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Employment ADR
The future

Talk about the 'future of ADR' began as long ago as 1976, at a conference with the theme 'Agenda for 2000AD – The need for systematic anticipation'. Proposals outlined at that now-famous 'Pound Conference' - named in honour of Roscoe Pound, the reformist Dean of Harvard Law School – led to reforms of the US justice system to provide a 'multi-door courthouse' offering more procedural choices to parties in dispute. But take-up has been slow, not only in the US but around the world.

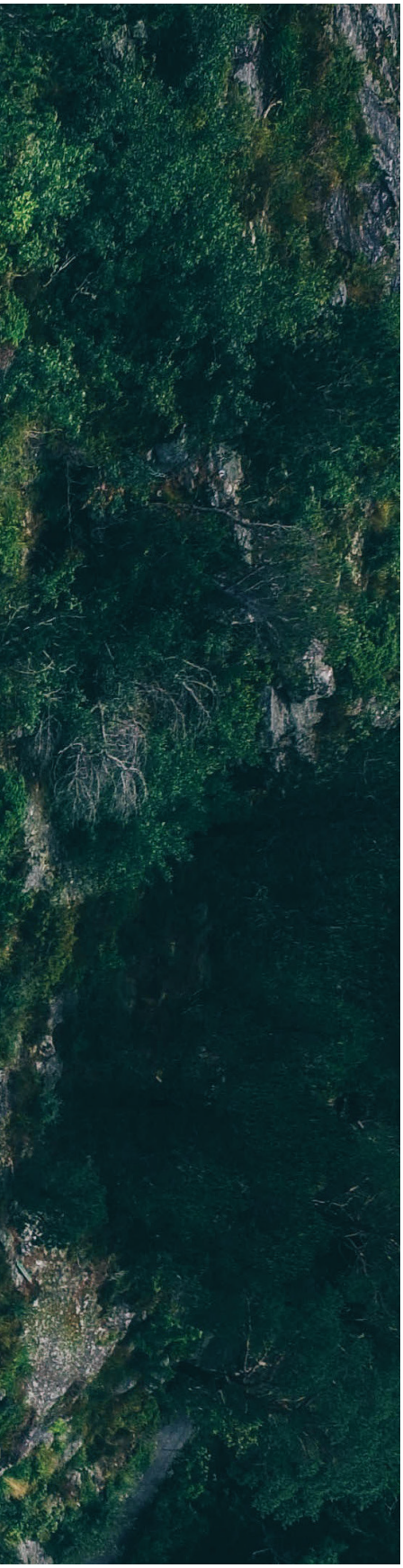
This issue formed the basis for a series of 28 Global Pound Conferences (**GPC**) in 24 countries during 2016 and 2017, at which Herbert Smith Freehills was a founder diamond sponsor. Views were obtained from over 3,000 delegates involved in the dispute resolution field on what users of dispute resolution need and want. A report providing a preliminary interpretation of the polling data is available here but, in broad terms, the data identified a strong preference for a **flexible** approach involving a mixed model of adjudicative and non-adjudicative approaches, with the importance of **efficiency** identified as the key driver in choice of resolution method. Data also indicated a desire amongst users for their advisers to focus on **collaboration** over representation, while in-house counsel were identified as the most likely agents of change and external counsel as most likely to **resist** change.

The data related to civil and commercial disputes generally and delegates are unlikely to have had employment disputes specifically in mind. However, the themes certainly chime with a recent but growing interest in ADR in the employment sphere: the desire for efficiency in time and cost is acute, given the low value of many employment claims, and the potential for confidential resolution and in some cases a desire to preserve a valued individual relationship makes ADR an obvious option.

So has ADR fared any better in employment disputes than other types of claim? Are the themes highlighted equally relevant? In the article below, the Herbert Smith Freehills employment team considers the relevance of the data in the context of employment disputes in the key jurisdictions of Australia, France, Germany, Spain and the UK. We also refer to the work of the Employment Lawyers Association's Arbitration and ADR Group (the **ELA ADR Group**), who have produced various reports on this topic under the co-chairmanship of Peter Frost, Herbert Smith Freehills, partner, and Paul Goulding QC, Blackstone Chambers.

Flexibility

The GPC produced a consensus in favour of making greater use of pre-dispute protocols and mixed-mode processes (ie both adjudicative and non-adjudicative). In this respect, employment is something of an exemplar in the jurisdictions covered. This is perhaps because the sums at stake rarely justify zealous advocacy, and the emotional component that drives employment disputes gives them more in common with family law cases than with most commercial litigation. This is reflected in the success of the pilots and experiments attempted in different countries in adopting pre-claim conciliation and melding opportunities for ADR with the judicial process. Indeed, a melded approach has been embedded in the Australian system for a long time, whereas in Europe developments have gathered pace in the last three to five years.



ADR embedded in Australian process

In Australia, claims in respect of unfair dismissal and 'general protections' (which protect workplace rights and freedom of association and provide protection from workplace discrimination) must be made to the Fair Work Commission (**FWC**) and are subject to early conciliation.

The FWC uses staff conciliators to conduct conferences by telephone (in a move away from the previous more formal face-to-face conciliation by tribunal members). Last year over 90% of unfair dismissal applications were resolved by agreement at telephone conciliations (or because the applicant withdrew the application). If a general protections dismissal dispute is not resolved by conciliation, the parties can agree to arbitration by the FWC as an alternative to applying to court. Australian courts will generally also have a compulsory mediation step prior to a final hearing.

The FWC also has a role in approving (collective) enterprise agreements (which can cover individuals' terms of employment, the terms governing the relationship between employer and trade union, and deductions from wages) with a stipulation that these must include a dispute settlement procedure (**DSP**). The DSP must authorise either the FWC or someone else that is independent of those covered by the agreement to settle disputes about any matters under the agreement. This could be by mediation or arbitration.

The Fair Work Ombudsman also offers free mediation for the categories of dispute within its remit, including underpayment of wages, non-payment of annual leave, pay in lieu of notice etc. This is a voluntary option offered to try to resolve disputes that would otherwise end up in the small claims court.

European focus on compulsory early conciliation

France, Spain and the UK all have compulsory conciliation prior to making an employment tribunal or labour court claim, along with the possibility of conciliation and/or judicial mediation during the litigation.

In France, employment tribunal judges have a conciliation responsibility pursuant to law, and conciliation is mandatory before claims can be submitted (with certain exceptions), although less than 10% of judicial conciliations result in a conciliation agreement.

The French Employment Code also provides for a mediation procedure that can be initiated by an alleged victim or perpetrator of bullying or harassment to attempt to resolve the situation without legal recourse. In 2015 rules for a mediation/conventional conciliation process in employment contract-related disputes were put in place. Further, since 2016 courts have been able to appoint a mediator at any stage of employment tribunal proceedings with the consent of the parties, or to enjoin them to meet with a mediator. Courts of appeal have also begun to promote mediation (although often rather late in the process).

Since 2015, parties can also agree to a 'participatory procedure' before a claim is filed to explore settlement in good faith. There is also a special 'collaborative law' process in which parties each choose a lawyer to work together to find a confidential, comprehensive, lasting solution within a set timescale – with third party expert assistance where necessary – but must agree to change lawyers if the process fails to provide a resolution. However, both of these last two options remain rather unknown and are rarely used in practice in employment law disputes (where settlement agreements are by far the preferred method).

Spain has a compulsory mediation and conciliation proceeding before the Administrative Services (with only a few types of exempt claim) before a claim may be filed before the Labour Courts.

If this is unsuccessful, there is a second attempt at mediation immediately before the matter comes to trial – first by the court clerk and then by the judge. These are successful in a large number of cases in helping the parties to avoid trial. There is also a compulsory out-of-court procedure for specific types of case involving collective consultation and the election of workers representatives.

In the UK, since 2014 the vast majority of employment tribunal cases are subject to 'early conciliation' (EC) by Acas (the Advisory, Conciliation and Arbitration Service).

Claimants must provide certain information to Acas to enable it to contact the parties to ascertain whether they are interested in conciliation. The claimant cannot submit their tribunal claim until after an EC certificate is issued by Acas either because the parties do not wish to participate in conciliation or because it has failed to achieve settlement within the prescribed period (usually one month). Acas can also provide free conciliation while a claim is ongoing, right up to the start of the hearing, if the parties both request it or the Acas officer considers there is a reasonable prospect of settlement. Acas figures for the year April 2016 to March 2017 indicate that 18% of cases resulted in a settlement through Acas and a further 64% did not progress to a tribunal claim (although this cannot be directly linked to the early conciliation process).

Further, since 2013 the UK employment tribunal rules require tribunals to encourage and facilitate ADR wherever possible and appropriate. Since 2016, judicial assessment has been available (although it has had low take-up so far). This provides an impartial and confidential assessment at the case management hearing of the strengths of the parties' cases (albeit without assessing the evidence), with the aim of encouraging subsequent settlement discussions. The ELA ADR Group identified that this may be helpful in providing a 'reality check' for litigants in person, assuming they are willing to participate. However, they expressed concern that the assessment may be disregarded as the particular and provisional view of the evaluating judge, while the actual judge hearing the dispute may take a very different approach. The ELA ADR Group noted that perceptions that particular judges are claimant-friendly or respondent-friendly, however ill-informed, will not go away. An employment judge can also offer judicial mediation, although this is only likely to be available for more complex cases listed for a hearing of at least three days and where the judge is persuaded that it has a high prospect of success.

Guidance recently issued by the President of the Employment Tribunals put more emphasis on judicial mediation, although it also states that a decision on whether to offer judicial mediation may include consideration of how reasonably the litigation is being conducted. The success rate is approximately 70% and records show that the average mediation day saves around three tribunal hearing days, with obvious financial savings to both parties.

However, the ELA ADR Group found that the wider usage of judicial mediation is held back by a lack of appreciation of the financial savings, both on the part of advisors and tribunal administrators, together with a lack of training for judges. Both judicial assessment and mediation require the consent of both parties, but are now free of charge to the users. It is notable that tribunal user groups have seen a significant increase in requests for judicial mediation since the abolition of fees for this service. Acas also offers collective conciliation, mediation or arbitration for collective disputes between employer and trade union.

In Germany there is a compulsory conciliation hearing as the first stage of the court litigation once the claim has been issued.

The judge usually summons the parties within one or two months of the complaint being filed; no application is necessary. The presiding judge can subsequently propose a legal proceeding before a conciliation judge to prolong the phase of conciliation hearing. As an alternative to the normal court process, the competent labour court may also propose a referral to a mediator or a different out-of-court procedure at every further stage of the proceedings, with usually a maximum period of three months for the conciliation process to take place; this requires the consent of both parties.

About 60% of German federal court proceedings are settled by means of an amicable settlement in the compulsory conciliation hearing or another hearing, leaving only less than 1% of disputes to be referred to the conciliation judge (only 7% of disputes are decided by judgment). Furthermore, there are certain disputes between an employer and the works council which, according to mandatory provisions of German employment law, need to be settled by proceedings before a conciliation board. The board is made up of a chairperson (with casting vote) agreed on by the parties or determined by the labour court, and additional members appointed by the employer and works council.

Efficiency

The emphasis placed by the GPC delegates on efficiency – both time and costs – in choice of dispute resolution method is unsurprising. Lawyers are largely inured to the barbs about being slow and expensive because they recognise that much of this is not a criticism of them so much as an unobtainable desire for greater simplicity in the issues and differences to be resolved. The legal profession well understands, and does not mind the odd judicious reminder, that costs can spiral if not carefully managed and that disputes are a considerable management distraction that can itself cause significant business disruption.

Cost is all the more relevant in a sphere where the value of many employment claims is low; the comparative cost of court/tribunal proceedings and different forms of ADR will clearly influence the choice of dispute resolution method.

This has perhaps driven the adoption by all five jurisdictions of a process of free-to-user, compulsory early conciliation as part of the employment claim process, and the availability (if limited) of free conciliation or mediation at subsequent stages (as discussed above).

The (obvious) significance of financial considerations in the employment sphere was recently illustrated in the UK, when the imposition of fees for bringing a tribunal claim in 2013 led to a dramatic reduction of around 70% in claims brought. Acas research (prior to the removal of tribunal fees in July 2017) indicated that many claimants still pursued early conciliation with Acas, but often had no intention of lodging a claim due in considerable part to the fee. The removal of the fees has led to a significant increase in claims, with tribunal user groups reporting a doubling in receipt of new claims since August 2017. The UK government has not ruled out reintroducing fees in the employment tribunal system at some point, but this is unlikely to be in the near future. Currently there are no fees at the initial stage of filing an employment claim in the UK, Spain, Germany or France, and a low filing fee (which can be waived in cases of serious financial hardship) to file certain claims in Australia. (Of course, if claims continue through to trial, there may be legal costs and, in some jurisdictions, subsequent court fees).

The relative lack of resource on the part of many employee claimants also makes private ADR a less attractive option than a state-provided free ADR process, as the employer will usually have to bear the full or main part of the costs of a private mediation or arbitration.

The use of private ADR is also inhibited by the inability to agree an ADR clause in an employment contract up front.

In France, clauses requiring conciliation or mediation before applying to the tribunal, and arbitration clauses, are not enforceable against employees. Similarly, in Germany it is generally not possible to agree in an employment contract that an arbitration proceeding has to be followed, and it is not possible to arbitrate labour disputes except for certain collective disputes and disputes in relation to managing directors and CEOs. In Spain an arbitration clause can be included in the employment contract, but again this does not prevent the parties from choosing instead to file a claim before the Labour Courts. In the UK, it is not possible to agree in the employment contract that future statutory employment claims will be determined by arbitration (although it is possible to agree that future contractual and tortious claims arising from an employment relationship will be arbitrated). However, agreements to arbitrate after the dispute has arisen are possible. In Australia, as discussed above, a (collective) enterprise agreement may provide for certain disputes which cannot be resolved at the workplace level to be settled by arbitration, while certain applications to the FWC may also be subject to ADR including arbitration. As a result, it is rare for arbitration clauses to be included in an individual's employment contract , even though they are permitted.

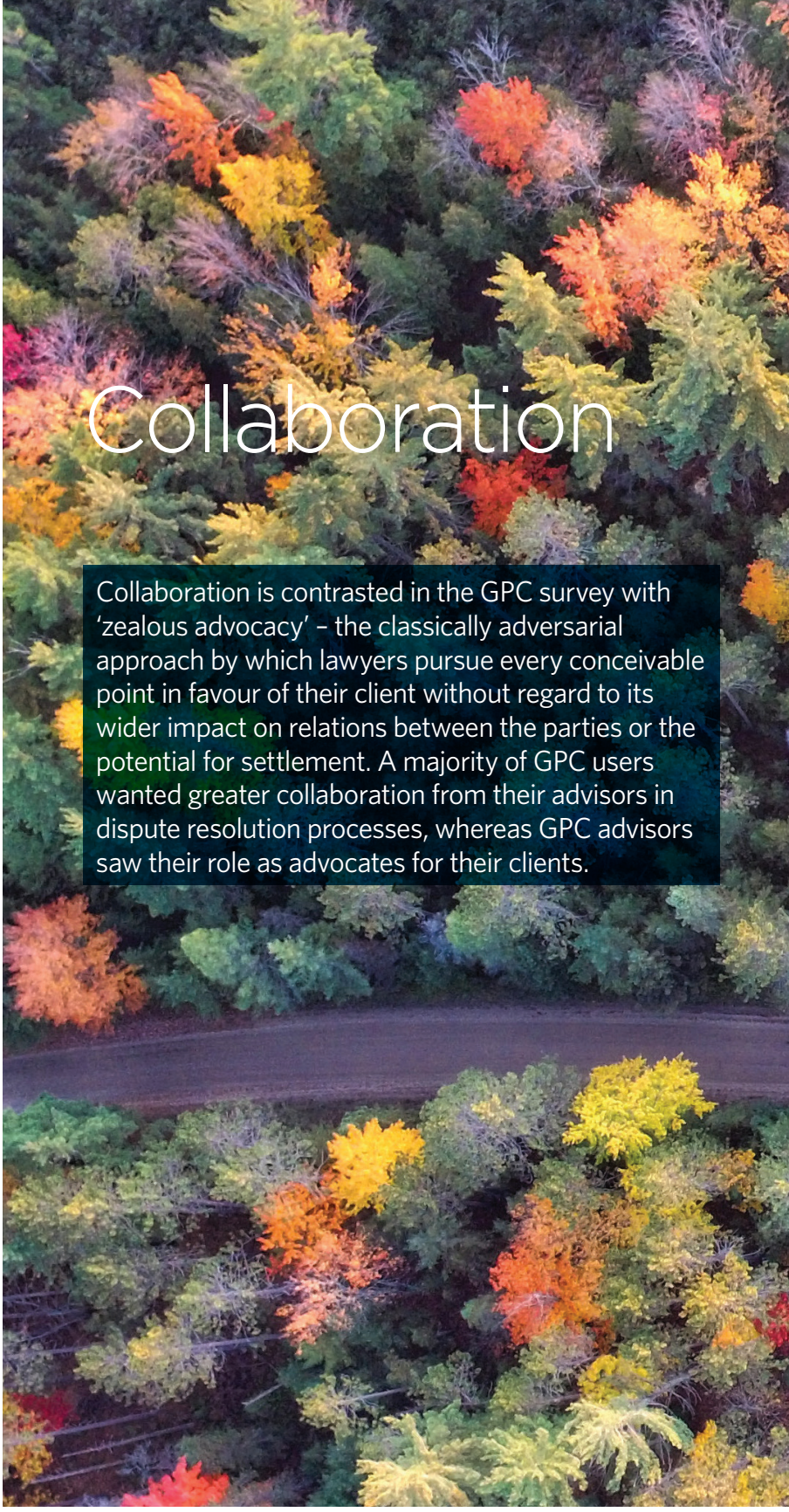
Other considerations identified by GPC delegates as a priority in the choice of dispute resolution process included relationships (24%) and confidentiality (19%), both of which are particularly relevant to employment disputes and weigh in favour of early settlement rather than a prolonged tribunal case.

What, then, are the special factors militating against early settlement of HR cases?

First, there is the psychological impact both for complainants nursing a sense of unfairness or rejection, and for managers on whom the spotlight is turned to justify their conduct or decisions. Employment cases tell a human story, and therefore come with a certain amount of heat and light that takes a while to dissipate (and perhaps longer than the time limit for submitting claims, even if that is extended to allow for early conciliation). Damaged reputations and feelings are, understandably, fought for and defended more keenly than an organisation's money. This could explain both why conciliation processes are often built in as a precursor to claims procedures, and also why the parties are not always ready to make full use of them at the start.

The GPC delegates also identified technology as an area to drive efficiency.

Initiatives for online employment dispute resolution are in the pipeline in the UK. The UK government has plans to reform the whole courts and tribunals system, including changes to the employment tribunal process designed to simplify and speed up the resolution of disputes. Key changes include digitising the whole claims process (currently only the claim and response form are online), delegating a broad range of routine tasks from judges to caseworkers and tailoring the composition of tribunal panels to the needs of the case. Australia has adopted technology to improve access to ADR processes, in response to a significant shift from collective dispute resolution between represented parties to individual and/or self-represented participants. The Fair Work Commission (**FWC**) has made more resources available online, including online 'Benchbooks' and online guides for unfair dismissal and general protections applications. It has also developed web-based virtual tours, largely designed for self-represented applicants to ensure that they are well-informed and comfortable accessing the functions of the FWC.



Collaboration

Collaboration is contrasted in the GPC survey with 'zealous advocacy' – the classically adversarial approach by which lawyers pursue every conceivable point in favour of their client without regard to its wider impact on relations between the parties or the potential for settlement. A majority of GPC users wanted greater collaboration from their advisors in dispute resolution processes, whereas GPC advisors saw their role as advocates for their clients.

Zealous advocacy is a relative rarity in HR cases due to the relatively small sums at stake and the comparative informality of labour courts and tribunals compared to most civil court proceedings. In some cases there will also be a desire to preserve a valuable employment relationship. Our employment disputes practice in each of the jurisdictions shows a significant amount of pre-litigation activity seeking to settle disputes through legally privileged negotiations.

However, it is worth noting that, in employment cases, perhaps the greatest opportunity for collaboration between the parties often arises (and disappears) at an early stage whilst the parties are bound together by a contractual relationship. Informal resolution at that early stage is optimal, yet employers feel obliged to follow set procedures (for grievances, discipline, redundancy, etc) that frame and shape (and perhaps impede) the content of that

collaboration, in order to ensure a fair process should claims subsequently be brought.

In the UK, the presentation of documentary and witness evidence and even in some cases cross-examination all contribute to what is too frequently an adversarial and defensive rather than collaborative mindset. Indeed the ELA ADR Group recommended the removal of the penalty on claimants for failing to lodge a grievance prior to issuing a claim as one way of encouraging the greater use of ADR.

At this early stage, many employers will not yet have sought advice or, if they do, the focus of the requested advice will be on how to comply with these set procedures rather than to discuss more innovative collaborative resolution.

An agreement to mediate before positions become entrenched (and to put on hold any formal disciplinary or grievance process) might seem like a good solution. So why has take-up been slow?

A number of factors maybe at play. External mediation can be expensive and, as discussed above, judicial ADR is often a free alternative, with in some cases considerable success rates. The ELA ADR Group found that external mediation has generally been used in the UK in higher value cases or in disputes involving senior members of staff, with its use in lower value cases comparatively rare. It recognised that further efforts need to be made to develop lower cost mediation options to allow greater use for lower value claims. Once a claim has been lodged, the short limitation periods that apply to employment tribunal claims can also restrict the use of private ADR methods.

In the UK, Germany and France, concerns over a lack of quality guarantee and regulation of mediators are also key inhibiting factors, as is lack of familiarity (a factor also identified by GPC delegates). Another limitation is that mediation requires an added investment of time and cost with no guarantee of a return; this might be seen as reducing rather than increasing efficiency. It may also be possible that the widespread use of lawyers as mediators (in the UK at least) may incline would-be participants to conclude that mediation is insufficiently different to be worth pursuing, given the expense of undertaking it and the potential risk of it failing.

Internal mediation in the workplace can also be problematic. The context of formal disciplinary and grievance procedures is generally a power imbalance arising from the fact that those procedures are designed, interpreted and operated by (and often to serve the interests of) the employer. Because employers – specifically HR functions – are accustomed to controlling these procedures, they can fall into the trap of treating mediation similarly if it is provided in-house.

Employees already feeling at a power disadvantage are likely to be wary of entering into a dispute resolution process that is not conspicuously independent. The same wariness applies to unfamiliar ADR procedures: unless the advantages of mediation and arbitration are clearly understood by the employee, they are likely to be treated circumspectly. The ELA ADR Group also identified that trade unions can be resistant to the use of internal mediation, particularly if they have not been involved in its introduction.

There can also be resistance from managers who prefer to resolve matters (or not) in their own way, perhaps because they feel they are judged by their ability to manage people, or because they are uncomfortable with the idea of HR performing a mediation function; the advantages of mediation will need to be actively 'sold' to them.

What are those advantages? For employment cases, the main attractions of mediation apart from potential efficiency gains and confidentiality are, first, that the outcome can mirror the shades of grey in the merits of a case (in contrast to the binary win-lose options available in court or tribunal) and, second, that it is possible for employees to extract important concessions (and for employers to make gestures) of items that courts usually have no power to award – alternative jobs, apologies, references, pension contributions, benefit continuation and so on. Managers may also be persuaded of the benefits of repairing and preserving employment relationships if the costs and management time spent on recruitment and legal claims are considered.

There are initiatives to promote collaboration at the workplace level. For example, in Australia, the Fair Work Commission has introduced a 'New Approaches' programme as part of its remit to promote cooperative and productive workplace relations and prevent disputes. This has involved the FWC using interest-based problem-solving to work with parties to develop new ways of resolving conflict.

In the UK, Acas trains staff within employers to become mediators and has been promoting the idea of smaller employers 'buddying up' to form mediation networks, bringing cost advantages while potentially retaining the benefit of the mediator understanding the particular sector.

A number of universities have adopted this approach. The ELA ADR Group also identified that some mediators and HR professionals use 'neutral evaluation', where an independent individual or member of HR is asked by the employer to speak to all involved in a particular situation (without taking formal statements or attributing remarks to individuals), with a view to recommending steps to resolve the matter. It is suggested that this nascent method may be appropriate where there is a team conflict involving a number of individuals, as it provides an opportunity for people to express their views and can lead to recommendations eg, for mediation, training, team building or changes in policy.

There is a growing interest in mediation in other jurisdictions too, but it remains relatively rare. In France this may reflect greater confidence in and familiarity with using legal advisers to negotiate settlements of employment disputes, which remains much the most common method of resolution.

In Germany, the use of compulsory conciliation in proceedings makes mediation less attractive as an alternative. It can sometimes be a more expensive one too, and of indeterminate quality, given that mediator training is not strictly regulated in Germany. There can also be disputes over liability for costs of any non-judicial ADR, which is not dealt with by law, and has the further disadvantage of not suspending time limits for bringing unfair dismissal claims whilst the process is in train.

Likewise, as mediation is embedded into the judicial process in Spain, little use is made of it outside of proceedings. It is possible to agree ad hoc procedure to resolve collective and individual disputes, as well as disputes relating to the employer's consultation obligations. However, such voluntary procedures are rarely used in practice.

Resistance

The GPC survey suggests that in-house counsel are viewed as best placed to drive change and external counsel as the primary obstacles. Self-interest, systemic conservatism and the cognitive ease of the familiar are all possible explanations for their resistance. For all the extra focus on efficiency, collaboration and flexibility of modern-day dispute resolution, the established forms of dispute resolution are still formidable opponents in the debates about the ideal forum.

They are reliable, effective and, in the vast majority of cases, tolerably efficient, and current plans to digitise processes in some jurisdictions could well enhance these attributes. On the other hand, any policy shift toward charging tribunal users at the point of use, rather than funding by the taxpayer, could diminish their attraction and lead to a greater consideration of other methods.

The GPC identified lack of familiarity and experience of ADR amongst advisers as influencing the choice of dispute resolution. This is an issue which the European Employment Lawyers Association (**EELA**) and the UK Employment Lawyers Association (**ELA**) have identified in relation to arbitration specifically and have sought to address.

Private arbitration remains the methodology to which employment disputes seem most stubbornly resistant

(although in Australia arbitration by the Fair Work Commission has always been an essential feature of the employment dispute resolution landscape). One of its disadvantages is that it cannot be imposed contractually on employees, as it would require them to contract out of their statutory rights. This, in effect, makes it viable only if it can be agreed at a time when agreement between the parties is often at its most elusive – just after the dispute has arisen. It may be that it is also viewed as insufficiently different from court or tribunal proceedings, or that one party may have more to gain from it than another. Indeed, the widespread perception (however flimsy the evidence) that employment tribunals are sympathetic to employees' claims may cause employees to feel that they would be giving up an advantage were they to agree to a different forum.

Even so, arbitration offers distinct advantages for parties to certain kinds of dispute.

The principal example of this is when both parties have a need for confidentiality. Confidentiality will be a paramount concern in cases whenever the publicity surrounding disputes would be bad for business or personal reputations. This is true of cases involving large bonuses or deferred remuneration, and those relating to restrictive covenants or team moves. It will also be the case in disputes trespassing on delicate issues, where the cloak of confidentiality may provide reassurance to a nervous or reluctant witness.

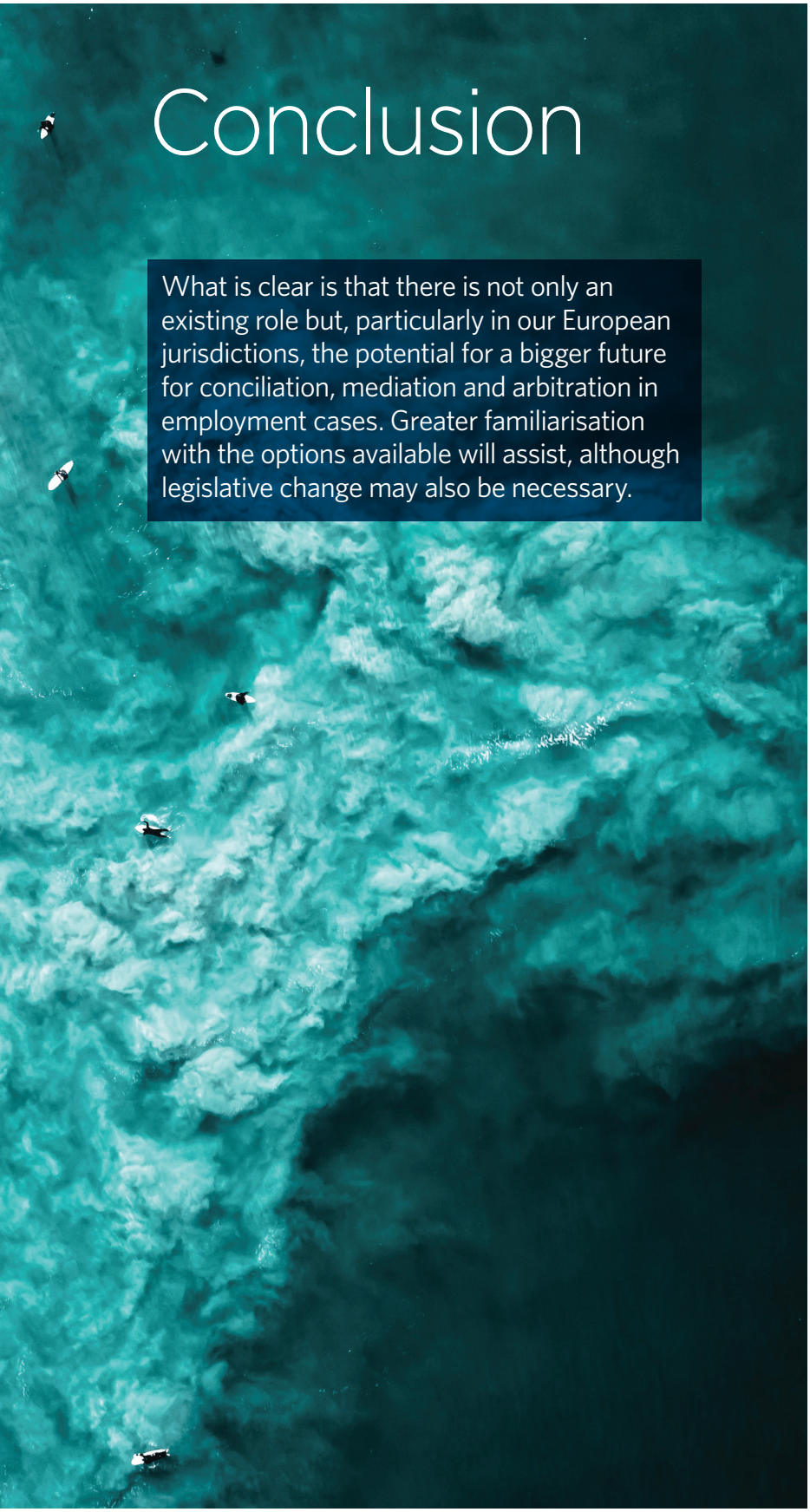
Arbitration also offers potential for saving time, as it is not subject to the case backlogs, bureaucracy and inefficiencies of the typical court system. This, along with the potential for increased use of technology (for example, to reduce in-person hearing time), can also lead to savings in costs. Arbitration may also be an attractive option in cases where the context is highly specialist or esoteric, because it allows for the appointment of an arbitrator with specialist knowledge or familiarity with the context of the dispute.

The EELA have developed bespoke arbitration rules, a model arbitration clause and a submission agreement under which existing disputes can be resolved by arbitration. In the UK, the ELA set up a working party which has recently published a report on arbitration in employment disputes, promoting the greater understanding and use of arbitration amongst employment lawyers. Herbert Smith Freehills lawyers have been heavily involved in both of these initiatives and further details are available here. Although parties can only agree to arbitrate UK statutory claims after the dispute has arisen, arbitration can be an appealing solution where an employee has also brought contractual and/or tortious claims, perhaps in more than one jurisdiction, enabling them to be resolved in a single forum. Although arbitration will not be appropriate for the common low-level employment dispute, it certainly has its place for higher value or more sophisticated disputes where confidentiality is key. Arbitration clauses (notwithstanding their limitations) are increasingly being included in partnership and LLP agreements, deferred remuneration scheme rules and contracts of employment.

In France private ADR procedures are still little-known as options for employees, and though use is slowly growing, remain marginal. There are concerns about the finality of the resolution they deliver and about the applicable tax and social security regime for settlement payments agreed under them. There is also confusion and unevenness within the qualification and training standards for mediators and conciliators, and a perceived skills gap on the parts of the legal community in terms of communication techniques and understanding of the emotional element in workplace disputes. Recourse to arbitration remains extremely unusual. The recent procedural changes (more restrictive rules) on employment disputes may prompt lawyers and clients to make better use of available ADR procedures in due course although, currently, negotiated settlement agreements are still viewed as the best way to meet client requirements for confidentiality, certainty and time and cost efficiency.

Germany has similarly little take-up of ADR procedures in employment disputes, even though the option of proceedings before a conciliation judge (who can refer the parties on for mediation or arbitration) has been available since 2012. This seems to be due to the success of the compulsory conciliation hearings, a low level of interest or knowledge in parties, and the fact that statutory time limits for bringing unfair dismissal claims are not suspended while non-judicial ADR is pursued.

While the various compulsory forms of ADR have been successful in Spain, there appears currently to be little demand for ADR in other circumstances.



Conclusion

What is clear is that there is not only an existing role but, particularly in our European jurisdictions, the potential for a bigger future for conciliation, mediation and arbitration in employment cases. Greater familiarisation with the options available will assist, although legislative change may also be necessary.

The ELA ADR Group suggested a number of legislative steps that could be taken in the UK to encourage the greater use of ADR, including removing the penalty for not lodging a grievance, extending the limitation periods for employment claims or allowing parties to enter standstill agreements in order to pursue ADR; it also proposed consideration of more compulsion to use ADR or greater costs sanctions for not doing so.

There is certainly growing evidence of the efficacy of ADR alongside rather than instead of the traditional court/tribunal procedures and negotiated settlements.

This is because the four benefits identified by the GPC survey participants are already well understood in the HR and employment relations field. The first of these is cost reduction – never far from the minds of client or counsel given the relatively small sums at stake. The second is added control over the outcome, because of the attraction of confidentiality, dealing with all claims together and exploring a wider range of possible bargaining chips for settlement. The third is that conciliation and mediation processes aid settlement even where they do not result in it, because the parties acquire a better understanding of the strengths and weaknesses of their case. Finally, it confirms what every employment lawyer worth their salt knows, namely that settlement has to address the hurt and distress caused by the underlying events, as well as the claims arising from them.

Arbitration, mediation and conciliation all offer scope, in different ways, for relationships to be mended or preserved, whether through the cloak of confidentiality or the reassurance of informality or the value of conciliatory gestures. Together they reveal a truth already well known to those working in the HR arena, whether client or counsel – that their greatest asset in following the thread of settlement to a successful end is not remorseless logic, photographic memory or dazzling technical skills but emotional intelligence.

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