

# **Access v Process in Employment Discrimination: Why ADR Suits the US But Not the UK**

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## **ABSTRACT**

This article compares the legal systems for resolving employment discrimination claims in the US and the UK, with particular attention to court or tribunal procedures and the use of alternative dispute resolution (ADR) techniques. The comparison reveals that the US system of bringing claims first to the investigative—but non-adjudicative—Equal Employment Opportunities Commission (EEOC) and then to the US Federal Courts takes more time and money, but results often in higher compensation, than does the UK system involving conciliation by the Advisory, Conciliation, and Arbitration Service (ACAS) before resort to the Employment Tribunals. From this difference appears to follow a much greater enthusiasm, even desperation, for ADR in employment discrimination in the US than in the UK. This piece suggests that the UK may not need ADR, as the US clearly does, because of different overall approaches and attitudes to remediation of employment discrimination in the two countries.

## **1. INTRODUCTION**

The US and UK both have witnessed a rise, over the last decade, in the amount of scholarship and legislation about the use of Alternative Dispute Resolution (ADR) to resolve employment disputes. However, when it comes to employment discrimination, the growth does not reflect a homogeneous Anglo-American trend. The discourse about ADR in employment discrimination in the UK appears to have a flavour all its own, and does not necessarily share the strong motivations and varied directions driving the US ADR debate.

This piece looks at what might be learned from the fact that, in these two nations with similar substantive employment discrimination protections and dissimilar formal systems to enforce them, the popularity of ADR has grown to different degrees, in different forms, and for different reasons. The article begins with a comparison of the formal systems for resolving employment discrimination disputes in the US and UK. It then compares the methods of ADR used or advocated in the two countries, with some attention to the efficacy and pervasiveness of the various techniques. It addresses also justifications advanced by parties, practitioners, academics, and legislatures for using specific types of ADR.

It will not escape notice that the US occupies more space in this piece than does the UK. This emphasis was not intended. Instead, it results from the fact that the quantity and complexity of formal and alternative processes for resolving employment disputes in the US exceeds that of the UK. Comparison highlights the elaborate responses of US participants to their more burdensome procedures, as against the relative satisfaction of UK participants with their speedier and less expensive ones.

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The article concludes that different ADR preferences not only reflect different procedural contexts, but may in fact result from different attitudes about employment discrimination prevention, and from a tension between the aims of individual access to justice on one hand, and remedial impact through the full process of law on the other. Indeed, this comparison implies that the use of private causes of action to deter employment discrimination may hamper the ability of those same causes of action to provide accessible and satisfying remedies. This leads to some cynicism about whether the US and the UK can meaningfully borrow techniques from one another, but the comparison nevertheless yields valuable directions for further inquiry into the ramifications of these differences in objectives.

## **2. SUBSTANTIVE EMPLOYMENT DISCRIMINATION LAW IN THE US & UK**

Several US federal statutes, taken together, prohibit discrimination in the terms and conditions of employment, including pay, on the bases of race, gender, religion, national origin, age, and disability.<sup>1</sup> Until 1991, these statutes provided for a cause of action in which the courts could award back pay and injunctive relief, such as an order to stop discriminating, or to reinstate an improperly discharged employee.<sup>2</sup> These purely equitable remedies did not call for a jury trial.<sup>3</sup> The Civil Rights Act of 1991 made amendments to several federal anti-discrimination (in employment) statutes such that remedies now include compensatory (ie, pain and suffering) damages and punitive damages. These damages are capped, but the caps range between \$50,000 and \$300,000 each for compensatory and punitive damages depending on the size of the employer.<sup>4</sup> These changes also entitle plaintiffs to demand a jury trial. Today, victims of employment discrimination across the US have the right (eventually) to ask a federal jury to award as much as \$300,000 in pain and suffering damages, and \$300,000 in punitive damages per claim.

Almost all of the 50 US states have their own anti-discrimination statutes, many of which afford unlimited punitive and compensatory damages. As a practical matter most claims under such statutes are litigated through the federal procedure, for reasons the explanation of which exceed the scope of this piece. This means that (1) federal damages caps often have no effect when the plaintiff joins her federal claim to a claim under a state statute without damages caps and (2) one can meaningfully (albeit not exhaustively) study employment discrimination law in the US without worrying too much about state court and ADR systems. Taking into account state claims litigated in the federal system, then, US employment discrimination law proscribes discrimination on the bases of race, gender, religion, national origin, age, and disability, and affords the plaintiff a federal jury trial, with the potential, in many cases, for unlimited state punitive and compensatory damages.

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<sup>1</sup> Title VII, Civil Rights Act of 1964, 42 USC s 2000e-5 et seq ('Title VII'); Civil Rights Act of 1866, 42 USC s 1981; Equal Pay Act, 29 USC s 206(d) ('EPA'); Age Discrimination in Employment Act, 29 USC s 621 et seq ('ADEA'); Americans With Disabilities Act, 42 USC s 12101 et seq ('ADA').

<sup>2</sup> 2 [1991] US Cong & Adm News 603-682.

<sup>3</sup> Section 1981 (Civil Rights Act of 1866) suits were an exception, as they did allow common law compensatory damages.

<sup>4</sup> 42 USC s 1981a.

Presently UK law forbids employment discrimination on the bases of gender, race, national origin, ethnicity, colour, and disability.<sup>5</sup> No UK law prohibits age or religion (except in Northern Ireland) discrimination in employment, and sexual orientation is not protected by UK law, as indeed it is not in the US. Damages can include awards for ‘injury to feelings,’ but no punitive or ‘exemplary’ damages; awards are not capped, but are generally vastly smaller than those awarded in the US.<sup>6</sup> Trials are not before juries, a fact that will receive greater attention in later sections. The substantive protections, however, otherwise track with those provided under US law.

One distinction between US and UK application of these protections lies in the burden of proof for ‘direct discrimination’ (what the US calls ‘disparate treatment’). In the US, making out a prima facie case, showing or implying that an employment decision was discriminatory, shifts the burden of proof to the defendant to demonstrate a legitimate, non-discriminatory reason for the decision or lose the case.<sup>7</sup> If the defendant meets this burden, the plaintiff can win by proving that the articulated reason is a ‘pretext’ for discrimination. This burden-shifting approach requires the application of a carefully balanced, sometimes counter-intuitive evidentiary standard very much different from standards of basic industrial fairness or ‘just cause,’ which are commonly used by labour arbitrators and employment tribunals. US courts have therefore erected an unabashedly legalistic substantive framework, which lends itself to complicated pretrial legal arguments and jury instructions. In the UK, although the concept of the prima facie case does apply, the making out of such a case without rebuttal allows, but does not require, the employment tribunal to infer discrimination.<sup>8</sup> The tribunals retain a more common-sense approach, reserving for themselves the decision whether they believe discrimination occurred or not.

Recent circumstances have forced UK law to move closer to the US’s more legalistic approach. An important part of the employment law community in the UK views the current approach as too informal, and inconsistent with the pro-plaintiff remedial aims of anti-discrimination law. Although recent reforms of employment tribunal procedure have responded to complaints that juridification has eroded the original ‘easily accessible, informal, speedy, and inexpensive’ character of the tribunals, parties to discrimination cases in particular are more likely to seek legal advice and insist on strict application of substantive discrimination law.<sup>9</sup>

More significantly, in 1997 the UK opted into the EC ‘Social Chapter,’ as a part of the Treaty of Amsterdam.<sup>10</sup> On the heels of the UK opt-in, the EC has issued (among other measures) two directives addressing (1) race discrimination in employment and other contexts<sup>11</sup> and (2) employment discrimination on the bases of religion, age,

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<sup>5</sup> Equal Pay Act 1970 (‘EqPA’); Sex Discrimination Act 1975 (‘SDA’); Race Relations Act 1976 (‘RRA’); Disability Discrimination Act 1995 (‘DDA’).

<sup>6</sup> See, eg, SDA §§ 65-6; DDA § 8. EqPA § 2(5) does effectively cap damages with a two year limitation on back-pay.

<sup>7</sup> *McDonnell Douglas Corp v Green* 411 US 792, 802 (1973).

<sup>8</sup> B Heppel, M Cousey, & T Choudhury *Equality: a New Framework* (Hart Oxford 2000) pp 4.37-4.39 (‘Equality’).

<sup>9</sup> *Equality* (n 8 above) p 4.39; JK MacMillan ‘Employment Tribunals: Philosophies and Practicalities’ 28 *Ind L J* 33, 34-40 (2000) (‘MacMillan’); see also *Anya v University of Oxford and Another* [2001] IRLR 377 (the Court of Appeals admonished employment tribunals to base decisions on detailed factual findings appropriate to the need of claimants to construct a circumstantial discrimination case).

<sup>10</sup> Catherine Barnard *EC Employment Law* (OUP Oxford 2000) 1-20.

<sup>11</sup> Council Directive 2000/43/EC of 29 June 2000, ‘implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’ (‘Race Directive’).

disability, ethnicity, and sexual orientation.<sup>12</sup> These directives require that the UK adopt, by 2003, legislation protecting against specific grounds of discrimination. The Employment Directive requires that the UK introduce new prohibitions relating to age, religion, and sexual orientation. Another significant change heralded by both directives is the requirement, in Article 8 of the Race Directive and Article 10 of the Employment Directive, that a court or ‘other competent authority’ deciding a discrimination case employ a legalistic burden-shifting approach.<sup>13</sup> Indeed, the 1997 EC Burden of Proof Directive (97/80/EC) already imposed this requirement for gender discrimination cases, leading to the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001. These regulations require tribunals to find for the claimant if a defendant cannot disprove the prima facie case, and they formalize the legal concept of indirect discrimination (known in the US as disparate impact). Similar implementation of the Race and Employment directives will ensure that the UK not only experiences an increased caseload, but treats all forms of employment discrimination with a level of formality perhaps exceeding that of the US.<sup>14</sup>

### 3. THE US PROCEDURAL SYSTEM FOR EMPLOYMENT DISCRIMINATION

While substantive employment discrimination laws in the US and UK share basic features and scope, the US and UK systems are not at all similar procedurally. The most that can be said by way of similarity is that both systems are at base adversarial, although even that similarity can be misleading. The fundamental distinction lies between a system of specialized tribunals for employment cases and a system of federal courts with general jurisdiction, that hear employment discrimination cases among a vast array of other unrelated matters.

Long before they reach federal court, however, all US employment discrimination cases begin with a complaint to the Equal Employment Opportunity Commission (‘EEOC’); this is a mandatory prerequisite to a lawsuit, and is a different process altogether from the lawsuit itself.<sup>15</sup> Any person who would complain formally of employment discrimination must file a charge with the EEOC within 300 days of the alleged act.<sup>16</sup> The EEOC then has exclusive jurisdiction of the claim for 180 days, during which time it purportedly investigates the claim. After this period the claimant can request that the EEOC cease its investigation, or can wait until the investigation bears fruit. If the claimant requests an end to the investigation, he will receive a ‘right-to-sue’ letter, certifying that he has exhausted the EEOC part of the process, and may proceed to federal court.<sup>17</sup> He has 90 days to do this.<sup>18</sup>

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<sup>12</sup> Council Directive 2000/78/EC of 12 October 2000, ‘establishing a general framework for equal treatment in employment and occupation’ (‘Employment Directive’).

<sup>13</sup> *Equality* (n 8 above) p 4.38.

<sup>14</sup> It should be noted that the UK adopted the European Convention on Human Rights into UK law through the Human Rights Act 1998. This will surely affect employment discrimination protection, but its impact is too unclear for a meaningful analysis in this paper. See, eg, RW Rideout ‘The Enforcement of Human Rights in Employment’ 52 *Current Legal Problems* (OUP Oxford 1999) 239.

<sup>15</sup> 42 USC s 2000e-5(e).

<sup>16</sup> The states generally have their own anti-discrimination laws and enforcement agencies. In recognition of this fact, the original 180-day limitation period for the federal statutes was extended to 300 days *in those states that have their own recognized investigative enforcement agency*. In the few states where a putative plaintiff has only the EEOC, she must file within 180 days. An explanation of this eccentric system exceeds the scope of this article.

<sup>17</sup> See The US Equal Employment Opportunity Commission *An Evaluation of the EEOC Mediation Program* (EEOC [www.eeoc.gov/mediate/report/chapter4.html](http://www.eeoc.gov/mediate/report/chapter4.html) 1999) (‘EEOC Mediation’).

According to the EEOC's own report on its procedures, leaving the charge with EEOC for investigation will yield one of three results: (1) a finding of no reasonable cause to believe discrimination has occurred; (2) a finding that reasonable cause exists, and conciliation should be pursued; or (3) a finding that reasonable cause exists, that conciliation should be pursued, and that, failing conciliation, the EEOC will take up the lawsuit itself.<sup>19</sup> A finding of 'no reasonable cause' means the claimant receives a right-to-sue letter, and may go to federal court. Only 8.8% of charges result in a finding of reasonable cause, of which one fourth (2.2% of total charges) successfully conciliate; of the remaining 6.6%, only 0.35% become an EEOC lawsuit, and the rest receive a right-to-sue letter.<sup>20</sup> Thus, in the neighbourhood of 97.45% of EEOC claimants either withdraw their complaint or receive a right-to-sue letter.

To understand why all employment discrimination claimants in the US must spend at least 180 days, and on average over 300 days,<sup>21</sup> in an EEOC process which does little but delay the inevitable federal lawsuit in all but 2.55% of claims, requires an appreciation of the naiveté of the legislators who created the EEOC in the 1960s, and of the impact of the availability of punitive damages and a jury trial. Such an appreciation goes beyond what this article can provide, but suffice it to say that in 1964 the US Congress thought that 180 days should be plenty of time for the EEOC to investigate and conciliate the vast majority of claims, and that federal lawsuits would be a last resort, and generally would be prosecuted by the EEOC, not the injured employee.<sup>22</sup> Indeed, Congress hotly debated whether to give the EEOC quasi-judicial authority, in order to increase access to remedies and speed resolution of disputes, but the majority consciously decided to entrust the courts with the final say, limiting the EEOC's remedial power to that of filing lawsuits on behalf of the aggrieved.<sup>23</sup>

The EEOC has never received enough money to do this job, and since the 1960s the legislature has (1) increased the time to file a charge, (2) assigned responsibility for all employment discrimination statutes (ADEA, ADA, EPA, Title VII) to the EEOC, and (3) added encouragements to litigation such as jury awards of punitive damages. This has left the EEOC with a hopeless backlog for decades, and led the EEOC to divide charges into three classes: (1) a tiny minority of high-profile cases targeted for litigation; (2) the largest group of cases, considered weak, and left to languish until the 180 day period expires; and (3) cases with some apparent merit, referred to mediation, and investigated only where the mediation fails.<sup>24</sup> For 97.45% of employment discrimination claimants, this means a six-month to one-year delay and the right, after it all, to embark on a lawsuit in federal court.

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<sup>18</sup> 42 USC s 2000e-5(f)(1).

<sup>19</sup> *EEOC Mediation* (n 17 above).

<sup>20</sup> In 2000 EEOC received 79,896 charges of discrimination and filed 291 lawsuits. The US Equal Employment Opportunities Commission *Statistics for All Statutes FY 1992-FY2000* (EEOC [www.eeoc.gov/stats/all.html](http://www.eeoc.gov/stats/all.html) 2001); The US Equal Employment Opportunities Commission *EEOC Litigation Statistics, FY 1992 through FY 1999* (EEOC [www.eeoc.gov/stats/litigation.html](http://www.eeoc.gov/stats/litigation.html) 2001).

<sup>21</sup> *EEOC Mediation* (n 17 above).

<sup>22</sup> See *EEOC Mediation* (n 17 above); 2 [1964] US Cong & Adm News 2404, 2515-16.

<sup>23</sup> 2 [1964] US Cong & Adm News 2515-16 ('the Commission must confine its activities to correcting abuse, not promoting equality').

<sup>24</sup> See *EEOC Mediation* (n 17 above); *Equality* (n 8 above) p 4.26.

Before the introduction of jury trials, the average time for litigating an employment discrimination case was about 14 months, not including one or two years for EEOC proceedings, and ten percent of cases took more than three years, not counting appeals.<sup>25</sup> Proceedings (with the exception of EEOC investigations) have taken dramatically more time since the advent of jury trials.<sup>26</sup> Litigation in federal court today involves active case management, a pre-discovery settlement meeting, and full blown discovery, sometimes in stages.<sup>27</sup> Most federal judges have another settlement meeting before receiving, or ruling on, motions for summary judgment.<sup>28</sup>

Summary judgment has become increasingly popular in the federal courts to help clear up case backlogs.<sup>29</sup> One who moves for summary judgment claims that there are no material facts in dispute, and that the movant is entitled to judgment as a matter of law, without findings of fact by a jury.<sup>30</sup> Although it is next to impossible to prove a causal relationship, summary judgment is on the rise in employment discrimination cases after the 1991 addition of jury trials. For instance, the US Court of Appeals for the Seventh Circuit, the federal appeals court responsible for an area covering several states and including Chicago, Illinois, reported that in 1992 published appeals from employment discrimination cases were roughly half from trials and half from summary judgment; in 1995 there were two summary judgment appeals for every one trial appeal, and by 1996 there were four summary judgment appeals for every one from a trial. Whether it flows from the influence of jury trials, punitive damages, or some other source, summary judgment has become (1) an essential stage in almost all federal employment discrimination litigation, and (2) a focus for settlement efforts, either by negotiation, mediation, or some other means.

Plaintiffs who successfully run the summary judgment gauntlet tend to win more often than defendants, and more often before juries than before judges (or arbitrators).<sup>31</sup> They usually receive high (by UK standards) punitive and compensatory damages from juries (a mean of \$417,178 and a median of \$106,500), usually with uncapped state damages added on.<sup>32</sup> Costs to litigants are frequently greater than \$50,000 per party, and

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<sup>25</sup> See RA Bales 'The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation' 77 Boston University L Rev 687 (1997).

<sup>26</sup> See D Sherwyn, JB Tracey, & ZJ Eigen 'In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process' 2 U Pa J Lab & Emp L 73, 97-98 (1999) ('Sherwin, Tracy, & Eigen'); SB Burbank & LJ Silberman 'Civil Procedure Reform in Comparative Context: the United States of America' 45 AJCL 675 (1997) ('Burbank & Silberman'); HR Rep No 487, 105<sup>th</sup> Cong, 2<sup>nd</sup> Sess, 1998 (1998 WL 191267); M Mankes 'Combating Individual Employment Discrimination in the United States and Great Britain: a Novel Remedial Approach' 16 Comp Lab L J 67, 82-83 (1994) ('Mankes').

<sup>27</sup> Fed R Civ P 26-37.

<sup>28</sup> Fed R Civ P 56. The motion for summary judgment is now called 'motion for judgment as a matter of law' under the Federal Rules of Civil Procedure.

<sup>29</sup> See D Goldian 'New Reason to Lie: the End of Proving Discriminatory Intent by Proving Pretext Only After *St. Mary's Honor Center v Hicks*' 30 Willamette L Rev 699, 717-719 (1994); PW Mollica 'Employment Discrimination Cases in the 7<sup>th</sup> Circuit' 1 Empl Rights & Empl Pol'y J 63, 76-79 (1998).

<sup>30</sup> Fed R Civ P 56.

<sup>31</sup> See Mankes (n 26 above) 84; KVV Stone 'Mandatory Arbitration of Individual Employee Rights Cases: the Yellow Dog Contract of the 1990s' 73 Denver L Rev 1017 (1996) ('Stone'); KM Clermont & T Eisenberg 'Trial By Jury or Judge' 77 Cornell L Rev 1124, 1135 (1992); SH Bompey & MP Pappas 'Is there a Better Way? Compulsory Arbitration of Employment Discrimination Claims after *Gilmer*' 19 Empl Rel L J No 3, 208 (1993-1994) ('Bompey & Pappas').

<sup>32</sup> See Sherwin, Tracy, & Eigen (n 26 above) 141; Mankes (n 26 above) 84-5; J Dertouzos, E Holland, & P Ebener *The Legal and Economic Consequences of Wrongful Termination* (Rand 1988); GD Newman 'The Model Employment Termination Act in the United States: Lessons from the British Experience with Uniform Protections Against Unfair Dismissal' 27 Stanford J Int'l L 393 (1991); 2 [1991] US Cong & Adm News 676-82.

the average plaintiff's lawyer requires a retainer of \$3,000 to \$3,600 and a 35% contingent fee to take a case.<sup>33</sup> Thus, the typical US employment discrimination plaintiff spends a year waiting for the EEOC, three months finding a lawyer to take her case,<sup>34</sup> and either a year in litigation ending in an utter defeat at summary judgment, or a year or two in litigation leading to a trial. The first formal airing of the US plaintiff's case happens as much as three (or more) years after filing an EEOC claim, or never.

#### 4. THE UK PROCEDURAL SYSTEM FOR EMPLOYMENT DISCRIMINATION

Complaints of employment discrimination in the UK are made to the 'employment tribunals.' Until 1971 the tribunals, called 'industrial tribunals,' handled a small range of matters such as entitlement to assessments from the Industrial Training Act 1964, or payments under the Redundancy Payments Act 1965.<sup>35</sup> The Industrial Relations Act 1971 introduced the cause of action for unfair dismissal, and gave jurisdiction of such claims to the tribunals. In time the tribunals were given jurisdiction over equal pay claims, sex discrimination claims, race discrimination claims, and now disability claims. The decision to give essentially all individual (as opposed to collective) employment matters to the tribunals drew in great part from the 'Donovan Report,' which hailed the tribunals, as it saw them in 1968, as 'easily accessible, informal, speedy, and inexpensive.'<sup>36</sup> The tribunals consist of a Chairman,<sup>37</sup> who is legally trained, and more specifically trained to handle employment matters, and two lay members with some industrial experience.<sup>38</sup>

The tribunals were largely viewed as successful, although by the 1980s there were complaints that procedure before the tribunals had increased in formality and legalism.<sup>39</sup> In the mid-1990s complaints arose of backlogs in the London area tribunals (but not elsewhere) to the effect that 'only' 54% of London cases were resolved at a tribunal hearing within 26 weeks of filing a claim.<sup>40</sup> As a result, the Employment Tribunals Act 1996, followed by the Employment Rights (Dispute Resolution) Act 1998, sought to streamline the system.

The 1998 Act changed the name of the tribunals to 'employment' tribunals, provided for new circumstances in which a Chairman can act without the lay members, and introduced measures to promote alternative means of dispute resolution.<sup>41</sup> Presently, a claim is filed on a form which a plaintiff can fill in by hand; this she must do within three months for most forms of discrimination, two years for EqPA.<sup>42</sup> The case is then referred to the Advisory, Conciliation, and Arbitration Service (ACAS) for possible

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<sup>33</sup> Sherwin, Tracy, & Eigen (n 26 above) 81, 99-100; see also Burbank & Silberman (n 26 above); C Summers 'Remedies for Employment Rights' 141 U Pa L Rev 457, 486 (1991).

<sup>34</sup> A tall order given that she will either need to come up with tens of thousands of dollars or have a case good enough to convince an attorney that, say, one third of the recovery after trial will exceed \$40,000. See Burbank & Silberman (n 26 above) 691, n 74 (noting that personal injury lawyers in the US have begun turning away cases worth less than \$100,000).

<sup>35</sup> See MacMillan (n 9 above) 34-5; BJ Doyle *Employment Tribunals* (Jordans Bristol 1998) p 1.1.1-3 ('*Employment Tribunals*').

<sup>36</sup> MacMillan (n 9 above) 34-5; *Employment Tribunals* (n 35 above) 1.1.2-5; L Dickens, M Jones, B Weekes, & M Hart *Dismissed* (Blackwell Oxford 1985) 276-7 ('*Dismissed*'); *Report of the Royal Commission on Trade Unions and Employers' Associations 1965-1968* (Cmnd 3623) (London, 1968: HMSO).

<sup>37</sup> There are recommendations before Parliament to render the title gender-neutral (eg 'employment judge'). *Equality* (n 8 above) p 4.11.

<sup>38</sup> *Employment Tribunals* (n 35 above) p 3.3.1.

<sup>39</sup> *Dismissed* (n 36 above) 194-200.

<sup>40</sup> MacMillan (n 9 above) 46, n 45.

<sup>41</sup> *Employment Tribunals* (n 35 above) p 1.3.1-6.

<sup>42</sup> Eg SDA § 76; EqPA § 2(5).

conciliation. ACAS does not investigate as the EEOC is supposed to do, but immediately begins a process of conciliation, which is a kind of shuttle diplomacy where the ACAS advisor tries to avoid evaluating the parties' positions, but encourages compromise and concessions, to the end of supervising a settlement.

The UK does have investigative agencies, the Equal Opportunities Commission (EOC) for sex discrimination and the Commission on Racial Equality (CRE) for race discrimination, which can support claimants in litigating their claims, but claimants are not required to go through these agencies, and they generally play a minor role in providing remedies to individual employees.<sup>43</sup> Instead, the agencies tend to focus on their powers to issue codes of practice, perform studies, and make recommendations or reports. They also have powers to make formal investigations and issue 'nondiscrimination orders,' but these do not relate to specific disputes, but to ongoing employer practices, and carry no award of damages. Whether the activities of the EOC and CRE more effectively combat employment discrimination than do awards of damages to aggrieved employees falls outside the ambit of this comparison, but it is clear that they do not affect the dispute resolution process to the extent of the EEOC or ACAS.

If a case does not settle through ACAS conciliation, many interlocutory matters can come before a chairman alone, and the parties may (although this is rarely done) submit their case for a resolution without a hearing. Cases are tried on fairly basic discovery, and the tribunal conducts an informal hearing by US federal court standards, sometimes playing an inquisitorial role where parties are unrepresented, in an otherwise adversarial procedure.<sup>44</sup> It is too early to measure the effects of the 1998 Act, but even at the time it came into effect, outside of London some 85% of cases resolved by a tribunal hearing were finished within 26 weeks;<sup>45</sup> the average award of damages in 2000-2001 was £11,024 for sex discrimination, £12,978 for disability discrimination, and £15,484 for race discrimination.<sup>46</sup> The average cost to each litigant is less than 1000 pounds, borne by each party.<sup>47</sup> In the fifteen month period from 1 April 1999 to 30 June 2000, the tribunals and ACAS received 17,329 employment discrimination cases (including equal pay); of all of these cases, ACAS successfully conciliated 44%, 31% were withdrawn, and 25% went to the tribunals.<sup>48</sup>

The process for resolving EqPA cases contrasts with this rosy picture of speedy remedies. UK protection against unequal pay for work of 'equal value' (like 'comparable worth' in the US) generally involves referral to an independent expert.<sup>49</sup> The independent expert provides an opinion, on which the tribunal relies, as to whether the claimant's job carries equal value to that of the chosen comparators. This process of course takes time. In 1998-99, the median time for completion of an equal value case in the UK was 17

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<sup>43</sup> See *Equality* (n 8 above) p 4.35; NR Lipper 'Sexual Harassment in the Workplace: a Comparative Study of Great Britain and the United States' 13 *Comp Lab L J* 293 (1992); M MacEwan 'Promoting Equal Opportunity: the Role of the Regulatory Agency in Racial Discrimination' 1 *Int'l J of Disc & L* 39 (1995).

<sup>44</sup> *Employment Tribunals* (n 35 above) ch 3; Mankes (n 26 above) 92-93; MacMillan (n 9 above) 37-44.

<sup>45</sup> MacMillan (n 9 above) 45-46; *Employment Tribunals* (n 35 above) p 1.1.4 ('The author's experience suggests that, outside London, cases are coming on so quickly for trial that many legal representatives are unprepared for trial').

<sup>46</sup> *Employment Tribunals Service Annual Report for year ending 31 March 2001*.

<sup>47</sup> MacMillan (n 9 above); 47; *ACAS Annual Report, 1999-2000* (ACAS Leicester 2000) ('ACAS'). Other sources have placed it between £1250 and £2500 for an employer-respondent. R Lewis & J Clark 'Arbitration in Dismissal Disputes: the ACAS Scheme' ([www.industriallawsociety.org.uk/lewisclark.htm](http://www.industriallawsociety.org.uk/lewisclark.htm) 2000).

<sup>48</sup> See *ACAS* (n 47 above) app 1, table 8.

<sup>49</sup> *Equality* (n 8 above) p 4.27. Tribunals may decide the issue themselves in easier cases. EqPA s 2A(1)(a).



months.<sup>50</sup> According to the Employment Appeals Tribunal, such delay is ‘properly described as scandalous and amount[s] to a denial of justice to women through the judicial process.’<sup>51</sup> This scandalous process nevertheless takes less time and expense than the US system where parties must hire their own experts—which often involves a ‘battle of the experts’ ultimately resolved by a jury—or simply fail to meet the very difficult burden of proving comparable worth.<sup>52</sup>

Compared with the ACAS/tribunal system, the US system imposes vastly greater costs in both time and money on litigants. In the UK a claimant (except in an EqPA case) can realistically expect to present her case to an expert tribunal within six months of filing her claim (which must happen within three months of the alleged grievance) and, if she prevails, collect a modest, four-figure award. US claimants struggle through the system for a time UK tribunals would call ‘scandalous’ and a ‘denial of justice,’ probably followed by abject defeat on summary judgment, but possibly leading, after three years of process, to \$300,000 in pain and suffering, \$300,000 in punitive damages, and unspecified state damages, making a major public statement into the bargain.

## 5. ADR IN THE RESOLUTION OF EMPLOYMENT DISCRIMINATION CASES

Against the backdrop of the systems described above, Parliament has introduced the Employment Rights (Dispute Resolution) Act 1998 in the UK, and Congress enacted the Alternative Dispute Resolution Act of 1998 in the US. Although the timing and names of the acts suggest an eerie coincidence, the statutes do very different things, and enter onto ADR landscapes which have developed along distinct lines. For example, while ADR is used in the UK in international business settings, to resolve construction disputes and, less commonly, in collective labour disputes,<sup>53</sup> arbitration<sup>54</sup> and mediation play almost no role whatsoever in employment discrimination, and ACAS conciliation hardly merits the name ‘alternative.’

Contrast this with the US, where the area of employment discrimination has seen increased use of mediation and negotiation, and the proliferation of pre-dispute arbitration agreements, often entered into as part of the consideration for employment.<sup>55</sup> Some courts have actually employed court-annexed arbitration, although this is rare; most courts use court-ordered mediation, or aggressive, settlement-oriented case management.<sup>56</sup> The EEOC tries to refer half of its charges to mediation under its in-house mediation program.<sup>57</sup> A US employment discrimination plaintiff could literally

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<sup>50</sup> 88 Equal Opportunities Review 16 (1999).

<sup>51</sup> *Aldridge v British Telecommunications, plc* [1990] IRLR 10, 14.

<sup>52</sup> *Equality* (n 8 above) p 4.31.

<sup>53</sup> See *ACAS* (n 47 above); *Employment Tribunals* (n 35 above) p 4.5.1; N Speechly ‘Talkin’ ‘Bout a Resolution’ 67 *The In-House Lawyer* 16 (February 1999).

<sup>54</sup> Although some insist that arbitration falls outside the rubric of ADR owing to its adjudicative character, I will treat it as an ADR technique in light of its role as an alternative to the formal procedural mechanisms.

<sup>55</sup> See *EEOC Mediation* (n 17 above); Stone (n 31 above); SA Fitzgibbon ‘After *Gardner-Denver, Gilmer, and Wright*: the Supreme Court’s Next Arbitration Decision’ 44 St. Louis U L J 833 (2000) (‘Fitzgibbon’); J Waters ‘Does the Battle Over Mandatory Arbitration Jeopardize the EEOC’s War in Fighting Workplace Discrimination?’ 44 St. Louis U L J 1155 (2000) (‘Waters’); TC Bailey ‘Reconciling *Alexander and Gilmer*: Explaining the Continued Vitality of *Alexander v. Gardner-Denver Co.* in the Context of Collective Bargaining Agreements’ 43 St. Louis U L J 219 (1999) (‘Bailey’); Task Force on Alternative Dispute Resolution in Employment *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* ([www.adr.org/rules/employment/protocol.html](http://www.adr.org/rules/employment/protocol.html) 1995) (‘*Due Process Protocol*’).

<sup>56</sup> HR Rep No 487, 105<sup>th</sup> Cong, 2<sup>nd</sup> Sess, 1998 (1998 WL 191267).

<sup>57</sup> *EEOC Mediation* (n 17 above).

experience (1) EEOC mediation, (2) EEOC conciliation, (3) negotiation upon filing suit, (4) court-ordered mediation, (5) more negotiation, this time with a judge serving as a neutral mediator/conciliator, (6) voluntary court-annexed non-binding arbitration, and (7) appeal mediation, all in the same case. This writer has litigated cases which involved (1) through (5). This gives one the impression, as an academic and as an advocate who has represented employers and employees in US employment discrimination matters, that participants in the US system—parties, their attorneys, and the courts—are desperate for some way out of the time, expense, and frustration of the formal system.

The next three sections will look in turn at pre-dispute arbitration agreements in the US, post-dispute ADR in the US, and ADR use in the UK. The kinds of ADR that feature primarily in these sections are arbitration, mediation and conciliation. Although these techniques find expression in various forms, the following discussion will benefit from a general typology. Arbitration refers to the submission of a dispute, usually under a contract between the parties, to an independent, private person (or panel of persons) for adjudication. The arbitrator (or arbitrators) is usually experienced in the field from which the dispute arises, and often has legal training. Arbitration is almost always binding on the parties, but this depends on the contract under which the dispute is submitted to arbitration, as do the process and standards for selecting the arbitrator or panel. Mediation involves an agreement by the parties to employ a third person, also usually legally trained and having some experience with the class of case to be mediated, to assist in the negotiation of a settlement. The mediator often gives the parties an opportunity to state their case to each other, before separating them and engaging in a process of conveying proposals between the parties whilst helping to educate them about the strengths and weaknesses of their cases. Finally, conciliation is essentially mediation performed by an official intermediary, and takes different forms according to the aims of the officials (for these purposes, the EEOC and ACAS).

## **6. PRE-DISPUTE ARBITRATION AGREEMENTS IN THE US**

Potential defendants in the US sometimes choose ADR even before a dispute arises, using pre-dispute mandatory arbitration agreements ('PMAAs'). These are contracts, generally at the inception of a relationship (either an employment, collective bargaining, or a licensing relationship), and often in consideration for employment, which require the submission to binding arbitration of all disputes arising out of the relationship.<sup>58</sup> US courts have held that such agreements can be enforced to require that an employee submit discrimination claims to binding arbitration.<sup>59</sup>

The arbitration required by PMAAs generally involves a single arbitrator (some call for three), selected according to a procedure set out in the arbitration agreement. Discovery is informal, although arbitrators generally have subpoena authority.<sup>60</sup> The hearing can take place within a month or two of submission, takes a day on average (but

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<sup>58</sup> MZ Green 'Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims' 31 Rutgers L J 399, 400-421 (2000) ('Green'); Bompey & Pappas (n 31 above) 198-201.

<sup>59</sup> *Gilmer v. Interstate/Johnston Lane* 500 US 20 (1991) ('*Gilmer*'). The decision addressed a licensing, not an employment, contract and explicitly avoided the question of whether the Federal Arbitration Act (9 USC s 1) allows the enforcement of PMAAs in employment agreements. However, lower appellate courts have enforced PMAAs in employment contracts, and the Supreme Court has not intervened. See, eg, *Mago v Shearson Lehman Hutton, Inc* 956 F2d 932 (9<sup>th</sup> Cir 1992); *Cook v Barratt Am, Inc* 219 Cal App 3d 1004, 268 Cal Rptr 629 (4<sup>th</sup> App Dist 1990) cert denied 111 SCt 2052 (1991).

<sup>60</sup> H Brown & A Marriot *ADR Principles and Practice* (Sweet & Maxwell London 1999) ch 1 ('*ADR Principles*') 77-78.

can take two or three), and is often followed by the submission of written briefs within a month of the hearing. A decision, usually based on a written opinion, should issue within a month. The entire process can take less than six months (264 days has been quoted as an average), and costs less than court litigation, especially where a party proceeds without counsel.<sup>61</sup> Arbitration is generally considered final, and not subject to meaningful judicial review under the Federal Arbitration Act, except for fraud, drunkenness, or exceeding authority under the arbitration agreement.<sup>62</sup>

The proponents of enforcing PMAAs, often strange bedfellows, focus on the need for quick, cheap, quiet, and, overall, accessible resolution. Supporters from the employee/plaintiff camp point to the fact that the formal process (lengthy EEOC, lengthy federal process, prohibitive expense) provides no real forum at all.<sup>63</sup> They claim the appropriate comparison is not between arbitration and a big, happy federal trial with a gullible jury and lots of judicially enforced procedural protections, but between arbitration and never finding a lawyer to take the case, or getting squashed on summary judgment, or languishing in the system until accepting a nuisance settlement seems the only way out.<sup>64</sup> The employee-side PMAA supporters also explain that arbitration can incorporate sensitivity to the unique issues arising in an industrial setting better than any generalist federal judge.<sup>65</sup>

Their fellow travellers, the employers, claim that while arbitration may afford every plaintiff a forum, and might mean more individual awards, the awards will not approach the numbers federal juries give, attorney's fees will be kept low, and the cases will stay out of the papers.<sup>66</sup> Both employer and employee-side supporters agree, however, that arbitration must provide whichever procedural safeguards are most important to that party.<sup>67</sup> Several organizations and academics, sympathetic to the rights of aggrieved employees to the processes intended by the various statutes, object to enforcement of PMAAs unless they comply with an agreed 'Due Process Protocol,' which guarantees several court-like procedural protections, and the application of statutory substantive standards.<sup>68</sup> The courts presently forbid an arbitration agreement or award to divest them of jurisdiction unless statutory remedies and minimal procedures are assured.<sup>69</sup>

On the other side of the debate are the EEOC and another faction sympathetic to employees. They are concerned that compulsory arbitration deprives the EEOC of its opportunity to punish the bad guys and strike a blow for change.<sup>70</sup> The argument is that the whole point of the statutes, and of the fact that they require resort to an enforcement

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<sup>61</sup> Sherwin, Tracy, & Eigen (n 26 above) 99-100; *ADR Principles* (n 60 above) 77-78.

<sup>62</sup> 9 USC s 10.

<sup>63</sup> Fitzgibbon (n 55 above); Mankes (n 26 above); Green (n 58 above).

<sup>64</sup> See Sherwin, Tracy, & Eigen (n 26 above).

<sup>65</sup> Fitzgibbon (n 55 above).

<sup>66</sup> Green (n 58 above); Waters (n 55 above).

<sup>67</sup> See, eg, *Due Process Protocol* (n 55 above); Green (n 58 above); Fitzgibbon (n 55 above).

<sup>68</sup> See *Due Process Protocol* (n 55 above); National Academy of Arbitrators 'Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems' ([www.naarb.org/guidelines.html](http://www.naarb.org/guidelines.html) 1997); Fitzgibbon (n 55 above); Bailey (n 55 above); Green (n 58 above).

<sup>69</sup> *Gilmer* (n 59 above) 30-32.

<sup>70</sup> See Stone (n 31 above) 1036-43; Waters (n 55 above) 1171-4. It is interesting that the EEOC seems satisfied as long as it gets to decide which cases must be large and public, and which cases get cleared off the decks through EEOC-sponsored mediation. Equal Employment Opportunities Commission *1997 Policy Statement on Mandatory Arbitration* ([www.eeoc.gov/docs/mandarb.text](http://www.eeoc.gov/docs/mandarb.text)).

agency like the EEOC, federal lawsuits, juries, punitive damages, and attorney's fees for successful plaintiffs, is to allow first the EEOC, and then certain particularly aggrieved citizens, to make a statement, and discourage discriminatory conduct nationwide.<sup>71</sup> According to this theory, arbitration cannot possibly accomplish what Congress intended, for the very reasons that it *does* save employers money, and it *does* provide access even to small claims.

## 7. POST-DISPUTE ADR IN THE US

While some participants like the idea of substituting arbitration for litigation before a dispute arises, very seldom, if at all, do parties opt to arbitrate an employment discrimination claim after the initiation of a lawsuit or EEOC charge.<sup>72</sup> Indeed, arbitration seems to have few supporters once the system has been set in motion. For example, the EEOC has recently instituted a mediation program, but not an arbitration program. The Alternative Dispute Resolution Act of 1998 (ADRA) provides for compulsory mediation, but not arbitration.<sup>73</sup> Why is arbitration a good idea before a dispute arises, but not after?

The answer, of course, depends upon which participant you ask. Courts appear to be warming to arbitration, and will enforce PMAAs which meet certain criteria. This, like the rising stock of summary judgment, may relate to increased pressure to clear overcrowded court caseloads. Congress, as evidenced by the ADRA, appears unwilling to thrust arbitration on parties not bound by a PMAA. ADRA now requires all federal courts to institute some kind of court-annexed ADR, including non-binding arbitration, mediation, early neutral evaluation, and summary jury trials (many have been doing so since 1990). However, binding arbitration does not feature in ADRA or any federal court ADR program, meaning dissatisfied parties can bring an arbitrated case back to court for a new trial.<sup>74</sup> Leaving arbitration non-binding reflects Congress's hesitance to undermine the remedial objectives of the statutes, and preference for leaving people to choose whether to arbitrate.

Employers generally choose not to. They have a stake in the full US process: delay, the EEOC-court-appeal hierarchy, and the expense of full-blown litigation all work to pressure the plaintiff into a smaller settlement.<sup>75</sup> Summary judgment is the employer's friend, allowing him to impose an expensive discovery and summary judgment defence workload on the plaintiff's attorneys, and out-lawyer the other side before her story has a chance emotionally to affect a fact-finder. Arbitrators are known to give 'compromise' awards, sympathizing with the plaintiff despite compelling legal arguments for the defendant.<sup>76</sup> Moreover, statistics demonstrate that arbitrators are more plaintiff-friendly than judges.<sup>77</sup> In short, if the employer believes the plaintiff's case is weak (which is most of the time), it will view arbitration as taking its weapons away.

Given employers' general aversion, employees naturally want to sign up for arbitration, right? Evidently not. Arbitrators, while finding for plaintiffs more often than

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<sup>71</sup> Stone (n 31 above) 1048-50.

<sup>72</sup> Green (n 58 above); *Due Process Protocol* (n 55 above).

<sup>73</sup> 28 USC ss 652(a), 654(a).

<sup>74</sup> 28 USC s 657(c).

<sup>75</sup> Green (n 58 above); Fitzgibbon (n 55 above).

<sup>76</sup> Bompey & Pappas (n 31 above) 211.

<sup>77</sup> Stone (n 31 above).

judges, seldom award punitive damages and generally award smaller amounts, and find for defendants more often, than juries.<sup>78</sup> The average plaintiff must find an attorney to take a case on a contingent fee or 'no-win no-pay' basis. Modest awards do not make for healthy contingent fees.<sup>79</sup> Discrimination is hard to prove: attorneys must eschew cases where *if* they win, they will only receive the market value for their time. Therefore, even the reduced costs of arbitration must be balanced against the need to get a large award to cover fees. A plaintiff proceeding without an attorney would almost certainly benefit from an arbitral alternative, but if the plaintiff proposes arbitration, what employer would agree, and pass up a chance to out-lawyer an unrepresented claimant?

When parties have a case in front of them, and compare the tools they have to get their way in federal court to the tools afforded by arbitration, at least one of them rejects arbitration.<sup>80</sup> PMAAs amount to a choice for arbitration, but they are chosen from a state of ignorance about the strength or weakness of the potential case. Once people actually know what they have, the siren songs of punitive damages (in a strong case) or of opportunities for delay and pressure (in a weak case) seem to blot the benefits of arbitration from the mind.

Mediation, on the other hand, is clearly the ADR darling of US employment discrimination law. The EEOC, representing the interests of aggrieved employees, has chosen mediation over arbitration.<sup>81</sup> Federal court-annexed mediation schemes almost always ear-mark employment discrimination cases as 'appropriate for mediation.'<sup>82</sup> The myriad benefits of mediation spill beyond the reach of this piece, but some of those benefits explain why it plays such a large role in US employment discrimination disputes.

The following excerpt, from a paper presented at an American Bar Association Continuing Legal Education Seminar on mediation in employment law, illustrates the point:

Given the cost of litigating even a 'winning' case ... consideration should be given in every [discrimination] claim whether a pre-litigation mediation may be the best way to resolve the claim. ... If it is a case with a real liability exposure, pre-litigation mediation makes sense if for no other reason than to avoid the costs of defense and, in discrimination cases, plaintiff's counsel. Even a weak plaintiff's case may be open to settlement before suit at a fraction of the cost of litigating to win.

The employer should have a sense of the plaintiff's intestinal fortitude: will she (or he) really want to go through depositions, etc. or will the claimant take a low-ball offer to avoid discovery? ...

Will your client, who insists on fighting on principle now, feel the same way \$100,000 in defense costs into the case? ...

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<sup>78</sup> Stone (n 31 above); Mankes (n 26 above); Bompey & Pappas (n 31 above) 208; Sherwin, Tracy, & Eigen (n 26 above) 140-141.

<sup>79</sup> Sherwin, Tracy, & Eigen (n 26 above) 99-100.

<sup>80</sup> Sherwin, Tracy, & Eigen (n 26 above) 129-130.

<sup>81</sup> *EEOC Mediation* (n 17 above).

<sup>82</sup> MS Rudy & LM Guerin 'An Employment Lawyer's Guide to Mediation' ABA CLE Seminar Documents, San Francisco, October 9, 1998, 640-644 ('Rudy & Guerin').

Motions for Summary Judgment are expensive. ... However, they are also expensive high-stakes gambles for plaintiffs. If discovery has gone well and a plausible summary judgment threat can be made, plaintiff may be motivated to settle at a figure appealing to the defense to avoid the risk of summary judgment.<sup>83</sup>

Although the foregoing expresses the strategic considerations of an employer's counsel, it demonstrates the kind of attitude that attorneys on both sides take to mediation. They see it as a flexible, tactical tool, ready for use when the tide of battle dictates. Some counsel use it simply to educate clients about weaknesses in the case, or to learn about the opponent's evidence and approach.<sup>84</sup>

Mediation in the US employment discrimination field generally involves what the UK would call evaluative, facilitative mediation. Unlike ACAS conciliation, which remains neutral and simply helps the parties understand each other's positions, a US mediator provides a sense of a forum for expressing grievances, as well as evaluating the strengths and weaknesses of the parties' cases. Unlike EEOC conciliation, which assumes that 'reasonable cause' has been found and advocates a specific settlement, a mediator attempts to effectuate the wishes of the parties, while telling them what is realistic, and perhaps making recommendations for what concessions would yield counter-concessions.<sup>85</sup> The mediation takes place in person (both ACAS and EEOC conciliation often take place over the phone),<sup>86</sup> and each party makes a statement, followed by the parties retiring to separate rooms, and the mediator essentially shuttling between the two.

The most attractive attribute of mediation is its non-binding nature.<sup>87</sup> The parties can get the things the scholars tell us they would get from arbitration: quick and easy access to a forum, a resolution without excessive delay and expense, and informal procedures. If they do not like where the mediation takes them, they can withdraw and proceed with formal litigation. Of course, the obvious downsides to mediation include resolutions which compromise what some consider categorical principles and, in many cases, no resolution at all. After months or years of draining process, however, claimants who began intending to vindicate their rights appear willing to accept five or six figures in exchange for letting their employer avoid any finding of wrongdoing.

Thus US litigants demonstrate their frustration with how the formal system works by reaching for mediation and similar techniques (judge-assisted negotiations, early neutral evaluation), but they will not reach all the way and opt for binding arbitration (which will surely resolve the case) except *before* they have a real dispute before them. The courts and Congress appear happy to encourage these options rather than expensively to reform either the federal court system or employment discrimination law. In the end, a system which does not give participants what they want remains intact, but festooned with 'alternatives,' which are simply ways out of the nightmare that is US civil litigation.

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<sup>83</sup> J Parton (III) & J Lau 'Making a Settlement Stick' ABA CLE Seminar Documents, San Francisco, October 9, 1998, 585, 587-9 ('Parton & Lau').

<sup>84</sup> Rudy & Guerin (n 82 above); Parton & Lau (n 83 above).

<sup>85</sup> *ADR Principles* (n 60 above) 277-293.

<sup>86</sup> *ADR Principles* (n 60 above) 77-78, 273-280.

<sup>87</sup> See Rudy & Guerin (n 82 above).

## 8. UK USE OF ADR TO RESOLVE EMPLOYMENT DISCRIMINATION CASES

The employment discrimination system in the UK has seen almost no use of pre-dispute arbitration agreements, and much less resort to mediation.<sup>88</sup> Arbitration has seldom been used because the race, sex, and now disability statutes have forbidden any arbitration agreement from divesting the employment tribunals of jurisdiction.<sup>89</sup> In fact, no agreement may effect a prior waiver of employment discrimination protections, and once a claimant invokes the jurisdiction of the tribunals, no agreement, except one brokered and approved by ACAS, or made privately with assistance from a ‘relevant independent advisor,’ can oust the tribunals of jurisdiction.<sup>90</sup> Prior to the recent arbitral alternative for unfair dismissal cases, ACAS had no authority to settle individual cases through arbitration. Thus the only experience most employers and employees have of arbitration comes from an arbitration service that ACAS has offered on a voluntary, non-binding basis, and used almost exclusively for collective disputes, or for individual claims in a union setting.<sup>91</sup>

Mediation is a word seldom seen in UK employment discrimination literature, probably owing to the fact that ACAS conciliation, which is much like simple facilitative mediation, has completely occupied the field. US-style mediation has been urged,<sup>92</sup> but not stridently, as this would involve paying extra to a neutral to do what ACAS does on public funds, except with a greater degree of case evaluation by the neutral. When ACAS receives a case, it opens negotiations between the parties and works for a settlement while adhering to a strict principle of neutrality.<sup>93</sup> ACAS has a high success rate, with 75% of conciliations resulting in either settlement or withdrawal of complaints.<sup>94</sup> It has been suggested that this success rate owes something to the fact that access to the employment tribunals is geographically difficult, and claimants accept settlements or withdraw complaints to avoid travel. It should be noted that this factor applies equally to US federal courts and EEOC offices, which are often hundreds of miles apart. Whatever the reasons, UK litigants do not clamour for mediation-style alternatives to ACAS conciliation.

In addition to changes aimed at streamlining the actual process of the Tribunals, the 1998 Act introduced a new arbitration alternative for non-collective disputes. In part because the new option arose in response to complaints of excessive formality and legalism in the tribunals, the arbitration alternative involves arbitration of the kind traditionally employed by ACAS in resolving industrial disputes, relying only on the rule of industrial fairness in a discharge, *not* on substantive legal principles.<sup>95</sup> This kind of arbitration probably will not suit discrimination claims, with increasingly legalistic,

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<sup>88</sup> *ADR Principles* (n 60 above) 273-280.

<sup>89</sup> Employment Rights Act 1996 s 203; *Employment Tribunals* (n 35 above) p 5.2.7.

<sup>90</sup> *Employment Tribunals* (n 35 above) p 5.2.11.

<sup>91</sup> *ACAS* (n 47 above) app 1-3. ACAS also offers ‘advisory mediation’ in connection with collective disputes.

<sup>92</sup> *Equality* (n 8 above) 4.59-4.65.

<sup>93</sup> See *Dismissed* (n 36 above); *Equality* (n 8 above).

<sup>94</sup> *ACAS* (n 47 above) app 1, table 8.

<sup>95</sup> Lords Hansard Text for 25 July 1997 and 21 October 1997 ([www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansard.html](http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansard.html)); Advisory Conciliation and Arbitration Service ‘ACAS Arbitration Scheme for the Resolution of Unfair Dismissal Disputes’ (ACAS 1998); MacMillan (n 9 above) 38-9.

burden-shifting frameworks for remediation.<sup>96</sup> The Act provided for prompt implementation of an ACAS-contrived scheme for arbitration of unfair dismissal complaints, and *allowed* for a subsequent order, by a secretary of state, that ACAS prepare a program of arbitration for claims like employment discrimination.

This has not occurred as yet, and according to ACAS will not occur in the near future.<sup>97</sup> Arbitration is not an option which the UK is necessarily free to employ, because soon all UK employment discrimination law will be backed-up by EC law, which can limit the UK's freedom to improvise remedies. For example, in 1988 a UK tribunal held that EC law prohibited the imposition of an upper limit on sex discrimination damages (no longer in effect in the UK), in that it failed to deliver the deterrent effect contemplated by EC discrimination protections.<sup>98</sup> EC directives already dictate burdens of proof, and could go beyond that to dictate procedure. At present the concern is that the an informal arbitral alternative could be subject to challenge before the European Court of Justice as inconsistent with enforcement of the substantive rights guaranteed by the Race Directive and Employment Directive. Any alternative will probably require something like an American-style arbitration, taking six months and costing as much as, or more than, a tribunal proceeding.

Participants in the UK system appear to want change, pointing specifically to excessive legal formality and, surprisingly from a US perspective, delay and expense. However, there is little evidence that delay remains a persistent problem except in EqPA claims, and no time would be saved by an arbitration scheme that went the way of the US Due Process Protocol. Arbitration could only save money if it reduced legalism and formality to the point that lawyers, discovery, and other expensive parts of the process disappeared. This seems unlikely to suit any party to a discrimination claim, and solicitors who practise in the field say they would not advise it.<sup>99</sup>

A recent poll of employers found that only half would likely use the new ACAS arbitration scheme, because they hoped it would take less time and be cheaper.<sup>100</sup> But the entire article in which the survey appeared, an IRS Employment Trends special feature on new ADR developments, made no mention of arbitration for discrimination claims. The Confederation of British Industry makes it very clear, in a statement from its Human Resources Directorate to its members, that it favours the new scheme 'for the cases most appropriate for this approach – relatively straightforward unfair dismissal cases.'<sup>101</sup> One study suggests that employers are happy with the present system for employment discrimination, and fear they would 'lose control' (read: 'lose substantive legal standards, discovery, and other procedural safeguards') in arbitration.<sup>102</sup> The same study concluded that arbitration would not diminish EqPA delays, and dismissed the need for arbitration

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<sup>96</sup> See *Equality* (n 8 above); MacMillan (n 9 above) 37-41.

<sup>97</sup> See, eg, Race Directive (n 11 above); Employment Directive (n 12 above); *Employment Tribunals* (n 35 above) p 5.3.21. A representative of ACAS told me that ACAS intended to stay clear of preparing an arbitration scheme affecting EC rights until it became clearer what was the stance of the European Court of Justice on arbitration.

<sup>98</sup> *Marshall v Southampton and Southwest Hampshire AHA (No 2)* [1988] IRLR 325 (Southampton Industrial Tribunal) (held that the statutory limit under s65 of the Sex Discrimination Act was contrary to art 6 of EC Directive 76/207 as interpreted by the European Court in *Von Colson v Land Nordrhein-Westfalen* (Case 14/83)).

<sup>99</sup> *Employment Tribunals* (n 35 above) p 5.4.1.

<sup>100</sup> Industrial Relations Services 'Conciliation and Arbitration' 719 IRS Employment Rev 4 (2001).

<sup>101</sup> CBI Human Resources Directorate 'Managing a Compensation Culture: Improving Case Management in the Employment Tribunal System' (CBI 2000) p 18.

<sup>102</sup> *Equality* (n 8 above) 119.



of other employment discrimination cases because, '[u]nlike the USA, where the cost and delays of civil litigation have stimulated the use of arbitration in discrimination cases, there is no reason to suppose that arbitration in the UK will be speedier or more cost-effective for the parties than the tribunals, particularly where there are complex disputes of fact or law.'<sup>103</sup>

As a general matter, participants in the system do not call for arbitration of employment discrimination cases; even the reception of the unfair dismissal scheme is lukewarm. Mediation is unlikely to do better than ACAS's good record of facilitating early settlement. The combination of quick referral to ACAS and the real likelihood of a tribunal ruling within six months means that few alternatives appear compelling.

## 9. CONCLUSION

Although dissatisfaction with the existing formal procedure drives calls for ADR in both the US and the UK, complaints are more strident in the US, and areas of concern in each system differ. The popularity of ADR in the US stems from frustration with the official system, making alternatives overwhelmingly appealing. The UK civil court system as a whole is not immune to US-sized delays and costs, but these problems are not evident in the system for protecting against employment discrimination. The difference might result from the fact that the US consciously turned away from providing an easy forum for resolution, and chose to use the dispute resolution process as its mechanism for fighting employment discrimination.

The UK decided, in enacting the SDA and then the RRA, to fight discrimination by (1) setting up agencies whose remit was to promote equal employment opportunities and (2) creating a wholly separate means for providing remedies to wronged individuals.<sup>104</sup> It is generally accepted that the remedies afforded by the tribunal system aim at compensation, not deterrence.<sup>105</sup> Although another paper might address whether the EOC and the CRE effectively promote equal employment opportunity in the UK, it is clear that the tribunals and ACAS have generally provided accessible, cheap resolutions.

The US, on the other hand, opted to combine the EEOC's discrimination-fighting task with the resolution of individual disputes.<sup>106</sup> It was assumed at the time that this would be consistent with individual access to justice, but access was not a separate priority. When this assumption proved naïve, in that most employees went without a real remedy while the EEOC and a few well-represented private attorneys-general struck blows for equality, the Civil Rights Act of 1991 appears to have confirmed the emphasis on process over access. The minority in the US Congress at the time of the 1991 Act objected that adding punitive damages and jury trials marked a change from 'promoting the prompt resolution of disputes ... to one of prolonged disputes and endless litigation.'<sup>107</sup> Over the minority's objection that the changes would bring about 'a lawyer's dream come true,' Congress put its imprimatur on a system where large-scale litigation is the mechanism for fighting employment discrimination.

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<sup>103</sup> *Equality* (n 8 above) pp 4.32, 4.65.

<sup>104</sup> See, eg, White Paper *Racial Discrimination* (HMSO London 1975) pp 40-41.

<sup>105</sup> See, eg, PR Ghandhi & PG Schofield 'Damages for Employment Discrimination' 140 (No 6439) *New Law Journal* 52 (1990).

<sup>106</sup> 2 [1964] *US Cong & Adm News* 2411, 2455, 2515-6.

<sup>107</sup> 2 [1991] *US Cong & Adm News* 655-6.

The tension between the goals of (1) access to remedies and (2) punishing discrimination through the legal process, is the most interesting product of this comparison. Neither the US nor the UK would likely benefit from borrowing each other's employment discrimination dispute resolution methods: perhaps not ever, but certainly not without addressing fundamental differences in objectives. Instead, the question arises whether one or the other approach does a better job eliminating discrimination, and whether that goal would be better pursued through something altogether separate from the system that purports to provide access to justice.