

Thank you Mr. Chairman,

To His Excellency the Minister of Justice, the Director of the Center of Judicial and Legal Research Mr. Bouzertini, all dignitaries, fellow speakers and delegates of the conference, I am delighted to be in your country. Thank you so much for making me and my colleague feel so welcome.

I would like to speak to you briefly about the British perspective on mediation in relation to labor disputes.

In Britain we can track back to the 19th century to look at how we started to address labor disputes that were growing mainly amongst the factories and other parts of the manufacturing industry with the introduction of the Conciliation Act in 1896 and the introduction of a non-governmental organization called ACAS. Over time in Britain, we found that the number of labor disputes began to rise and as we reached 2000 they increased quite significantly. So in 2004, some reforms were introduced to help both the employee and the employer have a clearer process to manage disputes and what was introduced was a process called the Statutory Grievance and Disciplinary Process which meant that the employer and the employee had to follow three-stages for that dispute to be managed. That had to be done before a claim could be lodged with an employment tribunal.

One of the problems that were faced in England and Wales was that, when the rules changed in early 2004, one year after, the number of claims being lodged at employment tribunals across those two countries had increased by about one third. So, in response to organizations' concerns, the Department for Business ordered a review into how disputes were managed in the workplace. The result of that review, which was called the Gibbons Review, was that there would be a repeal of the statutory dispute procedures that were introduced in 2004 and that the country would try and look how there could be a change in culture to manage disputes better than they had been managed before and a challenge was thrown out for all stakeholders to think more proactively about how labor-related disputes could be managed. So on April 6, 2009, the Employment Act of 2008 became live and as a result of that there was a new code of practice introduced. Organizations and employees are now expected to follow that new code. Some of the penalties that have been introduced to ensure that the code will be taken seriously are penalties where costs at an employment tribunal can either be decreased or increased up to 25% at the discretion of the judge based on how well the employer or employee has tried to solve that dispute prior to its going to a tribunal.

The government has also increased the amount of funding available to the ACAS organization for them to be able to increase their resources to help organizations better manage disputes. There has also been an introduction of what we referred to as judicial mediation, and this is where a number of employment tribunal judges have been trained to be mediators. So now if a case, particularly a case of harassment or discrimination, comes before an employment tribunal judge, the judge will recommend mediation in the first option and parties are given the choice either for the judge to mediate the dispute. Likewise parties can also go to a private mediation provider to attempt mediation of the dispute. In the event that it is successful, then the tribunal procedures will be stayed otherwise the tribunal process can continue.

One of the organizations that have been set up in England and Wales is called the Civil Mediation Council. The Civil Mediation Council has now introduced a panel of mediation providers so in the event that there is a labor dispute, companies can go to the website managed by the Civil Mediation Council and select one from a number of mediation providers to help a company with a dispute.

One of the aspects that are being considered greatly in Great Britain at the moment is, just like a number of other or many of the countries around the world, that we are experiencing a time of economic uncertainty. What is referred to as the business case is having a lot of weight and impact particularly on how organizations have to put a lot more scrutiny and on how resources are being used. Organizations are benefiting from the improvements that come from the mediation of disputes. So, we have started to do a lot of research which indicates that things like productivity and customer service improve when there are fewer disputes.

There is also a lot of research on health and well-being. Currently, the cost of disputes to organizations in England and Wales particularly last year was identified as £24 billion per annum. This argument is helping raise the profile of mediation and labor disputes in the country. The Gibbons Review of 2007 encouraged organizations to think differently of the management of employee relations and it encouraged organization to pursue a different culture. Part of that was that organizations would look at what was referred to as both preventative and remedial options. In the preventative there is a lot that organizations can do that will mean that it is more unlikely that disputes will need mediating. For example, they can train line managers on how to manage difficult sets of issues in the organization. They can train line managers on the issues of diversity and equality; they can think about the framework of an organization through things like organization charts and job descriptions making sure that everyone is clear about the goals, vision and mission of a particular organization. So, there has been a due route to try to ensure that the number of disputes decreased. Michael Gibbons from his report is very clear on how the implementation of the acts will be measured. Earlier on I mentioned that in 2004 when the statutory dispute resolution procedures were introduced the number of cases given to employment tribunals increased by a third. And Michael Gibbons is very clear that if the number of cases given to tribunals throughout England and Wales increases a year after the introduction of the Gibbons Report, then we will have failed. So, there is a very clear focus on this to ensure that it is successful and that will be one measure of a success.

Let me just speak briefly about why this is now so successful in Great Britain, specifically how mediation is being able to play a very important part. On the slide in front of you, there is a basic model of elements that make real disputes and we know that there are mainly three elements. The two columns that you see at the bottom show the difference between pursuing legislation, litigation or company's procedures and mediation. For example, we know that pursuing the law will address the physical element of bringing individuals together. Secondly, it addresses the mental aspect which is where they have the opportunity to discuss the disagreement that they have which has resulted in the dispute happening. However, what we experience and find is that without aspects of emotion, there is unlikely to be a dispute. So, typically things like anger, fear, shame, embarrassment or jealousy may not be addressed by going to law. That is why we find, just like a number of mediation providers in the UK, that employees can go through the statutory disciplinary and grievance procedures. Then they are expected to go back and work with their colleagues. But the problem still exists because the organization may have given a judgment on who is right and who is wrong but a series of emotions have not been addressed. Being a mediator myself, there have been a number of occasions where I have been mediating a dispute between employees in an organization and in the first part of the mediation I sit and listen to what it is, to understand the basis of the parties' dispute. That meeting may last for an hour or so. I remember one particular case where there was a dispute with health consultants which had been running on for about three or four years. I met with one health consultant who had a lot of experience told me his story and after an hour or so I thanked him and I went with next part of the process which would be the joint meeting. He looked at me very strangely and said "Is that it?" I explained that "Yes," the next part would be the joint meeting. His words to me were "No one of us has done that before. No one in the organization has listened to my problem, my dispute, without giving judgment." He found the overall experience very strange.

That has been repeated on a number of occasions. This process has been proven to be very effective.

This chart shows how the flexibility of mediation is a real advantage and what it shows on the left hand side is that there is no risk to an individual by engaging in the mediation process. So, individuals have and still maintain that statutory right to pursue organization procedures. The Gibbons Review has not taken away an individual's statutory right to be able to go to the process of litigation.

On the basis that mediation works on a confidential—as we say in Britain, without prejudice—basis, it means that the process can run in tandem with the process of procedures or litigation. If the mediation is successful, it either means that the statutory procedures can be drawn to an end in any terms of the settlement can be captured within the mediation agreement. So this settlement which is a great indicator for employees embarking on it shows how flexible and how successful it can be because there is no, or little, risk to them by engaging in it.

Let me just give you a few case studies. Firstly, the process of mediation in labor disputes is incredibly effective. For example, it can be used for individual disputes, team disputes, department disputes, organization disputes and as we know at much more bigger or strategic level such as country-to-country disputes. One example I would like to give first is to cite an organization. The organization that I will refer to is a local authority with 13,000 employees and for the last year they put in an in-house mediation scheme. My company provided the training for them and so far 34 cases have been mediated; 100% of those cases have been successful. The number of disputes raised in the organization has fallen by 47%. The organization has recruited initial training investment that was recruiting one month. The savings in productivity indicated have been just over £500,000 so far. They have also found that three employees who had been off-work sick for over one year have now returned back to the workplace.

Another case study that I would like to give is about a team dispute that I mediated between a group of pathologists and microbiologists who had fallen out about four or five years before the case was mediated. They were starting to affect patient care. So the Health Trust really wanted to try and address this quite quickly. The process of mediation took place. The first joint meeting that took place in the mediation session meant that for the first time in about two years all of the consultants who had worked with each other were together in the same room and they were encouraged to talk about their story within that joint session. The mediation was successful. And then during the follow up six weeks after that, the clinical director, who was the senior manager in that organization, just wanted to come and tell us how the department had changed and the service for patients had improved because the dispute had been solved. There was also a case of two individuals from different races. The employee had left the organization and was about to take organization to an employment tribunal because she had not had an opportunity to express how she felt about how her line manager had treated her. She was still very angry. The employment tribunal was scheduled for one month after the mediation took place. The mediation was successful partly because her line manager was able to hear for the first time how her colleague and employee felt as a result of how she was treated. Part of the settlement included a financial payment but also part of the settlement included an agreement that the line manager would have training for how to better manage the disputes that might come up with her colleagues in the future. Another one, the age difference, is where a line manager of 27 years old was managing a woman of 57 years old. The employee had been in the company for over 25 years and at that point she had never had any problems. But there was a new line management relationship and things broke down. She had difficulty understanding the process, so she was accompanied by a friend and the mediation which lasted just under 11 hours was able to be settled. In this case she decided to leave the organization, but again the organization agreed that they would put training in place for the line manager so that issues of this nature would not arise again in the future.

Just two more examples, the shortest mediation I have ever done lasted for 30 minutes. This was mediation between two women in the health sector from the National Health Service in England; they had fallen out because of something that one of them said to the other in a team meeting. The dispute had been going on for six months. For one of them, her health had suffered very badly as a result of the dispute. In the mediation, after I had met with them on the day and again talked through the process, they had the opportunity to speak to each other about why they believed the mediation was necessary. When the first person was speaking, it became clear to me that the listener had heard something she had never heard before. And when I asked her to respond, she responded by saying one word to her colleague, perhaps you can guess what that word was; it was "sorry." It was a shame because it had taken six months for that one word of apology to be given to her colleague. We finished the mediation by agreeing on some terms on which the working relationship would continue. I remember when I left the mediation and looked into the mirror of the car, they were still in the car park talking and laughing. Two days after that mediation happened, I had a telephone call from one of the parties who was the person who had quite a lot of illness as a result of the dispute. As she called me, she said she was only calling to thank me. She was thanking me because for the first time in six months, she was able to have two nights of sleep because the dispute was then put behind her. For the mediator, it is quite difficult to get a higher degree of job satisfaction than when you get with something like that.

One final story, we know that 90% of mediations in England and Wales will settle but they do not all settle. I remember one case that has not yet settled. It was a race dispute. The organization had agreed to make a payment to an employee that had left them the year before, but what he wanted compared to what they were offering was not quite enough. There was quite a quite significant gap. He turned to me and said "Mr. Lewis, I thank you for your help but I want the opportunity to express myself in court about how I felt." As a mediator, I talked to him about a phrase that I heard from very good parents to a friend of mine which is that a 100% winnable case in litigation has never been invented. So, he was very aware that he was running a large risk by going to a tribunal and at that moment there was a five-day hearing scheduled for the end of July and we would hear what the result was at that stage.

In closing, all mediations for labor-related disputes are underpinned by a mediation agreement. They would also conclude by having a settlement agreement. Mediators are a mixture of employment lawyers, HR professionals, line managers and also trade union representatives too. These are some of the things that we suggest to organizations. Items like this are included in a book, my book that was published in January of this year to help organizations prepare for the change in legislation and it lists things like ensuring people are trained, working with an external mediation provider, reviewing an organization's policies and procedures to include clauses of mediation in contracts. So, in the event a dispute happens, the first thing an individual will consider is to mediate rather than to go the legal route.

Mr. Chairman, thank you very much.