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A COMPARATIVE ASSESSMENT OF LABOR DISPUTE RESOLUTION IN THE UNITED STATES & THE UNITED KINGDOM

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INTRODUCTION[1]

Think Billy Elliott.[2] More specifically, think of the movie's vignettes of the massed riot police facing off the striking, enraged coal miners in the north of England.[3] After the English coalminers' strike, circa 1984, the world changed. Prime Minister Margaret Thatcher crushed the miners and Scargill, as fully—indeed, perhaps more so—as her fellow conservative President Ronald Reagan crushed the striking air traffic

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[1] This essay was written for presentation at the Transatlantic Perspectives on ADR Conference, London, England, July 26–28, 2006, co-sponsored by the St. John's University School of Law and the Chartered Institute of Arbitrators. For posting on the Conference website, see Chartered Institute of Arbitrators & St. John's University, Transatlantic Perspectives on ADR, http://www.LondonADR2006.com (last visited Feb. 21, 2007), and, ultimately, for publication in Issues 81.1 & 81.2 of the *St. John's Law Review*. Professor David L. Gregory was the co-chair of the Conference.

[2] *See* BILLY ELLIOT (Universal Studios 2000) (telling the story of a young boy from a working-class coal mining family who becomes a ballet dancer); BILLY ELLIOT: THE MUSICAL (2006) (adapting the movie to a musical that is now playing in the West End, London).

[3] On March 5, 1984, the Chairman of the National Coal Board, Ian MacGregor, announced the closure of the Cortonwood coal pit in Yorkshire, U.K. The next day, the Coal Board announced that Cortonwood was only the first of 20 closures of uneconomic collieries in the U.K.; 20,000 miners would lose their jobs. *See* Christine Jeavans, *The Miners' Darkest Year*, BBC NEWS ONLINE, Mar. 4, 2004, http://news.bbc.co.uk/2/hi/uk_news/3494024.stm. Almost instantly, miners began to strike at various pits throughout the U.K. On March 12, Arthur Scargill, President of the National Union of Mineworkers ("NUM"), called for a national strike and more than half of the U.K.'s 187,000 coal miners walked out. *Id.* So began one of the most divisive labor disputes in U.K. history.

controllers in the United States at the beginning of his first term in 1981. The Thatcher government followed her triumph over the coalminers with a series of laws designed to curb dramatically any future possibility of a strike as contentious, lengthy, and socially divisive as the coalminers' strike.[4]

For the first two weeks of August, 1984, one of the authors[5] attended a conference on comparative industrial relations at Merton College, Oxford. The Faculty included, inter alia, Stanford Law Professor William Gould,[6] who went on to Chair the Clinton NLRB, and the great Harvard labor economist, and Secretary of Labor during the Ford administration, John Dunlop. Since that conference over twenty years ago, and with increased Globalization, it has become increasingly important to examine industrial relations practices and Alternate Dispute Resolution on both sides of the Atlantic with the hopes that each side can learn something from the other.

In this essay, we reflect on the past quarter century of ADR in labor management relations in the United States and in the United Kingdom, critically assessing the trajectory and the evolution of ADR in labor management matters, with particular reference to the ADR of discharge and discipline grievances of unionized workers.[7] With this platform context for the past two

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[4] *See generally* Bradley Nash, Jr., Labor Law and the State: The Crises of Unions in the 1980s (Apr. 19, 2000) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute), *available at* http://scholar.lib.vt.edu/theses/available/etd-04272000-10360018/ (discussing at length the Employment Act of 1980, the Employment Act of 1982, the Trade Union Act of 1984, the 1988 Employment Act, and the 1990 Employment Act).

[5] Professor David L. Gregory attended the conference at Merton College. Frank Cavanagh was unable to attend as he was then enjoying a summer before grade school.

[6] For an interesting look into the challenges being faced by workers today. *See* WILLIAM B. GOULD IV, LABORED RELATIONS (2000) (outlining a polemical memoir of his years as the NLRB Chairman, and of his war with Republican Congressional leadership); *see also* David L. Gregory, *Labored Relations: Law, Politics, and the NLRB—A Memoir*, 2 EMP. RTS. Q. 74, 74 (2001) (book review) ("*Labored Relations* is not a 'nice' book. It is, however, a terrific book, and well worth the page-turning read. . . . Bill Gould is one of the most interesting and eclectic academics in the United States.").

[7] Recognizing this is a focused essay and not a multivolume Restatement, we sketch a brief overview of some selected aspects of ADR in the U.S. and U.K. labor and employment law regimes. For the most part, the U.S. will be the indirect focus of the essay, with our primary emphasis on the Advisory, Conciliation and Arbitration Service ("Acas") established with the Employment Protection Act of 1975 and the Employment Law of 2002 in the U.K. The U.K. initiatives adapt and build

decades, we ruminate on the similarities and contrasts, such as they may be, in the daily working realities of labor-union-represented workers in the U.S. and in the U.K., paying particular attention to the resolution of grievances in labor management relations. We also offer some preliminary thoughts on the likely future of ADR in labor management relations in the U.S. and the U.K.

The two centerpieces anchoring this essay are the Advisory Conciliation and Arbitration Service, established via the Employment Protection Act of 1975, and the heightened due process and progressive discipline protections and standards in the Employment Act of 2002.

I. PRIVATE ARBITRATION OR THE EMPLOYMENT TRIBUNAL: ICONS AND POLICY CHOICES

Alternate Dispute Resolution has been defined as a "range of procedures that serve[s] as [an] alternative[] to litigation through the intercession and assistance of a neutral and impartial third party."[8] Despite claims that ADR offers a more cost efficient way to resolve disputes, it was historically treated with some suspicion and wariness that remains in some quarters today. Finally, in the past few decades, ADR began to acquire some degree of acceptance in the U.S. and, more recently, in the UK.[9]

A. *Private Arbitration in the United States*

Despite periodic calls for such an instrument, there is no specialized labor and employment court in the United States. Additionally, there is no single body in the U.S. serving as the iconic symbol of ADR in employment. Instead, the U.S. has opted

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on the earlier United States Federal Mediation and Conciliation Service ("FMCS") and private and public labor contract models of multi-step grievance procedures, culminating with binding arbitration, and on principles of due process and progressive discipline. The Employment Tribunal system in the U.K, formerly the Industrial Tribunal, and the more recent development in the U.S. of private arbitration of non-unionized employment disputes are important backdrops to the dynamics of the Acas and the 2002 Employment Act.

[8] Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT'L ARB. 167, 170 (2001).

[9] *Id.* at 173. This momentum has continued with the Blair Labor government replacing almost two decades of the Thatcher/Major conservative government(s) in May 1997. ADR in the United Kingdom is most prominently exemplified by the Employment Tribunals. For a description of the Employment Tribunals, see *infra* notes 15–16 and accompanying text.

for a multiplicity of avenues for hearing a panoply of employment disputes. Federal and state courts and agencies (the Equal Employment Opportunity Commission, for example) hear employment discrimination claims, while private arbitration is the recognized capstone for disputes in private sector unionized environments.[10] Since the National Labor Relations Act of 1935,[11] and the *Steelworkers Trilogy*[12] from the United States Supreme Court in 1960, the ADR regime in private sector labor relations in the U.S. has been decentralized, with the locus of negotiation and resolution dynamics situated with the particular union and employer, capped by binding private arbitration before a private arbitrator.[13]

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[10] Since the Supreme Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (endorsing mandatory arbitration, rather than litigation, of a former employee's age discrimination claims), and *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), many employers have successfully channeled employment discrimination claims into ADR proceedings, rather than be subject to litigation de novo in the federal or state courts.

[11] 29 U.S.C. §§ 151–169 (2000).

[12] United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

[13] *See generally* Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U.L. REV. 687 (1997); Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919 (1998); Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571 (1990); Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty To Bargain*, 64 CHI.-KENT L. REV. 3 (1988); Samuel Estericher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990); David E. Feller, *Labor Arbitration: Past, Present, and Future: Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 BERKELEY J. EMP. & LAB. L. 296 (1998); William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of* AT&T *and* Misco, 64 NOTRE DAME L. REV. 464 (1989); Michael C. Harper, *Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for* Lingle *and* Lueck, 66 CHI.-KENT L. REV. 685 (1990); Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141 (2002); Stephen L. Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 BERKELEY J. EMP. & LAB. L. 521 (2000); Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781 (2000); Ann C. Hodges, *The Steelworkers Trilogy in the Public Sector*, 66 CHI.-KENT L. REV. 631 (1990); Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements That Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 61 (2004); David Lewin, *Grievance Procedures in Nonunion*

When compared to litigation, U.S. labor arbitration in the public sector is considerably more constrained in the range of relief that it traditionally offers. For example, the classic remedy in labor arbitration in wrongful discharge cases is the status quo ante, make-whole remedy, restoring the grievant to employment with full back pay and benefits. There is generally not, however, double damages, compensatory or punitive damages, or attorneys fees. In contrast, in employment arbitration in the nonunion private sector—comprising more than 92% of the private sector workforce in the U.S.—these broader remedies are, at least theoretically, available and within the purview of the arbitrator.[14]

B. *State-Controlled ADR in the U.K.*

Resolution of labor management disputes in the United Kingdom has taken a somewhat different course. Under English Law, employment rights fall into two distinct categories: contractual and statutory. Contractual claims are dealt with in the High Court or County Court. Statutory claims are dealt with in the Employment Tribunal.[15]

Workplaces: An Empirical Analysis of Usage, Dynamics and Outcomes, 66 CHI.-KENT L. REV. 823 (1990); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to* Gilmer, 44 HASTINGS L.J. 1187 (1993); Jerry W. Markham, *Judicial Review of an Arbitrator's Award Under Section 301(a) of the Labor Management Relations Act*, 39 TENN. L. REV. 613 (1972); Janet McEneaney, *Arbitration of Statutory Claims in a Union Setting: History, Controversy and a Simpler Solution*, 15 HOFSTRA LAB. & EMP. L.J. 137 (1997); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137 (1977); Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 BRANDEIS L.J. 495 (2004); Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83 (2001); Clyde W. Summers, *The Trilogy and Its Offspring Revisited: It's a Contract, Stupid*, 71 WASH. U. L. Q. 1021 (1993).

[14] For example, perhaps the most significant development in the area of broader remedies in employment arbitration in the U.S., beyond the make-whole remedy, is in the niche of harassment claims brought against major investment banks, with multimillion dollar settlements far beyond the actual damages of lost compensation per se. Because arbitration proceedings are often confidential and unpublished, awards of these proceedings are not directly cited here.

[15] The Employment Tribunals are "tripartite organizations that deal mainly with matters related to the individual employment relationship and the statutory rights of individual employees. They are not legal institutions per se, but their decisions are enforceable by recourse to the courts." Nash, *supra* note 4, at 149 n.84 (citations omitted).

The Employment Tribunal—formerly known as the Industrial Tribunal—was created in 1964 and is the principal forum for airing employment disputes in the UK. It is a centralized, bureaucratized instrument which gives the government oversight of most of the employment regime, whether or not unionized and whether or not public or private sector. The Tribunal is an omnibus instrument, hearing claims ranging from unfair dismissals and redundancy to workplace bullying and discrimination.[16] The Tribunal's membership is comprised of a chairman who is a qualified lawyer, a representative from a trade union or a consulting organization for employees, and a representative from one of the employer federations.

One reason ADR may become a popular alternative in the U.K. to the Employment Tribunal is the range of greater and more significant remedies ADR offers. Usually, the Employment Tribunal awards consist only of compensation. The Employment Tribunal can only recommend affirmative steps such as the reinstatement of an employee, but cannot compel reinstatement. Thus, the Tribunal has acquired the reputation of awarding some money to virtually all claimants, but lacking the power to reinstate workers who are, in fact, wrongfully discharged. Meanwhile, however, ADR can provide a range of greater remedies, including: compensation; an apology; an agreed reference; improvements in the employee's situation at work; reconsideration of a request for flexible working; reinstatement/re-engagement; changes in policy; adopting an equal opportunities policy or improving the way it is implemented; and arranging training for staff and management on discrimination or other issues.[17]

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[16] *See* EMPLOYMENT TRIBUNALS SERV., ANNUAL REPORTS & ACCOUNTS, 2005–06, at 8 (2006), *available at* http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR05-06.pdf. ("Employment tribunals have powers to determine over *70* different types of complaint, including complaints of unfair dismissal, race, sex and disability discrimination, unauthorised deduction of wages, breach of contract and redundancy pay." (emphasis in original)); INT'L LABOR LAW COMM., AM. BAR ASS'N, INTERNATIONAL LABOR AND EMPLOYMENT LAWS 7-4 to -5 (William L. Keller et al. eds., 2003).

[17] ADRnow, Employment (Jan. 2007), http://www.adrnow.org.uk/go/SubSection_20.html [hereinafter ADRnow, Employment].

II. THE ADVISORY CONCILIATION AND ARBITRATION SERVICE, AND THE EMPLOYMENT PROTECTION ACT OF 1975

A. *Reconciling Differences Between the Parties*

In 2004–2005, 86,181 people made a complaint to an Employment Tribunal.[18] However, the majority of these complaints never reached a Tribunal hearing, as they were settled or withdrawn first.[19] Most claims settled before going to a Tribunal hearing primarily because of the assistance of the Advisory, Conciliation and Arbitration Service ("Acas"). Acas, created by the Employment Protection Act (EPA) of 1975, is an independent body with a statutory duty to help resolve employment disputes involving individuals through ADR methods.[20]

Acas uses conciliation to resolve claims that have been registered with the Employment Tribunal, or, more broadly, where parties have a right to a tribunal. By talking through the issues of the dispute, explaining the law, and exploring ideas about settling, Acas helps parties involved reach solutions.[21] Thus, resolutions are not externally imposed by Acas or by the Employment Tribunal, but, rather, are mutually achieved by the parties. The conciliation process is completely voluntary and confidential, providing a discreet forum where parties can feel comfortable to discuss the strengths and weaknesses of their case. Because the cost of resolving claims through Acas

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[18] EMPLOYMENT TRIBUNALS SERV., ANNUAL REPORTS & ACCOUNTS 2004–05, at 8 (2005), *available at* http://www.employmenttribunals.gov.uk/publications/annual_reports/ETSAR04-05.pdf. This number was a significant decrease compared to the 115,042 claims filed in 2003–04. *Id.* The reduction "is mainly accounted for by a large decrease in multiple cases which fell by 39%." *Id.*

[19] *See* Advisory, Conciliation & Arbitration Serv., Disputes Involving Individuals at Work, http://www.acas.org.uk/index.aspx?articleid=356 (last visited Feb. 21, 2007) [hereinafter Disputes Involving Individuals at Work].

[20] *See* Advisory, Conciliation & Arbitration Serv., Acas History, http://www.acas.org.uk/index.aspx?articleid=413 (last visited Feb. 21, 2007). The organization was actually created in 1974, but did not adopt its full name until 1975; it became a statutory body in 1976 under the terms of the Employment Protection Act of 1975. *Id.* It now has approximately 900 staff based in eleven main regional centers throughout England, Scotland, and Wales, with its head office in London. Advisory, Conciliation & Arb. Serv., Acas History, http://www.acas.org.uk/index.aspx?articleid=413 (last visited Feb. 21, 2007).

[21] *See* ADRnow, Conciliation, http://www.adrnow.org.uk/go/SubSection_2.html (last updated Feb. 2007) (giving a general overview of the conciliation process); Disputes Involving Individuals at Work, *supra* note 19.

conciliation is relatively low, the process has been lauded as an "effective filter" for the Employment Tribunal.[22] A settlement reached through Acas conciliation is binding on both parties. However, the Acas conciliation process will not affect the outcome of a case if the parties decide to stop the conciliation and proceed to the Employment Tribunal.[23]

B. Conciliator Involvement in Disputes, Like It or Not

Acas conciliators will typically get involved in one of two ways when it comes to employment disputes. The first is based on statutory procedure. When a dispute claim is submitted to the Employment Tribunal, it is automatically copied to Acas and an Acas conciliator.[24] Once the claim is forwarded, the conciliator will contact each of the parties.[25] This process puts the dispute on file with the Employment Tribunal, and opens the option of having the case resolved through Acas conciliation. If the case cannot be resolved through conciliation, it is kept on file for the Employment Tribunal. In these situations, the complainant does not risk exceeding the three month statute of limitations for initially filing claims with the Employment Tribunal,[26] which will defer to Acas in the first instance of attempted resolution through conciliation.

Acas conciliators may also become involved in employment disputes at the invitation of the parties. Either party has the ability to contact Acas to request Acas conciliation before filing a complaint with the Employment Tribunal.[27] When one party contacts Acas, settlement is aggressively encouraged from the inception, before the positions of the parties become calcified.[28]

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[22] Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1434–35 (2004).

[23] ADRnow, Acas Conciliation, http://www.adrnow.org.uk/go/SubPage_50.html (last updated Feb. 2007) [hereinafter ADRnow, Acas Conciliation].

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] If parties pursue conciliation without filing a claim with the Employment Tribunal, they run the risk of exceeding the three month time limit for initiating a claim with the Employment Tribunal. *See id.* Thus, while this second approach for involving the Acas may encourage settlement, many parties might choose to file claims anyway, to avoid the risk of exceeding the statute of limitations. *See id.* In addition, the party requesting conciliation may sometimes find it "difficult to

Acas ADR arbitration is also available for disputes dealing with unfair dismissals and flexible working requests. If both parties agree to arbitrate, an experienced independent arbitrator will hear evidence and decide the case. This scheme is an election of remedies alternative to the Employment Tribunal; parties cannot subsequently go to the Tribunal after such arbitration.[29]

C. *Benefits and Costs of Acas Conciliation*

Acas's role and the Blair government's focus on ADR appreciably increased in 1998 with the passage of the Employment Rights Dispute Resolution Act.[30] The Act brought with it a strengthened Acas ADR scheme, an easier route to settlement through compromise agreements, the extension of Acas conciliation to disputes regarding statutory redundancy pay, and an emphasis on using an employer's internal appeal system, with penalties to complainants for not doing so.[31]

Acas ADR arbitration offers informality and speed. In addition, unlike the bureaucratized Employment Tribunal, arbitrations are confidential and private and much less legalistic.[32] In Acas ADR, cross-examination of witnesses generally does not occur, unlike the interrogations before the Employment Tribunal. Arbitrators, meanwhile, base their awards on the same criteria used by the Employment Tribunal and the arbitrator's decision is final.[33]

Of course, Acas conciliation process has some negatives. For instance, up until 2002, there was no sanction imposed for not conciliating. Thus, it can be difficult to persuade both parties to agree to conciliation.[34] In addition, complainants rarely have the

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persuade the other side to conciliate without the threat of a tribunal hearing looming." *Id.*

29 ADRnow, Employment, *supra* note 17.

30 Employment Rights (Dispute Resolution) Act, 1998, 8, § 7.

31 *Id.* § 13; *see* ADRnow, Employment, *supra* note 17.

32 Acas also provides mediation services in more limited circumstances. If used properly, mediation may defuse a situation before it escalates to a full-blown adversarial standoff; thus, mediation may be especially useful in continuing employment relationships, and in resolving communication problems or personality clashes. ADRnow, Employment, *supra* note 17 (noting that "[m]ediation is sometimes used for non-statutory disputes, such as bullying and disputes between colleagues").

33 *See* Disputes Involving Individuals at Work, *supra* note 19.

34 *See* ADRnow, Acas Conciliation, *supra* note 23.

opportunity to meet with their employer face-to-face; because most Acas conciliations take place by telephone,[35] many employees who seek to directly confront their employers might find Acas conciliations somewhat less gratifying.

III. CONTINUING THE PUSH TOWARD ADR IN THE U.K.: THE EMPLOYMENT ACT OF 2002

The Blair government further encouraged ADR in employment, rather than recourse to the Employment Tribunal, via the Employment Act 2002. The Act emphasized the utility of the employer and employee first discussing and endeavoring to voluntarily resolve problems before resorting to the Employment Tribunal. It also authorized the Tribunal to sanction recalcitrant parties.[36] Finally, and perhaps most importantly, the Act improved the efficiency of the Tribunal procedures by establishing statutory procedures for dealing with dismissal, disciplinary action, and grievances in the workplace.

Under the 2002 Act, employees and employers must follow a three step process in dealing with most dismissals, disciplinary actions, or grievances. The first step is to "put it in writing." The employer must put in writing the reasons why the employer is considering disciplinary action or dismissal for the employee. The written notice should contain information on why the alleged behavior is unacceptable, and inform the employee that there will be a meeting with the employee to discuss the alleged conduct. Similarly, the employee must put the reasons for a grievance in writing to the employer. The second step is to "meet and discuss." A face-to-face meeting between the employer and the employee is required. However, prior to the meeting both parties must be given time to consider the facts of the other's complaint. After this meeting, an employer must inform the employee of the employer's decision and right to appeal. The third step is "appeal." An appeal meeting is required between both parties. If an employee wishes to appeal they must inform their employer. In addition to the three steps, the parties must

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[35] *Id.*

[36] *Id.*; DEP'T OF TRADE & INDUS., NEW LAWS FOR RESOLVING DISPUTES: IT'S AS SIMPLE AS 1 2 3 (2004), *available at* http://www.dti.gov.uk/files/file11420.pdf?pubpdfdload=04%2F1651.

act reasonably throughout the process and the procedures must be taken without unreasonable delay.[37]

IV. NEW PROCEDURES IN PRACTICE

The new procedures under the Employment Act of 2002 institutionalize the concept of due process and of progressive discipline to a great degree. When an employer decides that disciplinary action is justified, the first formal action of the employer is normally the issuance of a written warning discussing the misconduct; if there has been no recurrent misconduct, this first written warning is usually disregarded for disciplinary purposes and effectively expunged de facto after six months. If the employee fails to improve the problematic behavior or performance, the employer takes the second formal action: issuance of a final written warning. If the conduct improves and there is no recidivism during a one year period, the final written warning is mooted. If incorrigibility still persists after issuance of the final written warning, the employer may take the third step: discharge, demotion, or loss of seniority.[38]

Employers failing to follow statutorily mandated procedures in a dismissal or disciplinary action may face penalties; typically, the most immediate sanction is that the law automatically presumes that the dismissal is unfair. However, Acas may also impose other penalties such as 1) awarding a mandatory minimum of four weeks pay to the employee, 2) increasing the base monetary award to the employee by a factor of 10% to 50%, or 3) reducing any eventual monetary award to the employer by a factor of 10% to 50%.[39]

CONCLUSION

The U.K.'s Employment Act of 2002 formalizes what is, for all practical purposes, an adaptation of the multi-step grievance procedure in the labor contract ADR process in the United States.[40] However, in the U.K., the micro-process at the first

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[37] *Id.*

[38] ACAS, CODE OF PRACTICE 1: DISCIPLINARY AND GRIEVANCE PROCEDURES 10 (2003), *available at* http://www.acas.org.uk/media/pdf/9/5/CP01_1.pdf.

[39] DEP'T OF TRADE & INDUS., *supra* note 36.

[40] Acas is a more expansive version of the United States Federal Mediation and Conciliation Service ("FMCS"). The FMCS administers a panel of private arbitrators qualified and available to arbitrate private and public sector labor management

level begins with the Employer initiating the written communication about, and to, the employee. This initial step is just one example of how the U.K. provides for a much greater degree of communication and dialogue between the parties; this increased communication should, over time, yield considerable voluntary resolution rates of employment disputes.[41]

Thus, the U.K. has adapted and broadened some of the best features of ADR in private sector labor management relations in the U.S. The Acas and the Employment Act of 2002 initiatives in the U.K. are admirable constructs of due process and progressive discipline, emphasizing transparency, dialogue, and, throughout, the merits of voluntary ADR. Over time, the case load incidence of the Employment Tribunal in the U.K. should appreciably decline.[42] Of course, just as in the U.S., there is the risk of creeping legalism infecting the ADR regime in the U.K., hardening the process and vitiating substantially its nimble, supple qualities of efficiency and timeliness.

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disputes throughout the United States. The FMCS also provides qualified FMCS mediators to assist parties in collective bargaining negotiations to successfully achieve agreements. *See generally* FED. MEDIATION & CONCILIATION SERV., FIVE-YEAR STRATEGIC PLAN, 2004–2009 (2005), *available at* http://www.fmcs.gov/assets/files/Public%20Affairs/Revised_Strategic_Plan_September_2005.doc.

[41] ADRnow, Mediation, http://www.adrnow.org.uk/go/SubSection_14.html (last updated Feb. 2007) ("Mediation involves an independent third party helping disputing parties to resolve their dispute. The disputants, not the mediator, decide the terms of the agreement.").

[42] *See* EMPLOYMENT TRIBUNALS SERV., *supra* note 16, at 8 ("Single cases fell from just over 55,000 to under 52,000; this is broadly in line with the underlying downward trend which we have seen in the number of applications and claims over the last five years . . . ."); *see also id.* at 29 (indicating that Acas conciliated settlements in 26% of all Employment Tribunal cases disposed of in 2005–06).