Introduction

The Overriding Objective of the Civil Procedure Rules is to enable the court to deal with cases justly and at proportionate cost. Hence, there is a hope cases settle prior to hearing and in practice this is quite common. Alternative disputes resolution (ADR) has seen a new lease of life in recent years and mediation has been an effective method of ADR.

The introduction of fees to lodge complaints through the Tribunal has meant more potential Claimants are encouraged to resolve disputes informally. Acas Early Conciliation has added another hurdle to the Tribunal process and meant Respondents will now always be contacted (where the Claimant is happy to attempt conciliation) to discuss potential settlement.

This has brought ADR into the mind of employers. In construction this is not a new way of thinking. Collective Agreements such as the Joint Industry Board (JIB), Plumbing, Mechanical and Engineering Services (JIB-PMES) and National Agreement for the Engineering Construction Industry (NAECI) all have provisions for a disputes mechanism.

The most effective method of ADR will depend upon the situation, the type of dispute and the industry. Schneider\(^1\) believed that the type of ADR that was appropriate depended on the legal issues, the effect on relationships and emotion and the needs of the client.

The most common forms of ADR are negotiation, arbitration and mediation. Mediation works differently to other forms of ADR as it allows the parties

\(^1\) Schneider 1999.
the opportunity to talk directly to each other and the mediators' role is to facilitate the conversations and the topics².

Objectives and Aims

This project aims to inform of the effectiveness of mediation focusing on the electrical industry by analysis of the JIB procedures. The JIB model will be analysed as a case study to establish why mediation has been so effective in the electrical industry specifically in order the reasons may be highlighted to wider legal practice.

The aim is to encourage solicitors and other legal representatives to use or consider mediation if possible as an alternative route to the traditional court room confrontation, taking into account recent changes in the law.

The JIB model for mediation has been used as an example due to its uniqueness and effectiveness over recent years.

What has promoted mediation in the electrical contracting industry?

ADR developed as a way to resolve issues outside of the formal legal setting due to weaknesses in the legal system and gained popularity first in the United States before spreading elsewhere³. The JIB model is based on the New York Joint Industry Board model for dispute resolution.

The JIB’s Dispute Procedure is the dispute resolution mechanism for the JIB agreement. The JIB Agreement is owned jointly by Unite the Union and the Electrical Contractors Association (ECA), and it is these two organisations that are the constituent parties of the JIB.

Prior to the inception of the JIB in 1968, strikes and lock-outs were common place in an industry known for its poor industrial relations⁴. The JIB has always focused on dispute resolution as one of its principal objectives to provide a forum by which it would adjudicate upon all kinds of disputes arising from the employment of labour to provide a fast and effective means of resolving conflict within the industry.

² McKenzie 2015, 54.
³ Struthers 2005, 54.
⁴ JIB 2015.
The JIB was, and remains, the only body which has held a Dismissal Procedures Agreement ("Exemption Order")\(^5\). Mediation within this disputes procedures is a long established mechanism.

Mediation is the process utilised by the JIB most effectively and a structured process is used to address the parties' dispute and by which a mutual satisfactory resolution is sought. The JIB has a great deal of experience in mediation and takes a proactive role in attempting to resolve disputes.

The JIB has maintained a consistently high level of conciliated and mediated settlements in recent years and this was as high as 98% in 2013. This was remarkable especially considering the high numbers of cases submitted between 2010 and 2013 (over 80 each year).

Is Mediation Effective?

The 2008 CIPD survey on mediation in the workplace showed that "three-quarters of respondents considered mediation to be the most effective approach to resolving conflict in the workplace"\(^6\).

Using the example of the JIB Procedures, over the last 5 years 417 claims have been lodged\(^7\). Of these 417, 67 were withdrawn, 334 were mediated, conciliated or settled, with only 9 cases reaching a Dispute Hearing\(^8\).

Mediation accounts for the majority of the cases which are recorded under Mediated/Pre-Claim Conciliated/Informal Settlements (Fig. 1) which represents 80% of all claims in the past 5 years. Some of the cases withdrawn at an early stage will be following conciliation.

This shows the effectiveness of ADR within the JIB Procedures. When you eliminate those cases which were withdrawn or are rejected (Others), the success rate of settlement in some form is over 95% for this period.

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\(^6\) Acas and CIPD 2013, 14.

\(^7\) JIB 2014, 11.

\(^8\) Ibid.
Figure 1 – JIB Dispute Procedure Figures between 2010 and 2014

As can be seen by the table above, mediation (as the focus of ADR), has been effective under the JIB Disputes Procedures. This is likely due to a number of industry specific factors.

**How Does Mediation Operate under the JIB Disputes Procedures?**

Mediation under the JIB Procedures is voluntary. The JIB National Officer does not make a decision or make a judgment but is there to assist the parties to reach a settlement. There is no pressure on either side to settle a case and there is no financial incentive for the JIB to settle.

Mediation is provided as a free service to JIB members. Either party can withdraw from the proceedings at any time (however, this has never been known to happen).

The procedure involves the JIB National Officer chairing the meeting with the parties. The case is discussed in a flexible and informal manner for the facts to be established. Following this the National Officer discusses the case with each party separately and, through these discussions, tries to reach a settlement. It should be noted that not all settlements are financial.
ADR in the Wider Construction Industry

Conditions in construction generally led to a situation where ADR was necessary for the electrical industry yet mediation is not a common process within other collective bargaining agreements in construction, and where ADR is used, it is not as effective.

The National Joint Council for the Engineering Construction Industry (NJC) has a disputes mechanism as contained within their collective agreement (NAECI). The NJC perform facilitation and arbitration for their members that arise from disputes. The types of issues that can be addressed (including relationship problems between colleagues and disagreements regarding work duties) are wider than those under the JIB Procedures.

Since 2008, there have been 10 cases submitted into the NJC Facilitation procedures\(^9\). Of these 10 cases submitted to August 2015, 5 have been resolved successfully. Of the 5 that were unsuccessful, 4 of these concerned disagreements between people on site, either employees of the same company but more often between employees and a sub-contractor. In this way the types of cases that the NJC explore have tended to be different to those of the JIB.

The NJC figures for arbitration show that out of the arbitrations held between 2009 and 2015, 8 of these resulted in the arbitrator awarded reinstatement with continuous service maintained\(^10\). This would be rare in a JIB Dispute Hearing.

Although the NJC has seen good levels of success through its procedures these have not reached the levels of settlement from mediation in the JIB Procedures. Increased use of mediation may prove a useful tool in resolving disputes before reaching a stage where relationships deteriorate beyond a point where parties cannot work together in the future.

The possible effectiveness of mediation in comparison to arbitration or adjudication could be that it moves away from the traditional adversarial process. Adjudication and arbitration will be closer in nature to the tribunal process, whereas mediation focuses of finding an appropriate middle ground and is therefore less confrontational.

\(^9\) NJC 2015.
\(^10\) Ibid.
The Law and Mediation

Dispute resolution has been described as at the heart of the justice system\(^{11}\) and although mediation is not compulsory there can be cost implications for those who refuse to engage if there is a real prospect of success. This will depend on a reasonable objective view as to the prospect of success at the time in question\(^{12}\). Courts have shown that although a refusal to engage in dispute resolution such as mediation may result in adverse costs consequences, this will depend upon the facts of the case and the conduct of the parties generally\(^{13}\).

Mediation has become a more readily used method of ADR, and in the electrical industry, it has almost mandatory as it is insisted upon by the union and the contractors association where they are acting as representatives.

Individuals have a right of access to justice as provided by Article 6 of the European Convention of Human Rights (ECHR), and it has been suggested by some that mediation could be installed as a mandatory element of a court or dispute proceeding\(^{14}\).

Although there have been those which would view the implementation of a stage of mandatory mediation as in conflict with Article 6\(^{15}\), as it is the role of the courts to “encourage not to compel” mediation in line with the overriding objective, it is admitted that the form of this encouragement can be robust\(^{16}\). A mandatory mediation stage would not prevent an individual from accessing the court system as there would be no requirement to reach a settlement and hence, to deny this right.

In other jurisdictions such as Ireland, pursuant to Sec. 15 of the Civil Liability and Courts Act 2004 and Rules of the Superior Courts (Commercial Proceedings) 2004, mechanisms were introduced to require mediation where requested by a party under the Act and to enforce mediation if the court decides it is appropriate under the Rules in applicable cases.

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\(^{11}\) Hurst v Leeming [2001] EWHC 1051 (Ch), [2003] 1 Lloyd’s Rep 379.
\(^{12}\) Register of the Corby Group Litigation v Corby Borough Council (Costs) [2009] EWHC 2109 (TOC).
\(^{13}\) Société Internationale de Télécommunications Aeronautiques SC v Wyatt Co (UK) Ltd and others (Maxwell Batley (a firm), Pt 20 defendant) [2002] EWHC 2401 (Ch).
\(^{14}\) Lord Philips, 2008.
\(^{15}\) Dyson LJ in Halsey v Milton Keynes General NHS Trust [2004] EOWA (Civ) 576.
\(^{16}\) Ibid at para. 11.
In the JIB Procedures, mediation is an accepted stage and although voluntary, is overwhelmingly encouraged and utilised by both claimants and respondents. It has almost become mandatory by the compelling effect success has on the views on those in dispute.

The Law Reform Commission believes Courts have a fundamental role to encourage parties to use mediation where appropriate\(^{17}\). Acas Early Conciliation, which since 6\(^{th}\) May 2014 is a mandatory part of the employment tribunal process\(^{18}\), has helped to change the perception of ADR. Acas refer individuals who may eligible under the JIB Disputes Procedure to the JIB, which increases the respect and impartiality of the procedures.

The Effectiveness of the JIB Procedures

The combination of industry acceptance, successful history, changing attitudes and increasing costs in the tribunal process have meant that mediation generally been encouraged, but does not explain why mediation under the JIB Procedures has been so effective. This effectiveness is linked to industry specific conditions that have led to the development of the JIB Procedures, and mean that they have become a recognised and essential part of the collective agreement.

\(^{17}\) Law Reform Commission 2008, pp.331.

How and why is mediation an effective form of ADR for employment disputes within the JIB Collective Agreement?

Analysis

Introduction

Disputes procedures under national agreements are less significant today than in the 1970s and 1980s but remain an important function in the electrical contracting industry. Although provisions under the JIB Agreement are more favourable to employees (such as the ability to be able to lodge an unfair dismissal case from the first day of employment rather than after two years continuous service), employers have seen the benefits to such a dispute resolution mechanism to the overall employee relations in a company or site. Included as an established and well utilised facet of this mechanism, is mediation.

Why is mediation effective generally?

Rather than the adversarial stance in Tribunals, mediation takes a softer approach which finds the parties more willing to negotiate and listen to the issues raised.

Mediation makes the process more personal and it is easier to conduct a fact-finding exercise to gauge the merits of a case. Parties are actively involved rather than solely through representatives. Harkavy believed

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20 The JIB Dispute Procedures can be accessed by those who are directly employed by JIB companies from the first day of their employment rather than the two years required under s.92(3)(1) ERA 1996, as amended by The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.
“mediation provides a comfortable forum for all parties and thus is more likely to facilitate a workable resolution to a dispute than a more adversarial process involving rights adjudicated in a formal setting under a fixed set of rules.”

There are a range of attributes cited for the attractiveness of mediation generally. These could be practical issues such as time, cost, flexibility and confidentiality. Others have suggested human and social issues such as the continuance of the relationship, impartiality and the ability to negotiate settlement have been key for the success of mediation.

Cheung et al set out 10 main traits which affect the choice of dispute resolution mechanism and the performance of the chosen method. These include cost, time, confidentiality, neutrality, preservation of relationships, creative remedies, enforceability, flexibility, outcome and control. Mediation, particularly through the neutral third party mechanism of the JIB, can provide a benefit in all of these areas.

A Change in Mentality

The “Gibbons review of employment dispute resolution in 2007, and the updated Acas Code of Practice on Discipline and Grievance introduced a specific reference to mediation in its foreword.” The Government’s response to the 2011 consultation on “Resolving Workplace Disputes” made clear the intention was to use mediation until it becomes an accepted part of general disputes resolution.

Most workplaces have established procedures in place for dealing with grievances and disciplinaries (89%), and those that don’t tend to be smaller employers with fewer staff. The WERS 2011 sets out that 68% of collective disputes procedures refer to an eternal body for resolution, with 37% using Acas conciliation, 25% Acas arbitration and 11% mediation. Although a low figure, the number of those undertaking mediation has doubled since 2004 and the previous survey.

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21 Harkavy 1999, 156.
22 York 1996.
25 Acas and CIPD 2013, 3.
26 BIS 2011.
27 Wanrooy et al 2011, 27.
28 Ibid
Mediation is included within 62% of grievance and disciplinary procedures, but this has not translated into a high level of use with only 7% of businesses using mediation in the 12 months prior to the 2011 WERS survey.29

Although mediation is recognised by businesses as having the potential to be of use, or to be seen to be of use, few businesses have faith in using these procedures, or mediation is not a process which is embedded into the workplace culture of the business.

In the JIB Procedures, all those individuals who submitted a Disputes Application since 2010 (and where a case proceeded to the relevant stage) engaged in mediation barring two cases.30 The expectation of companies and operatives under the JIB Agreement has meant all parties involved expect the JIB to perform mediation and many representatives will advise the parties to engage as they have seen the benefits before.

The JIB Procedures embody the main aspects of mediation but there are other factors which mean the industry is particularly keen of maintaining good industrial relations.

Type of Mediation

The JIB utilise evaluative mediation whereas organisations such as Acas tend to use facilitative styles of mediation. McKenzie31 described evaluative mediation as that in “which the mediator offers an expert opinion to assess the legal and substantive merits of a claim in order to give the parties information about the strengths and weaknesses of their case”.

The JIB uses its knowledge and expertise to fully explain the complex systems that have arisen in the industry (such as the now defunct holiday stamp system under the Construction Industry Scheme). Evaluative mediation is suggested as more effective in this model due to the more simplistic nature of cases and the quantifiability of the possible awards of claims.

McKenzie sets out that the power inequality in the employment relationship must be taken into account by the mediator.32 The belief in fairness is essential as the mediator must realise that often individuals are sceptical

29 Ibid.
31 Ibid.
32 McKenzie 2015, 54.
of company led procedures where they believe that the company is trying to exert their influence to gain an advantage.\footnote{Greer and Bendersky 2013.}

Mediation is a viable alternative to litigation and is chosen for a number of reasons. The classical reasons given for the use of mediation are less expense, can assist in repairing relationships, allow greater control of the proceedings, which inclined to be satisfied with the outcome.\footnote{Forsyth, 2012, McKenzie 2015, 58.}

Organisational commitment to policies such as mediation has been viewed as essential, as when companies buy in to these types of policies, their employees do as well.\footnote{McKenzie 2015.} Through the JIB Disputes Procedure companies are aware and familiar with the role mediation plays and many expect and wish to utilise the JIB’s resources in this manner. This means that often companies operating in the electrical or general construction industry will have a different mentality towards mediation than those outside the industry and unfamiliar with the process.

Why has mediation been so effective in the JIB Procedures?

The JIB prefers mediation for several reasons. The 10 main aspects cited by Cheung et al can be analysed to establish what the principal influence on the effectiveness of mediation is under the JIB Procedures.

Cost and Time

Disputes within the workplace take up management time (and therefore costs) and can sour working relationships.\footnote{ASA 2012, 5.} Procedural rules through Courts are particularly complex and often require costly legal advice to navigate.\footnote{CPD Seminars 2010.}

Mediators will often claim mediation is a cheaper process than taking more formal legal action such as an Employment Tribunal claim.\footnote{CPD 2010, ASA 2012, 3 and Acas and CIPD 2013, 16.} The Advice Services Alliance (ASA) set out the cost associated with mediation will obviously depend on the type and complexity of the case, and the number of Claimants (where cases are raised together).\footnote{ASA 2012.}
There has been a drop in the number of Employment Tribunal claims since the introduction of fees\(^{40}\). According to figures released by the Ministry of Justice on 11\(^{th}\) December 2014, the number of claims lodged with the Employment Tribunal are 72% down in total for the year August 2013 to July 2014 compared to the previous 12 months\(^{41}\).

The CIPD found 51.7% of companies they surveyed stated they used mediation as a way of avoiding higher costs\(^ {42}\) that are associated with hearing a dispute through the more traditional remit of the employment tribunal (before the introduction of tribunal fees).

In the CIPD report, 42% of the responses believed mediation increased costs\(^ {43}\). The CIPD however had found that organisations spent more (through indirect costs) when handling disciplinary and grievance cases than those who utilised external mediators (at a direct cost) and hence believed this to be an overstated claim\(^ {44}\).

When mediation results in settlement, parties believe it is quicker and cheaper than going to a full hearing. Conversely, when mediation is not successful, partiers believe mediation adds cost and increases the time spent on a dispute\(^ {45}\).

This would mean it could be reasonably expected those who have used mediation successfully in the past are more likely to consider it again\(^ {46}\), and for those where mediation was unsuccessful, they would be less likely to consider it in the future.

As the JIB procedures are provided free of charge\(^ {47}\), it is likely these people would be willing to engage in mediation. It has been suggested that once an individual has paid an issue fee for lodge their ET1 form, they become less willing to mediate and want to see their claim pursued as far as possible (including the recovery of the issue and/or hearing fee, which adds further expense).

\(^{40}\) The Ministry of Justice statistics show that claims fell to 61,306 between April 2014 and March 2015 from 191,541 in the same period the previous year, MOJ 2015.

\(^{41}\) Table C1, Statistics of the Employment Tribunal.

\(^{42}\) CIPD 2011, 3.

\(^{43}\) Ibid, 12.

\(^{44}\) Ibid, 14.

\(^{45}\) ASA 2012, 4.


\(^{47}\) There are 24,479 individuals eligible to use the JIB Dispute Procedures, JIB June 2015.
As there are no cost awards under the JIB Procedures, there are no adverse cost consequences of refusing mediation as per the Halsey factors\(^{48}\). As such it would be expected that parties would be more inclined to refuse mediation (particularly where they believe that they have a particularly strong case) but this has not happened and it is shown the vast majority of parties engage in mediation.

**Confidentiality**

Anything said during a mediation meeting is confidential and the JIB has viewed this as an essential characteristic towards the success of mediation as both sides must feel comfortable to discuss the issues raised freely.

The CIPD reported\(^{49}\) 27.1% of companies who used mediation did so because it maintained confidentiality. This has also been true within the JIB Dispute Procedures with anecdotal reports from both claimants and respondents that confidentiality of the procedures has been essential.

**Neutrality**

The JIB procedures have focused on resolving issues by listening to parties to understand their perspectives and the history behind a dispute. The nature of the JIB as an independent and impartial organisation, and the use of third-party, neutral mediators, have been quoted as major advantages of the JIB mechanism.

CIPD reported that 40% of employers who had used mediation used an internal mediator whereas only 20% used an external mediator\(^{50}\). The CIPD listed that internal mediators were knowledgeable of the organisation and culture, would require less briefing in terms of the dispute and there is little or no cost\(^{51}\). The JIB is well versed in the electrical contracting industry and is familiar with many of the companies through its regional board network. JIB mediators tend to require less briefing on issues and this is a service is free of charge. In this way the JIB procedures embody the positives of internal mediation.

\(^{48}\) Halsey v Milton Keynes General NHS Trust; Steel v Joy and another [2004] EWCA Civ 576, [2004] 1 WLR 3002

\(^{49}\) CIPD 2011, 3.

\(^{50}\) CIPD 2011, 14.

\(^{51}\) CIPD 2011, 15.
The benefits of external mediation have been listed by the CIPD are mediators will not have personal knowledge of the individuals involved, are likely be more experienced, can gain the the parties quicker and are able to provide the organisation with better insight into organisational or cultural issues. The JIB may have personal knowledge of managers or representatives in a company but it is unlikely that there will be personal knowledge of individuals prior to a claim due to the large numbers in the industry. JIB has a fantastic reputation for mediation and is experienced at dealing with these types of claim (with one mediator having been involved in over 600 mediations).

In this way the JIB are respected and trusted by parties as they do not have an agenda and do not charge, hence there is no monetary gain to come from settling a case. The JIB in this sense also embodies the best of the external mediators.

Third party mediators are rare outside of the construction industry but organisations in a particular sector that provide mediation services should certainly be considered as they can encompass the best attributes of both internal and external mediators.

**Preservation of Relationship**

Some employees want to rebuild the relationship with their employer rather than gain a financial settlement, and this is much more likely through mediation than any other form of dispute resolution. In this setting, with the confidentiality requirement of a mediation meeting, can allow parties to discuss issues more freely without believing they are incriminating themselves.

Mediation is effective because people feel like it is a fair process and they will likely be satisfied by the outcome. The aim is that the process is a collaboration and this can be most effective at helping to maintain the employment relationship.

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52 Ibid.
53 As of 1 June 2015, there were 24,479 individuals with the right to raise a claim through the JIB Disputes Procedure.
54 Harlos 2004
55 Ibid, 55.
Creative Remedies

Mediation allows a wider array of resolutions than litigation, which is usually concerned with compensation (or reinstatement and reengagement in cases of unfair dismissals\textsuperscript{56}).

Mediation can, and has under the JIB procedures, led to resolutions on the basis the provision of a reference, the provision of transport or a change in workplace. This links to the idea of greater control which these type of procedures allow and can be a major advantage to both parties.

Enforceability

Where parties successfully mediate on an issue the JIB draws up the necessary agreement. No party has ever breached an agreement once it has been made due to the respect of the parties to the procedures. Mediated settlements have historically had higher compliance rates than adjudicated settlements\textsuperscript{57}.

Flexibility

"Overly complicated ADR based resolution procedures destroy the original intents of having flexible and direct dispute resolution."\textsuperscript{58} A less formal setting than an Employment Tribunal has allowed the JIB to successfully resolve many cases which would have otherwise required high levels of legal expense, time, causes unrest, and perhaps, irrevocably damage to the employment relationship. The independence of the JIB makes mediation a vital service for companies.

Singh and Kumar argue that conflict in workplaces is inevitable, it is also "containable through various institutional arrangements"\textsuperscript{59}. The institutional method of control in the electrical contracting industry is the JIB Disputes Procedure, and more specifically, mediation.

\textsuperscript{56} S.113-117 ERA 1996.
\textsuperscript{57} McEwen and Maiman 1986.
\textsuperscript{58} Cheung 2014, 299.
\textsuperscript{59} Singh and Kumar 2011, 15.
Voluntary Nature and Control

One of the keys to the effectiveness of mediation is it is voluntarily entered into\(^6^0\), although others have theorised mandatory mediation may be just as effective once those unwilling parties become “infected with the conciliatory spirit” \(^6^1\).

It is the control parties have over the discussions and the way in which a mediation meeting can be discussed that is appealing to some parties. Where an employer may be limited as to the control through the Employment Tribunal, in mediation they can affect the way in which parties analyse their position with a view to settlement. This may mean cases can be settled for less than would have been awarded at Tribunal.

As mediation is voluntarily entered into, either party can choose to withdraw at any time if they believe this in their best interest. Although no party has withdrawn from mediation in the JIB Procedures, there have been some circumstances where an agreeable settlement cannot be reached and a Dispute Hearing has been held to decide on the case.

Some parties may engage in mediation, but believe they have a strong case which should progress to hearing to achieve their best possible

Why has the JIB Procedures been so effective?

The JIB Procedures have a high level of effectiveness in terms of mediation success and the reasons for this, beyond the generic reasons why mediation is effective, are detailed below.

Industry Knowledge

The industry knowledge of the JIB Officers who undertake mediation is of great advantage when attempting to mediate. Often it has been reported that those outside of the industry, such as Acas Conciliators, will be unaware of this specific set up in what has been a rather volatile industry, and hence will not know the full story as to what the cause of a dispute may be (such as demarcation of roles).

\(^6^0\) Editors Volume 1 of the White Book (2003) comments to paragraph 1.4.11.
\(^6^1\) Lord Philips, 2008.
Issues such as demarcation, the grading of electrical operatives, and the terms of the JIB Collective Agreement will mean that the JIB National Officers will have the relevant knowledge and experience to properly conduct an evaluative mediation meeting and discuss the strengths of the case with both parties.

Remit

Mediation has traditionally been used in an array of different sectors from family issues, workplace personality disputes and personal injury claims. The remit under which JIB Dispute Procedures is strictly limited and this could be one of the reasons for the effectiveness of mediation. Cases tend to be those which are not as legally complex

The losses of the individual can (generally) be easily quantified. Unfair Dismissal claims have made up the vast majority of claims lodged into the JIB procedures; 1275 of the 2850 claims lodged in total since 1968 (45%)\(^2\).

The JIB model of evaluative mediation narrows the potential award to a reasonable band. Unfair dismissal cases have been the most common in the JIB Procedures. These cases are easier to calculate in terms of potential compensation if successful as there is a basic award calculated on a fixed formula\(^3\). These cases may also have consideration for future loss, and a date at which it would have been reasonable to have found equivalent employment will need to be established.

In the construction industry though, turnover of jobs is high due to the large number of individuals who are self-employed and mobile. This again has meant calculation of potential losses is more restricted in general and easier to calculate.

Unlawful Deductions from Wages claims have been consistently high over the last 5 years and have outnumbered Unfair Dismissal claims in this period (157 compared to 82)\(^4\). The majority of these claims relate to companies not paying the correct rate of pay under the JIB Agreement.

Unfair dismissal claims, unlawful deductions from wages and redundancy pay disputes have formed 1920 of the 2850 claims (67.4%) since 1968\(^5\).

\(^2\) JIB 2015, 7.
\(^3\) s.119 – 123 Employment Rights Act 1996.
\(^4\) Ibid.
\(^5\) JIB 2014.
Where potential awards are easier to calculate, claimants can be shown how this is done at mediation and weigh up their options as to loss and come to a conclusion on a reasonable settlement figure as part of the evaluative mediation process.

Representation

The process, although open to representation from either solicitors or barristers, has seen to be much more effective in the past when the parties are represented by the parties to the JIB, the ECA and Unite the Union. However, this is not compulsory.

All claims where the ECA represented between 2012 and 2014 were mediated successfully. The two cases which could not be mediated and reached a Dispute Hearing in 2014 were those where the company were represented by independent advisors (one solicitor and one HR consultant).

Unite representatives may view the mediation process differently and are more likely to pursue a case with little regard for the indirect costs associated with a claim reaching JIB Dispute Hearing or Employment Tribunal. A company will spend more time preparing for a case and indirect costs will be higher for companies compared to claimants (estimated at 18 days for a disciplinary and 14.4 days for a grievance in management and HR time).66

This would suggest that representation is not necessarily linked to the effectiveness of mediation as proposed. Although we can see where a company is represented by the trade body (in this case the ECA) they are more likely to engage positively in mediation.

66 CIPD 2011, 14.
Fig. 1.2 – Representation for claims through the JIB Dispute Procedure

As discussed above, Unite are an involved union (with many officers representing several claimants in cases each year, and hence familiar with the procedures) that invest in the process of mediation and believe in the benefits. This acceptance of the procedures and their support being sought at an early stage means employees see this as a legitimate and effective means of dispute resolution. It is believed in organisations that work with trade unions to “embed mediation, it is accepted – and even championed – by them”. The benefits of representation are not always clear though. Acas and the CIPD state representation should not generally be encouraged as this does not allow the parties to find their own solution to the dispute or be as open and honest as they may be without representation. The same report does admit many claimants can be nervous about the process and will often believe they require representation in mediation, whether in reality this is actually true or not.

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67 Acas and CIPD 2013, 20.
68 Acas and CIPD 2013, 20.
69 Ibid, 28.
70 Ibid.
Regularity of Use

Those who use mediation regularly are more likely to use it again as they have seen first-hand the effectiveness of the process. Under the JIB Agreement, due to the nature of the industry, the majority of claims come from larger companies who have the most employees. In 2014, 58% of the claims that were submitted through the JIB Disputes Procedure were against major electrical companies (who employ 50 or more electricians)\(^\text{71}\).

These companies who regularly deal with the procedures are more likely to see the benefits from mediation. This tends to be larger companies who have more employees and therefore tend to have more disputes numerically. Larger employers also tend to have more formalised procedures. Hence, these companies are expected to be more conversant with the relevant collective agreements and procedures.

In 2014, one Unite the Union regional officer was representative in 6 different cases, 4 of which were resolved by conciliation or mediation and 2 of which did not reach the mediation stage because the claims were deemed to not have a reasonable chance of success\(^\text{72}\). Representatives are familiar with the use of mediation.

An expectation by Claimants, who are generally advised by Unite the Union regional officers who have experience with the JIB Agreement, means that parties are aware of the process more and are then more likely to expect a settlement through mediation.

Mediation has been more widely used in recent years, and firms which have used mediation before, were more likely to use mediation again. The CIPD found that 49.4% of companies have increased their use of mediation in the past two years\(^\text{73}\) compared to only 3.5% who had the decreased their use of mediation. Familiarity and understanding of the process breeds confidence. To this end many companies have increased training for line managers on how to have difficult conversations with their staff (61.5%)\(^\text{74}\).

Conclusion

\(^{71}\) JIB Quarterly Statistics, June 2015.
\(^{72}\) JIB 2014.
\(^{73}\) CIPD 2011, 3.
\(^{74}\) CIPD 2011, 11.
Mediation is a growing method of dispute resolution. The effectiveness of the model is becoming more recognisable. The JIB model is conducive to mediation due to the nature of the industry, the familiarity of the parties, the knowledge of the JIB and the changes to the legal system (particularly the introduction of fees).

The nature of the JIB Agreement revolves around the process of mutual understanding and recognition between the parties to the JIB. The ECA and Unite are the parties which work together with the JIB to find effective solutions in mediation. There is often a recognition by the representatives of the volatile nature of the industry prior to the formation of the JIB and this leads to the parties being more understanding of the events which have led to the dispute in the first place.

Mediation is an agreed process by the parties, recommended to employees and companies, and has been proven effective under the system generally for more than 45 years. The ten benefits of mediation set out why the process can be effective generally, but the specifics to the electrical industry are what make the process so effective. The industry knowledge of the mediators and representatives and the limited remit, as well as the perception from bodies within the industry, mean that parties are more open to and even expecting mediation from the time that a dispute arises.

The JIB Procedures are seen as a safety net in the industry for those who are covered by the collective agreement, particularly as they have the ability to lodge a claim from the first day of their employment, and this in turn means that employers are fairer in their practices and more conscientious of employees’ terms and conditions.

Summary - Practice Outcomes

- As mentalities to ADR evolve, mediation is becoming a more common and accepted. As mediation becomes more widely used, more people are willing to engage in mediation and this leads to higher levels of resolution

- Mediation should form an integral step in the disputes resolution mechanism, and is specifically effective in collective dispute procedures
Over time, imbedded mediation becomes an accepted and efficient manner of resolving disputes.

Mediation has provided a cost effective mechanism of resolving disputes for companies under the JIB Agreement.

Where not an automatic part of a company's disputes process, mediation should be utilised if possible. This is likely to result in less expense and less time spent on dispute resolution.

Mediation in the JIB Disputes Procedure is effective as the JIB is an independent body, respected by both contractors and their employees. Neutrality is essential to maintain this trust and confidence as a mediator.

Mediation may be more effective on simpler issues and where an evaluative method of mediation is utilised, particularly on cases where losses can be accurately estimated.

Mediation through industry procedures such as the JIB is most effective when parties are represented. This is due to the industry knowledge and experience with the procedures.

Mediation will be encouraged by courts and jurisdictions other than the UK may even require mediation as a mandatory first step prior to a hearing.
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