reported settlement rates from mediation vary widely from 13% to 95%. Overall levels of satisfaction for mediated cases, with processes and outcomes, tended to be consistently high. Similarly, when comparator groups were analysed, there were wide variations in the measured impact of mediation and the results "can only be described as mixed and contradictory" (Mack, 2003).
- The evidence on costs was also unclear with successful mediations potentially reducing time and costs, but unsuccessful ones raising them (Genn *et al.*, 2007). There was also some evidence that mediation reduced the size of financial settlements in studies where there was a control group.
- In schemes where participation was voluntary, there were often problems of lower than expected participation, especially in the UK.
- Evidence from the US on judicial mediation suggested concerns over the imposition of additional costs of the process and the impartiality of the judiciary where they both conducted the mediation and later heard the case at a hearing. The study here suffered less from the latter as the judiciary did not mediate in cases that they would eventually hear.

In this chapter the researchers present a literature review, which considered various aspects of the mediation process. This included international evidence on the critical success factors for mediation and the selection criteria used in studies of ADR (including questions over whether the process should be voluntary or compulsory). Additionally, the researchers examined the literature on timing of early dispute resolution and the outcomes of mediation.

Although there was currently extensive academic and political interest in mediation, the concept has been in existence and practised in a variety of forms for several centuries (Griffiths, 2001; Wall & Lynn, 1993). It was just one of a wide range of possible approaches to resolving conflicts under the ADR heading. Among the more commonly deployed ADR practices were negotiation, conciliation, mediation, arbitration (and the combinations

med-arb and arb-med),⁷ early neutral evaluation (ENE), private judging, mini-trial, expert determination, ombudsman and summary jury trial. The definitions of mediation vary.

Boulle and Nestic adopted a definition of mediation's 'core' features as consisting of:

a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent.

(Boulle and Nestic, 2001: 3)

This described mediation as facilitating superior **decision-making** rather than emphasising its role in terms of **dispute resolution** and was in some contrast to the motivation for deployment of mediation in the present study – superior decision-making emphasises 'taking ones time', as opposed to speedy resolution. While each of these authors above did not mention conflict resolution explicitly in their definition, for most this was intrinsic (e.g. Liebmann, 2000; Borg, 2000).

Interestingly, these definitions could equally be used to describe the process of 'conciliation' which described Acas' individual work.⁸ The difference between the two concepts was sometimes maintained as being one of "the degree of initiative taken by the third party" (Corby, 1999, p 3). Within the literature, there was overlap in the terms conciliation and mediation and therefore the degree of difference of judicial mediation offered in this pilot compared to the existing Acas conciliation already on offer. However, for this study a particular distinction could be drawn in terms of the duration over which the process occurred, as judicial mediation was predominantly conducted in a single day, while (Acas) conciliation was usually a more protracted process.

The practice of mediation

While variations existed, mediations typically involved a fairly common structure with four distinct phases (Ingleby, 1991).

1. Identification of the issues at stake.
2. Generating and evaluating options.
3. Deciding on one or more of these alternatives.
4. Developing a plan for implementation.

In practical terms, mediations varied in their precise arrangements. However, the majority of judicial mediation events mirrored this structure with the process often following that described by Genn (1999). They often began, unless the relationship was sufficiently adversarial, with a joint meeting between the parties at which the mediator explained the process of mediation and allowed each side an opportunity to set out their perspective without interruption. The parties then proceeded to negotiate separately and in turn with the mediator. The mediator (following

⁷ For a theoretical consideration of these two hybrid forms, see Ross and Conlon (2000).

⁸ See Fox (2005) for details of Acas arbitration and pilot workplace mediation schemes.

the description of Genn, 1999; 24) would attempt “to establish where there is common ground between the parties and to discover the scope for compromise... the most important sticking points and to understand why the disputing parties take a different view of those points”.

The judicial mediation process relied heavily on the interpersonal and facilitation skills of the member of the judiciary acting as mediator. A literature had developed around the mediator’s role, some of it theoretical, some of it from a more practical, educational perspective (see, for example, Genn, 1999; Mayer, 2000). It was interesting to note the results of Maley’s (1995) discourse analysis which concluded that “it is the degree of authoritative intervention and the variety and range of interventions that distinguishes judicial from mediatory discourse” (p 108).

In line with the general thrust of the 2004 White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*, the mediation literature suggested that one might wish to adopt different forms for different types of dispute. The literature typically cautioned that “one size does not fit all” (Menkel-Meadow, 1997, p 1,619). However, there was no clear guidance in the literature on which type of dispute was best tackled by mediation⁹ and this is discussed further below.

Perceived benefits and measures of success in mediation

Among the many benefits claimed for mediation compared to litigation were (using Genn, 1998, pp 1-2):

1. that it was a flexible procedure applicable to a wide range of mediation disputes;
2. it was capable of achieving creative solutions to disputes that would not be available in court adjudication;
3. that it was capable of reducing conflict;
4. that it could achieve a reconciliation between the parties;
5. that it was less stressful of parties than court procedures; and
6. that it could save legal and other costs and lead to speedier settlements than would be achieved through litigation procedures.

It was claimed that parties had greater control of both process and outcome, relative to proscribed litigation procedures, and as such it was considered empowering. Parties in mediation also potentially avoided the danger of an unfavourable ruling at adjudication; in contrast, “[l]itigation... frequently produces binary, win-lose outcomes. When it does not, both parties lose to some extent”, (Seul, 2004, p. 893). One of the problems of adversarial approaches such as litigation was that while they might be conceived of as such, they were only rarely true ‘zero-sum’ games¹⁰ (Menkel-Meadow, 1984). As such, they involved some mutuality of interests as well as points of conflict; mediation was thus seen as having the potential to transform a dispute into one where each side could ‘win’.

⁹ For more detail on the role of the mediator, readers should refer to *Appendix Section 1: The role of the mediator*.

¹⁰ A ‘zero sum’ game is a process where it is assumed that any gains of one party can only be achieved through a loss to the other party.

These strong claims were pursued in the researchers' qualitative investigation of the experiences of parties undergoing judicial mediation. However, by its nature, there was no clear and ready-to-use index of success in mediation when considering the researchers' more quantitative analysis. Among measures proposed in the literature (see various lists reviewed and quoted in Mack, 2003) were:

1. reduction of delay/cost;
2. the degree of movement from initial positions;
3. proportion of issues resolved (or parties holding back on concessions);
4. rates of compliance;
5. extent to which one could observe, 'fairness' or 'quality' of outcome;
6. satisfaction of the parties and whether they would recommend the process;
7. improvement in post-mediation environment.

It was interesting to note a possible conflict with the researchers' own focus on rates of settlement as the primary criteria for success. Galanter and Cahill (1994) argue that the **quality** of settlements was crucial (see also Bush, 1989). They suggested that "the task for policy is not promoting settlements or discouraging them, but regulating them" (Galanter & Cahill, 1994, p 1,388). Such an argument mirrors one that had, in the past, been levelled at Acas conciliation, namely that the pursuit of settlement was more important than its nature or 'fairness' (Dickens, 2000).¹¹

In the evaluation of judicial mediation, there was a focus on the rate of settlement and levels of satisfaction across both claimants and respondents as measures of success. Later in the report, there was some consideration of the extent to which mediation was seen to alter the 'balance' of satisfaction between claimants and respondents – an indicator that reflected perceived levels of fairness.

Evidence on suitability, take-up and outcomes

Suitability

The empirical research suggested that there was no simple checklist of characteristics to determine which cases should utilise mediation. Indeed, evidence tended to underline the complexity of cases and the difficulty of using a checklist approach (Mack, 2003). The use of criteria was, however, necessary for consistency purposes and Boule and Nestic (2001)¹² suggested a list of such criteria as set out in Table 2.1.

¹¹ For more detail readers should refer to *Appendix Section 2: Long-term and short-term success factors*.

¹² Drawing on Stulberg (1987); Fulton (1989); Clarke and Davies (1992); Brown and Marriott (1999); and Henderson (1993).

Table 2.1: Mediation indicators

Suitability	Unsuitability
Moderate conflict	Matters of policy
Party commitment	Pure legal questions
Lawyer commitment	Ulterior motives
Continuing relationship	Personal danger
Power equality	Fact-finding required
Party ability	Credibility determinations
Multiple issues	Emotional problems
Adequate resources	Responsibility avoidance
No clear guidelines	Value differences
Proportionality issues	Proportionality issues
Privacy accepted	Court remedy needed
External pressure	Great urgency
Discrimination potential	Direct negotiation appropriate
	Inequality

Source: Boulle and Nestic (2001), p 92.

Mack (2003, p 9-10) highlighted several possible allocation mechanisms to ADR (*qua* mediation):

- “automatic” (possibly dependent on a fixed set of criteria);
- “presumptive” (referred except under certain circumstances);
- “random” (for example as part of an evaluative programme);
- or by “choice” (that is, by self-selection).

However, she also noted that much of the literature examined the issue of ‘matching’ cases to ADR interventions, possibly “to maximise likelihood of a ‘successful’ outcome” through a better ‘tailoring’ of dispute resolution. A difficulty, of course, was that all cases vary along a number of dimensions. They might also change as a case proceeded and as such it was difficult to be too prescriptive. In addition, as Ingleby (1993: p 450) noted: “What is appropriate for one may be more or less appropriate for the other”. Therefore, it is difficult to predict which types of cases mediation would be suitable for.

Some authors have examined the issue of whether referral should be mandatory. Ingleby (1993), for example, drawing on his observation of 89 cases in three Australian contexts, argued that such compulsion was at variance with the underlying principles of self-determination in ADR, lacked empirical support and that it “represents a challenge to the ideas comprehended by the rule of law” (p 450). Ward (2007) and Hedeem (2005) also struck cautionary notes. However, some have suggested that (in Australia at least) “mandatory ADR... is weathering controversy” (Tyler and Bornstein, 2006, p 2). In the UK, in contrast to both the US and Australia, the impetus towards compulsion appeared thus far to have been resisted (for discussion, see Boulle and Nestic, 2001, Ch. 9, who also set out cogently the arguments for and against mandatory provisions).

The issue of selection of appropriate ADR technique was also considered in the literature – what Sander and Goldberg (1994) vividly term “fitting the forum to the fuss” (see Mack’s 2003 discussion for details). While this was not considered in any detail here, it is worth commenting on an interesting addition by Van Veen *et al.* (2003). These authors used two surveys of participants in water disputes in Ontario to address this question. Their findings suggested that less formal techniques (e.g. mediation) should be tried first, that mediation, for example, was more appropriate where a relationship was ongoing or parties “wish to remain on good terms” (p 109) and that one should assess regularly during the process whether to progress to more formalised methods.

As the next section of the report details, this study identified cases according to characteristics specified by the ETS; these cases were then offered mediation and of those who took up the offer in principle, some did not actually undergo judicial mediation (providing the researchers with a control group).

Take-up

One of the key issues faced in respect of **voluntary** mediation (and which was faced in the current study) was that of low take-up. This was especially true in the UK where mediation, despite recent interest, was less well-established than in the US and Antipodes, and there was accordingly less knowledge of, and greater suspicion surrounding, this process. Genn (1998)¹³ for example, reported a mere 5% take-up rate in the Central London County Court pilot of non-family civil disputes. The suggested reasons for the low take-up rate might include “lack of experience and widespread ignorance of mediation among the legal profession”, fear that indicating a willingness to participate signals weakness, as well as “litigant resistance to the idea of compromise, particularly in the early stages of litigation” (Genn, 1998, p v). Baldwin (1999) also noted a preference for adjudication in the UK in the general civil context (but see Lampe and Ellis, 1995).

Understanding why some individuals opt for mediation and others do not was important in the absence of compulsion. Bordeaux *et al.* (2001), for example, drawing on a small survey of various parties in environmental disputes, concluded that perceived potential cost savings, speed and the possibility of a ‘better deal’ were key factors. More recently still, Charkoudian and Wilson (2006) examined the factors that determined an individual’s choice to use mediation using a sample of community mediations in Maryland. Among their key findings from multivariate (probit) regression analysis, they reported that the probability of opting for mediation followed an inverted-U shaped relationship over time, initially rising and then declining as the duration of the case increased. They also confirmed that the type of case matters. Mediation was more likely to be chosen where the dispute involved personal, rather than business, relationships and where the participants expected to continue to interact.

13 The update to the 1998 study (Genn, 2006) does suggest that take-up had increased, but this was possibly a response to the Dunnet v Railtrack case in 2002.

Whilst the researchers' evaluation of judicial mediation might benefit from implementation relatively early in the duration of most cases, the fact that they were dealing with business relationships and had relatively few parties who continued to interact (in the workplace) suggested lower expected take-up.

Outcomes: settlement rates

Moving on to consider the literature on outcomes, reported settlement rates from mediation vary extensively across the literature. For example, in her review of 52 studies in the civil litigation context, Wissler (2004) pointed to settlement rates for mediated cases that range from as low as 13-22% in the general context (Kakalik *et al.*, 1996; Macfarlane, 2003), to 84-95% in the civil context (Goerdt, 1993; Raitt *et al.*, 1993; Maiman, 1997). In general, mediation settlement rates tended to be fairly high across most courts and countries. In a review of family cases, Kelly (2004) reported 50-90% settlement rates for mediated cases and similar figures were reported by Genn (1998) in the UK civil context.

In a number of civil studies that had an unmediated control group, settlement rates for the mediated were also found to be somewhat higher and trial rates were lower (e.g. Kakalik *et al.*, 1996; McEwen, 1992; Genn, 1998), although others reported no difference (e.g. Clarke and Gordon, 1997; Wissler, 2002). In respect of divorce, Emery *et al.* (1991) reported an especially dramatic difference, with settlement rates of 72% and 11% for the mediated and unmediated groups. Wissler's (2004) survey also found cases more likely to be resolved where appeals were being considered.

Such comparisons relied heavily on the appropriateness of the comparator sample. This was the strength of the researchers' study, where the comparator (or control) group was designed to be as close as possible to those receiving mediation (both in terms of the pilot design and also the use of propensity score matching). However, it was important to note that rates of resolution that avoided a hearing (one of the key indicators of success in this study), were around 60% in ETS cases even in the absence of judicial mediation.

Outcomes: satisfaction

In terms of satisfaction levels as outcome measures, these were also typically high among mediated cases (Wissler, 2004; Kelly, 2004; Mack, 2003). This was true in terms of: procedural and distributive fairness (i.e. process and outcome); the opportunity to express the individual's case/opinions; the neutrality of the mediator; the extent to which they were able to control the process and/or outcome; whether they were treated with respect and dignity; and whether they would use mediation again. However, as Wissler (2004) observed, studies of civil cases with a comparator group were less clear-cut, with few consistent differences in satisfaction levels between mediated and non-mediated cases. This essentially confirmed Mack's assessment that although there was some evidence of greater satisfaction in mediated civil cases, taken in conjunction with settlement rates, the assessment of the impact of mediation "can only be described as mixed and contradictory".

The importance of the ability to express one's views and be listened to was a recurring feature in the literature (Kressel & Pruitt, 1989; Niemeijer & Pel, 2005). In her review of nine family mediation studies, Kelly (2004: 29) concluded that "[r]epeatedly clients indicated that they felt heard, respected, given a chance to say what is important". Interestingly, some studies (e.g. Fix and Harter, 1992) reported a preference for mediation among groups conventionally regarded as having less power (e.g. women), possibly for this reason. Together with a sense of control (Kressel & Pruitt, 1989), these were "key qualities necessary for a perception of procedural fairness" (Mack, 2003, p. 51).

Important in all these respects were the parties' expectations of mediation (Guthrie Levin, 1998; Herrman *et al.*, 2004). Satisfaction was likely to be reduced where parties came to mediation with an unrealistic set of expectations about what it might be able to achieve. Preparation for, and the introduction to, mediation were thus key components. For example, a key feature of the small firm workplace mediation pilot offered by Acas, (Fox, 2005), was that satisfaction and effectiveness were higher when Acas staff had met with the parties beforehand to explain and the process and 'scope' of mediation. This was potentially because this helped frame expectations. However as will be seen, unrealistic expectations of parties tended to persist in the researchers' study too, especially when they considered perceptions of the role of the Tribunal Judge who would chair the mediation event.

Outcomes: costs

In terms of the effect of mediation on costs/timing, the evidence was mixed. In the ten civil studies reviewed by Wissler (2004) where disposition time was considered, five reported a decrease, four no change and one an increase. In contrast, appellate cases revealed a more potent effect of mediation, with only one of the six cases indicating no change, and the remainder all reporting a reduction. In the UK, Genn *et al.* (2007) reported that while successful mediation could reduce costs and (judicial) time, unsuccessful mediation could actually increase costs. In the small claims setting, Wissler (1995) and Keilitz (1993) both reported cost savings for litigants and also on (court) workloads, with costs also being reported as lower in some of the family mediation studies (e.g. Kelly, 1996). As will be seen, reduction in case duration was not considered explicitly in this study, rather it was the number of days at hearing that was the focus for any cost and time savings.

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). Wissler (2004) identified the same phenomenon in at least some of the studies in her survey of civil cases. She noted that while mediation might make the receipt of at least some monetary compensation more likely compared with adjudication, the amounts were typically lower and in the small claims context "represented a smaller percentage of the plaintiff's claim" (p 57). Clearly the reduced amounts reflected the compromise involved and also the potential (legal

and other forms of) cost savings available via mediation compared with pursuing a claim to a hearing. Risk averse litigants were also likely to prefer the certainty associated with a mediated outcome rather than the 'all-or-nothing' character of adjudication. The comparison of claimants' and employers' levels of satisfaction with outcome, provided some insights into this, but details of settlement were not considered explicitly.

Outcomes: drivers

There were a number of key factors that had been examined as possibly driving any improved outcomes. Among the most important were: (i) referral mode and timing; (ii) case/ party characteristics (such as the intensity of conflict, legal representation, balance of power, motivation to settle, etc.); and (iii) mediator characteristics and tactics. The last of these the researchers have already touched upon and in later sections of the report they return to consider some of the issues identified under (i) and (ii) below:

- i. The issue of referral received an extensive treatment in Mack (2003), where she noted that the key questions revolved around who was referred and by whom. However, as Mack noted, the key issue was **when**. Among the empirical contributions in this area, Wissler (2002) found mediation to be more effective if "held sooner after the case had been filed" (p 677). In a divorce context with mandated mediation, Zuberbuhler (2001) also suggested earlier intervention was more efficacious, confirming that settlement might become more difficult to realise the further into the litigation process parties proceed (Emery *et al.*, 2005). The essential characteristics of the researchers' study of judicial mediation were that the criteria for selection were determined prior to the pilot and served to focus the offer of mediation on cases that were seen as harder to resolve. This was to show the added value of mediation over and above the conciliation already offered through Acas.
- ii. A variety of case and party characteristics had been found to impact **fairly** consistently on mediation success (settlement). Among these were:
 - equality of power (Bercovitch, 1989; Kelly & Gigy, 1989);
 - party commitment to the process (Hiltrop, 1989);
 - motivation to reach settlement (Kelly & Gigy, 1989; Wissler, 1995; Burrell *et al.*, 2007);
 - parties' goals (Wissler, 1995);
 - availability or otherwise of resources (Kressel & Pruitt, 1989);
 - the (financial) amount at stake (Genn, 1998);
 - the intensity of conflict (Wall *et al.*, 2001; Henderson, 1996); and
 - the initial distance the parties were apart (Wissler, 2002).

Not all of these were, however, unequivocally supported in the literature. Bercovitch and Jackson (2001) suggested that matters of principle were typically less amenable to mediation, while Henderson (1996) suggested resolution might be easier if the dispute centred on 'tangibles' such as money.

Legal representation was sometimes found to be important, although the direction and nature of its impact depended on the lawyer in question; for mediation to be effective it was important that lawyers accepted the process (Kressel & Pruitt, 1989) and co-operated during ADR (Wissler, 2002). Lawyers' lack of experience was important in explaining the low rate of take-up of mediation in the CLCC study (Genn, 1998). In the same study, settlement was also found to be more likely where neither side was represented.

Judicial mediation

Finally, there was a small amount of US literature specifically on judicial mediation. This typically referred to a rather different application, where mediation took place by the same judge who would hear the case were it to come to court, via a pre-trial conference (Wall & Rude, 1987; Galanter, 1985), although Brunet (2002/03) suggested this position was changing. This raised issues concerning legally admissible and ethically appropriate behaviour by the judge (see Wall & Schiller, 1982, pp 29-33). Importantly too, the meeting was generally with the parties' lawyers rather than the litigants, and in many cases (but by no means all) the approach was also evaluative rather than facilitative (Brunet, 2002/03). Notwithstanding these differences in judicial mediation approaches, which were reflected in most of the literature, the US context did provide some interesting insights that were of value here.

For example, in a survey of US lawyers, Wall and Schiller (1982) established the most commonly used judicial mediation techniques and the extent to which these were perceived to be (un)ethical. Many of the frequently used methods were similar to those in more conventional mediation (e.g. meeting lawyers, moving discussion to areas where settlement was most likely, shuttle diplomacy). One obvious question that was pertinent for judicial mediation, as with non-judicial mediation, was the effect on outcomes. Citing earlier work, Galanter (1985, pp 8-9) concluded there to be "little evidence that judicial efforts bring about production gains... at least so far as production is measured by the number of cases disposed of" or speed of disposition. This he surmised was "not surprising... most cases would settle anyway". Resnik (1985: p 686) goes further, even suggesting that "judicial management techniques impose additional costs and pose the risk of abuse of judicial power in the quest for greater economies". These studies are now rather dated and the present study serves to update the research with a much more analytically rigorous approach.

3. Methodology

This section of the report describes the design of the pilot: the data collected and the methods used to analyse these data. The main quantitative methods were regression analysis and propensity score matching. These evaluated the possible value that judicial mediation added to the ET process. To achieve this one needed to:

1. measure the extent to which judicial mediation was able to resolve discrimination cases without the need for a formal hearing;
2. compare this to an otherwise identical sample of unmediated cases.

In addition, these data also allowed analysis of the costs and benefits of judicial mediation if the pilot were rolled out to other regions. Collection of more qualitative information allowed a wide range of claimant and respondent views to be captured.

Pilot design

Figure 3.1 provides an overview of the pilot design, in the form of a flow diagram. At **Stage 1** cases with the following characteristics were prioritised by Tribunal Judges for judicial mediation in the pilot areas of Newcastle, Birmingham and Central London.¹⁴

1. Cases that have at least one of the following discrimination jurisdictions cited.¹⁵
 - a. Disability Discrimination Act.
 - b. Discrimination on the grounds of religion or belief.
 - c. Race Relations Directive.
 - d. Discrimination on grounds of sex or transgender.
 - e. Discrimination on grounds of sexual orientation.
2. A case start date between June 2006 and March 2007.
3. Cases with only single claimants were prioritised for the judicial mediation pilot as the process was not seen as appropriate for cases involving multiple claimants. Large numbers of claimants could not be consulted in a process that involved a short intensive period of deliberation.
4. Only cases that, if they went to a hearing, were expected to have a hearing length of three or more days were prioritised for mediation. This was to determine the added value of judicial mediation compared to existing arrangements which included conciliation by Acas.

Both parties of eligible cases were then informed by the Tribunal Judge at their initial Case Management Discussion (**Stage 2**), of the opportunity to join the judicial mediation pilot, and

¹⁴ Priority was given to these cases, but as the following discussion suggests, there were some exceptions.

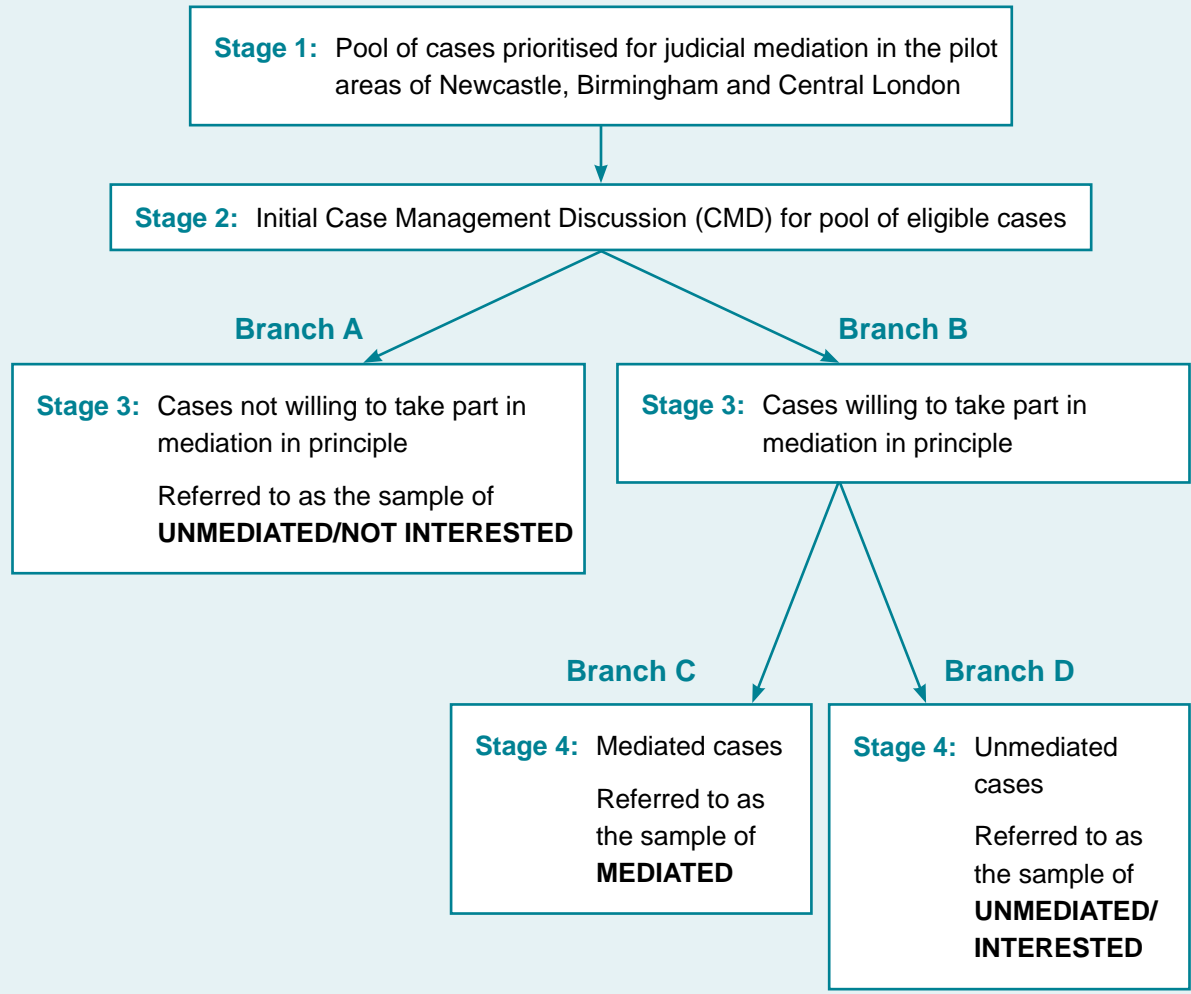
¹⁵ The study considered all cases that had at least one discrimination jurisdiction. Each ET claim could be, and often was, brought under multiple jurisdictions. For instance, if a claimant felt that they were unfairly dismissed because of their race or gender, the case could be registered under three jurisdictions.

asked whether they would be willing, in principle, to take part in mediation if selected. Both parties had to be willing to undertake judicial mediation. There is then a split at **Stage 3** of the flow diagram, with cases that were not willing to take part in mediation in principle going down **Branch A** and those that were willing in principle flowing down **Branch B**.

Finally, at **Stage 4**, of all the cases that expressed a willingness to be mediated, some underwent mediation (Branch C) and others did not receive mediation (Branch D). These willing cases were randomly assigned to receive mediation to try and achieve a 50/50 split to enable propensity score matching. Thus, as the diagram shows there were three main samples.

- a. Cases that were not willing to take part in mediation in principle when offered the service at the initial CMD (referred to as the sample of UNMEDIATED/NOT INTERESTED).
- b. Cases willing to take part in mediation in principle when offered the service at the initial CMD, but who subsequently did not receive mediation (referred to as the sample of UNMEDIATED/INTERESTED).
- c. Cases willing to take part in mediation in principle when offered the service at the initial CMD who subsequently received mediation (referred to as the sample of MEDIATED).

Figure 3.1: Flow diagram of judicial mediation pilot



At the start of the pilot there was random assignment to judicial mediation based on date of birth. This was stopped very early in the pilot because of opposition to this method of allocation. Only a small number of cases were randomly assigned and they could not be excluded from the analysis because it was not known which cases were randomly assigned. Although this was less than ideal, this was dealt with by date of birth not being used in the Propensity Score matching equation.

The time taken for each case to move through the flow diagram was variable. Following submission of the details of a dispute to the ETS by a claimant (usually an employee) using the ET1 form, the respondent (usually the employer) had 28 days to respond by completing an ET3 form. Soon after this, a CMD would be held and the offer of mediation made. The aim was for judicial mediation to take place within the month after the offer in principle had been made and it was mandated that mediation be completed within seven weeks of this date.

All discrimination cases would have been approached by Acas and offered conciliation. If both parties expressed interest in judicial mediation, a two-week mandatory period was allowed for further Acas conciliation, before the case was formally allocated to undergo judicial mediation. At this point, Acas conciliation was suspended until judicial mediation had been found to be successful or unsuccessful, at which point it could resume.

Whilst this study was not set up to compare success rates of Acas conciliation and judicial mediation, some of the motivation for the present study came from a desire to see if it was appropriate to add judicial mediation to the Alternative Dispute Resolution 'toolbox', in addition to the conciliation process already provided by Acas. If the answer to this question was to be 'yes', then judicial mediation needed to add value to the existing arrangements (including Acas conciliation). As a result, the aim of the pilot was to target judicial mediation at cases perceived as harder to resolve, particularly those cases where discussion in the initial CMD had resulted in an estimate that, if the case went to a hearing, it would take three days or more.

The data

Figure 3.2 provides detail of the timeline for the various parts of the pilot study, the points of evaluation and the data collected at each stage, where all eligible cases with a start date between June 2006 and March 2007 flowed into the pilot. The researchers essentially had a 'snapshot' of the status of all these cases taken from the Employment Tribunal Service case management database, as of August 2007. Further on from this, there was another 'snapshot' taken through the administration of the questionnaire during the fieldwork carried out between October and November 2007.

In addition to these snapshots in August and October/November 2007, the ET1 and ET3 forms provided valuable detail on the present and previous employment relationship of the

claimant and employer. Combining the ETHOS data, which provided detail of the start and end dates for all cases, with the information in the ET1/ET3 forms, provided the researchers with a rich source of information. This was further enhanced by the administration of the questionnaire which captured the views of mediated and unmediated/interested cases.

The researchers' estimates of the start and end dates were determined by the administrative system. The ETHOS start date was when the ETS received completed ET1 and ET3 forms. The end date (for those cases that did end in the period of the study) was taken as the 'promulgation' date specified in the administrative system. This was the date on which a judgment signed by the Tribunal Judge had been made public or a notification of settlement/withdrawal had been made.

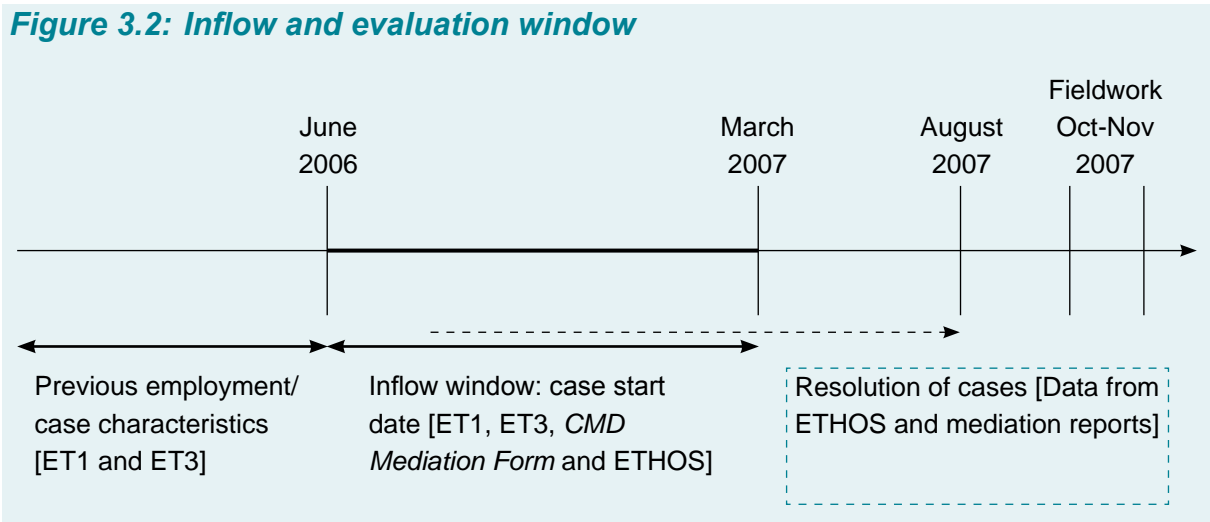


Figure 3.1 details the stages of selection and Figure 3.2 highlights the dynamics of the pilot design; the methodological and process challenges will be explored later. Cases entering towards the end of the pilot in March had much less time to be brought to some resolution and therefore final outcomes were less likely to be observed as two-thirds of cases are still unresolved after six months. Before tackling this and other methodological issues, the following section of the report provides detail of the data collected in all parts of Figure 3.2 and also outside the pilot areas.¹⁶

Hard copy administrative data and the ETHOS extract

Within the pilot regions, when a claim (ET1) and response (ET3) form were received in a case involving discrimination, copies were retained and as the case progressed further relevant information was collected. The sources of hard copy administrative data that were analysed for the cases transferred to the project team are shown below.

16 In addition to the information detailed under these headings, the project team's understanding of the judicial mediation and Acas conciliation processes had been informed by the observation of three mediation events, more than 15 meetings with staff in the ETS and Ministry of Justice and a focus group of Acas conciliation managers. The participants were Acas conciliation managers from the London region (three); Newcastle (one) and Birmingham (one). The aim was to provide more clarity about the process of Acas conciliation, and to discuss the conciliators' views on the judicial mediation pilot.

1. ET1 form. The Employment Tribunal appeal form was used by the claimant to initiate his/her case, and gave details on aspects such as: the gender and age of the claimant; the size of the employer' business; details of the case and the processes followed to date.
2. ET3 form. The Employment Tribunal response form was used by the employer to respond to the claim and detailed many of the characteristics that were also set out in the ET1. This provided an indicator of the extent to which these were conflicting and in addition provided information on employer representation at submission of ET3.¹⁷
3. A '*CMD Offer to Mediate Form*' was completed by the Tribunal Judge, recording details of the CMD where the parties had been alerted to the judicial mediation process and whether or not they had expressed an interest in principle.
4. Where mediation was conducted, a mediation report was produced, giving details on: the length of the mediation; representation; and detailed narrative of process and outcomes from the viewpoint of the mediator.

The information from these hard copy administrative data were merged with the administrative information held on the ETS case management database. Using the ETHOS data the researchers were able to create data on case durations, measured as the number of days between registration date and the last promulgation date listed for a case. This allowed systematic and reliable comparison of rates of 'resolution' between mediated and unmediated cases, and in addition the distinction between cases that did, and did not, go to a hearing. Similarly the ETHOS extract provided information on the outcome of a case and its jurisdiction.

There were questions raised over the accuracy of the ETHOS fields that recorded the estimated days for hearings as estimates by the Tribunal Judges at the CMDs differed and were accepted as being more accurate. However, other than this, the ETHOS extract was a reliable source of information able to accurately determine the overall sample frame for the pilot. When merged with the hard copy administrative data, the researchers were able to identify the following number of cases at each stage of the pilot process set out in Figure 3.1.

- a. During the ten months of the pilot an estimated 868¹⁸ cases satisfied the eligibility criteria for inclusion in the pilot across the pilot regions.

17 See Technical Annex Table 1.1 for details of all the characteristics captured in this study from the ET1 and ET3 forms. The Technical Annex can be obtained on request from MoJ at the following email address research@justice.gsi.gov.uk

18 During the last three months of the pilot, due to a lack of resources, only paperwork relating to mediated cases was transferred to the pilot project team for analysis. During the six months from June 2006 an average of 67 cases per month declined the offer of mediation. Thus it was estimated that 200 records would have been transferred in those three months. Only paperwork received could be analysed and this only affects the calculation of the take-up rate.

- b. One hundred and ninety-six cases took up the offer of judicial mediation in principle when offered the service at the initial Case Management Discussion by the Tribunal Judge (with 116 randomly allocated to receive mediation and 80 remaining unmediated).
- c. This left an estimated 672 cases who did not take up the offer in principle and hard copy details of 472 of these cases were transferred to the research team.

Table 3.1 provides detail on the regional breakdown of these cases and as one can see there was a good geographical spread. Birmingham contributed the lowest proportion of cases that expressed an interest in principle (23.3% of the **mediated** and 27.5% of the **unmediated/interested** sample), whilst contributing the most (39.6%) to the **unmediated/not interested** sample.

Table 3.1: Mediated and unmediated cases within the pilot regions

Region	Cases experiencing judicial mediation (MEDIATED)	Cases expressing an interest in principle, but not mediated (UNMEDIATED/INTERESTED)	Sample of cases rejecting the offer of mediation in principle (UNMEDIATED/NOT INTERESTED)	Estimated total number of eligible cases
Newcastle	41 (35.3%)	30 (37.5%)	114 (24.2%)	201 (23.1%)
London central	48 (41.4%)	28 (35%)	171 (36.2%)	392 (45.2%)
Birmingham	27 (23.3%)	22 (27.5%)	187 (39.6%)	275 (31.6%)
All Pilot Regions	116 (100%)	80 (100%)	472 (100%)	868 (100%)

Source: Employment Tribunals Service case management data (ETHOS) & transferred hard copy admin. data.

There are some key points to note.¹⁹

- The figure of 868 (and the regional contributions to this overall figure) in the final column of Table 3.1 was an estimate, as outlined in footnote 22. All other figures were exact and taken from ETHOS.
- Some cases that were not seen as a priority for judicial mediation were included in the pilot. For instance, 12% of cases in the first two columns of Table 3.1 had start dates prior to June 2006 and also 9% were recorded as ‘multiples’. Given the need to boost numbers, these cases were included in the remainder of this study, with any multivariate analysis controlling for possible unobserved differences in the characteristics of these cases.

¹⁹ See Technical Annex Section 1.2 *Data Quality Issues* for more details.

Telephone survey and in-depth Interviews

A telephone survey was conducted during October and November 2007. All claimants and respondents who had expressed an interest in judicial mediation and for whom contact details were identified were sent letters inviting them to take part in the telephone survey.²⁰ The aim was to capture various aspects of the process that were not available in the existing datasets, such as recorded levels of satisfaction, estimates of time spent on cases, as well as previous experiences of ADR.

For the survey of claimants, a sample of 139 contacts was issued and a total of 69 telephone survey interviews achieved. Of the achieved telephone survey interviews, 32 cases had undergone judicial mediation and 37 had not. The telephone survey interviews lasted an average of 25 minutes.

For the survey of employers, a sample of 166²¹ contacts was issued and a total of 74 telephone survey interviews were achieved. Of the achieved interviews, 47 cases had undergone judicial mediation and 27 had not. The telephone survey interviews lasted for, on average, 25 minutes.

The following headings give an idea of the content of the two telephone surveys, which did differ in some ways, but tackled a similar range of issues and asked mainly closed questions.

- Current status of the case
- Present employment
- Initial expectations of the claim
- Offer and uptake of mediation and conciliation (excluding judicial mediation)
- Judicial mediation
- Previous employment tribunal claims
- Other issues relating to current claim
- Satisfaction with the Employment Tribunal system
- Demographics (asked only of claimants)

²⁰ Pilots were also carried out for both the Claimant and Employer telephone surveys between 6th and 19th August 2007. For the Claimant Survey, a sample of 24 contacts was issued and a total of 12 interviews were achieved and for the Employer Survey a sample of 24 contacts was issued and a total of 13 interviews were achieved. Where possible these responses were used in the analysis.

²¹ The number of contacts issued was determined by the availability of contact details, which were missing in many claimant and employer ET1 and ET3 forms. Subsequent web searches and directory searches filled in many more of the gaps for employers than it did for individuals.

The final response rate for employers was 45% and for claimants 49% for the telephone survey. There were clearly limitations placed on the amount of quantitative analysis that could be carried out separately for the 69 claimants and 74 employers. However, in some sections of the following analysis it was possible to boost numbers by pooling both claimant and employer responses. This allowed the researchers to consider different samples²² which combined employer and claimant responses to provide case-level datasets. For example, claimants and employers response rates resulted in information being provided for 81% (65 out of 80) of the unmediated, interested cases and 55% (64 out of 116) of the mediated cases. Respondents in cases that went to a hearing were less likely to respond to the survey, with only 13% of unmediated/ interested cases in the survey resolved through a hearing, compared to 24% amongst unmediated/interested cases as a whole. For the mediated, the figure was only 6%, compared to 11% in the entire sample.

Table 3.2 summarises some of the key characteristics of claimants and respondents of mediated and unmediated/interested cases gained from the telephone survey. As can be seen, mediated cases were more likely to have claimants and respondents who thought that the case was likely to be resolved without the need for a hearing when the case first started. This finding might reflect their own optimistic disposition, the nature of the case, their knowledge of the system or their dislike for confrontation. Mediated claimants who answered the telephone survey were the least likely to have received Acas conciliation.

Table 3.2: Selected characteristics from the telephone survey

Telephone survey questions	Claimants experiencing judicial mediation	Claimants interested in principle, but not mediated	Employers experiencing judicial mediation	Employers interested in principle, but not mediated
	Percentage			
Felt case would be resolved without hearing (at point of ET1/ET3)	31	24	37	32
Taken part in Acas conciliation	17	33	27	30
With representatives or advisor	80	73	73	81
With A-level or higher qualifications (claimant only)	80	69		
Non-White claimants	34	29		
Total frequency	35	45	51	37

Source: *Survey of Judicial Mediation in Employment Tribunals, 2007*.
 The number of contacts issued was determined by the availability of contact details, which were missing in many claimant and employer ET1 and ET3 forms. Subsequent web searches and directory searches filled in many more of the gaps for employers than it did for individuals.

It should be noted that the administration of a telephone survey many months after the start of a case was problematic and one might reasonably expect problems with recall. Some claimants and respondents might be asked about events that happened more than 18 months previously.

²² See Technical Annex Section 1.2 *Analysing Questionnaire Data* for more details.

However, this was a common problem and any recall bias experienced was comparable to the 2003 Survey of Employment Tribunal Applications (Hayward *et al.*, 2004), which surveyed between October 2003 and January 2004 for cases completed between March 2002 and March 2003.

Telephone survey respondents were asked if they would be willing to be contacted by staff from the University of Westminster to further discuss their experiences of the ET and judicial mediation process. These in-depth interviews were organised during February 2008 and focused on a deeper exploration of some of the emerging quantitative findings. The aim was to interview a group of ten to fifteen claimants, respondents and representatives. The initial sample was selected to include 23 potential participants who had experience of judicial mediation but had also tried other ways of resolving the case through, for instance, Acas conciliation and internal grievance procedures.

For both the telephone survey and the in-depth interviews, the sample were sent a formal letter, and then contact was made over the phone following this. The in-depth interviews were carried out with four claimants and four employers. In accordance with the preference of the participants, six in-depth interviews were carried out over the phone and two face-to-face. One of the employer respondents was an 'in-house' legal representative. Therefore, the discussions in the in-depth interview covered the experience of three mediations (one unsuccessful and two successful). Of the other seven individuals interviewed, three had experience of successful mediations and four were unsuccessful at mediation (overall, therefore, five successful and five unsuccessful judicial mediation experiences were drawn upon).

The in-depth interviews lasted between 20 and 50 minutes and were recorded and transcribed verbatim. The participants were assured of the anonymity and confidentiality that surrounded their participation in this research. The general themes tackled during the interviews included: reasons for taking up judicial mediation; perception of judicial mediation; time issues; tribunal judge's conduct; and experiences of dealing with Acas.

Analytical methodology

The methodological approach adopted in this study was driven primarily by a desire for broad quantitative or 'headline' findings that attempted to gauge the value added from judicial mediation. The discussion of methods was primarily focused on this quantitative aspect. Thus whilst the more qualitative findings shed light on a variety of more detailed interactions 'behind' these headline figures, they did not constitute a stand-alone element of the study – rather they delved deeper into perceptions and personal experiences. For instance, the more qualitative elements of the study shed light on the factors that influenced take-up of mediation, the views of claimants and respondents on the process, and the factors influencing outcomes. The qualitative discussions drew on the relevant sections of the telephone survey, the mediation reports and in-depth interviews.²³

²³ The details of a focus group of Acas conciliators, meetings with ET staff and the Regional Chairperson for the London region, as well as three observations of judicial mediation events also provided additional contextual information for our discussion.

Propensity score matching and regression analysis

A direct comparison between the indicators of success for mediated and unmediated cases would not provide a reliable estimate of the value added of judicial mediation. Cases taking up the offer of judicial mediation were likely to exhibit systematic differences when compared to cases that turned down the offer. The unmediated cases might not have exactly the same characteristics as the mediated cases. Therefore, any difference in rates of resolution between the two might reflect their differing characteristics, rather than any impact of judicial mediation.

Ideally, the researchers would compare the observed rates of resolution for the mediated group (X_1) with the rates of resolution of this same group had they not been mediated (let us call this X_2). This relationship was often referred to as the 'counterfactual' as it simply did not exist in the real world (it was simply not possible to observe the mediated in a state of not being mediated).

This statement of the problem summed up the challenge by suggesting that the researchers wished to compare the outcomes from the mediated cases with the outcomes from a group of unmediated cases that were, **in all other respects, identical** to the mediated group. There were two ways in which this study attempted to gain an unbiased estimate of the true value added of judicial mediation ($X_1 - X_2$) through this approach. The researchers strove to ensure that comparisons on the basis of outcome were made between a sample of mediated cases and an otherwise identical sample of unmediated cases by the following.

1. Ensuring that comparison was made between mediated cases and unmediated cases that expressed an interest in mediation in principle. This helped to ensure that any unobservable characteristics, (i.e. those the researchers did not capture in their data), that might determine case outcomes were less likely to be driving the researchers' findings, (as both the mediated and unmediated cases had expressed a willingness to consider early resolution).
2. By the use of propensity score matching. This ensured that the comparison of outcomes was made between these mediated and unmediated/interested samples in a way that the latter group were 'otherwise identical' to the mediated, on the characteristics that we observed in the data. Ideally, the researchers would ensure that, for each mediated case, there was an otherwise identical or 'matching' case in the unmediated/interested group. The way that this was carried out in practice involved a 're-weighting' of the unmediated/interested sample to look like the mediated sample.²⁴

In addition to the process of matching, an additional regression equation was estimated in order to identify those factors that were most important in determining whether a person did or did not express an interest in mediation, in principle. This was a similar equation to the one carried out

²⁴ Refer to Technical Annex Section 1.1: *Methodological Challenge and Propensity Score Matching* and Technical Annex Table 1.3 for more detail on the process of propensity score matching.

to determine the propensity for cases to be observed amongst the mediated and unmediated/interested sample. The only difference with the dependent variable was whether the case was observed as expressing an interest in mediation or not (a binomial Probit analysis).

Within this methodological framework, there were a number of methodological issues that presented the researchers with essentially the same trade-off. In each instance, for reasons of methodological certainty, there was a suggested reduction in the number of cases included in the evaluation; in contrast there was a continuing need to retain sufficient numbers to have any chance of identifying a statistically significant effect, if such an effect existed. For instance, there were mediated cases that had start dates prior to the official pilot start date, but the removal of these would further drop the number of observations and reduce the chances of identifying any significant impact of mediation. In the Technical Annex Section 1.2: Data Issues, consideration was given to each one of these in turn and the ways in which the methodology accommodated any potential for bias arising from their inclusion.

Approach to costs

The researchers approach to cost benefit in Chapter 7 was to firstly calculate the direct costs to the ETS of providing the judicial mediation service to those cases included in the pilot. They then gauged the extent to which there might be a net direct cost/saving arising from the provision of judicial mediation, with the focus of direct savings being on the potential for mediation to avoid days at a hearing. Having calculated this, the analysis was then expanded to consider the cost/savings that would arise from roll-out of the judicial mediation pilot.

The approach to costs differed from the approach to evaluation of outcomes. The researchers did not utilise the findings from the propensity score matching process when estimating whether there was a net cost benefit. Rather they utilised the raw data to consider 'upper' and 'lower bound' cost and benefit scenarios, essentially asking what it would take for the process of judicial mediation to deliver a net benefit.

4. Case characteristics and take-up

Key findings

- It was estimated that 23% of eligible cases took up the offer of mediation in principle, though it must be remembered that this was an estimate and applied to a very specific group of eligible cases.

Parties involved in cases with the following characteristics were statistically more likely to take up the offer of judicial mediation in principle.²⁵

Claimant characteristics

- Cases involving female claimants (having controlled for jurisdiction) ***.
- Claimants whose job involves (or involved) longer hours***.
- Cases where the claimant was still in the same job at the submission of the ET1 form*. Though this effect was weaker (as it was only significant at the 10% level), this finding was in line with that of Van Veen *et al.* (2003) who suggested that mediation might be more appropriate where there was an ongoing relationship (claimants and respondents would seem to be signalling some agreement with this).

Employer characteristics

- Employers without representatives*** (i.e. if the employer mentioned a representative in the ET3 form, he/she was less likely to have subsequently taken up the offer of mediation).

Case characteristics

- Higher estimated hearing length in days** (ETHOS data).
- Cases within the Newcastle area** (as opposed to Central London and Birmingham).

From the more qualitative aspects of the study it would seem that:

- representatives had the most influence on encouraging the take-up of mediation, though employers were less likely than claimants to suggest that their representative had been an influence.
- some employers and claimants seemed to participate in judicial mediation because they felt they had nothing to lose, but others saw the potential for earlier resolution and a lessening of the stress associated with the case.

Of the estimated 868 cases that were eligible for mediation, the following analysis focused on the differences between those interested in accepting the offer versus the uninterested in mediation.

²⁵ The degree of significance is indicated as follows – *significant at 10% level, **significant at 5% level, ***significant at 1% level.

- The 196 cases that took up the offer of judicial mediation in principle at the initial Case Management Discussion; of which 116 subsequently received mediation and 80 remained unmediated.
- The sample of 472 cases (from the remaining 672 who rejected the offer in principle) for which hard copy administrative data were transferred to the research team.

The take-up rate must be considered with care, as it was an estimate. However, the implication from these figures was that 23% of eligible cases that were offered mediation took up the offer in principle.

Who takes up the offer of mediation?

The case characteristics gleaned from ETHOS and the hard copy administrative data for the 116 mediated, 80 unmediated/interested and 472 unmediated/not interested cases are set out in Technical Annex Table 1.1. Some of the more pronounced differences in the characteristics of those who were interested or not in the offer of mediation tended to be related to the gender of the claimant. For example, 44% of cases expressing an interest in mediation in principle had a sex discrimination jurisdiction (41% amongst the mediated and 49% amongst the unmediated/interested), compared to only 37% of unmediated/not interested cases that rejected the offer in principle. In addition, 64% of cases where there was an expression of interest in principle having female claimants (68% mediated and 59% unmediated/interested) compared to 51% amongst the unmediated/not interested group.

In addition to this gender effect, there was some indication that claimants aged over 50 were more likely to be represented amongst those who expressed an interest in principle. Similarly, cases where there was no issue of dismissal (highlighted in the ET1 form) and where the claimant was still in his/her job were more highly represented amongst the sample expressing an interest in mediation.

In order to identify which case characteristics were most important in determining who took up the offer of mediation, the information from the ET1 and ET3 forms, the ETHOS extract and the *CMD Offer to Mediate Form* was used to estimate a (Probit) regression equation which had a dependent variable with the following two categories.

1. Cases where either the claimant or respondent did not express an interest in mediation (472).
2. Cases where both parties expressed interest in judicial mediation in principle, and therefore the case was considered for such (116).

A selection of the parameter estimates from this regression analysis are presented at the end of this section, in Table 4.1. The key findings were that **cases with the following characteristics were statistically more likely to take up the offer of judicial mediation in principle.**²⁶

Claimant characteristics

- Cases involving female claimants (having controlled for jurisdiction)^{***}.
- Claimants whose job involves (or involved) longer hours^{***}.
- Cases where the claimant was still in the same job at the submission of the ET1 form*. Though this effect was weaker (as it was only significant at the 10% level) this finding was in line with that of Van Veen *et al.* (2003) who suggested that mediation might be more appropriate where there was an ongoing relationship (claimants and respondents would seem to be signalling some agreement with this).

Employer characteristics

- Employers without representatives^{27***} (i.e. if the employer mentioned a representative in the ET3 form, he/she was less likely to have subsequently taken up the offer of mediation).

Case characteristics

- Higher estimated hearing length in days^{**} (ETHOS data).
- Cases within the Newcastle area^{**} (as opposed to Central London and Birmingham).

It was particularly interesting that those employers stating in the ET3 form that they had a representative were significantly less likely to take up the offer of mediation in principle. However, it was important to note the context of this finding.

- This was not a finding driven by the size of the employer's business, as the researchers controlled for size of firm in the regression equation – one could imagine that size could proxy for the fact that employers with large businesses were more likely to have in-house legal teams.
- However, it was a finding driven by a relatively small number of employers without representation. As can be seen in Technical Annex Table 1.1, it was still true that many of the cases that opted for mediation (81% amongst the mediated and 76% amongst the unmediated, interested) had employers who mentioned a representative in the ET3 form. Furthermore, by the time the mediation event took place this was likely to have risen (according to the telephone survey evidence).
- The finding was in contrast to that for claimants mentioning that they had a representative on the ET1 form, who were not more or less likely to take up the offer of mediation.

26 The degree of significance is indicated as follows – *significant at 10% level, **significant at 5% level, ***significant at 1% level.

27 The ET1 and ET3 forms did not specify whether representatives were legal reps or not.

Figure 4.1: Selection of the parameter estimates from this regression analysis

	Coefficient	Standard Error	Z Stat.	Prob> z
Claimant characteristics				
Male	-0.479	0.152	-3.160	0.002***
Hours worked with employer (respondent)	0.027	0.008	3.370	0.001***
Claimant has new job	-0.058	0.205	-0.280	0.777
Claimant was still in job at submission of ET1	0.656	0.369	1.780	0.075*
Whether claimant mentions representative in ET1 form	0.055	0.138	0.390	0.693
Employer Characteristics				
Whether employer mentions representative in ET3 form	-0.456	0.173	-2.630	0.008***
Jurisdiction				
Disability Discrimination Act (DDA)	0.058	0.194	0.300	0.764
Discrimination on grounds of sex, marriage or transgender (SXD)	-0.042	0.199	-0.210	0.831
Discrimination on grounds of sexual orientation (DSO)	-0.560	0.587	-0.950	0.340
Discrimination on rounds of Religion or Belief (DRB)	-0.483	0.361	-1.340	0.181
Race Relations Directive (RRD)	0.059	0.198	0.300	0.765
Regional office (reference is Birmingham)				
Newcastle	0.354	0.161	2.210	0.027**
Central London	0.198	0.160	1.240	0.217
Missing Values (following were coded 1 if the information was missing and zero otherwise)				
Claimant income missing	-0.112	0.175	-0.640	0.522
Whether claimant in new job was missing	-0.382	0.190	-2.010	0.044**
Hours worked was missing	1.464	0.365	4.010	0.00***
Age missing	-22.850	14.171	-1.610	0.107
Occupation missing	-1.483	0.148	-10.010	0.00***
Month of case start date (reference was before June 2006)				
June to August 2006	0.158	0.222	0.710	0.477
September to November 2006	0.514	0.222	2.320	0.021**
December 2006 to March 2007	0.769	0.253	3.040	0.002***
Constant	21.918	14.165	1.550	0.122
Log Likelihood				
Log Likelihood	-273.07473			
Number of Observations				
Number of Observations	668			
Likelihood ratio; Chi Square (34)				
Likelihood ratio; Chi Square (34)	194.53			
Prob > Chi square				
Prob > Chi square	0			
Pseudo R2				
Pseudo R2	0.2626			

Modelling Interested (1) or Not Interested (0) as dependent categories.

* significant at 10% level, ** significant at 5% level, *** significant at 1% level.

Finally, there was a separate section of the equation dedicated to the inclusion of variables that captured whether the ET1 form had missing observations for a number of explanatory variables. The motivation for their inclusion was related to statistical integrity. However, it was interesting to consider that, whilst the inclusion of an indicator of **whether the claimant was in a new job or not** had no impact, those cases where ET1 forms were blank for this section were much less likely to take up the offer of mediation in principle. Similarly ET1 forms that did not have completed fields for hours worked and job type (recoded to occupation here) were significantly less likely to take up the offer of mediation in principle.

What influences take-up of mediation in principle?

The researchers, having identified from their regression analysis the characteristics that were seen as most important in determining the take-up of mediation, then considered the additional factors that influenced take-up. It should be noted that the figures presented here were taken from the telephone survey data and in-depth interviews and any findings should be considered with care (due to the possibility for sample selection bias and low response to some questions).

For instance, 37% of claimants and respondents suggested that the mediation judge was an important influence on their decision to take up mediation. This did not differ too much between claimants and respondents. Overall, 54% suggested it was their own representative/ advisor who was the most important influence. This overall 54% hid a big difference between employers, who were less likely to cite their representative/advisor as an influence in taking up the offer of mediation (47%), when compared to claimants (62%).

From previous studies, legal representation was sometimes found to be important in determining take-up, although the direction and nature of its impact depended on the lawyer in question (Kressel & Pruitt, 1989; Wissler, 2002). In this study of judicial mediation, 18% of claimants had an arrangement with a legal representative where they paid only if they won and 16% had an arrangement where they paid whatever the outcome (66% had no arrangement). In addition, 36% of employers reported having a legal department.

From the in-depth interviews, the reasons for taking up judicial mediation were seen as two-fold. On the one hand, the parties involved argued that they had 'nothing to lose'; the judicial mediation would have no impact on other possible courses of action, so why not try it.

Because there was absolutely nothing to lose [from taking up the offer of judicial mediation], you know, apart from time, a little bit of time. There was every opportunity to resolve a case before it goes to a full blown tribunal.

(Employer; Interview 1, unsuccessful mediation)

On the other hand, the in-depth interviews participants perceived the judicial mediation option as a 'better' alternative than going to a hearing, as it was seen as potentially quicker, cheaper, less traumatic and less polarising. For some claimants judicial mediation was seen as a

solution that helped to resolve the situation without 'a need to go through the stress at the court'. It was also seen as a 'less traumatic experience than going to the court' and saving money (in terms of fees for legal representatives) and time.

It was thought of being able to actually settle it quicker than going to a tribunal and obviously the cost and time, and the stress of going to a tribunal. It seemed a better alternative, to be honest

(Claimant; Interview 7, unsuccessful mediation)

Some employers also considered judicial mediation to be a 'cost saving' option, especially if witnesses had to be released to attend a long hearing. Time and the reduction of stress and trauma were also perceived by employers as an important aspect, as it was an opportunity to resolve the situation within one day rather than a long hearing.

The other reason for going for judicial mediation is when there's an existing employee who's taken out a claim. So it's...I think it's really silly to go all the way to an employment tribunal, because it just polarises the situation even more. You know, the mediation can help build bridges, especially if there's an existing employee.

(Representative; Interview 2, two successful and one unsuccessful mediation)

One view related to the strength of the claimant's case – when the employer had a strong case, 'settling through mediation would not really be to their advantage' and some cases 'would inevitably go through ET'. This view was confirmed in an interview with a representative:

(...) I thought that the respondent's [employer's] case was very weak, you know. I had urged mediation at a very early stage. [...] I kind of really impressed on my client department that, you know, they have to settle, because it would attract a lot of adverse publicity if such a case went to tribunal and, you know, they'd really be labelled as a very cruel employer.

(Representative; Interview 2, two successful and one unsuccessful mediation)

Judicial mediation was also seen as a 'mini tribunal' and an opportunity to get everyone together at the same place and at the same time.

[...] it was actually the opportunity to get everyone together in one forum to resolve the situation. Doing it like a mini tribunal, I think was what we thought it was going to be, without doing the full-blown tribunal, and our view was, well, that's got to be better than trying to resolve it over the phone

(Employer; Interview 1, unsuccessful mediation).

For the representative of the larger company where there were more cases being brought to ET, judicial mediation was described as an opportunity to experience a new way of dealing with an ET case, and 'see if it has any benefit' as a potential reason for take-up.

5. Case outcome and duration

Key findings

- The conclusions were that no discernable, statistically significant effect could be identified for the impact of judicial mediation between the groups on:
 - (i) rates of cases settled within a set time period;
 - (ii) rates of resolution that avoided a hearing.
- The rate of cases resolved without a hearing was:
 - 57% for mediated cases;
 - 61% for unmediated/interested cases; and
 - 54% for unmediated/ uninterested cases.
- There was an indication that the characteristics the researchers were controlling for in the matching equation were those that made mediated cases harder to resolve. This would, therefore, reduce the ability of judicial mediation to resolve the case.
- In the matching equation, those claimants that had not filled in the field in the ET1 form setting out their job title were significantly less likely to be mediated. This might be acting as a proxy for some other underlying or unobservable characteristic and the researchers return to a discussion of this.

The more qualitative aspects of the study based on the telephone survey show the following.

- Of those that undertook mediation, 60% of employers and 39% of claimants felt that it was very effective in bringing the case closer to resolution, whether or not they actually settled in mediation.
- Some claimants seemed to particularly welcome some of the non-financial aspects of any awards that were achieved during mediation.
- There were 72% of the mediated survey respondents that reported judicial mediation resolved their cases. However, amongst the unmediated/interested survey respondents, 79% of cases were resolved, either through Acas, privately and/or using 'other' methods not involving a hearing (see Table 5.3). This was consistent with the researchers' finding that judicial mediation did not add significantly to rates of resolution that avoided a hearing.

Table 5.1 presents overall rates of resolution for the cases included in the pilot. Thus, of the 116 cases that experienced judicial mediation, 68% achieved some form of resolution of the dispute before the end of the evaluation window. This compared to 85% of cases that expressed an interest but were not mediated and 69% of those cases that turned down the offer of mediation in principle. However, this measure of ‘resolved’ included cases that were resolved by going to a hearing (an event that judicial mediation was attempting to avoid). Table 5.1 shows that 13 of the judicially mediated cases ultimately went to a hearing – a figure that represented 11% of all judicially mediated cases. In contrast, 24% of the cases that expressed an interest, but were not mediated, eventually went to a hearing.

Table 5.1: Resolution rates within the pilot regions - how many cases, where mediation was attempted, were resolved?

	Pilot cases experiencing judicial mediation MEDIATED	Pilot cases expressing an interest in principle, but not mediated UNMEDIATED/ INTERESTED	Sample of pilot cases rejecting the offer of mediation in principle UNMEDIATED/NOT INTERESTED
Percentage of total cases resolved (any type of resolution before Aug 2007)	68 (79 cases)	85 (68 cases)	69 (328 cases)
Percentage of total cases resolved, through a hearing	11 (13 cases)	24 (19 cases)	15 (73 cases)
Percentage of total cases resolved, through methods other than a hearing	57 (66 cases)	61 (49 cases)	54 (255 cases)
Total cases	116	80	472

Source: Employment Tribunals Service case management data (ETHOS) & transferred hard copy admin. data.

Thus, from Table 5.1 one can see that of the 116 cases that experienced judicial mediation, 57% arrived at some form of resolution that avoided a hearing during the evaluation window. This compared to 61% amongst cases that expressed an interest but were not mediated and 54% of cases that rejected the offer in principle. Generally, therefore, rates of resolution were higher for cases that expressed an interest in mediation (whether mediated or not), when compared to cases that had rejected the offer of mediation in principle (54%).

Table 5.2 provides a more detailed breakdown of these figures and also allows some comparison with cases outside of the pilot regions. More specifically, figures are provided on the proportion of cases resolved at two-month intervals following case start date.²⁸

²⁸ Resolution rates were calculated for each month after case start date, but presentation of the two-monthly figures was adopted here for ease of exposition.

Table 5.2: Proportion of cases resolved through methods other than a Hearing, according to month after case start date

Duration (months)	Pilot cases experiencing judicial mediation	Pilot cases expressing an interest in principle, but not mediated	Sample of pilot cases rejecting the offer of mediation in principle	All cases within the pilot regions satisfying selection criteria, apart from estimated hearing days	All cases outside the pilot regions satisfying all criteria, apart from estimated hearing days
	UNMEDIATED/ MEDIATED	UNMEDIATED/ INTERESTED	UNMEDIATED/ NOT INTERESTED	Percentage	
2	0	0	10	9	9
4	8	10	26	23	30
6	28	34	36	33	44
8	45	51	50	37	51
10	53	59	53	39	52
12	57	61	54	39	52
Total Frequency	116	80	472	3,059	6,929

Source: Employment Tribunals Service case management database (ETHOS).

Table 5.2 shows the following:

- Both the mediated cases and the unmediated/interested cases (columns one and two) did experience lower resolution rates during the first four months after case start date, with resolution rates coming into line with other cases inside and outside the pilot areas approximately eight months after case start. This could be a result of the pilot design, as those expressing an interest in mediation had the potential for some additional delay to the progress of their case in the early stages.
- Columns four and five of Table 5.2 allows some comparison between cases inside and outside the pilot regions. However, only information from ETHOS was available for these 3,059 and 6,929 cases and therefore these last two columns included cases that had less than three days estimated for a hearing at the initial CMD (in contrast to the pilot cases which only included cases with three or more estimated hearing days). However, they were 'singles', with at least one discrimination jurisdiction and with case start dates between June 2006 and March 2007. This allowed some comparison between resolution rates inside and outside the pilot regions. It was interesting to note that, apart from the point two months after case start date, cases inside the pilot regions had lower rates of resolution that avoid a hearing. This could arise for a variety of reasons, including the fact that there was simply a higher concentration of hard to resolve cases in the pilot regions or administrative disruption from the implementation of the pilot.

As one can see from Tables 5.1 and 5.2 there were quite pronounced differences in the apparent outcomes when comparing mediated cases with unmediated cases that expressed

an interest. This could be due to the impact of mediation, but also possibly the differences in characteristics of cases (see Technical Annex Table 1.1) or characteristics of the pilot (for instance, differences in the rates of inflow of mediated and unmediated cases between June 2006 and March 2007). Thus, as the section in Chapter 3 on analytical methodology suggests, an analysis that directly compared the mediated outcomes with an unmatched sample of unmediated (but interested) sample was not advisable as the researchers were not comparing like with like. So they used propensity score matching in an attempt to better compare the outcomes from mediated and unmediated/interested cases.

Impact of judicial mediation on case duration and resolution rates

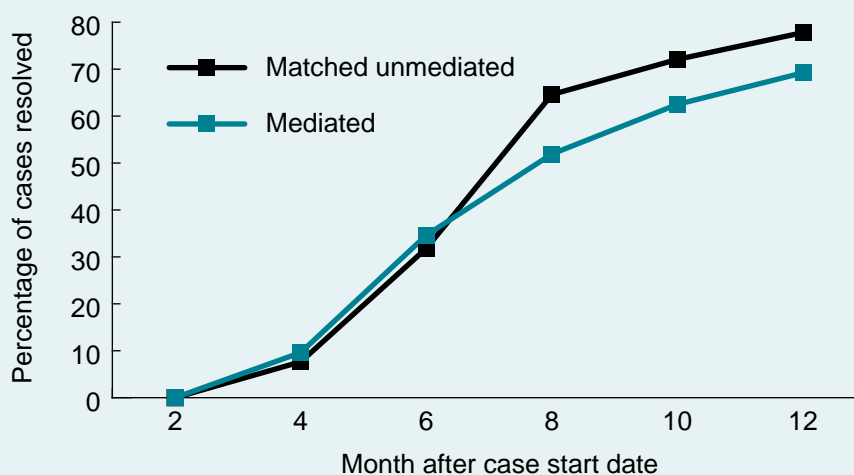
This section sets out the results from a comparison of **matched samples**, comparing:

- 1a. the proportions of cases resolved [by any method, **including** a hearing] for the 116 mediated and 80 unmediated/interested cases;
- 1b. the proportions of cases resolved [by any method, **other than** a hearing] for the 116 mediated and 80 unmediated/interested cases.

In this section, the outcomes for mediated and unmediated cases were able to be directly compared as:

- both mediated and unmediated cases had expressed an interest in mediation;
 - the unmediated sample that expressed an interest had been reweighted, to ensure that it was otherwise identical to the mediated cases (on the observable characteristics that were available for this study).
- 1a. Figure 5.1 compares the percentage of cases that were resolved (through any method) at two-month periods from case start date, for the matched (i) mediated, and (ii) unmediated/interested groups. For instance, six months after case start date, 35% of mediated cases, compared to 32% of matched unmediated cases had been resolved, but this was not a significant difference. From month eight onwards, the rates of resolution for the unmediated matched sample rose above those for the mediated, but again any difference was not significant. The main finding was that there was no statistically significant difference between the rates of resolution in any of the two-month periods after case start date; the researchers cannot confidently say that judicial mediation resulted in statistically higher or lower rates of resolution.

Figure 5.1: Rates of resolution at two-month periods from case start date



Resolved cases in this Figure include those going to a hearing

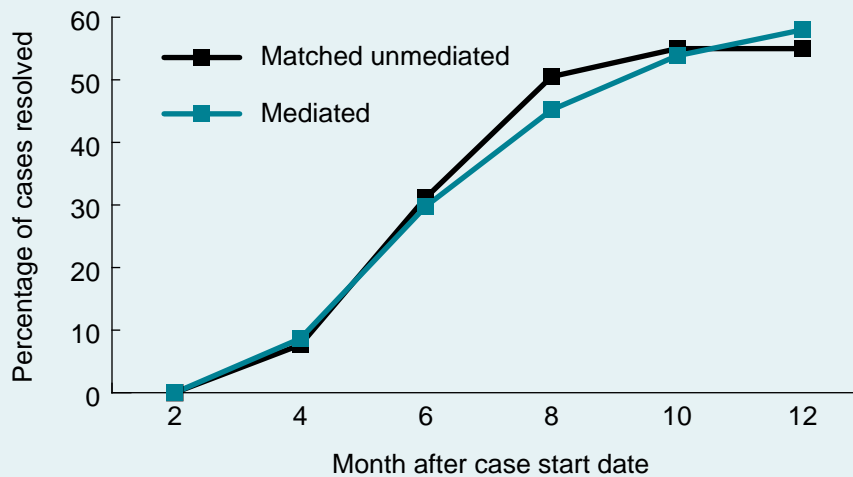
All cases were eventually resolved in some way or another and the categorisation of 'resolved' cases used in Figure 5.1 included all forms of resolution, including a hearing. Although as discussed in Figure 3.2, in this study, cases entering towards the end of the pilot in March had much less time to be brought resolution before the end of the pilot, therefore some data were missing.

- 1b. Figure 5.2 compares the percentage of cases that were resolved (through methods other than a hearing) at two-month periods from case start date, for the matched (i) mediated and (ii) unmediated/interested groups. For instance, in month eight the gap between the two rates was at its largest, with 45% of mediated cases resolved and 51% of the matched unmediated cases resolved. However, once again there was no statistically significant difference between the rates of resolution in any of the two-month periods after case start date; the researchers cannot confidently say that judicial mediation resulted in statistically higher or lower rates of resolution that avoided a hearing.

It was interesting to note that if the researchers plot the rates of resolution for the unmediated/interested group before matching had been carried out, they found that for both Figures 5.1 and 5.2 rates of resolution were higher than those for the matched unmediated/interested sample. This suggests that the characteristics the researchers were controlling for in the matching equation were those that made mediated cases harder to resolve. Put another way, when they reweight the unmediated group to look more like the mediated, the sample was more likely to include hard to resolve cases. This implies that the mediated cases might be those that were harder to resolve and suggests that the matching process was needed to make sure they compared like with like).²⁹

²⁹ More specifically, it was only in month eight of Figure 5.1 that the reweighting of the unmediated control group results in an increased estimate of the rate of resolution.

Figure 5.2: Rates of resolution (other than through a hearing) at two-month periods from case start date



The average duration for a judicial mediation event was five hours and twenty-three minutes. This ranged from one hour and fifteen minutes carried out on one day, to 14 hours spread over three days (giving an average of approximately one day per case). As one might expect, the more complicated cases required longer mediations. Whilst spending longer in mediation did not seem to improve the chances of resolution for these harder cases, this time might not be wasted as it might reduce the amount of time spent in subsequent hearings.

What influences outcomes?

From the previous section of the report, it would seem that judicial mediation did not have a statistically significant impact on rates of resolution amongst mediated cases, when compared to 'otherwise identical' unmediated/interested cases. Unfortunately it was not possible to carry out a multivariate analysis that compared the characteristics of resolved cases amongst the mediated and unmediated/interested groups, as the researchers had only 37 mediated cases and 12 unmediated/interested cases that were not resolved by the end of the study.

However, whilst one must consider with care the data from unmatched samples, it was interesting to note from Table 5.3 those characteristics that were more or less associated with success amongst the mediated and unmediated cases. For instance, 91% of mediated cases that involved discrimination on the grounds of disability, that were eventually resolved, did so without the need of a hearing. This compared to only 73% of those that involved claims of discrimination on the grounds of ethnicity.

Table 5.3: Characteristics of mediated and unmediated/interested cases that were resolved without a hearing, as a proportion of resolved cases

	Mediated - cases resolved without hearing, as a proportion of relevant cases resolved before Aug 2007	Mediated cases - number of relevant cases resolved before Aug 2007	Interested but not mediated - cases resolved without hearing, as a proportion of all cases resolved before Aug 2007	Interested but not mediated - number of relevant cases resolved before Aug 2007
Region				
Newcastle	83%	24	71%	24
London Central	81%	31	72%	25
Birmingham	88%	24	74%	19
Total All Regions	84%	79	72%	68
Jurisdiction				
DDA	91%	35	73%	26
SXD	86%	35	79%	34
RRD	73%	22	61%	18
Gender				
Male	67%	24	61%	28
Female	91%	53	82%	38
Does case involve dismissal?				
No dismissal	80%	25	83%	24
Dismissal	85%	47	68%	37
Whether claimant has a new job at submission of ET1				
No new job	86%	29	67%	30
Yes new job	93%	14	63%	8
Missing values	78%	36	77%	30
Whether claimant mentions representative on ET1 form	84%	51	80%	44
Whether employer mentions representative on ET1 form	82%	65	70%	50

Source: Hard copy data of 196 ET1 and ET3 Forms.

In addition, one can see from Table 5.3 that a higher proportion of resolved cases that had female claimants, (91% among the mediated and 82% among the unmediated/interested) were resolved without a hearing. In addition, a higher proportion of resolved cases that involved dismissal (according to the original ET1 form) were resolved without going to a hearing among the mediated cases (85%) when compared to the unmediated cases that

involved dismissal (68%). Finally, Technical Annex Table 1.2 highlights the higher proportion of cases that were resolved without going to a hearing among mediated cases where the employer had a representative, when compared to the unmediated cases.

Moving on to consider the factors that influenced the outcome of judicial mediation events, in the responses from the questionnaires, 49% of employers and 39% of claimants said that the judicial mediation judge had a strong influence on the outcome. Fifty-one per cent of claimants and employers said that their advisor had a strong influence (with no big difference between claimants and respondents) whilst 51% of claimants and 36% of employers were more likely to suggest that the other party had a strong influence on the outcome of mediation.

Of those that undertook mediation, 60% of employers and only 39% of claimants felt that it was very effective in bringing the case closer to resolution. From the in-depth interviews some claimants felt more satisfied if the outcome of judicial mediation included more than just financial compensation – for instance a reference. Even some respondents, who experienced unsuccessful mediation, claimed it was a useful experience, as 'it helped to clarify the framework for settlement'.

Yes, yes, because apart from a settlement, a financial settlement, I also got other things which was important to me, for example, a reference. I was able to, you know, agree that I could use them, I could use them as a reference basically.

(Claimant; Interview 3, successful mediation)

What we came away with was them (a) apologising, which was the most important thing for me, a letter of apology.

(Claimant; Interview 4, successful mediation)

[...] having had that mediation, a day, I think that sort of helped clarify a framework of settlement. I think both sides then, you know, had time to sort of think about the case in more detail, about the other – the other side's position [...]

(Employer; Interview 6, unsuccessful mediation)

Before moving on to the final sections of the report, it is worth noting that the verbatim responses included in the survey tended to be from disgruntled claimants and respondents. The overall levels of satisfaction were high. However negative comments from both claimants and employers included suggested game-playing by the other side and/or accusations of biased mediation judges, who were not perceived to be attentive enough. However, these were few and came from both sides. They were offset by some very positive comments from claimants and respondents on how thoughtful and helpful the mediation judges were – clearly all those in the process need to be reflective, but the overwhelming message was one of satisfaction. Two employers thought that the process should be compulsory, whilst others thought that screening was needed and these were issues which are returned to in the conclusion.

6. Satisfaction with ET, case outcomes and mediation

Key findings

- Employers in the survey sample who experienced mediation reported much higher levels of satisfaction than claimants.
- However, the conclusion was that **no discernable, statistically significant effect could be identified for the impact of judicial mediation on satisfaction.**

From the qualitative elements of the study.

- From the telephone survey questionnaire: there was a high level of agreement that mediations had been carried out in an appropriate fashion and 76% would use the process again. Employers were particularly positive.
- From the in-depth interviews: positive comments on the mediation judges were common. However, the delicate balance that they had to achieve was underlined by the fact that many negative comments on their conduct related to them being either 'too distant/detached'.
- There was some indication that some participants would prefer a more interventionist approach.
- Negative perceptions of the process tended to centre around the organisation, with communication felt to be a particular problem. Some participants (especially claimants) seemed to have unrealistic expectations.
- Some respondents valued the ability of Acas to start conciliation early on in the life of the case, but in comparison to judicial mediation judges, the Acas conciliators were seen as having less authority. The fact that mediation facilitated face-to-face meetings (compared to much of Acas conciliator's work being over the phone) was also seen as a strength.

Satisfaction with ET and case outcomes

Table 6.1 details the levels of satisfaction reported in the questionnaire, both with the ET process in general and more specifically the outcomes of the case. Just over half of mediated (54%) and unmediated interested claimants (55%) reported satisfaction with the ET **process** as a whole. Levels of claimant satisfaction with outcomes were lower, with 37% among the mediated and 40% among the unmediated/ interested.

In contrast to the broadly similar rates of satisfaction among mediated and unmediated-interested claimants, employers experiencing mediation reported higher levels of satisfaction than their unmediated/ interested counterparts. Sixty-seven per cent of the employers in the researchers' sample who experienced mediation reported being either satisfied or very satisfied with the ET process, compared to only 46% of unmediated employers. A similarly pronounced differential exists when the researchers considered satisfaction with outcomes amongst employers (57%, compared to 40%).

Table 6.1: Levels of satisfaction reported in the survey for cases that were resolved at the point of questionnaire response

Survey questions	Pilot cases experiencing judicial mediation	Pilot cases expressing an interest in principle, but not mediated
Percentage of claimants satisfied or very satisfied with ETs	54	55
Percentage of claimants satisfied or very satisfied with outcome	37	40
Total claimant responses (ETs/Outcome)	35/35	44/45
Percentage of employers satisfied or very satisfied with ETs	67	46
Percentage of employers satisfied or very satisfied with outcome	57	40
Total employer responses (ETs/Outcome)	49/51	35/37

Source: Survey of Judicial Mediation in Employment Tribunals, 2007.

In answering the question of whether satisfaction levels were significantly higher amongst mediated cases the researchers wished to compare them with an otherwise identical sample of unmediated cases. Therefore, as with the analysis of administrative data that attempted to capture any significant difference in outcomes from mediated, as opposed to unmediated/interested cases, the researchers wished to match the mediated and unmediated/interested samples. Using PS match in this instance allowed them to once again take account of any systematic differences in the characteristics of mediated and unmediated, claimants and respondents, before directly comparing satisfaction levels.³⁰

The next section compares the pooled questionnaire responses for employers and claimants of the 116 mediated cases – a total of 232 possible respondents. Table 6.2 presents the results from this process of comparison of **matched samples**, comparing:

- recorded levels of satisfaction with the ETS process as a whole for the 163 claimants and respondents who answered this question in the questionnaire (a subset of the 232 claimants and employers that expressed an interest in mediation);
- recorded levels of satisfaction with case outcomes, for the 168 claimants and respondents who answered this question in the questionnaire (a subset of the 232 claimants and employers that expressed an interest in mediation).³¹

30 Not all claimants and employers responded to the survey and this introduced the possibility of sample selection bias. If selection into the researchers' sample was on 'observable' characteristics then propensity score matching helped to account for such selection. However, if selection was on unobservables (i.e. characteristics that the researchers did not capture in the data) then matching would not counter all of the potential selection effects.

31 A straightforward pooled sample, where claimants and respondents from the same case were counted separately. The researchers were, therefore, measuring 'overall' satisfaction above and beyond the straightforward satisfaction that arose from 'winning' or 'losing'.

Table 6.2: Comparison of mean levels of satisfaction across the matched mediated and unmediated cases*

Survey questions	Pilot cases experiencing judicial mediation	Pilot cases expressing an interest in principle, but not mediated
Percentage of claimants and respondents satisfied or very satisfied with ETS	59	68
Percentage of claimants and respondents satisfied or very satisfied with outcome	46	45

* Matching takes account of differential case start dates and interview dates.

Table 6.2 compares the proportions of cases that were satisfied or very satisfied with the ET process or the outcome of the case, for matched mediated and unmediated/interested samples where there were questionnaire responses. For both satisfaction with the ET process as a whole, and with the outcome of the case, there was no statistically significant difference between the mediated and unmediated/interested groups.³²

Experience of the judicial mediation process

Overall there was a high level of agreement that mediations had been carried out in an appropriate fashion, with 76% of claimants and respondents agreeing that they had been able to participate as much as they would have liked. Eighty per cent agreed that there was plenty of time allowed for the mediation; 83% agreed that the mediation judge was very competent and 76% suggested that judicial mediation was a process they would use again in any future disputes.

Interestingly the only substantial difference between claimants and respondents in these overall figures was for this final category of responses, where 81% of employers suggested that they would use the judicial mediation process again, compared to only 68% of claimants. Combining these findings with the mediation reports, it was not possible to determine clear explanations for these differing levels of satisfaction by relating them to the methods employed by the mediation judge.

Similarly, whilst the mediation reports note the levels of conflict, disagreement and the extent to which the cases were emotionally charged, it was hard to connect this to systematic practices in mediation, other than starting the process with claimant and respondent teams in different rooms the more emotionally 'charged' was the case.

The overall positive impression of judicial mediation seen in the responses to the survey was also reflected in the in-depth interviews, especially by participants who went into judicial

³² Because these cases were matched, direct comparison is acceptable and a discussion of statistical significance is appropriate.

mediation with no pre-conceptions of what to expect. Negative perceptions voiced in the interviews related to the communication of the judicial mediation 'process' and concerns about the intentions of the 'other side' when agreeing to mediation.

One of the claimants maintained there should be more information provided about what to expect from judicial mediation, as this claimant's expectation was that "it would be like an open court". Another claimant found the process of judicial mediation difficult to understand, as he/she did not have much knowledge of legal procedures and felt that users of ET needed better legal advice.

Other claimants who experienced unsuccessful mediation claimed that judicial mediation was only appropriate for parties that "have a genuine desire to want to resolve it" which was not the case for their respondent [employer] in their view: "the other party came to mediation in order to look at the strength of evidence and solicitors" (Claimant; Interview 7, unsuccessful mediation).

[...] when we went for the mediation, you know, we went there, and I keep saying, in good faith – we went there potentially looking to resolve it and to walk away from it all. Basically, the [company] weren't prepared to entertain that at all. They weren't prepared to negotiate or to discuss anything. They weren't prepared to back down on anything and they weren't prepared to accept anything we said. [...] I felt that they hadn't gone in there with any desire at all to settle it. I think they come here to have a look.

(Claimant; Interview 7, unsuccessful mediation)

As the literature review suggests, the role and conduct of the mediation judge was pivotal and the in-depth interviews reflected the perceptions from the survey of the mediation judge as a positive driving force. For mediation judges, this was clearly a delicate and challenging balance to achieve as being a positive driving force was perhaps not fully in the facilitative ethos of mediation. Positive descriptions of the mediation judge were common and included, for the majority of respondents, 'professional', 'communicative', 'impartial', 'unbiased' and 'well prepared'.

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 judicial mediation 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. An employer with several experiences felt that when the mediation judge had "an interventionist" approach, it helped judicial mediation process. This perhaps implied that they would prefer a process where the mediator was more 'guided' and less 'facilitative' in their actions – something that the third quote suggested happened in at least one case. There was also a suggestion that in cases where Tribunal Judges were more remote, parties had to make more effort 'to communicate meaningfully'.

I thought that the mediation judge, who was the mediator, did a very good job. He obviously has to walk a fine line between not giving any legal advice but enabling the two parties to talk, and he did a very good job of that.

(Employer; Interview 6, unsuccessful mediation)

[...] be a conduit, if you like, of points of view about the case, not I don't think giving any strong guidance or advice in actually trying to look at the merits of either case, but just relaying, in a concise way, the other side's position, and maybe clarifying any points which, you know, going backwards and forwards, needed to be clarified, and that was very helpful I think.

(Employer; Interview 6, unsuccessful mediation)

Absolutely brilliant, you know, really reassuring, very much there to listen and to make his own opinion [...] then once the judge had sat down and said, look, do you realise that, you know, this woman has witnesses, you know, and all the evidence that was there – how can you possibly fight this thing in court?

(Claimant; Interview 4, successful mediation)

[...] mediator, the mediation judge, was attempting very hard to kind of get common ground and get understanding of both parties.

(Employer; Interview 8, unsuccessful mediation)

In instances where mediation judges were perceived as distant, (i.e. they gave relatively little guidance and adopted a more facilitative approach), this was perceived as negative. According to a claimant, the mediation judge “only listened rather than tried to find a middle ground” and they expected more direction from him – “I thought mediation judge was going to talk about pros and cons of my case”. One of the respondents claimed that the mediation judge was “carrying messages between the two parties which could be done over the phone” and offered no guidance or advice.

[...] all I gained was one person taking messages backwards and forwards, and that was it, and I don't think that I really needed to attend – I didn't really need to attend, you know, the tribunal to do that [...] I think – I think if we're going to try and resolve a case out of the tribunal [...] I think that particular individual should be given a bit more influence... authority, so that they can influence outcomes... you know, in some way.

(Employer; Interview 1, unsuccessful mediation)

Looking back to the previous responses of this employer, he/she had some very positive expectations for judicial mediation which were not met. Primarily he/she felt that this would be a chance to resolve the case informally, face-to-face, rather than at a hearing or over the phone. When he/she actually experienced the process he/she seemed disappointed with the extent to which this was facilitative, rather than directed, mediation. The following claimant comment seemed to be similar in that there was some desire for direction from the mediator.

We sort of half-expected that, you know, he would have negotiation skills. I'm not saying he didn't have them, but they certainly weren't, you know, brought out to bear, and that's the side that I feel was lacking in that there was no real direction from him. It was more or less sort of left to us as to what, you know, what we tried to do.

(Claimant; Interview 7, mediation unsuccessful)

Most of those taking part in the in-depth interviews viewed the process of judicial mediation as fair to both parties. Negative perceptions related to the fact that no time was really given to talking about the case itself as the focus was on outcome. One interviewee (respondent) wanted to be able “to discuss the merits of the case”, whilst judicial mediation was “all about settlement for a claimant and as money goes to a claimant, it was working on behalf of claimant”.

[...] for [mediation judge], it seemed to be a case of how much are you going to offer, and trying to agree a figure. You know...if my recollection serves me right, it was a case of I was sitting there thinking, well, why is it about the money, when actually I don't believe that the person has got a case.

(Employer; Interview 1, unsuccessful mediation)

Judicial mediation and Acas conciliation

Table 6.3 details the outcomes of survey respondents' cases.³³ For some of the less pronounced findings, care must be taken as differential response rates could explain some differences between mediated and unmediated cases. Having said this, there was a clear perception among 72% of the mediated survey respondents that judicial mediation resolved the cases. However, there was little difference (only seven percentage points) between the percentages of mediated and unmediated/interested cases going to a hearing. In contrast, many of the cases that expressed an interest in judicial mediation (31%) were resolved through Acas; 35% were resolved privately and 13% used 'other' methods. These three categories accounted for 79% of resolutions among the unmediated, compared to only 19% among the mediated.

Table 6.3: Type of resolution as a proportion of cases that were resolved at the point of questionnaire administration (unmatched samples)

How case was resolved that responded to the survey	Interested but not mediated		Mediated cases	
	Observations	Percentage	Observations	Percentage
Resolved through a hearing	6	13	3	6
Resolved through Acas	15	31	2	4
Resolved privately	17	35	7	15
Resolved by judicial mediation			34	72
Or was it withdrawn	4	8	1	2
Other	6	13	0	0
Total resolved	48	100	47	100
Total unresolved	17		17	

Source: *Survey of Judicial Mediation in Employment Tribunals, 2007.*

³³ The ETHOS extract did include an outcome code, but many of these apparent outcomes for cases were not accompanied by a promulgation date and therefore could not be used as part of a study that had to provide an end date to each case.

All cases within this pilot would have been approached by Acas and offered conciliation. There was no substantial difference in the proportion (32%) of claimants and employers responding to the survey who had taken part in Acas conciliation and similarly 41% of each group suggested that they had taken part in some other form of ADR.

From the discussions with participants in the in-depth interviews, judicial mediation and Acas conciliation were seen as two different processes. Any negative perceptions of Acas, in comparison to judicial mediation, related to the greater difficulty in handling complex cases and the relative lack of authority of the conciliator. In contrast, others were very positive about Acas conciliation as it offered “an opportunity to resolve things early and it polarises the situation less”. Moreover, it was claimed that Acas conciliation provided a quick resolution, especially important in cases “where both parties agreed they want a departure of the employee”, and where “there is less risk of polarised situations.

It was mentioned by two claimants that judicial mediation was perceived as a “waste of time”, as the same outcomes could have been achieved through Acas conciliation without the need to go to ET. This might reflect a lack of understanding of the relative strengths of the two processes, but it did underline that, with the introduction of judicial mediation, there was the possibility for a ‘grey area’ of responsibility and possible overlap.

Some respondents felt judicial mediation was a better option than conciliation offered by Acas, as it was face-to-face and therefore was “more personal”, rather than over the phone. There was a perception that judicial mediation judges have “more power” in comparison to Acas conciliators. Judicial mediation had “people talking in the same building at the same time, with minds focused on a problem”, whilst with Acas “things get more drawn, and it might take two or three days to get the parties in the same sort of ballpark”. During judicial mediation, both parties met face-to-face, and “there was less chance for miscommunication”, as any issues “can be ironed out” straight away, and the judicial mediation judge would be more prepared as “he/she would have a good look at the files”, whilst an Acas officer would “probably just look at the pleadings”.

Normally, Acas, you know, they contact both the parties, but they're not there in person, so any issues...can be ironed out. Also, the Acas officer can get...place a different emphasis on what's being kind of...what the issues are, and in the way they communicate, they may place a different sort of emphasis. But if, during a mediation process that's...as with the pilot scheme, the parties are actually there, so all those type of differences can be ironed out face-to-face as well, so less chance of miscommunication, I would have thought.

(Representative; Interview 2, two successful and one unsuccessful mediation)

7. Cost implications

Key findings

- There were costs associated with implementing the pilot in ETS. It was expected that these costs would be offset by the benefits to the ETS of cases resolved earlier in the process than without the pilot. There was an estimated £908 risk-adjusted direct net cost to the ETS per judicial mediation case.
- The estimated additional cost to the ETS of a limited roll-out of the pilot to 742 cases was £673, 342. This was because there was no discernable, statistically significant effect from the pilot on earlier case resolution.
- The average cost per case for the time involved for claimants and respondents was estimated at £3,738.
- It was estimated that there was a saving of £822 (22% of £3,738) to both claimants and employers for each case that was resolved early.
- Taking into account the potential savings to employers and claimants only dropped the estimate of net costs of judicial mediation to all parties to £880 per case.
- There were many additional potential indirect benefits of saving the employment relationship and improved psychological well-being, but they were very hard to estimate. There would have to be a substantial saving to offset *al.* of the estimated cost of £880 per case.

In this section of the report, detailed consideration is given to the cost implications and estimated benefits of judicial mediation. There were three stages of development. Firstly, the researchers detailed the costs associated with delivery of the judicial mediation pilot and a hearing day. Then an estimate was made of the possible net direct cost/saving of the pilot for the ETS, weighing the costs of delivery of the pilot against the benefits of avoiding time spent in hearings. Finally, the researchers set out possible scenarios of the costs and benefits of rolling out the judicial mediation service.³⁴

How much did it cost to provide mediation services?

The data in Table 7.1 were provided by the ETS and form the basis for analysis of the costs associated with judicial mediation and hearing events. It was worth noting that, whilst the ETS suggested that only one room was used for judicial mediation, during the three observations the research team made, the use of shuttle diplomacy necessitated the use of two or more rooms.

³⁴ The researchers did not include 'award' as a cost as it was assumed that this was a transfer to offset personal loss. Financial settlement outcomes from mediation and tribunals process have not been compared, and it was possible that mediation might have resulted in different case outcomes to the tribunal cases.

Table 7.1: Estimate of daily cost of hearing and judicial mediation

Average daily cost	Hearing	Judicial mediation
Full-time tribunal judge (national average)	£891.50	£891.50
Member (full day)	£193.00	-
Member (Half day)	£112.00	-
Room	£140.00	£70.00
Total Daily Cost	£1,336.50	£961.50

Source: ETS.

However, the magnitude of this difference was small and did not impact substantially on the conclusions to this section of the report. Taking the costs set out in Table 7.1 as given, Table 7.2 sets out the calculation of the estimated risk adjusted costs of the judicial mediation service.

Table 7.2: The costs of judicial mediation

	Pilot sample 3 regions
Number of Cases experiencing judicial mediation	116
Number successfully resolved at mediation (resolved without a Hearing)	66
Number unsuccessfully at mediation	50
Direct success rate (%)	57
No. of days spent on judicial mediation	116
Cost of 1 day on judicial mediation	£961.50
Optimism bias adjustment - increase cost estimates*	10%
Total risk-adjusted cost of judicial mediation days spent for the pilot	£122,687.40

* Optimism bias was the demonstrated systematic tendency for appraisers to be over-optimistic about key project parameters, including capital costs, operating costs, works duration and benefits delivery. For government business cases and cost estimates, HM Treasury Green Book guidance suggested increasing base cost estimates by 10% to 25% to allow for optimism bias, depending on the level of uncertainty in the assumptions and project/proposal definition underpinning the base estimates. These estimates were based on costings from a pilot phase, so the uncertainties were judged to be low, e.g. assumptions on cost of mediators, rooms, projected volumes.

The first four rows of Table 7.2 simply present the calculations of direct success rates associated with judicial mediation for the pilot sample. As one can see, the direct rate of success amongst those cases that experienced judicial mediation was 57%. There were, on average, five hours and twenty-three minutes spent on judicial mediation among those cases that were mediated during the pilot period and this translated to an average of approximately one day per case. When the researchers considered the cost of administering judicial mediation to an estimated 116 cases within the pilot period, the figure was £122,687.

Does the provision of mediation services result in any savings?

Table 7.3 places the calculations in Table 7.2 within the context of the additional (unmediated) categories of case that were collected as part of the pilot evaluation and which form the basis for analysis in the remainder of the report. There were two points where one needed to focus attention. Firstly, there was the comparison of direct success rates across

the various samples; essentially success was measured as avoiding a hearing, whether or not the case underwent mediation. From Table 7.3 it was clear that 61% of the control group (unmediated/interested) of 80 cases were successful in resolving the case before going to a hearing. Whilst they did not experience judicial mediation, they obtained a level of success that was very close to the mediated sample. In the last column of Table 7.3 the researchers present the rates of success for cases in the unmediated/not interested group. Even for this group, who we might expect to be less likely to resolve before a hearing,³⁵ 54% arrived at some form of resolution that avoided a hearing.

Table 7.3: Estimation of hearing days ‘vacated’ or ‘saved’

	Mediated cases	Unmediated/ interested cases	Unmediated/ not interested
Number of cases experiencing judicial mediation	116	80	472
No. successful	66	49	255
Direct success rates (percentage of cases avoiding a hearing)	57	61	54
No. of days spent on judicial mediation	116	-	-
Cost of 1 day on judicial mediation	£961.50	-	-
Optimism bias adjustment - increase cost estimates	10%	10%	10%
Total risk-adjusted cost of JM days spent	£122,687.40	-	-
Estimated total number of hearing days saved, based on average of 3 days per case	198	147	765
Row 9: 3 days per case - Estimated average hearings days expected to be saved scaled to 116 cases; assuming identical distribution of expected Hearing length in days	198	213	188
Estimated total number of hearing days vacated, based on average of 4 days per case	264	196	1,020
Row 11: 4 days per case- Estimated average hearings days expected to be saved scaled to 116 cases; assuming identical distribution of expected hearing length in days	264	284	251

As the ETS annual reports underlined, in the absence of judicial mediation the majority (around 60%) of employment tribunal cases did not go to a hearing. Thus, in any evaluation of the costs and benefits of judicial mediation, one must account for this fact. If the researchers did not account for this, then they falsely inflated the estimated savings from judicial mediation, as they attributed to judicial mediation many of the successes that would have happened anyway.

35 If one took claimant and respondent rejections of mediation as indicators of an unwillingness to compromise.

If the researchers adopted a measure of success for judicial mediation as being the avoidance of hearing days, through early resolution of the case, they must, therefore, also calculate the hearing days saved for the unmediated groups. (Hearing days were saved for various reasons during the development of a case, without the intervention of judicial mediation). Unfortunately the ETHOS data that recorded estimated hearing length in days has been found to be unreliable. However, it was quite straightforward to estimate robust figures for the remaining case types set out in Table 7.3 and consider scenarios.

First, all cases in columns one to three of Table 7.3 must have had an estimated hearing length of at least three days at the first CMD. If this was not the case, they would not have been offered judicial mediation. Second, the mediated and unmediated cases were selected on the same criteria and it was therefore reasonable to assume that they had the same distribution of expected hearing days. On the assumption of the same distribution of estimated hearing days across all mediated and unmediated case types, there was very little difference in the estimated number of days saved, whether the cases were or were not mediated. Row eight of Table 7.3 simply calculated for each case-type the number of hearing days saved³⁶ and then row nine scaled up columns to reflect the days saved if there was a sample of 116 cases (and an average estimated hearing length in days of three for each case).

As can be seen, even without the judicial mediation intervention the researchers expected between 188 and 213 days to be saved (over the initial estimate made during the first Case Management Discussion) for 116 cases of this type. Raising to four the estimate of the average days vacated for all the cases within the pilot sample (row 11), we would still expect to have between 251 and 284 days saved (over the initial estimate) without judicial mediation. According to the 2003 Survey of Employment Tribunal Applications (SETA) findings, (Hayward *et al.*, 2004), only 21% of cases going to a hearing lasted two or more days. This figure was even lower for discrimination cases and it would therefore seem reasonable (especially as one is dealing with cases where there were only single claimants) to consider four days as an upper bound.

Table 7.4 sets out the implications of these estimates for consideration of the cost benefit of judicial mediation. In setting out the figures the researchers compared the mediated with the unmediated/not interested group. This latter group had lower rates of resolution that avoided a hearing and this gave an idea of the required scale that this difference would need to be to create a direct net saving. In this process we have been comparing unweighted mediated and unmediated samples. As can be seen, there was some indication that the mediated cases might have characteristics that made them slightly harder to resolve, but any differences (between the weighted and unweighted unmediated samples) was not significant.

³⁶ For instance, for the 66 successful cases amongst the within-pilot mediated sample in column two, this figure was would be $66 \times 3 = 198$.

Table 7.4: Estimated net cost benefit with reference to comparison of mediated against unmediated/interested cases

	Net cost/benefits with average 3 expected hearing days per case	Net cost/benefit with average 4 expected hearing days per case
Estimated average hearing days expected to be vacated for 116 mediated cases (assuming 57% success rate)	198 days	264 days
Estimated average hearing days expected to be vacated for 116 unmediated/not interested cases (assuming 54% success rate)	188 days	251 days
Estimated additional hearing days vacated as a result of judicial mediation	10 days	13 days
Cost of 1 hearing day	£1,337	£1,337
Estimated saving from hearing days vacated as a result of judicial mediation	£13,365	£17,375
Total risk-adjusted cost of judicial mediation days spent - 116 judicial mediation cases	£122,687	£122,687
Risk-adjusted direct net cost saving - 116 judicial mediation cases*	-£109,322	-£105,313
Risk adjusted direct net cost saving per judicial mediation case	-£942	-£908

* A negative saving means there was a cost to the ET of providing this service.

Table 7.4 completes the evaluation of the costs and benefits of judicial mediation. As can be seen, when one adjusted estimates of days vacated to consider what would have happened in the absence of an intervention such as judicial mediation, there was a clear net average direct cost to the ETS associated with judicial mediation events. Thus, even in the absence of judicial mediation, one might expect between 188 and 251 days to be saved or 'vacated'. If this was the case then, at most, the saving of 264 hearing days under judicial mediation represented a value added of only 13 days. If one then compared this cost saving to the cost of implementation, one arrives at an estimate of cost to the ET of £105,313 for judicial mediation for the 116 cases.

In the next section of this chapter the researchers extrapolate how much this service cost the ETS and consider whether and where it could be more targeted and perhaps delivered on a smaller scale.

Overall, what is the cost benefit of judicial mediation?

This section begins with a consideration of the potential total direct benefits and costs that employers and claimants, in addition to the ETS, might expect if the judicial mediation scheme were rolled out more extensively. The first consideration was approximately how many cases might be expected to take up the offer of judicial mediation across the ET system in one year. From this study, such figures cannot realistically include:

- cases with multiple claimants;
- cases that did not include at least one discrimination jurisdiction;
- cases that were likely to reject the offer of mediation in principle (i.e. the nature of any roll-out should remain voluntary).

Though there were issues to consider around the exemption of these cases, the figures calculated as part of this report only applied to cases within these limits. More importantly, even if a case could be made to extrapolate to other jurisdictions, multiples and cases that did not volunteer, there was a question over the extent to which this was possible or desirable, given that judicial mediation might not be as appropriate. Table 7.5 sets out the estimated cost of a very limited roll-out of the judicial mediation pilot to only those cases that have the same characteristics as those in the pilot/post-pilot sample (in many ways this can be seen as a lower-bound estimate). The figure of £908 per mediation case was used below, as it was the more conservative of the two cost estimates.

Table 7.5: Estimated cost to the ETS of limited roll-out of judicial mediation

Average net cost to the ETS of mediating a case	£908
Estimated number of cases with at least one discrimination jurisdiction that were singles in 2006 (ETHOS)	11,515
Estimated proportion of these cases having an expected Hearing length of three or more days (28%)	3,224
Estimated proportion (23%) of these appropriate cases that can be expected to take up the offer	742
The estimated additional annual net cost to the TS of rolling out the pilot*	£673,736

* This estimated cost assumes that the roll out would be on a similar 'targeted basis' – i.e. that the same criteria were applied as to who would be offered mediation and the take up rate was the same.

However, this only considered the **direct costs and benefits to the ETS**. Consideration needed also to be given to the costs and benefits to employers and claimants set out in Table 7.6. Comparing the outcomes of table 7.6 with those from SETA 2003,³⁷ the overall estimates of the costs to business were higher by 25%, as SETA figures suggested that on average each business spent 9.85 days responding to a claim. However, within the SETA figures, 78% of these days were time spent by Directors and Senior Managers (Hayward *et al.*, 2004), whilst the figures in Table 7.6 suggested only 48% of time spent in firms was attributable to this group.

³⁷ See Hayward *et al.* (2004) for the 2003 Survey of Employment Tribunal Applications data.

Table 7.6: Claimant and employer cost estimates used in the evaluation*

Event/item to be costed	Cost Estimates	Source(s) and calculation(s)
Calculation of costs to the claimant		
Legal representation	£4,433	Average from SETA, 2003.
Average total number of days spent on the case by claimant**	Average 28 days	(a) Total hours spent calculated for each case using Mediation Survey Questionnaire responses***
Estimated average hourly wage of claimant	£10.14	(b) Annual Survey of Hours and Earnings, 2007 Office for National Statistics (figures exclude overtime)
Estimated total average cost of claimants time	£1,987	(a) X (b) X (7 hour day)
Calculation of costs to employer		
Legal representation	£5,813	Average from SETA, 2003
Average total number of days spent on the case by employer respondents (who are not Directors of Senior Managers)	6.5 days	(a) Total hours spent calculated for each case using Mediation Survey Questionnaire responses
Estimated average hourly wage of respondent	£10.14	(b) Annual Survey of Hours and Earnings, 2007 Office for National Statistics (figures exclude overtime)
Estimated average cost of respondent time	£461	(a) X (b) X (7 hour day)
Average total number of days spent on the case by Directors and Senior Managers	6 days	(a) Total hours spent calculated for each case using Mediation Survey Questionnaire responses
Estimated average hourly wage of Directors and Senior Managers	£17.19	(b) Annual Survey of Hours and Earnings, 2007 Office for National Statistics (figures exclude overtime)
Estimated average cost of Directors and Senior Managers time	£722	(a) X (b) X (7 hour day)
Average total number of days spent on the case by other staff	8 days	(a) Total hours spent calculated for each case using Mediation Survey Questionnaire responses
Estimated average hourly wage of Other staff	£10.14	(b) Annual Survey of Hours and Earnings, 2007 Office for National Statistics (figures exclude overtime)
Estimated average cost of other staff time	£568	(a) X (b) X (7 hour day)
Estimated average cost of all staff time for employer per case	£1,751	£461+£722+£568
Average total time costs to claimant and respondent per case	£3,738	

* Dated figures for legal fees have not been altered to account for any inflationary effects, as the relevant index was not readily identified.

** Including time spent travelling, at the case management discussions, on the telephone or writing letters.

*** Even with repeated prompting, many claimants provided estimated days that simply reflected the length of the case and these have been removed from the figures in order to provide a realistic estimate. However, even when this had been done some of the estimates suggested that six respondents had spent up to one-third of the lifetime of the case preparing for the case and therefore the median was used as the measure of central tendency to mitigate against these supposed overestimates.

Table 7.6 sets out estimates from a number of sources to arrive at an overall joint estimate of claimant and respondent costs of £3,738 per case. The figures in Table 7.6 were calculated for entire cases, so one must speculate on the time savings to employers and claimants from proportionate reductions in case length. Considering all pilot cases that were resolved (across the mediated and both samples of unmediated), average durations were, according to the ETHOS extract,³⁸ as follows.

- Of the 105 cases that went to a hearing, the average case duration was 242 days.
- Of the 370 cases that were resolved through methods other than a hearing, the average case duration was 185 days
- So the average case duration for those that did not go to a hearing was 76% (185 as a percentage of 242) of those that did.
- **The researchers estimated a saving of £822 (22% of £3,738) to both claimants and employers for each case that was resolved before a hearing.**³⁹

One must be careful, as the full savings from early resolution of a case, through avoiding a hearing, cannot be attributed solely to judicial mediation. However, if one continued the approach from Table 7.4 where the suggestion was that 13 hearing days were potentially vacated as a result of judicial mediation, then this equated to approximately four cases resolved before the hearing (if one assumed an average of three expected hearing days per case). However, the estimated savings to employers and claimants of resolution of four cases before hearing were only £3,288.

- **Taking into account the potential savings to employers and claimants, against the net costs of delivery to the ETS, this only dropped the estimate of net costs of delivering 116 cases from -£105,313 to -£102,025, or £880 per case.**

Finally, before moving on to the next chapter, there was a clear need to set these figures within context, as there had been no consideration of the indirect benefits to employers and claimants. The following list gives some idea of these.

- **Saving the employment relationship.** Only 23% of the original 668 cases transferred to the research team included claimants that were still employed in the job which was the focus of the tribunal case at the point of ET1 submission. There was then some self selection of cases with an ongoing employment relationship into the group

³⁸ Referring back to Table 7.1, these figures were the sums of rows three and four in Table 7.1.

³⁹ Within the figure of £3,738 there was clearly some element of fixed and variable costs and therefore 22% might be seen as an overestimate of the savings to claimants and respondents of early resolution. The inclusion of costs of representation would likely overstate the costs to claimants and respondents. Eighteen per cent of claimants had an arrangement with representatives and advisors where they paid only on winning the case (a 'no win, no fee arrangement'); 16% paid anyway and the remaining 66% had no representation; in contrast, 36% of employers stated that they had a specific legal department to deal with these issues. The solution was to assume that these were offsetting.

that expressed a willingness to undergo mediation in principle. Thirty-one per cent of interested (mediated and unmediated) claimants and 34% of mediated cases reported that they were in the same job at ET1. However, by the point of mediation these proportions were likely to have fallen further and even if the original proportions persisted to mediation, the numbers were not large enough to allow quantification of the benefits from mediation of saving the employment relationship.

- There were also, possible **wider ‘spillover’ effects of improved practice in the workplace**, as the employer might ‘learn’ from the ET process. Thus, in the questionnaire employers were asked, *have you re-evaluated your internal employee relations processes [specifically dispute resolution] in light of your experience of judicial mediation?* The responses suggested that 30% of employers had reviewed policies on equal opportunities as a result of being involved in an Employment Tribunal case, and 40% had reviewed practices. However, once again numbers simply did not allow the quantification of any differences in effect between mediated and unmediated cases.
- Finally there were likely to be wider **psychological and productivity costs** to both employers and claimants. As has been considered in the literature review, Kelly (2004: p 29) concluded that “[r]epeatedly clients indicated that they felt heard, respected, given a chance to say what is important” within mediation events. However, again it was not possible to capture these benefits of mediation over a litigious process.

8. Conclusions and recommendations

One can summarise the findings from the existing literature as underlining the popularity of various forms of ADR amongst the parties to a dispute, in various legal settings. The empowering and flexible nature of the process, in contrast to the process of litigation, was highly valued by those involved.

From the analysis presented here, this was also true of judicial mediation when one considers the views of employers, though less clearly the case for claimants. Many claimants and employers take part in judicial mediation as they see an opportunity for early (and less stressful) resolution of the case.

- However, we could find no discernable, statistically significant effect for the impact of judicial mediation on (i) rates of cases settled within a set time period or (ii) resolution that avoids a hearing. Outcomes from judicial mediation were not significantly better (statistically) than those from a matched control group of unmediated cases that expressed an interest in mediation. The rate of cases resolved without a hearing was:
 - 57% for mediated cases;
 - 61% for unmediated/interested cases; and
 - 54% for unmediated/uninterested cases.

It may seem somewhat contradictory to report the positive experiences of claimants and respondents alongside a finding that this process does not seem to make a difference to outcomes. However, the positive impression of the process was consistent with a finding that judicial mediation did not add significantly to rates of resolution that avoided a hearing.

Specifically: as the literature suggested satisfaction with ADR in general tends to be high and alongside judicial mediation there were many other forms of ADR available to the parties of an ET case. In the researchers' survey of claimants and employers, the suggestion was that 72% of cases that underwent judicial mediation felt that this had resolved their case. However, amongst the unmediated/interested survey respondents, 79% of cases were resolved through Acas, privately and/or using 'other' methods not involving a hearing.

Judicial mediation is an additional process in an environment where the majority of cases (approximately 60% across the ET system) were resolved without a hearing and where a variety of ADR techniques were already available. Even with a larger sample size for analysis, this makes it less likely that one would see a significant value added from judicial mediation.

In fact, when describing the proportion of cases resolved through methods other than a hearing, pilot areas seem to have worse resolution rates than non-pilot areas. This was a concern for the present study, as it was quite possible that one was observing the effects of

a focus of time and effort on the resolution of certain cases (with expected hearing days of three or more) and, perhaps as a result, a fall-off in success rates in other case types within the pilot regions.

Unfortunately, even when the researchers used empirical tests to see if there was a significant difference in the levels of satisfaction (across both claimants and employers) between the mediated and unmediated/interested, there was no evidence that the mediated were more satisfied.

Looking beyond the researchers' own sample to evidence across the ET systems, the majority of cases do not progress to a hearing. Given this fact and the findings of this study, it was perhaps not surprising that there was an estimated net cost of judicial mediation which, even when the researchers take into account the potential benefits to employers and claimants, was £880 per case.

Based on the findings of this study, judicial mediation was an expensive process to administer and cannot be 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.

There was a variety of evidence that suggests employers were much more positive about the process than claimants. The mediated employers had higher levels of satisfaction with the overall process than the mediated claimants and 57% of mediated employers, compared to only 37% of mediated claimants, reported that they were happy with outcomes. Employers were also more likely to say that they would use the process again and report that mediation moved them closer to a resolution. However, these figures were based on a small sample size and therefore should be treated with caution.

Given the high cost of the process, the positive impressions of employers and the recent moves towards a greater focus of resolution within the workplace, it may be worth pursuing the possibility of charging employers for the use of a judicial mediation service prior to submission of an employment tribunal appeal form.

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Appendix A

Abbreviations and acronyms

Acas	Advisory, Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
BMRB	British Market Research Bureau
CMD	Case Management Discussion
COT3	Standard form used to record binding settlements agreed with the help of an Acas conciliator
DCA	Department for Constitutional Affairs (now known as Ministry of Justice)
DDA	Case that includes claim of discrimination covered by the Disability Discrimination Act
DRB	Case that includes a claim of discrimination or victimisation on the grounds of Religion or Belief (DRB)
DSO	Case that includes a claim of discrimination or victimisation on the grounds of sexual orientation
ET	Employment Tribunal
ET1 Form	Employment Tribunal Claim Form completed by claimants and submitted to the Employment Tribunals Service when a breach of employment regulations is claimed
ET3 Form	Employment Tribunal Response Form completed by employers in response to the submission of a formal ET1 form
ETHOS	Employment Tribunals Service case management database
ETS	Employment Tribunals Service
Hearing	A public hearing of the details of the Employment Tribunal case, at the end of which the Tribunal Judge usually makes a decision on the merits or remedy of the matter
Logit or Probit equations	The regression techniques most often used to model dichotomous dependent variables; in this case, whether a case takes up the offer of mediation (coded as a '1') or not (coded as a '0'); also whether the case is mediated (1) or not (0)
Mediation CMD	Formal categorisation of the judicial mediation event
Multiples	One case brought by multiple claimants on similar or identical matters which can go on to have their own lives, as each claimant can carry on independently
Pre-hearing review	Pre-hearing reviews normally held in public, to determine jurisdictional or other matters prior to the case possibly progressing to a substantive hearing but with a Tribunal Judge sitting alone (possibly administered over the phone)
Singles	Cases with only one claimant
Promulgation	Where a matter has reached a hearing, Pre-hearing Review or Remedies Hearing, promulgation is the sending out of a judgment which has been signed by the tribunal judge who heard the matter to the parties, at which point the judgment will also be published on the Employment Tribunal's public register of judgments. Promulgation can also refer to the sending out of a notification by the Employment Tribunal of a settlement or withdrawal, where the Tribunal has been informed of a withdrawal by the claimant or Acas, or of a settlement by both of the parties or Acas
PS match or matching	Propensity Score Matching
RRD	Case that includes claim of discrimination covered by the Race Relations Act
SETA	Survey of Employment Tribunal Applications (see Hayward <i>et al.</i> , 2004)
SXD	Case that includes a claim of discrimination or victimisation on the grounds of sex, marriage or transgender
Treatment	Term used in the evaluation literature to denote any intervention or service that forms the focus of evaluation (in this case the judicial mediation 'treatment')

Appendix B

Table B.1: Approximate sampling tolerances applicable to percentages at or near these levels

Size of sample on which results are based	10% or 90% ±	30% or 70% ±	50% ±
100 interviews	6	9	10
200 interviews	4	6	7
300 interviews	3	5	6
400 interviews	3	5	5
500 interviews	3	4	4
600 interviews	2	4	4
700 interviews	2	3	4
800 interviews	2	3	4
900 interviews	2	3	3
1,000 interviews	2	3	3

For example, where 50% of the population in a sample of 500 respond with a particular result, the chances are 95 in 100 that this result would not vary by more than four percentage points, plus or minus, from a complete coverage of the entire population using the same procedures.

Tolerances are also involved in the comparison of results from different parts of the sample. A difference, in other words, must be of at least a certain size to be considered statistically significant. The following table is a guide to the sampling tolerances applicable to comparisons.

Table B.2: Differences required for significance at or near these percentages

Size of sample on which results are based	10% or 90% ±	30% or 70% ±	50% ±
100 and 100	8	13	14
100 and 200	7	11	12
100 and 300	7	10	11
100 and 400	7	10	11
100 and 500	7	10	11
200 and 200	7	10	11
200 and 300	5	8	9
200 and 400	5	8	9
200 and 500	5	8	8
300 and 300	5	7	8
300 and 400	5	7	8
300 and 500	4	7	7
400 and 400	4	6	7
400 and 500	4	6	7
500 and 500	4	6	6
1,000 and 1,000	3	4	4

Ministry of Justice Research Series 7/10

Evaluating the use of judicial mediation in Employment Tribunals

This is an evaluation of Judicial Mediation (JM) in the Employment Tribunal (ET) for cases starting between June 2006 and March 2007.

The aim was to establish the extent to which JM was able to resolve discrimination cases without the need for a formal hearing. It also aimed to establish whether JM resulted in a lower cost to the Employment Tribunal Service, and if it had benefited claimants and employers.

The report presents the findings of analysis of administrative data, a survey, and semi-structured interviews with claimants and employers.

The study used an analytical technique, Propensity Score Matching, to compare the outcomes of 118 cases that were mediated, with an otherwise identical sample of 80 cases that volunteered for JM but did not receive it.

The pilot found that there was an estimated net cost to the ET per JM case. There was no statistically significant effect identified for the impact of JM on the: rates of cases settled within a set time period, rate of resolution that avoided a hearing and the overall levels of satisfaction of claimants or employers. The JM process was well received and there were potential indirect benefits of saving the employment relationship and improved psychological well-being.

The report concluded that Judicial Mediation was an expensive process to administer and was not offset by the estimated benefits (both direct and indirect) of the process.

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