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Workplace Mediation: Success in the Second-Oldest Profession

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Abstract: This article focuses on workplace mediation and, in particular, how mediators conceptualise success and whether the disputing parties share their mediator's view as to whether or not a dispute has been successfully resolved. Based on a case study of mediations by the Advisory, Conciliation and Arbitration Service (Acas), the article finds that success for many mediators is obtaining an agreement, written and/or verbal, that mediators mainly do not seek to find out later what actually transpired, and that disputing parties' views are less positive than those of their mediator. The article concludes that, in place of absolute measures of success, none of which are problem free, a more nuanced criterion should be adopted: mediators should judge success relative to what they are trying to do, whether to contain/manage the dispute, or to settle the overt conflict, or to resolve the root causes. Moreover, their judgements should be made in the context of the tractability of the dispute, the parties' commitment to mediation, the commissioner's objectives, and evaluations by the parties and the commissioner, both immediately after the mediation, and after an elapse of time.

Keywords: mediation, workplace disputes, conflict, Advisory, Conciliation and Arbitration Service, Acas, agreements, ADR, success.

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WORKPLACE MEDIATION:

SUCCESS IN THE SECOND-OLDEST PROFESSION

Introduction

Mediation is not new. Kolb (1983:1) claims:

> Mediation may not be the oldest profession, but it surely must be close. As long as people have had disputes with each other, mediators have emerged to counsel the use of reason over arms.

Furthermore, Gould et al (2010:7) believe, 'The origins of mediation and conciliation can be traced to China some 3000 years ago.'

Whenever and wherever it originated, however, in recent years, there has been high-level encouragement to use mediation to resolve workplace disputes, for example, in the Gibbons review of employment dispute resolution in Britain (Gibbons 2007), and in the consultation document on the 2011/2012 review of employment tribunal rules of procedure (BIS 2012:12), and there is evidence that mediation is being increasingly used. For instance, Acas reported a significant growth in demand for its mediation services in 2008/2009 (Acas 2009:12); its records show that it has handled over 200 cases of mediation a year for the past seven or so years; and the current Acas *Discipline and grievances at work* guide has a whole section on using mediation (Acas 2015:7). Furthermore, in their analysis based on WERS 2011, Wood et al (2014:26) state:

> Mediation by an impartial third party was used by just 7 per cent of workplaces responding to WERS 2011. But closer inspection suggests that it has become a significant part of workplace dispute resolution regimes, being used in almost one in five workplaces which experienced a formal individual grievance.

This growth in the use of mediation assumes that it 'works', that it is successful in resolving disputes; but unless success is defined, one cannot gauge whether a mediation is successful or not. Both practitioners and academics, however, often do not explicitly define what they mean by success or, if they do, they differ in their definition. Accordingly, this article seeks to fill this research gap, first examining how mediators themselves conceptualise success, secondly exploring whether disputing parties usually share their mediator's view that a dispute has been fully resolved, and finally putting forward a definition of success.

To do so, the article focuses on the mediators employed by the Advisory, Conciliation and Arbitration Service (Acas) and the mediations conducted by them. It finds that, in the main, those mediators interviewed defined success as 'getting an agreement', an agreement which might be written, verbal, or a mixture of both. This article indicates the shortcomings of this reliance on agreements and the shortcomings of judging success in the immediate aftermath of mediation. It also finds that disputing parties' views of the success of mediation are less positive than those of mediators.

The plan of this article is as follows. After defining mediation and reviewing the relevant literature, it outlines the methodology employed. It next examines the findings: first, the emphasis by mediators on agreements, second, the objective and subjective measures used by them to judge whether a mediation is likely to be successful, third, the point in time that mediators adopt to judge success and, fourth, the commissioners' and disputing parties' views. It then draws conclusions, arguing that, in place of absolute measures of success, mediators should judge success relative to what they were trying to do: to contain/manage the dispute, or to settle the overt conflict, or to resolve the root causes. Moreover, success should be gauged not only immediately after a mediation, but also after an elapse of time.

Defining mediation

There is 'a range of voluntary processes involving a neutral third party that brings two sides together to resolve disputes without having to resort to litigation' (Acas 2005:2), processes that are known collectively as alternative dispute resolution (ADR). This article concentrates on just one aspect of ADR, mediation, that is 'the intervention [in a dispute] by an impartial third party. Mediators do not offer advice or solutions; their skill is in facilitating parties to come to their own solutions' (Reynolds 2000:166).

Surveying the ADR spectrum, Liebmann (2000:10) considers that 'mediation is the least interventionist of the dispute resolution methods which involve a third party'; and that 'the intervention by the third party is limited, as the decision making remains with the parties themselves'.

This article, however, does not focus on mediation generally, but on workplace mediation, although we sometimes draw on the literature from other mediation areas. We further define workplace mediation as mediation to help resolve 'disputes between individual employees [not collectives] and their employers, or between individual colleagues or groups of colleagues' which 'do not involve actual or potential claims to an Employment Tribunal' (Acas 2009:12).

Disputes concerning individuals are often referred to as interpersonal disputes, but it is important to remember that, while some such disputes may well be about the very personal, others may reflect broader, perhaps collective, conflicts. For example, the differences between Tony Blair and Gordon Brown, while they were in Government, are seen by some as having been about mainly personal ambition, but by others as reflecting, in reality, a disagreement as to what New Labour was about (Blair 2010:495). West and Markiewicz (2004:116) make the point that work role or organization factors 'cause the largest proportion of interpersonal conflicts in teams'.

Bollen and Euwema (2013:331) consider that the goal of workplace mediation:

> . . . is to settle interpersonal employee conflicts arising out of a continuing or terminated employment relationship. Workplace mediation may seek to resolve disagreements over work conditions, conflicts between employees, the reintegration of employees after a leave of absence, and disagreements about an employee's termination. [It] . . . can also address complaints about sexual harassment, discrimination, bullying, multiparty conflicts and/or business-to-business conflicts.

Also, Saundry (2012:13) mentions a District Council mediation service that 'is now routinely used for long-term sickness absence cases related to workplace stress where there is no medical resolution'.

Genn compares mediation with adjudication. She notes claims that mediation is 'capable of achieving creative solutions that would not be available in court adjudication', and that it is 'less stressful for parties than court procedures'. However, she contends that '[o]nly a small minority of settlements are in any way creative'; and she points out that the benefits of mediation tend to be 'expressed in opposition to adjudication, despite the fact that most civil cases are settled out of court'(2010:196).

Success

Having defined mediation generally and workplace mediation specifically, we now turn to what the literature tells us about success, but this is a complex task as the concept is not always defined explicitly as noted above. A so-called 'cookbook' for dealing with conflict does, however, contain 'some pointers for a successful mediation: Pre-mediation, Role of mediator, Ground rules, Positions, Meeting, and Agreement' (McConnon and McConnon 2004:150). For these authors, a successful mediation results in an agreement and the mediator should '[c]heck that the agreement is acceptable to both parties. Put this in writing and invite both parties to sign it.'

Similarly, in their 'handbooks', Charlton and Dewdney (2004:126) say that the 'final stage of the mediation calls for the drafting of the agreement reached by the parties', and Beer (1997:53) outlines a process ending in an agreement which 'there are good reasons to insist that disputing parties write down'. In a 'process for primary schools', Tyrell (2002:27) suggests that, as the 'tally of arrangements [between disputing parties] grows it is written down as an *agreement*' (Tyrell's emphasis).

Crawley and Graham (2002) also include a 'do-it-yourself guide to mediating' for managers, the penultimate stage of which is 'Building agreements', which a case study suggests be written down; while, in a 'pocket guide' to conflict resolution, Crawley (2012:66) envisages agreements on various issues emerging from mediation, and those agreements being written up. In their 'toolkit' on resolving conflict, Cornelius and Faire (1989:164) suggest that, at the end of mediation, 'Make some agreements. Write them down.'

Equating success with a written agreement is not uncommon in literature outside the cookbook/handbook genre. For example, Bailey and Efthymiades (2009:6) say that '[s]ince spring 2008, NHS East Lancashire mediators have carried out 23 mediations, of which 22 have reached a written agreement. This equates to a 96% success rate', although they also note that mediation can have a wider effect such as changes of attitudes and approaches of staff in dealing with conflict. Furthermore, an Acas paper reviewing the mediation scheme about which Bailey and Efthymiades (2009) write makes a similar point about this indirect impact of mediation (Saundry et al 2011:7). Nevertheless, 'successful mediation' as such still seems to come back to 'written and . . . sustainable agreements' (Saundry et al 2011:33).

A mediation provider, one of whose directors co-authored the Bailey and Efthymiades (2009) study, writes (Consensio 2011):

> . . . [U]nlike other mediation providers, Consensio does not merely measure success by a signed agreement; nor do we directly link a signed agreement to a high success rate . . . [W]e see a signed agreement as a useful instrument. But we quantify our success as a mediation provider . . . [through] post-mediation [follow-up].

It is not, however, clear to the authors what specific measures of success Consensio uses in its post-mediation follow-up.

Written agreements may be of variable quality: Poitras's and Le Tareau's (2009) research distinguishes between what they label as disappointing, satisfactory and value-added signed agreements. In his study of the Acas small firms' mediation pilot in 2003/2004, Seargeant (2005:34) says that, in two cases, 'parties saw themselves as having reached agreement by giving in'. They each had 'felt exhausted by . . . [the behaviour of the other party] and wanted it ended by reaching agreements they were not committed to'.

Accordingly, it is important to look beyond written agreements, and, indeed, beyond agreements as such. Saposnek (2004:47) says:

> Some researchers assert that if the mediation process focuses on relational issues with therapeutic objectives or with emotionally transformative goals, agreement is not the only important criterion for an outcome of success;

and Della Noce (2001:77) states:

> Agreements are but one possible outcome, which the mediator can and does help the parties reach, if they so choose. At the same time, other outcomes are also possible, and may be valued by the parties as much or more than they value an agreement. The ultimate end-state is the parties' choice.

Della Noce (2001) argues that, for the 'stage' models (where the mediator directs progress through a series of sequential stages) found in, say, the commonly used facilitative style of

mediation, 'the ultimate desired end-state… is agreement… Stage models encompass no other definition of success: a good mediation is one in which a win-win agreement is reached.' Stage models therefore 'distort the goal of agreement from one that the parties may have to one that they *must* have. Agreement becomes an end-point which belongs to the *mediator's* overall plan' (Della Noce's emphases) (Della Noce 2001:74).

So, if not written agreements, or even just agreements, as a measure of success in mediation, what then? Latreille (2011:49) draws from research on judicial mediation to suggest that 'there is no simple, single index of success in mediation and a variety of measures have been proposed'. In looking at the outcomes from judicially mediated employment cases, Boon et al (2011:58) note:

> Measures of mediation success . . . include degree of movement from initial positions, proportion of issues resolved, rates of compliance, 'fairness' or 'quality' of outcome and improvement in the post-mediation relationship or environment.

Yet, although these measures are 'the ultimate justification for mediation and the facilitative model', they are difficult to evaluate.

Bercovitch (2006:291) makes the point that 'success in mediation is a quality that may be applicable to the process or the outcome'. In theory, disputing parties may be happy with, and consider successful, the process of a mediation they have undergone, even if disappointed with the outcome. However, Folger (2001:57) contends that 'process and content are intertwined – the choices made about process have a direct and inevitable influence on the way a conflict unfolds'. Also, disappointment with outcome often leads a party to rubbish the process, and the mediator overseeing it, when it comes to end-of-mediation evaluation.

Implicit in Boulle and Nesic's (2001:6) primary and secondary objectives of mediation is the point that success is not an absolute, that there are degrees of success. This idea is made more

explicit by Mareschal (2003:437), who says 'mediators tend to view "success" along a continuum'. A perhaps more sophisticated approach comes with Weeks (1994:9), who advocates a 'conflict partnership' approach to resolving conflicts in an effective and sustainable way. Conflict partnership is described as a process with eight steps, the last of which is making mutual-benefit agreements 'capable of resolving specific conflicts within improved relationship patterns'.

An even more sophisticated approach to looking at degrees of success comes from Bercovitch (2006:295), who notes 'four terms utilized in describing different conflict management impacts: settlement, management, resolution and transformation. Each of these terms may indicate a different degree of mediation success.' Bercovitch's (2006) terms are not necessarily accepted by others. Also, the authors are not totally sure, from Bercovitch (2005:104), of even his precise distinction between, say, conflict settlement and management.

Another issue is at what point in time, success (or lack of it), should be judged. A well-known instance of a short-lived written agreement for peace is the notorious 'piece of paper' signed at Munich in 1938; and there are plenty of examples at the more prosaic level of workplace mediation. Accordingly, the success (or not) of mediation cannot necessarily be accurately judged immediately after the mediation meeting.

Interestingly, there appears to be little written that is explicit on what should count as 'failure' in mediation. However, Ross (2000:33) notes that '[p]opular judgements about the success or failure of . . . conflict management are often dichotomous, focusing on the presence or absence of a signed peace agreement'. He suggests, instead, 'the idea of success and failure as a continuum'.

To sum up, there is little consensus in the literature about what is meant by 'success' in mediation and there is a range. At one end of the continuum, some writers opt for a simple measure, a written agreement, but at the other end writers opt for many, often complex measures.

Methodology

The first author conducted all the fieldwork. He adopted the interpretivist end of the continuum of research paradigms and carried out a case study of Acas mediation. Although Acas does not have a monopoly of workplace mediation in Great Britain, it is a significant provider. Indeed, starting up to 250 mediations a year, it is probably one of the bigger providers.

A variety of research methods were used:

- participant and non-participant observation (besides other observation of mediations, the first author has himself mediated in around 40 Acas individual mediations since 2006);

- focus groups of Acas mediators (four focus groups, involving 18 mediators in all, the mean time per group meeting being 112 minutes);

- individual interviews with Acas mediators (27 mediators, with a mean interview time of 101 minutes);

- the exploration of Acas's records of the activities of its staff, its so-called Events and Advisory Recording System (EARS); and

- perusal of the evaluation forms returned to Acas by clients (commissioners and the disputing parties).

In addition to the above, the methodology for this article included individual interviews with seven mediators from outside Acas.

This multi-method approach provided rich data and some opportunities for triangulation. All focus group meetings, and all but three of the 34 individual interviews, were recorded and the results transcribed and analysed, using Microsoft tools, according to themes adduced from the interview questions and from further perusal of the transcripts. The Acas electronic record system (EARS) was manipulated to produce the table below and evaluations forms were perused and matched by the first author with the corresponding EARS data.

As an Acas mediator himself, the first author did not have to face the problem of 'getting in' to the organisation he wished to research. In particular he was privy to documentation and records - about mediation - that an 'outsider' would probably not have been able to view. Of course, this insider status opens up the first author to the charge of bias, but as participant/non-participant observation is only one element out of five data sources and as most of this article is based on focus groups, individual interviews, Acas records and statistics, and the evaluations provided by commissioners and disputants, this article claims that the extent of possible bias is limited.

Findings

Agreements

Of the mediators interviewed, most appeared to define success in mediation as 'getting an agreement' between the disputing parties (although one experienced mediator was not alone when he admitted, 'I've never asked myself that question' as to what is success). The agreement might be written, verbal, or a mixture of both – although their initial training as mediators had placed great emphasis on *written* agreements.

That initial training also suggested – according to interviewees - that a mediator should be aiming at reaching some sort of agreement, written or otherwise, in most, if not all cases. The

latter may seem obvious and uncontentious, but it is worth remembering Della Noce's (2001:77) thoughts about agreements in mediation being 'but one possible outcome'. However, according to one interviewee, 'we're bogged down with getting an agreement'.

Also, a small number of mediators acknowledged that valuable mediation objectives, such as bringing clarity to a dispute situation, might be under-appreciated – at least, by less experienced mediators - as a result of too much focus on agreements. Such a focus actually led one interviewee to say that 'we're not there to do anything but get an agreement'.

Some mediators interviewed look for a written agreement always, as 'something for a mediator to go back to/work from, if things break down', or as something 'psychologically quite good for disputing parties to take away from a mediation'. Other mediators interviewed (a similar number) look for a written agreement rarely, producing one only if the disputing parties specifically request it. The view was expressed that, sometimes, trying to write down an understanding reached by disputing parties may risk 'spoiling' things between them. 'Trying to shoehorn a mediation discussion into a few points [in an agreement] is not helpful,' in the eyes of one mediator.

In one office, the mediators interviewed – the two most experienced there - had completely opposite views and practice on this question of written or verbal agreements. No mediator suggested, however, that, if her/his preference was not to be met, s/he would not proceed with an agreement. The parties' wishes, even on what is after all a procedural matter (and, therefore, usually left to the facilitative mediator), were deemed to be paramount.

On the face of it, written agreements are much more certain of execution than verbal ones and, therefore, to be preferred. However, 'Agreements reached in mediation are not normally legally binding unless both sides specifically ask for this' (Acas 2008:9). In the experience of one of

the authors, written agreements in workplace mediations are not - by and large - intended by the parties to be legally binding and may be no more certain of execution than verbal agreements. Indeed, a written agreement might sometimes be a cover for a lack of success.

As to the content of agreements, most interviewees talked of mutual understanding on 'a way forward'. When probed on this, several mediators spoke of the parties 'being able to resume their working relationship, not necessarily becoming good friends again', that is, if they ever were – or being able to resume enough of their working relationship that future contact between them would be mutually tolerable. Sometimes, these agreements addressed a number of specific issues between the parties. Some covered only some of the issues that the parties had brought to mediation, while in other cases agreements were more comprehensive; and, in some instances, agreements were fairly superficial, while in others they appeared to get to the root of dispute situations.

Mediators sometimes spoke of at least one of the disputing parties in a case deciding to literally move on from the workplace in question. The imminence of a mediation session might have induced this: EARS records show some mediations were not progressed because one or other party had resigned their employment immediately beforehand. Or it might be there was a realisation, during or after mediation, that there really did need to be a parting of the ways, thus making an agreement on a way forward together unnecessary.

Objective indicators/reinforcers

In the course of any mediation, there will be various indicators for the mediator(s) as to likely success, encapsulated, as noted above, in an agreement; and there will be what might be called reinforcers of agreements reached. Most of the measures are objective ones (as are written agreements), but some are subjective.

Getting through the mediation process   For several mediators, getting through the facilitative mediation process, particularly achieving a joint meeting, is seen as an indicator of likely success. It may even be seen as success in itself, regardless of the final outcome of a mediation ('success is when I've been able to complete the whole process. I might have some misgivings that it's all sorted out but . . .').

Several mediators interviewed talked of the 'magic of the mediation process', the sometimes surprising results that ensue from the parties sitting down together. Such a view seems, though, to have led most interviewees to launch into joint meetings without the 'formulations' or 'hypotheses' that Lang and Taylor (2000) and Haynes and Haynes (1989) suggest are essential. Some use the language of deciding to 'think on my feet, wait and see what comes out'.

The 'magic of the mediation process' also seems to have led some mediators to abandon mediation when they realised they could not get quickly to a joint meeting in a particular dispute, and perhaps to abandon work altogether on the dispute, rather than try a less 'pure' version of mediation or go with some other dispute resolution process.

Examples, extracted by the first author from EARS entries by mediators, of their reaction to failure to reach a joint meeting, include the following:

- Investment management company - 'Mediation Unprogressed [that is, abandoned]: One party insisted she did not want to sit in the same room as the other party, so any joint meeting unlikely.'

- Bank - 'Mediation Unprogressed: Couldn't progress to round table [ie joint meeting] as E wouldn't meet or speak to . . [N].'

Disputing parties' behaviour   The first author as mediator often tells disputing parties that facilitative mediation is not about raking over the past, but about their looking forward; and he

has on occasion tried to dissuade, as being unrealistic, the party who believes s/he should get an apology as a condition of even participating in mediation. This author's experience has, however, been that sometimes – in the course of mediation - one party will volunteer what is effectively an apology. This will often be an indicator of likely success in the mediation, often but not always. One mediator interviewed recalled a nurse who had received what appeared to be a 'heartfelt apology' in the course of mediation, but who had said that it was not good enough. What she had been through before the mediation, treatment allegedly resulting in her suicide attempt and psychiatric care, called for more. Often, that 'more' will be some sort of retribution against a perceived wrong-doer.

For another mediator interviewed, feelings of success on at least one occasion were reinforced by the disputing parties' shaking hands towards the end of the mediation. This was a spontaneous act on the part of the disputing parties. However, an EARS entry for another case has a hint of something more contrived, instigated by the (different) mediator concerned: 'Dispute resolved. At the end of the [mediation] process . . . [the parties] were willing to shake hands.'

Part of a mediator's script for disputing parties is often to stress that s/he is not looking to make them the best of friends. However, a couple of the mediators interviewed mentioned instances of disputing parties leaving mediation hand-in-hand; and another told of the parties going off together for lunch, both scenarios reinforcing the idea of success. As with shaking hands, however, there may be dangers for a mediation if the parties feel manoeuvred into particular actions regarding meals. Saundry et al (2013:26) say that, in one case, 'the mediator asked the participants if they wanted to have lunch together. This was highly problematic.'

Repeat business for mediators   For yet other mediators, the perceived success of a mediation was reinforced by their being 'invited in/used, again' by a commissioning party. This would

appear to tie in with Latreille's (2010:2) point that 'attitudes towards mediation are in many instances only as positive as the last experience'. Acas notes:

> . . . a strong link between resolution of the underlying issue and willingness to take part again in the mediation process, with those who felt the underlying issue had been resolved more likely to indicate that they would take part in mediation again in the future (Acas 2013a:10).

In fact, although Acas's reports refer to the resolution of *underlying* issues, its evaluation questionnaires ask whether *the issues that the mediation was designed to address* have been resolved completely/partly/not at all: a discrepancy in the wording between the report quoted above and the questionnaires. Be that as it may: there were 237 mediations started by Acas in 2012/2013, involving 215 different organisations. Of the 215, 176 (82%) had not previously commissioned an Acas mediator (that is, were new to the service) while the remaining 39 (18%) had commissioned at least one individual mediation in an earlier year (Wainwright 2013).

Subjective indicators/reinforcers

So far, this article has looked at objective indicators of likely success and reinforcers of agreements reached. Mediators, however, sometimes judged likely success more subjectively. For example, several mediators referred to 'light bulb' moments: at some stage in a mediation, perhaps one that appears to be going nowhere, there may come a moment 'comparable to a light bulb being switched on', when the parties do start to talk to one another seriously about the issues in question. As a mediator, 'you may not know why this has happened, what was the trigger, but you'll suspect at this moment that you're on the path to agreement'. Those mediators mentioning this said that part and parcel of any 'light bulb' moment might well be the parties' literally turning toward, and engaging with, one another.

In a similar vein, more than one mediator interviewed said: 'You just know when you walk out of the door whether you have been successful.' This may be a positive experience or not; or a recognition that an agreement reached by the parties 'is not going to work' and 'won't change anything when . . . [the disputing parties] go back to work'; or an acceptance that an agreement 'may not last'.

One explanation of 'light bulb' moments is suggested by so-called tipping theory, the idea that a build-up and combination of what may be, in themselves, quite small events may 'tip' a situation in a particular direction. A different explanation was suggested by a mediator in respect of one of her cases in a medical practice: there had been a 'revelation' in the joint meeting. Some authors would talk of an epiphany (for example, Friedman 2013:48).

A relative measure: dispute impacts

As yet, this article has focused on objective measures of success, including getting an agreement, and on subjective measures, in particular a mediator's 'feelings' of success. We now turn to look not just at the end result of mediation in isolation, but in relation to the mediator's objectives. This article terms this relative measure the dispute impact approach, in other words whether the mediator was seeking just to contain/manage the dispute, or to settle the overt conflict, or even to resolve the root causes.

The approach seemed to resonate with mediators, in that interviewees were, albeit with some prompting, able to relate what they had done in their cases to the various dispute impacts. At the time of any mediation, of course, they were not necessarily using the language of dispute containment, settlement and resolution. Mediators, however, appeared to recognise that the approach gave them useful ideas as to how they might best tackle disputes and afterwards reflect on their actions.

Mediators also appeared to recognise the value of judging success according to a mediator's reflection on what dispute impact s/he had been attempting, whether this had been achieved, and whether, with hindsight, it had been appropriate. One mediator, however, said, 'I don't think you know what you're trying to achieve in mediation until you come out of it, sometimes, until you've walked out of it and assess what you've achieved.' Unfortunately, because of the pressure of work (the mediators always have a significant amount other than just mediation), there may be little or no time for reflection.

An example of a mediator changing what he was attempting involved a senior manager in an organisation and a staff member with whom he had had an affair. The mediator had gone into the joint meeting looking for dispute settlement, if not resolution, but after a tempestuous start to the meeting, he had adjusted his ambition to dispute containment/management. However, after a 'light bulb' moment for the parties later on, the mediator's attempted dispute impact reverted to resolution.

On the other hand, an example of a mediator having a settled view of the impact to be achieved, and in her/his view achieving it, concerned a falling-out in a school between the Head Teacher and the Examinations Officer (EO), with the mediator trying to ease the latter's return to work following sickness and suspension. The parties were more comfortable talking about the practical issues around the EO's return than about the emotions generated when the two had been working together; and, led by their wishes, the mediator did not therefore go for root causes with dispute resolution but looked instead to eliminate overt conflict with dispute settlement.

Lack of success?

A mediation can achieve much, whether or not the disputing parties reach some sort of agreement: a mediation may bring clarity to a situation, overcome or reduce communication

problems between the parties, identify and acknowledge parties' needs and interests, promote constructive negotiations, and reduce tension (Boulle and Nesic 2001:8). Acas mediators may well regard such situations as Progress Made when making EARS entries.

Indeed, those interviewed largely suggested that most mediations did move dispute situations 'forward' in some way, at the very least, and, therefore, usually resulted in some sort of progress; that most dispute situations benefited from a mediator's intervention; and that mediators usually left matters in a better state than they had found them. Therefore, when the suggestion was made to interviewees that it was surely 'hard to muck up' a mediation, and when they were specifically asked whether a mediation could ever 'fail', many struggled to answer.

'Not getting [the parties] together to talk about things' was a failure to one interviewee; and worsening a situation was a failure to another. 'One definite failure' for a further mediator was:

> . . . where one party went off into a separate room and never really got back together [with the other party]. It petered out, really. It was a horrible mediation, one of those things where it's on your mind afterwards.

The mediator's 'impression was that, for both [of the individuals in dispute], mediation was an opportunity to collect information on the other person', for use against her/him in other fora. The mediator 'went back and forth for a long time to try to get them back together' but was unsuccessful. The more junior of the two parties had 'made lots of notes [during the mediation] and wanted to take them with her' at the close. The mediator had to insist on the notes being left behind, for destruction. 'That's what it was all about [collecting information], horrible.'

In the light of all that has been said, it should come as no surprise that this article asserts that a Dispute Not Resolved entry in EARS (the Acas electronic recording system) does not necessarily denote failure in mediation. It may simply indicate that a dispute was not 'ripe' for

settlement, let alone resolution, and that dispute containment may have been the best that could be achieved by the mediator in the short term. This view is supported by consideration of the EARS entries for those mediations closed as unresolved 1 April 2013-30 September 2013.

There were only eight cases in the whole of Acas in the first six months of the 2013/2014 operational year where the mediations were closed as unresolved (eight out of 102 closed cases, 10 of which were closed as Mediation Unprogressed). The commentary in EARS on the eight cases suggests that the disputing parties, in most of the cases, could not – for whatever reason - commit to the concept and demands of mediation, even as regards the mediation process (not outcome).

The timeframe

Arguably success should not be judged immediately after a mediation, but only after some time has elapsed. There is little follow-up by the case study organisation of mediation agreements, however, to ascertain how well they have actually fared; little follow-up, either, of mediations where there has been no agreement as such or only partial agreement. One mediator had 'never felt it was appropriate to contact . . . [the disputing parties], again'. Another revealed, 'We're actively told [by line management] not to go back.' Yet another actually said that he would 'try to avoid . . . [follow-up] like the plague' and that he would 'never, ever offer' it. He spoke of a 'can of worms waiting to be opened'.

An interviewee who was a mediator outside the case study organisation, working for a local authority, outlined a Fire Service mediation she had conducted where her initial feelings about the results of the mediation were clearly mistaken. After a couple of joint sessions, with lots of 'you're not listening to me' from each party to the other, she (the mediator) 'just had to end [the mediation]. I thought one or other [of the parties] would [then] put in a formal grievance [against the other party].' In the event, a grievance did not materialise, and a chance meeting six months

later revealed to the local authority mediator that the 'working relationship [between the disputing parties] had never been better' than they had been since the mediation!

Follow-up of mediations has not been particularly encouraged in the training the case study organisation has given its staff, perhaps because it raises the question of payment for the mediator's time. Lack of follow-up may, however, result in a loss of business. In one EARS report, it is stated: 'Employer got back in touch to say that he has decided to use another company [for the mediation] because of their offer of on-going support.'

Acas notes commissioners of mediation as wanting follow-up contact (Acas 2013a:12); and, from their study of workplace mediation participants (with 15 of the 25 cases mediated by Acas), Saundry et al (2013:27) conclude:

> An important issue that emerged from interviews was the lack of any follow-up after the mediation process, either from the organisation or the mediator. A number of respondents thought that this could have been useful, particularly given the concerns over the sustainability of agreements.

On the other hand, several mediators interviewed by the first author pointed out that disputing parties had been given their contact details, but had never come back to them.

The commissioner and the parties

For none of the case study interviewees did success involve establishing with the commissioning party, at the start, what her/his objectives for the mediation were (other than in the vaguest terms), in order to then judge the mediation outcome against those objectives. This may seem surprising, given that for other work carried out by these mediators, such as advisory projects, they will usually check out at the start, with those paying the bill, what their expectations are of the end result.

Surprising, too, given that commissioners do report on objectives for mediation in their responses to the evaluation questionnaires sent to them once a mediation case is closed. Some mediators interviewed said that objective-setting by commissioners could be problematic for a mediator's impartiality. Also, if/once set objectives by a commissioning party, the mediator would then have to go back at the end of a mediation to report what had been achieved, and confidentiality might be compromised.

Any contact by the mediator with the commissioning party was, therefore, usually limited to gleaning background information on the dispute in question. One mediator interviewed did, however, keep commissioners completely at arm's length, finding contact with them 'uncomfortable'. He thought that *any* contact, let alone discussion of objectives, would endanger the confidentiality promised to the disputing parties. Even the office managers when receiving a request for mediation do not appear to push commissioning parties as to objectives.

Remarkably, the parties' views on whether or not a mediation was successful rarely coincided with that of their mediator. The recording system, EARS, has a limited range of outcomes that may be input by a mediator: Dispute Resolved, Progress Made, Dispute Not Resolved, and Mediation Unprogressed, and there are no definitions of these categories. Occasional explanations can leave as many questions as answers, for example, 'Unprogressed cases are where no meaningful mediation activity took place even though the parties formally agreed to mediation' (Acas 2013b:38). What counts as meaningful mediation activity?

Table 1 compares the figures in EARS entered by mediators with those from the evaluation questionnaires returned by mediation participants between 2007/2008 and 2012/13, remembering that the evaluation questionnaire results are based on relatively small numbers of mediations and completed questionnaires. It should be remembered also that mediators' and participants' criteria are not exactly the same. Participants are asked whether the issues that the

mediation was designed to address have been resolved (completely, partly, or not at all), whereas mediators are asked about the outcome of a dispute (see categories above). In short and given these caveats, mediators' perceptions of success, as recorded in EARS, have been much more positive than those of the participants, as noted in evaluation questionnaires. It will also be seen that, over the years, while the EARS figures have been fairly consistent, those in the evaluation questionnaires have, in general, shown a decline in complete and partial resolution and a corresponding increase in issues being 'not at all resolved'.

TABLE 1 ABOUT HERE

The first author took the figures for 2012/2013 and noted, for each of the 68 evaluated cases, what the returned questionnaires said about resolution compared with what the mediators concerned had entered in EARS. As the overall figures in Table 1 would lead one to expect, there are differences between the evaluation questionnaires and EARS in respect of particular cases, some predictable, such as 'Issues partly resolved' rather than 'Dispute Resolved', or 'Issues not at all resolved' rather than 'Progress Made'. But there are other starker differences, such as 'Issues not at all resolved' compared with 'Dispute Resolved', or less often 'Issues completely resolved' compared with the mediator's saying 'Dispute Not Resolved'.

The participants' evaluation questionnaires also show that a written agreement does not necessarily equate with 'Issues completely resolved' in all participants' eyes; and, indeed, in one case, there had apparently been a written agreement even though a participant thought the 'Issues not at all resolved'. In some cases, a mediator's claim on EARS of 'Dispute Resolved' was hardly borne out by that same mediator's narrative on EARS.

Discussion and conclusions

Writers on mediation argue that, while it can have a direct effect in improving the outcome of disputes, it can also have an indirect impact in improving organisations' ability to resolve disputes outside of mediation. This article focuses on the former. Perhaps because measures of improved dispute outcome are difficult to operationalise, much of the mediation literature tends to fall back on equating success in mediation with a written agreement being reached between the disputing parties.

In this case study, the organisation does not appear to have explicitly defined for its staff what it regards as success in mediation, and there is a lack of certainty among mediators on this issue. In the main, however, those mediators interviewed defined success as 'getting an agreement', written, verbal, or a mixture of both. There are, however, shortcomings in a reliance on agreements. Written agreements may be no more certain of execution than verbal ones, and a written agreement might sometimes be a cover for a lack of success. As to the content of agreements, most interviewees talked of mutual understanding on 'a way forward'. Sometimes, such agreements addressed a number of quite specific issues between the parties, to a greater or lesser breadth and depth.

In the course of any mediation, there will be various indicators for the mediator(s) as to likely success, such as getting through the mediation process, and there will also be what might be called reinforcers of agreements reached. Of the indicators and reinforcers mentioned above, this article finds that the most significant is the mediator's feelings as to likely success in a case. The mediator may, however, prove to be genuinely mistaken, when compared with the evaluation forms received back from the disputing parties. These showed that, on the whole, the parties judged any mediation less positively than did the mediator.

This article has already commented that that there is a lack of follow-up to assess whether the initial judgement as to success was correct. Some mediators do go back, or appear genuinely to

encourage the parties to come back to them; but most do not. At best, the lack of follow-up is something that happens by default; often, however, it is a deliberate act by the mediator. That is not, however, to say that follow-up is *always* welcomed by the parties.

The lack of follow-up ties in with the notion of individual workplace mediation often being like a band aid: a relatively 'quick fix', bounded product which either 'works' or does not but, after which, the mediator does not hang around. Some commissioners of mediation are, of course, more than happy with this.

If a mediation body allows its staff to claim 'success' in mediation work, it should reflect upon what the measure of that success is to be and then incorporate that measure into any recording system that it employs, defining the terms used. More importantly, success should not be measured in absolute terms. One size does not fit all and instead a more nuanced and relative measure should be adopted: success in any one mediation should be judged according to the dispute impact that had been attempted (essentially, containment, settlement or resolution), whether that impact had been achieved, and whether the choice of impact had been, with hindsight, appropriate. Such an approach is predicated on the mediator having a strategy at the start of mediation, rather than just 'winging' it, but we are not suggesting that this strategy should be rigidly adhered to. Indeed, as a mediation progresses, a mediator's initial strategy may change and this research has quoted an example of that (see above).

The next issue is whether the strategy regarding the dispute impact chosen was the appropriate one. We have already said that the mediator's reflection after the event should be taken into account when deciding whether the impact chosen was appropriate; however that is a necessary, but not sufficient basis for determination. Also what the commissioner wanted at the outset should be taken into account, as well as the views of the commissioner and the disputing parties some time after the mediation. This is because without a longer-term look, by going back to the

parties or at least telephoning them, it is difficult to be sure in many cases of mediation about the outcome. The seeming disaster may turn out well eventually, while the apparent success may have dissipated. Furthermore, in considering the appropriate choice of dispute impact, the context in which the mediator had to work, that is principally the tractability of the dispute and the commitment of the disputing parties to mediation, would be relevant.

To conclude, this article argues that this relative measure of success, which takes into account a range of viewpoints and factors, should be adopted, but it is undoubtedly complex. Further research could assess whether this dispute impact measure of success is practicable and whether these findings, based on a case study of Acas workplace mediators, are applicable to other workplace mediators, particularly those working in large organisations such as New Zealand's Mediation Service, South Africa's Commission for Conciliation, Mediation and Arbitration and the USA's Federal Mediation and Conciliation Service.

TABLE 1

OUTCOME		2007/08 %	2008/09 %	*	2010/11 %	2011/12 %	2012/13 %
FULLY RESOLVED	**Eval'n Q'res**	32	24		24	19	14
	EARS	63	67		65	60	62
PARTLY RESOLVED	**Eval'n Q'res**	53	60		49	40	48
	EARS	25	24		26	29	28
NO RESOLUTION	**Eval'n Q'res**	15	15		27	41	38
	EARS	12	09		10	11	09

Notes

1. ** 2009/2010 excluded since a complete set of evaluation questionnaire data for that year is not available.*

2. *The figures are rounded and so, in some cases, do not add up to 100%.*

3. *Eval'n Q'res = Evaluation questionnaires returned from mediation participants. The figures have been extracted from Acas's reports on 'Individual Mediation: responses from participants and commissioners'. They are percentages of the total number of participant questionnaires returned to Acas for the years in question.*

4. *EARS = Events and Advisory Recording System, completed by Acas mediators. The EARS figures are percentages of the 'Total mediations closed in the period' after 'Mediations closed as unprogressed' have been deducted.*

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