Title: ‘Third party dispute resolution in the UK workplace – a better way than litigation?’

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Introduction

This paper considers how issues of ‘felt fairness’ and organisational justice can be addressed by workplace alternative dispute resolution (ADR) rather than through the pursuit of legal remedy. This is a topical employment relations issue in the UK in the light of the recent repeal of its statutory grievance and disciplinary procedures following the recommendations of the Gibbons review (Gibbons, 2007) which called for a far greater use of mediation in workplace conflict resolution. Over the past 30 years the response of UK employers to the growth in individual employment rights and their increased likelihood of experiencing legal claims has been to focus on procedural compliance as the best means of demonstrating fair treatment in the resolution of individual workplace disputes. This emphasis on developing formal processes reported in the past two Workplace Employment Relations Surveys (Millward et al. 2000; Kersley et al., 2006) has occurred at the same time as a reduction in unionised workplaces and collective bargaining. One outcome has been a diminishing role for trade unions to play as joint regulators of the employment relationship and in the resolution of individual and collective workplace disputes (Dickens, 2008).

A combination of these factors has led to the specialist HR function’s continuing preoccupation with process and documentation (Bach, 2005: 33). In terms of demonstrating the fairness of managerial decision making this has a value as a means of providing an organisational defence in the event of a legal claim but, it is argued, at the cost of developing processes which encourage a focus on reaching workplace solutions. The paper will examine the potential benefits of independent third party intervention in individual dispute resolution as an alternative to litigation through an analysis of three cases selected from the author’s personal experiences as a national mediator and arbitrator. The discussion will particularly explore what third party intervention can offer in terms of perceived fairness though an examination of the different dimensions of distributive, procedural and interactional justice illustrated in the cases. The intention is to examine the benefits of ADR in the resolution of workplace differences but also to identify potential limitations; those issues that need to be considered in the promotion of ADR as a better way of resolving individual workplace disputes than seeking legal remedy.

Background

The increased numbers of individuals seeking redress from their employers through litigation is evidenced by the growth in employment tribunal claims in the UK. In 1990 the Advisory, Conciliation and Arbitration Service (ACAS) received a total of 52,071 cases for conciliation with 26 per cent of these proceeding to employment tribunal. By 2009 this had increased to 138,535 cases (a decrease upon the preceding year) although the percentage of claims proceeding to an Employment Tribunal (ET) was virtually unchanged (ACAS 1990, 2009). One interpretation of these statistics is that a USA style ‘compensation culture’ has spread to the UK which has resulted in individuals becoming more litigious. A more likely explanation is offered by Hepple and Morris (2002) who point to the growth in litigation stemming directly from the increase in statutory rights which in the UK has resulted in the number of jurisdictions that can be heard by Employment Tribunals (E.Ts.) doubling between 1981 and 2001.

Whatever the explanation for this escalation in legal claims, it has become a cause of consternation for successive UK governments and employers, not least because of the costs involved and that the original objectives of the tribunals to provide informal,
speedy and cost effective access to justice have not been met. As a result of such criticisms, an alternative option to Employment Tribunals has been the subject of consideration by labour lawyers from the early 1980s onwards (Earnshaw and Hardy, 2001: 290). Based on the premise that inadequate procedures in the workplace are the main cause of successful employment tribunal claims, particularly in smaller businesses, statutory procedures for handling discipline or grievances were introduced in the UK in 2004. The aim of these statutory procedures was to provide minimum standards to improve upon (Parker and Arrowsmith, 2004) and to encourage employers and employees to engage in early workplace dispute resolution. It was, however, predicted from the outset that these regulations would increase complexity, formality, legalism and costs arising from the involvement of lawyers at an early stage (Hepple and Morris, 2002). This proved to be the case which led the UK government to commission a review of dispute resolution which concluded that the application of these procedures had indeed resulted in ‘unintended negative consequences which outweighed their benefits’ (Gibbons, 2007: 8). As a result of the recommendations of the Gibbons’ review, the statutory procedures were repealed only four years after their implementation.

As the potential for litigation has grown, so has employers’ concern to demonstrate procedural justice at the cost of placing an equal value on achieving sensitive, flexible solutions in resolving individual disputes which take account of the substantive issues in each case. The need to redress this balance was identified by the Confederation of British Industry (Séguret, 2006) in its acknowledgement that the statutory procedures had led to the elevation of procedure over substance, the over formalisation of disputes and had led to a lack of recognition that different issues required different procedures. Concerns about growing adversarialism resulting from resolving differences through litigation rather than seeking out workplace solutions have resulted in organisations such as ACAS and the Chartered Institute of Personnel and Development (CIPD) promoting the principle of workplace dispute resolution through the use of mediation (Emmott, 2009). Furthermore, academic commentators (Edwards, 2007; Dickens, 2008) have argued the case for a new public policy initiative for workplace justice and alternatives to a reliance on state regulation and Employment Tribunals as the means of resolving workplace differences.

There is some evidence, albeit limited, of growing organisational interest in mediation (both internal and external), arbitration or some form of final adjudication stage involving an independent third party (CIPD, 2007). A recent European Foundation Report (Purcell, 2010) concludes that the use of ADR is growing across Europe although it varies between individual countries. Yet there continues to be a lack of analysis about what independent third party resolution actually offers the parties in terms of justice or of its limitations as a means of resolving areas of conflict compared to legal remedy. Without such understandings, the danger is that ADR can all too easily descend into being just another ‘fashionable fad’ or even, as Sanders (46: 2009) observes, lead to a culture where there is ‘less access to justice’ for individuals because of pressures from employers to reach a settlement.

Harris et al’s research (2008) into dispute resolution in small businesses revealed a lack of knowledge among employers about what third party workplace ADR could offer despite their expression of significant support for the concept in principle as a better approach for business and individuals than adversarial, costly and time consuming litigation. The discussion in the Gibbons report and in recent practitioner literature (Emmott, 2009) has promoted mediation as a ‘better way’ but it does not consider it in terms of dynamic continuum which includes the stages of conciliation, mediation and arbitration. As the case studies in this paper reveal, it is important to
consider ADR as a process which offers the parties the opportunity to flex the approach to one that is most suited to the circumstances at the time. Regarding its stages as fixed and unrelated is to take insufficient account of one of third party ADR’s particular advantages; its adaptability. Drawing upon the case studies, the discussion of fairness will focus on circumstances where an independent third party has been asked by the parties to arbitrate and provide a decision which is not legally binding or to mediate and make recommendations to resolve the issue(s). There will not be an examination of conciliation as a specific stage in ADR where the third party acts as a facilitator to maintain communication between the parties but provides no recommendations or judgement. In the UK conciliation is conducted by ACAS staff as a mandatory stage in ET claims. It is, however, acknowledged that there will be elements of conciliation in any mediation and, at times, in an arbitration process as part of supporting communications between the parties.

Whilst it is argued that approaches to dispute resolution should promote justice in the workplace as an important outcome in its own right, their adoption should also take proper account of considerations of costs and efficiency. The present model of dispute resolution dominated by legal regulation is undoubtedly a costly one, for example, Gibbons reported (2007:4) that the average tribunal case took up some 9.85 days of the business’s time and cost an employer £9,000 to defend. In a survey of 798 organisations employing over 2.2 million employees, the CIPD (2007) found employers reporting that they spent an average of 15 days in management and HR time preparing for a tribunal case; a figure which does not include the time spent in preparation by in house lawyers or the days of attendance involved at a tribunal hearing. These average time periods are certainly far in excess of what would be expected or required where individual differences are referred for third party resolution through mediation or arbitration. In recognition of the protracted timescales involved in discrimination cases, a Judicial Mediation scheme (a designation which could be regarded as a contradiction in terms) has been introduced in the UK following a pilot scheme in 2006. This provides for employment tribunals in certain discrimination claims to allow the parties to seek a resolution without the need for a formal hearing. There is not the scope to consider this development within this paper and it differs from third party ADR in that the mediation involves the judiciary and will occur only if legal proceedings have begun.

**Concepts of Fairness**

A brief consideration of organisational justice theory is helpful in exploring perceptions of what constitutes fair treatment. This is an important consideration in understanding how differences can be resolved when employers or employees feel standards of fairness have been breached and seek to remedy a situation through actions which may have negative consequences for the organisation or the individuals involved. As the case studies reveal there are multiple tests of fair treatment in individual disputes between employers and their employees which illustrate the complex interactions between distributive, procedural and interactional justice in shaping individual feelings of fairness (Folger and Cropanzano, 1998).

Prior to the 1980’s the theoretical framework that influenced and informed research into organisational justice was largely that of distributive, or outcome, justice. This considers the fairness of organisational outcomes in relation to individual or group inputs (Bierhoff et al., 1986) so that concerns about the fairness of outcomes were dominated by equity theory (Adams 1965) which continues to be the prime consideration for trade unions in seeking solutions to differences through collective bargaining. It was a situation that prevailed until the inadequacies of equity theory as a conceptual framework (Locke and Henne 1986; Miles et al., 1989) become
The growing use of litigation to resolve allegations of unfair treatment and, most particularly, discrimination in both the US and the UK shifted attention away from distributive justice to the present concentration on procedural justice. Folger and Cropanzo (ibid; 28) describe this as the methods, mechanisms and processes used to determine outcomes, observing that, whilst, in theory, procedural and distributive justice are two distinct theoretical concepts, in practice, process and outcome no longer have independent status when procedural constraints may predetermine the outcomes. A situation that is routinely encountered in third party dispute resolution where managerial decision making is rationalised on the basis of 'unfortunately, under our procedures, there is no alternative but to dismiss…' as was evident in two of the reported cases.

As identified earlier, the shift away from collective bargaining to an increasing reliance on legal rights and litigation to resolve disputes resulted in control over the process as a means of achieving greater consistency becoming a key determinant of procedural justice (Thibaut and Walker 1975, 78). Greenberg (1987) suggests this is the essential means of employers demonstrating the 'reasonableness' of their decision making and enhancing perceptions through 'voice' (Folger, 1977) which provides for participation and thus opportunities to influence the outcome. A third dimension of fairness is described by Bies and Moag (1986) and Tyler and Bies (1990) as 'interactional justice' which stems from the explanations and feedback to individuals and the quality of interpersonal treatment. Reducing the negative consequences of adverse decision making may be addressed by paying greater attention to this frequently underestimated dimension in applicant evaluations of fair treatment (Harris, 2000). Again this was illustrated in one of the case study scenarios where greater concern for the individual's personal feelings would have gone a long way towards resolving the grievance and preventing its escalation.

The case studies and the methodology.

Adopting an 'exploratory' case study approach (Yin, 1993) provides the flexibility to consider the justice issues that emerged in a three cases where the author was the appointed mediator or arbitrator. It is an inductive approach which aims to contribute to the development of understanding about issues of fairness in the application of workplace ADR. The advantage of using selected cases as the subject of analysis is the richness of insights these offer to a researcher who played the role of both participant and observer with access to whatever information was required for the specific purpose of making an informed decision or recommendations. The disadvantage is that the available evidence was obtained without prior categorisation for the purposes of future analysis.

The opportunity to examine such issues at first hand stems from the author's 25 years of experience as an independent national mediator/ arbitrator for ACAS. As a role, this provides the opportunity for what is described by Watson (2000) as 'critical participative' research but it is important to make explicit the nature of that involvement from the perspective of a research process. It is not a distanced, unheard role but rather one that demands the highest level of involvement in what has taken place as a means of establishing the fairness of the process and the final outcome. As an independently appointed third party, the mediator/arbitrator is in a unique position to observe, record and evaluate the respective perceptions and arguments of the parties in disputed areas of workplace policy and practice which would be difficult, if not impossible, to access through other research methods.

An advantage of third party ADR is that it is a process which legitimises independent fact finding and access to any documentation with a relevance to what has taken
place; the aim being to reach an informed but independent final decision on a fair outcome. The process requires careful recording of all the available evidence by the appointed third party and the provision of a comprehensive, evenly balanced, written report for the parties summarising what has taken place, their respective arguments and the considerations which have informed the arbitrator's award. It is a situation which offers greater freedoms to request information from the stakeholders involved than is likely to be provided by more conventional research roles but it has acknowledged limitation and it is socially constructed in the sense that both parties are striving to show their actions in the best possible light to persuade the arbitrator to find in their favour. Such 'impression management' is, arguably, counter balanced by the independent nature of third party enquiry, the arbitrator's experience of fair process across a diverse range of organisational contexts and issues as well as the each party's principle aim to have all their arguments fully considered.

ADR is a confidential process, which can be one of its main attractions to the parties, so the organisations and individuals involved in the to be reported case studies have been anonymised to protect identities. There is, unfortunately, not the scope within this paper to go into the detail of each case and nor would it be appropriate to do so as the focus of the discussion is upon the process and its outcomes as the means of illustrating how ADR can address different dimensions of fairness and what it can offer as an alternative to legal remedy.

Cases A and B took place in companies involved in electrical supply and installation and Case C was a large police authority These cases have been selected on the grounds that they illustrate a range of issues referred for resolution through ADR and the processes of both arbitration and mediation. Two of the cases were concerned with appeals against dismissals and the third involved unresolved grievances brought by two individuals against their employer. In all three organisation the internal procedures had been exhausted. The presence of two case studies from the electricity supply industry is explained by the long established use of an independent third party to resolve disputes in this industry as part of collectively bargained agreements. These arrangements have been widely continued post privatisation. It is also no accident that all three case studies are organisations which have either had such a history or operate in the public sector. Such organisations are more likely to use ADR to resolve individual disputes than private sector companies. This may be explained by a greater familiarity with the processes or the sensitivities for public sector organisations in attracting undesirable media attention and their reduced scope to agree any financial settlements when differences are unresolved.

**Case A** involved an appeal against dismissal referred to arbitration of two employees who worked at a UK power station which was part of the British Nuclear Fuels Industry. Disciplinary proceedings were pending for six other employees depending on the outcomes of the arbitration. Following lengthy management investigations and hearings, the appeals stemmed from the employer's decision that two employees should be dismissed for undertaking inappropriate activities in company time by copying CDs and videos that were made available to staff using the company's intranet allegedly as part of a lending library. Regardless of any contraventions of copyright law (which was in one of the two instances the subject of possible police investigation) the basis for the employer's decision to dismiss for gross misconduct was a serious breach of company policies which led to a breakdown of trust.

The outcome of the arbitration process was that in one instance the employee's dismissal was upheld on the grounds that the evidence indicated that the individual had been trading during working time using the company's IT system. The other dismissed employee was reinstated on terms agreed with the parties which included
a demotion to a lower salary but with a specified review period. The reason for the reinstatement being a lack of evidence of any personal financial gain or direct involvement in copying material, line management’s awareness of the individual’s activities in maintaining the library data base and their suggested participation in the library which suggested double standards. At no stage had the individual been warned his activities were in breach of company rules which in themselves, were revealed to be far from clear, particularly the Company’s policy on IT usage. Furthermore, no account had been taken of the individual’s unblemished work record over more than 28 years of service. Rather unusually in the case, post the arbitration decision it was learnt from the employer and the union that the individual upon his return to work had apologised for any errors of judgement and his supervisors acknowledged the lessons they had learnt. The final outcome was that the individual was fully reinstated to his former salary and grade after a period of one year.

Case B concerned three long serving employees with no previous disciplinary offences on their records, who worked for one of the world’s largest investor-owned energy companies. After an extensive internal investigation and internal hearings, the three were summarily dismissed for breaches of the company’s health and safety procedures and for the misuse of company equipment whilst working together as a team. All three employees appealed against their dismissals and, in accordance with the collective agreement, these were referred to arbitration by an independent third party. This was a complex case where many factors needed to be taken into account in the arbitrator’s decision. In summary, acknowledged management weaknesses in terms of lack of training (particularly in using certain equipment), poor management preparation, managerial knowledge that working practices were taking place that were not consistent with company policies, a formal internal investigation and decision to dismiss taking place six months after the event and inconsistency of treatment compared to a supervisor who was not dismissed were key factors in a decision which led to all three individuals being reinstated with penalties that fell short of dismissal.

Case C involved two white female police officers who had raised a series of grievances with their employer of alleged serious sexual harassment by a male officer who was of a different ethnic origin. As their grievances remained unresolved, the individuals concerned were at the point of pursuing legal action against senior officers in the Police Authority for a failure to properly address their complaints over a period of several years. This matter was referred to mediation although the potential for the pursuit of legal remedy remained. Again it was a complex situation aggravated by the length of time involved which had led to the more senior of the two officers deciding to end her career with the police as a result of her experiences. The mediation revealed that the paramount concern for senior officers was the avoidance of any claims of racial discrimination in the light of the Government commissioned MacPherson report (1999) into policing and racial discrimination which had concluded that there was ‘institutional racism’ in the police. As a result, it emerged that a greater weighting was placed on avoiding litigation on the grounds of race discrimination than sexual harassment. At the time the mediation took place the perpetrator was in the process of being dismissed from the force following a complaint of sexual harassment from a member of the general public.

The highly sensitive nature of the issues involved led to the parties to seek out of a solution through mediation rather than litigation which would have invoked media attention and potentially career damage to the younger officer still in employment. The key outcomes of the mediation were an apology to both individuals from the head of the organisation, a compensation package for the officer who had left the
force and training for officers in handling grievances in the future to address the failures that had occurred.

Discussion and Conclusions

It is intended to use the themes of distributive, procedural and interactional justice to consider the different dimensions of fairness that became apparent in three cases. Whilst this categorisation is used to organise the discussion these dimensions were, in practice, found to be both interrelated and overlapping.

Distributive Justice.

The issue of fairness and consistency of treatment was a major factor in creating a sense of unfair treatment for the employees in all three cases. In case B this particularly arose from the decision not to dismiss the supervisor who had been responsible for organising and managing the job that led to the dismissals of three individuals. In case C perceptions of an inequity of approach stemmed from the seriousness attached to the issue of racial discrimination while grievances about serious sexual misconduct were not resolved. In all three cases there was a perception that double standards were in operation which led to one group being taken to task or being advantaged whilst another group ‘got away with it’. For example;

- Case A revealed managers who were complicit in a situation until a third party (the police) made it necessary to address an issue.
- Case B managers had operated with practices which breached certain rules to get the job done but then resorted to the rule book when there was a dangerous occurrence.
- Case C showed how certain types of discriminatory behaviours being taken more seriously than others because of political considerations.

The ADR process revealed that, despite issues of equity being a dominant factor for the individuals concerned in their perceptions of just treatment, this was regularly underrated by employers in trying to resolve a grievance or in considering the appropriate outcome in a disciplinary matter. Their focus in Cases A and B at the outset of the ADR process was on demonstrating that there had been a proper compliance with the procedures and in Case C on showing that a procedure had been followed even if the reality was that its application had been ineffective.

Procedural Justice

In all three cases, there were adequate procedures in place and alleged unfairness stemmed from either a lack of managerial engagement with the spirit of the procedures or rigidity in their application stemming from a concern with procedural compliance (Dickens, 2000) which prevented a consideration of more flexible, tailored outcomes. In the dismissal cases the procedures themselves were identified as the constraint on employers in terms of their ability to exercise discretionary judgement and take account of individual factors seen as equally important by the individuals and their representatives. As Folger and Cropanzo (1998) observe distributive and procedural justice could not be considered independently of each other in circumstances where a rigid adherence to process led to a lack of considering alternatives when it came to deciding penalties. For example, in cases A and B, once it was established that there was a serious breach of company rules amounting to gross misconduct, it was concluded that the only option was dismissal. In case B, this was deemed as particularly unfair when a supervisor who had a
responsibility for the execution of the task appeared to have been dealt with more leniently as he had left the site. In case C a major factor which had led to the individuals' sense of unfair treatment was the sense that their 'voice' had not been heard. Despite processes that provided for access to senior officers if a matter remained unresolved, these were seen to be ineffective if no one was prepared to listen or take action. The individuals' sense of indignation and injury to feelings increased as a result of formally pursuing a grievance about a sensitive matter in a perceived 'macho culture' and then finding the issues not being taken sufficiently seriously by their employer to be properly addressed. It created a sense of distrust in the value of the processes themselves leading to both individuals to observe that the third party mediation was the first time that they had felt properly listened to and that a great deal of damage to their self belief and career development would have been avoided if this had happened earlier.

**Interactional justice.**

Case B, in particular, illustrates how a fair procedure can still leave individuals feeling very unfairly treated. It demonstrates how significant the gap can be between formal rules and daily informal interactions between employees and their managers especially in situations which require collaborative team working. Failing to take account of how things really operate, how individuals were expected to use initiative in difficult time constrained situations and paying insufficient attention to conversations and explanations of known working practices was a major contributory factor in the appellants feeling their dismissals had been harsh in the extreme notwithstanding any breaches of company rules. This sense of injustice had increased when there appeared to be no of long and loyal service, unblemished records and evidence of commitment to the organisation which went beyond the legal contract, for example working long hours to ensure a job was completed. In case C the quality of the interpersonal treatment was the catalyst in the two female officers' decision to pursue a legal claim against an employer prior to the intervention of external mediation. It was felt that there had been insufficient concern for the well being of two employees who were the victims not the cause of the problem which, in turn, raised the principle of equity of treatment already identified. Comments such as 'we just weren't valued', 'my feelings were never considered' and 'it was bad enough without being made to feel we were over reacting' portrayed their overwhelming sense of injustice which had to be addressed in finding acceptable ways forward in the mediation process.

**Discussion and Conclusions**

The evidence from cases A and B challenges the position that fair procedures can result in an individual perceiving a decision as just even when there has been an unfavourable personal outcome (Greenberg 1987; Leung and Li 1990). The evidence from all three cases suggest that perceptions of fairness are complex and multifaceted; violations of distributive justice and interactional justice were shown to be as important, if not more important, than procedural justice in terms of individual 'felt fairness'. For example, in Case C where procedures had been followed but proved ineffective, the sense of not being taken sufficiently seriously or properly valued were a root cause of the individuals feeling they had been badly treated. Yet employers in their approaches to conflict resolution continue to place the emphasis on demonstrating fair procedures and o pay insufficient attention to other equally important dimensions of justice which, if recognised at an earlier stage, would make it easier for both parties in the employment relationship to resolve individual differences through workplace solutions.
Although a successful ET claim may well offer financial compensation which takes into account failures in procedures, injuries to feelings and loss of earnings, because of adversarialism and the length of time that can elapse before a case is heard, it is argued that is less likely to be able to address wider aspects of distributive justice than third party ADR.

Where an individual has been dismissed, workplace ADR offers greater opportunities to reinstate or reengage an individual than legal remedies even when employment has been terminated as evidenced by the outcomes in cases A and B. Despite remedies of reinstatement or reengagement being available to an employment tribunal, in practice, these have been very rarely used since the introduction of Industrial Tribunals (now ETs) by the UK’s 1971 Industrial Relations Act. Even where these might, in theory, be possible, the nature of the legal process contributes to the erosion of trust to the extent that it contributes to the employment relationship rupturing beyond repair (Lewicki and Bunker, 1996) so that neither party wishes to continue the relationship. Financial remedy thus becomes the only real option in the vast majority of successful ET claims which reinforces perceptions of a growing compensation culture.

Using ADR in the three reported cases provided the opportunity to find a more flexible range of remedies and solutions through investigation as opposed to cross examination about what would be acceptable to the parties. It was also, where to lend support where there was an ongoing employment relationship. The opportunity to explore workplace culture and practice is easier away from the formal setting of a court room and the focus of an independent third party can be on trying to establish what has taken place and what each parties’ key issues are, rather than evaluating the strength of the respective legal arguments. As a result in Case A and B, it was possible to consider the merits of exercising no discretion in the application of procedures against those of finding a remedy as an alternative to dismissal which took account of distributive and interactional justice to retain skilled and long serving employees who had shown commitment to the organisation. An ADR process can assist the re-building of trust in the employment relationship to the extent that the parties are able to identify learning from the experience and could move forward. Although feedback post the ADR intervention was not available in Case B, reinstatement with a loss of status for a period of time was accepted as a fair way forward and one that addressed the individuals’ complaint of disparate treatment. It led to the Employer identifying changes to be made to working practices, improved training in equipment usage and safe systems as well as clearer communication of roles and responsibilities; benefits that were in addition to the preservation of individual jobs and the avoidance of costly litigation that would in all probability have ensued if there had been no use of ADR.

The value of opting for mediation in Case C was more mixed. Possibly because it was a process of mediation with recommendations rather than arbitration, there was less pressure to progress the outcomes from the outset. Even though these were accepted by the end of the mediation there was a delay in some of the implementation. At the level of the individuals a package was agreed to which addressed their needs for an acknowledgement that there had been insufficient regards for their feelings and, in the case of the officer still in service, interventions to further her career development. This case, however, serves to illustrate some of the potential limitations of ADR and, in particular, of mediation. As Baker (2002) points out one of the most attractive attributes of ADR is its non binding nature but this can also be one of its disadvantages in terms of achieving permanent change more widely adopted change as a result of establishing principles in a public domain, i.e. a court of law. Privacy may be a key consideration for some (as it was for the parties in
this instance) but others will want their ‘day in court’ and the opportunity to see their position publicly vindicated.

It can be argued that legal decisions will have to have more impact on employers practices but, on the basis of the author’s experiences and the cases reported in this paper, resolving disputes through ADR may in reality prove to be a more effective, incremental vehicle for achieving changes in practice at the level at the workplace with the engagement of both employers and employees because of its problem solving approach.

The flexibility and reduced formality of ADR provides more opportunity to address issues of distributive justice and interactional justice in complaints of unfair treatment than would be possible in the Employment Tribunals. As evidenced by the experiences reported in this paper, it is the application and interpretation of organisational rules which are the most significant factor on individual perceptions of fair treatment (Hutchinson and Purcell, 2003). In many conflict situations, it is argued that third party ADR is more likely to lend support to the development of managers with the skills needed to effectively address individual disputes in the workplace through an approach which is about seeking out solutions which the parties can live with rather than allocating blame though litigation.

Wedderburn in his overview of what has happened to British Labour Law over the past 40 years reminds us that whilst opinions of we think is fair will change with the times, ‘fairness at work has a lot to do with a workable compromise between the conflicting interests at play’ (2007:412). Whilst it has acknowledged limitations and is not appropriate where it is in the public interest for principles to be established which relate to employment rights at work, ADR is likely to offer more to both employers and individual employees in achieving workable compromises than the outcomes of litigation in the conduct of employment relations. There is, however, a need for more research studies which provide evidence to support a greater understanding of what ADR can offer to both parties in the employment relationship and when it may be better to seek resolution in a court of law.

References


