CONFIDENTIALITY, REPRESENTATION AND EVIDENCE IN ADR IN EMPLOYMENT DISPUTES IN TURKEY AND THE UNITED KINGDOM(*)

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Abstract

In the world, ADR (Alternative Dispute Resolution) methods are becoming increasingly popular because of the heavy caseload of tribunals/courts, and the resolution of individual employment disputes through ADR is part of this trend. However, there have always been concerns regarding the use of ADR for the resolution of employment disputes, particularly due to the potential power imbalance between the disputants. These concerns are mutual in the comparison countries of this research: the United Kingdom (UK), with its long and honourable history of ADR in individual employment disputes, and Turkey, which has recently started to employ ADR methods for these disputes. The concerns revolve around: (i) whether confidentiality acts as a 'curtain' that prevents stakeholders from assessing whether the procedure is justly managed or whether employees have been pressured to settle; (ii) whether representatives are accessible, whether there are providers of legal counsel for employment disputes, and whether the governments offer legal aid for individuals who cannot afford the cost of representation; (iii) the types of evidence that can be submitted in ADR processes and whether there is an enforcement mechanism in case of resistance to providing necessary documents for ADR meetings.

Consequently, it must be highlighted that the same set of rules should not be applied to all kinds of disputes. Due to the potential power imbalances in employment disputes, necessary precautions must be taken to ensure access to justice. On this basis, this research illustrates how ADR regulations in Turkey and the UK should be adjusted to align with the unique structure of employment disputes.

Keywords

ADR, Mediation, Conciliation, Employment Disputes, Confidentiality, Representation, Evidence, Turkey, The UK.

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GİZLİLİK, TEMSİL VE DELİLLER: TÜRKİYE VE BİRLEŞİK KRALLIK'TAKİ İŞ UYUŞMAZLIKLARINDA ALTERNATİF UYUŞMAZLIK ÇÖZÜM YOLLARI

Öz

Dünyada, mahkemelerinin ağır iş yüklerinden dolayı, Alternatif Uyuşmazlık Çözümü Yöntemleri (AUÇY) giderek daha popüler hale gelmekte ve bireysel iş uyuşmazlıklarının AUÇY aracılığıyla çözümü bu eğilimin bir parçası halini almıştır. Ancak, özellikle uyuşmazlıkta yer alan taraflar arasında potansiyel güç dengesizliği nedeniyle, iş uyuşmazlıklarının çözümünde AUÇY'nin kullanımıyla ilgili her zaman endişeler olmuştur. Bu endişeler, bu araştırmanın karşılaştırma yapılan ülkelerinde, uzun ve saygın bir geçmişe sahip olan Birleşik Krallık ve yakın zamanda AUÇY'yi kullanmaya başlayan Türkiye'de, ortaktır: AUÇY hususunda endişeler şu konular etrafında dönmektedir: (i) gizliliğin, sürecin adil bir şekilde yönetilip yönetilmediğini değerlendirmekten paydaşları engelleyen bir 'perde' olarak işlev görüp görmediği veya çalışanların bu süreç içinde anlaşmaya varmaya zorlanıp zorlanmadığı; (ii) yasal temsilcilerin erişilebilir olup olmadığı, bireysel iş uyuşmazlıkları için hukuki danışmanlık sağlayıcılarının bulunup bulunmadığı ve hükümetlerin temsil maliyetini karşılayamayan bireyler için adli yardım sunup sunmadığı; (iii) AUÇY süreçlerinde sunulabilecek kanıt türleri ve AUÇY toplantıları için gerekli belgelerin sağlanmasına direnilmesi durumunda bir zorlama mekanizmasının olup olmadığı.

Sonuç olarak, tüm uyuşmazlık türlerine aynı AUÇY kuralların uygulanmaması gerektiği vurgulanmalıdır. İş uyuşmazlıklarındaki potansiyel güç dengesizlikleri nedeniyle, adalete erişim hakinin garanti altına alınabilmesi için gerekli önlemlerin alınması şarttır. Bu temel üzerine, bu araştırma, Türkiye ve Birleşik Krallık'taki ADR düzenlemelerinin iş uyuşmazlıklarının özgün yapısına uygun şekilde nasıl uyarlanması gerektiği hususuna yoğunlaşmaktadır.

Anahtar Kelimeler

AUÇY, Arabuluculuk, Uzlaşma, İş Uyuşmazlıkları, Hukuki Temsiliyet, Gizlilik, Deliller, Türkiye, Birleşik Krallık.

Extended Abstract

Globally, the use of Alternative Dispute Resolution (ADR) methods is on the rise due to employment tribunals/courts being overwhelmed with cases. The adoption of ADR for resolving employment disputes is not without its criticisms, particularly concerning the possible imbalance of power among the parties involved. The criticisms focus on: (i) whether confidentiality serves as a barrier that hinders the evaluation of the fairness of the process or if it pressures employees into agreements; (ii) the availability of representatives, the provision of legal advice for employment disputes, and the government's support in providing legal aid to employees that are unable to bear representation costs; (iii) the admissibility of evidence in ADR procedures and the presence of an enforcement mechanism for the submission of essential documents regarding workplace required for ADR sessions. Nevertheless, regulations regarding confidentiality, representation, and evidence might pose disadvantages for employees, often the less dominant party in the employment relationship. Therefore, worries about these three aspects raise doubts about whether ADR methods create an inappropriate environment for the settlement of employment disputes.

Concerning confidentiality, mediation in Turkey and conciliation in the UK offer a private setting for the settlement of employment disputes. However, they do not take the necessary precautions to ensure access to justice. Therefore, this research firstly recommends that governments could potentially impose a duty on third parties to at least make parties in employment relations aware of their right to waive confidentiality and to inform them about the pros and cons of waiving. This approach is considered because often parties are not aware that this option exists.

Secondly, as an additional solution, introducing a cooling-off period for cases where parties choose not to waive confidentiality could be beneficial. During this period, disputants could reach a preliminary, non-binding agreement, which could later gain legally binding status. This method could mitigate the negative impacts of confidentiality by providing employees the opportunity to understand the risks associated with giving up employment rights, and by reducing the likelihood of them entering agreements under pressure or economic coercion from employers.

As for legal representation, unlike the UK, which has institutions providing free legal advice to the less advantaged parties, Turkey lacks such support structures. In Turkey, legal aid is available to employees facing

financial hardships, but it only covers mediator fees, not representation costs. Hence, the Turkish government is urged to increase legal aid funding and promote pro bono activities among intern lawyers. In contrast, the cost of legal representation can be prohibitive in the UK, where no legal aid is available for employment disputes either in employment tribunals or conciliation procedures. However, institutions like the Citizens Advice Bureaus (CABs) and the Free Representation Unit (FRU) play a vital role in addressing the power imbalance, though they suffer from underfunding and excessive workloads, limiting accessibility and thus, the government should allocate more funds for these institutions. Additionally, the Damage-based Contingency Fee Agreements (DCFAs) in the UK, absent in Turkey, could contribute to better access to justice.

Regarding the presentation of evidence, Turkish regulations allow only expert opinions and do not address the use of witnesses and expert evidence in employment mediation. Furthermore, the Turkish Constitutional Court has ruled against mediators evaluating witness statements or expert evidence. Given the significant role that expert evidence plays in resolving employment disputes, especially where mediation is mandatory, the suggestion is to create a specialised 'accredited expert evidence institution' dedicated to employment mediation to enhance justice access. In contrast, in the early conciliation process in the UK, there's a general avoidance of employing evidence to foster a setting where parties can converse freely, confidentially, and respectfully. Consequently, for cases that significantly depend on witness statements or expert evidence, neither Turkey's mediation system nor the UK's early conciliation approach appears to be a suitable mechanism for resolving employment disputes.

INTRODUCTION

ADR is as much an art as it is a science[1]. Just as the most productive results can be achieved under the most appropriate conditions in art, the appropriate dispute resolution can be achieved only when ADR methods are provided under a proper environment and in accordance with the nature of employment disputes. However, rules concerning confidentiality, representation, and evidence may be disadvantageous for employees who are mainly the less powerful party in the employment relationship. Hence, concerns revolving around these three elements cause a question of whether ADR methods provide an improper environment for resolving employment disputes.

Before analysing these three elements, it is necessary to briefly demonstrate how ADR is working in comparison countries in the resolution of employment disputes. In Turkey, the 2017 LCL states that when a claimant seeks employment rights or compensation relying on an employment statute or individual employment contract or CBA, or when he/she seeks reemployment[2], they have to invoke mediation before getting involved in court action[3]. This obligation is called mandatory mediation and is regulated as a 'pre-condition to action (*dava sarti*).' By contrast, in the United Kingdom, where parties want to bring a case to an Employment Tribunal (ET), they must have an Early Conciliation (EC) certifi-

1 ILO, "Manual Mediation, Conciliation, Arbitration", International Labour Organisation, 1 August 2006, Access Date: December 15, 2023, 86. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_120302.pdf.

2 Reinstatement and re-engagement claims in the UK are merged and named as reemployment cases in the context of Turkey.

3 Labour Courts Law, No.7036, Official Gazette: 25/10/2017 No: 30221, Article 3.

cate from the Advisory, Conciliation and Arbitration Services (ACAS), an ADR institution. However, it should be highlighted that any party is not forced to attend conciliation meetings.

This first element is confidentiality relating to an obligation on parties who participate in ADR meetings not to disclose details, documents or information about ADR procedures to anyone outside the meetings[4]. However, regarding employment law, confidentiality may be a factor that dissolves fair protection of employees since wide use of ADR methods may mean making employees' inalienable rights negotiable[5]. Furthermore, confidentiality might be a 'curtain' that prevents stakeholders from evaluating whether the procedure is justly managed or whether employees have been under pressure to settle[6].

As for representation, although there are numerous definitions of it, legal representation refers to a person who transfers legal information and/or has the authority to act for an individual[7]. Having a legal advisor or representative might eliminate the shortcomings of confidentiality for employees against employers. However, when employees want to engage with a legal representative, there are questions about whether the representatives are accessible, whether there are legal advice providers for employment disputes and whether the State provides legal aid for those who are unable to afford the cost of representatives.

Access to evidence is a necessary tool for proving a violation of the law[8]. Nonetheless, in ADR methods, employees may not be able to access evidence, such as business records, since they have limited mechanisms to require the discovery of evidence. There might be confusion unless a clear distinction is made between evidence in litigation and evidence in ADR mechanisms. On the one hand, evidence in litigation is mainly related to confidentiality since it requires examining to what extent confidentiality allows disclosure of evidence submitted for ADR in following court proceedings. This examination will be made under the subheading of confidentiality. On the other hand, evidence in ADR necessitates an investigation into what kind of evidence can be submitted for ADR processes and this investigation will be made under the subheading of evidence in ADR.

On this basis, this article will compare ADR in employment disputes in Turkey and the UK in terms of these three aspects. Firstly, it will examine the scope

4 Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018), 251.

5 Kübra Yenisey, editor, *İş Mahkemeleri Kanunu Tasarısı Taslağının Değerlendirilmesi* (Türkiye Isveren Sendikaları Konfederasyonu, 2016), 176.

6 Cheryl Dolder, "The Contribution of Mediation to Workplace Justice", Industrial Law Journal (2004): 323.

7 Jen Webb, *Understanding Representation* (Sage Publishing, 2019), 1-11.

8 Baki Kuru, Ramazan Arslan and Ejder Yilmaz, *Medeni Usul Hukuku* (23rd edn, Yetkin Publishing, 2012), 793.

of confidentiality and the exceptions to confidentiality. Secondly, it will analyse the representation of employees or employers in ADR meetings. Then, it will investigate what kind of evidence can be submitted for the resolution via ADR methods. Ultimately, it will comparatively analyse these systems to express how to reach appropriate dispute resolution systems.

I. CONFIDENTIALITY

It is very challenging to give a uniform and versatile confidentiality definition because of significant uncertainty over its scope in many legislative frameworks. However, international ADR instruments endorse the principle of confidentiality. To illustrate, Article 10 of UNCITRAL's Mediation Model Law points out that 'unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for implementation or enforcement of a settlement agreement[9].'

Besides, Article 7 of the EU Mediation Directive states that:

> given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process[10].

Article 10 stipulates some exceptions, as follows: where all parties agree to disclose mediation proceedings; the evidence is necessary for overriding consideration or public policy; or disclosure is necessary to implement or enforce the mediation settlement agreement[11].

Confidentiality encourages disputants to speak freely and openly because they do not expect what happens and is said in ADR meetings to have the same outcomes as if they occurred in court. A sincere atmosphere in which parties reveal their feelings, thoughts, and expectations would enable a neutral third-party to appraise the disputants' real position and interests and to assess the possibility of settlement. Therefore, it is claimed that confidentiality might be an essential ingredient of ADR methods protecting the interest of all participants and ensuring the integrity of the process[12].

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9 United Nations Commission on International Trade Law on Mediation Model Law (2018), Article 10.

10 Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, Article 10.

11 Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, Article 10.

12 Scott Nelson, "The EEOC's Mediation Program: A New Hope" ADRER 17 (1999): 18.

Nevertheless, confidentiality may have several disadvantages for ADR users. To illustrate: (i) parties may show the cards in their hand in ADR proceedings by trusting its confidential nature (ii) confidentiality might be an obstacle to evaluating whether the procedure is justly managed, whether there is any irregularity during the proceedings, whether an employee has been under pressure to settle[13] (iii) confidentiality might prevent an employee from using the pressure of public opinion as a powerful weapon[14]. Therefore, there is a concern that confidential ADR mechanisms might be a fishing expedition with good catches against vulnerable parties such as unrepresented employees. Therefore, confidentiality constitutes one of the most challenging problems in terms of protecting the weaker party in employment relations[15]. On this basis, this section will reveal the understanding of confidentiality in ADR employment disputes in comparison countries.

A. CONFIDENTIALITY IN TURKEY

Article 4 of the Law on Mediation in Civil Disputes (LoMCD) expresses that parties, their representatives and any party involved in the ADR processes must keep all information, documents, and reports confidential unless otherwise agreed[16]. The underlying reason for the obligation is to provide an environment where the parties can negotiate comfortably without risking their reputation[17]. Therefore, this is a manifestation of the obligation to maintain confidentiality, arising from the law[18]. Confidentiality is not a phenomenon that changes based on whether the parties reach an agreement or not at the end of mediation but it is of importance especially when the parties do not reach an agreement[19].

In 2012, when mediation was first introduced in Turkey, the provisions on confidentiality were brought to the Constitutional Court by claiming that it would not be possible to evaluate whether the weaker party is forced to settle through misrepresentation, duress or undue influence due to the lack of publicity. However, the Constitutional Court held that because mediation is not a judicial mechanism, there is no need for publicity. In addition, it was stated that confidentiality

13 Kaan Yağcıoğlu, "Yeni Is Mahkemeleri Kanunu Uyarınca Arabuluculuk ve Arabuluculuğun Is Yargılamasına Etkileri" Dokuz Eylül University Law Faculty Journal 20(2) (2018) 457, 478. See also concern about confidentiality in hybrid ADR methods (med-arb): Betül Canatan, "Med-Arb Yönteminin Getirdiği Olumsuzluklar ve Gizlilik Sorununa Yönelik Bazı Med-Arb Modelleri" Anadolu Üniversitesi Hukuk Fakültesi Dergisi 9(1) (2023), 81-90.

14 Karl Mackie, The ADR Practice Guide Commercial Dispute Resolution (Butterworths 2000) 139.

15 Ibrahim Ermenek, *Arabuluculuk Surecinde Zayifin Korunmasi* (Yetkin Yayincilik Ankara 2021) 129.

16 Law on Mediation in Civil Legal Disputes, No. 6325, Official Gazzette: 22/6/2012 No: 28331.

17 Ali Yeşilırmak, Elif Kısmet Kekeç, Alper Bulur, editör, *Temel Arabuluculuk Eğitimi Katılımcı Kitabı* (Adalet Bakanligi, 2021) 101. Süha Tanrıver, *Medeni Usul Hukuku Cilt I* (Yetkin Publishing, 2016) 375.

18 Umut Ozan Erginer, "Arabuluculuk ve Gizlilik" Uluslararası Antalya Üniversitesi Hukuk Fakültesi Dergisi, 9, 2017, 88.

19 Çiğdem Yazıcı Tıktık, *Arabuluculukta Gizliliğin Korunması* (On iki Levha Publishing, 2013) 135.

is one of the most prominent features of mediation and its purpose is to encourage the parties to resolve disputes rather than hiding something. The Court also emphasised that it is possible to waive confidentiality if the parties agree[20].

Although the justification of the Court is rational, it did not respond to the question of whether the same set of rules can be applied to all kinds of disputes such as family, commercial, consumer and employment, where there is a potentially different level of inequality in bargaining power. Therefore, it can be argued that the confidentiality of ADR mechanisms should be configured according to the nature of the disputes in question and different disputes should be treated differently.

Article 5 of LoMCD determines the scope of confidentiality: (a) a party's invitation to the mediation process or the request of one of the parties to apply for mediation; (b) views and suggestions expressed by the parties regarding the settlement of the dispute; (c) statements and acknowledgements made by the parties during meetings; (d) documents issued exclusively for mediation. To ensure the protection of these materials, taking photos or audio or video recordings is not permitted during ADR meetings[21]. The materials that need to be protected by confidentiality might have economic value, or it can be a value that must be legally protected in a moral sense[22]. Because the parties providing these documents and information will be assured that they cannot be used as evidence against them in the following litigation, a sincere environment would be created[23]. However, there is no clarity on whether parties can agree to use the materials in Article 5 in subsequent court proceedings. On this issue, it is noted by scholars that it is possible for the parties to make an "evidence agreement" to use these materials in the court process[24].

The commencement of confidentiality obligations is the stage of preparation but since mediation is a pre-condition to action for bringing a claim to courts in individual employment cases, the obligations will commence at the time of case acceptance for the mediators[25]. However, it is claimed that the settlement agreement signed at the end of the mediation is not covered by confidentiality[26]. On this

20 Constitutional Court`s Decision, Application No: 2012/94, 10/07/2013.

21 Tankut Centel, *Labour Dispute Resolution in Turkey* (Springer, 2019), 147.

22 Tıktık, *Arabuluculukta Gizliliğin Korunması*, p.137.

23 Centel, *Labour Dispute Resolution in Turkey* (Springer, 2019) 27. Tıktık, *Arabuluculukta Gizliliğin Korunması*, 35.

24 Ibrahim Ermenek, *Arabuluculuk Surecinde Zayifin Korunmasi* (Yetkin Yayincilik Ankara 2021) 130. Ozge Yakici, Bireysel Is Hukukunda Bireysel Arabuluculuk (Yetkin Publishing 2019) 45. Uğur Yazıcı, *Arabuluculukta Gizliliğin İhlali Suçu* (Seçkin Publishing 2024) 69.

25 Yazıcı, *Arabuluculukta Gizliliğin İhlali Suçu*, 58.

26 Emre Kıyak, "Arabuluculuk Sureci Sonucunda Ulaşılan Anlaşma Belgesinin Hukuki Niteliği" Turkiye Adalet Akademisi Dergisi 6(21) (2015) 541-542.

issue, within the framework of the principle of party autonomy, just as the parties have the freedom to terminate the mediation process, they have also the freedom to decide which matters will be included in the settlement agreement[27]. Hence, they will have the ability to determine the scope of the confidentiality.

The scope of confidentiality also covers private sessions (shuttle diplomacy) that take place in the absence of the other party[28]. In the private session, the parties may be inclined to convey to mediators all the matters that they refrain from expressing in front of the other party. Nonetheless, in these meetings, mediators are prohibited from passing the information on to the other side unless there is explicit consent. This is because, for example, suppose a mediator has notified an employer about the financial difficulties of an employee. The employer may want to take advantage of the employee's situation and insist on offering less than they deserve.

Confidentiality can be divided into two parts: the prohibition of disclosure of information to anybody (person-oriented protection); and the prohibition of the use of acknowledgements and statements in following court processes (document-oriented protection[29]). On this basis, whereas Article 4 of LoMCD mainly refers to person-oriented protection Article 5 of LoMCD mainly refers to document-oriented protection. Furthermore, Article 4(2) of LoMCD, as amended by Article 18 of the Labour Courts Law (LCL) No. 7036, expands the scope of person-oriented protection by stating that in addition to the parties and their legal representatives, other persons participating in the mediation meeting such as intern lawyers are mandated to keep the acknowledgements, statements and documents submitted or obtained confidential[30]. In case of breaching the confidentiality by an employee or intern of the lawyer, the lawyer will be liable for the breach of confidentiality[31].

Nonetheless, the LoMCD may need some amendments because the Turkish system has been transformed from facilitative mediation to evaluative mediation with the enactment of the LCL by allowing mediators to raise a resolution proposal where parties are unable to reach an agreement. It is clear that Article 4 of LoMCD provides protection for parties' offers and parties' responses to the offers but it does not specifically mention offers being put forward by the medi-

27 Hakan Pekcanıtez, Hülya Korkmaz, Muhammed Özekes, Mine Akkan, *Pekcanıtez Usul-Medeni Usul Hukuku* (On iki Levha Publishing, 2017) 783.

28 Tıktık, *Arabuluculukta Gizliliğin Korunması*, 116. İrfan Atış, "Arabuluculuk Uygulamasında Gizlilik İlkesinin Uygulanması ve Önemi" Sakarya İktisat Dergisi, 8(1), 2019: 82. Doğan Gedik, "Arabuluculukta Gizliliğin İhlali Sucu" Terazi Hukuk Dergisi 13(148) (2018): 99

29 Fahrettin Korkmaz, Emre Kıyak, "7036 Sayılı İş Mahkemeleri Kanunuyla 6325 Sayılı Hukuk Uyusmazliklarinda Arabuluculuk Kanununda Getirilen Değişikliklerin Değerlendirilmesi" İstanbul Aydın Üniversitesi Hukuk Fakültesi Dergisi, 4, (2018): 39. Gedik, "Arabuluculukta Gizliliğin İhlali Sucu" 100.

30 Labour Courts Law, No.7036, Article 18. Official Gazette: 25.10.2017. No: 30221.

31 Erginer, "Arabuluculuk ve Gizlilik", 85.

ator. Therefore, the scope of document-oriented protection should have involved offers being put forward by the mediator as well. Hence, the LoMCD should be amended in accordance with the amendments of the LCL.

Additionally, since all information and documents that the mediator possesses have been privileged by the LoMCD, mediators and parties' legal representations are entitled to avoid providing testimony in some cases. In this regard, there are three provisions on which Turkish mediators can rely. Firstly, Article 7 (1) of the Regulation on LoMCD states that mediators cannot be invited by courts for testimony[32]. In this regard, it should be noted that confidentiality might be a potential cloak for the mediator's misconduct[33]. Secondly, Article 249 of the Civil Procedural Act (CPA) states that individuals who have referred to testimony about information protected by the law can abstain from testimony on the basis of person-oriented protection[34]. Finally, Article 250(b) of CPA regulates the right to withdraw from the testimony if the witness's statement causes a criminal investigation for mediators. In this context, Article 33 of LoMCD states that any person, who causes harm to a person's legally protected interests by acting against the rules of confidentiality, can be punished by imprisonment for up to six months.

It is clear that the circumstances expressed above are protected under the cloak of confidentiality and a judge cannot rely on them in the following judicial process[35]. Nonetheless, the extent to which the content of mediation proceedings can be disclosed needs to be addressed. This report may involve statements made during mediation. For instance, if an employee accepts in mediation proceedings that they worked three hours overtime two days of the week, and the report says they are paid for this, would such a statement be considered by a judge while deciding? In this context, it is not true to state that all the facts revealed during the ADR meetings can be buried in a coffin[36]. Some written or oral information shared can be partly disclosed. That is, confidentiality is not absolute, and it can be removed.

Two circumstances might be exceptions to confidentiality. Firstly, Article 4 of the LoMCD states that *unless otherwise agreed*, the parties are obliged to keep confidential the information documents and other records submitted or obtained in any other way throughout the mediation process[37]. It highlights that the consent of both parties is required so that confidentiality can be circumvented. On

32 Regulations on LoMCD, Official Gazette: 02.06.2018, No: 30439

33 Mustafa Erdem Atlihan, "A New Suggestion on The American Experience of the Limit of Mediation Confidentiality" Law & Justice Review 12(23) (2022): 47.

34 Civil Procedural Law, No. 6100, Official Gazette: 4.2.2011. No: 27836.

35 Centel, *Labour Dispute Resolution in Turkey,* 125.

36 Atış, "Arabuluculuk Uygulamasında Gizlilik İlkesinin Uygulanması ve Önemi", 83

37 Law on Mediation in Civil Disputes, No. 6325, Article 4.

this issue, where the parties have made sufficient progress in communication and where confidentiality is not needed to protect personal and trade secrets, waiving confidentiality can be offered by the mediators[38]. Secondly, according to Article 7 (5) of the Regulation on LoMCD, if the parties could hold or obtain evidence without the disclosure of evidence in mediation meetings, the admissibility of the evidence would not be affected. For instance, an employment contract or payslip submitted for mediation will not become inadmissible in courts or arbitrations just because it was alleged in the mediation.

On this issue, Murat Atali states that one of the primary purposes of mediation is to end disputes without delays and admissions made for this purpose should not have any evidentiary value in future litigation proceedings[39]. This is because the admission aims to establish a sincere and realistic negotiation environment. Otherwise, mediation would become a platform enabling disputants to produce evidence for subsequent court proceedings[40]. The parties' expectation from confidentiality is to avoid any negative consequences in the future or, at the very least, not to end up in a worse situation compared to their pre-mediation status[41]. Therefore, the present author thinks that the scope of confidentiality should be understood as information that the other party would not have learned if the mediation was not used. In other words, if the parties have the opportunity to present evidence in court, regardless of whether it was included in the mediation process, it will be admissible in court. Otherwise, the labour law jurisdiction will be blocked by people abusing confidentiality rules[42].

B. CONFIDENTIALITY IN THE UNITED KINGDOM

Early Conciliation[43] is the main form for resolving individual employment disputes in the UK and this forum is conducted by a non-governmental agency whose name is ACAS. To provide a better understanding of confidentiality in Conciliation, it is necessary to distinguish between confidentiality and 'without prejudice privileges (WPP)'. Confidentiality refers to the prohibition of disclosure of any information about employees, employers or trade union officials[44]. The WPP is a common law principle which prevents statements made in ADR meetings, whether written or oral, from being used as evidence in Employment

38 Ihsan Berkhan, *Dava Sarti Arabuluculuk* (Aristo Publishing 2019) 37.

39 Murat Atali, editör, *Zorunlu Arabuluculuğun Yargilama Hukuku Bakımından Ortaya Çıkardığı Sorunlar* in *Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu* (Yıldırım Bayezid Üniversitesi Yayınları, 6-7 December 2018), 152.

40 Fatih Usan, *Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu* (Yıldırım Bayezid Üniversitesi Yayınları, 2018) 165.

41 Omer Ekmekci, Muhammet Ozekes, Murat Atali, Vural Seven, *Hukuk Uyusmazliklarinda Arabuluculuk* (Oniki Levha Yayincilik 2019) 33.

42 Ozge Yakici, Bireysel Is Hukukunda Bireysel Arabuluculuk (Yetkin Publishing 2019) 48.

43 This might be considered a functional equivalent of mediation in Turkey.

44 Trade Union Labour Relations Consolidation Act, (1992), section 251b (1).

Tribunals (ETs) or court[45]. The underlying motive for WPP is to encourage the parties to resolve their disputes knowing that their communications will not be used against them while pursuing the litigation process[46]. In the context of this study, because the scope of confidentiality also covers WPP in many scholarly materials, the term 'confidentiality (WPP)' will be used.

In the UK, the confidentiality (WPP) of ADR processes may arise from contractual agreements and specific legislative provisions. Firstly, it sometimes can be based on non-disclosure agreements (NDAs). NDAs, known as confidentiality clauses, are agreements that 'restrict what a person or organisation can say, or who they can tell, about something[47].' They might emerge in several ways, such as in an employment contract, or COT3 agreements, which are the agreements signed at the end of conciliation meetings[48]. Parties can determine the scope of confidentiality via NDAs in COT3 agreements under the contract law principles because these settlements are legally binding contracts between parties to settle actual or potential disputes. In practice, parties' professional advisors or parties' immediate family members are commonly excluded from confidentiality[49].

When it comes to the legislative provisions, there are various legislative provisions on confidentiality in UK Law. Firstly, section 251B(1) of the Trade Union Labour Relations Consolidation Act (TULRCA) 1992 prohibits ACAS from disclosing any information related to employees, employers and their representatives[50]. It proposes to ensure that the information held by ACAS in the course of performing its duties, including ADR methods, is properly protected[51].

Secondly, the Employment Tribunal Act 1996 stipulates that 'anything communicated to a conciliator in connection with the performance of his functions under this section shall not be admissible in evidence in any proceedings before ETs, except with the consent of the person who communicated it to that officer[52].' For example, In *Hughes-Maher and Co v Cowley*, the Employment Appeal

45 ACAS, *Guidance on Settlement Agreements* (December 2018) 18.

46 Klause Hopt, Felix Steffex, editor, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2013), 400.

47 ACAS, "Guidance on Non-Disclosure Agreement" (February 2020), 4-6, Access Date: Ocak 12, 2024, https://archive.acas.org.uk/media/6367/Non-disclosure-agreements/pdf/Non_disclosure_agreements_February_2020.pdf.

48 ACAS, "Guidance on Non-Disclosure Agreement" (February 2020), 4-6, Access Date: Ocak 12, 2024, https://archive.acas.org.uk/media/6367/Non-disclosure-agreements/pdf/Non_disclosure_agreements_February_2020.pdf.

49 Anthony Korn, Mohinderpal Sethi, *Employment Tribunal Remedies* (4th edn, Oxford University Press, 2011), 409.

50 Trade Union Labour Relations Consolidation Act, (1992), section 251b (1).

51 *Advisory, Conciliation and Arbitration Service v Woods* [2020] EWHC 2228 (QB); [2020] I.C.R. 1581; [2020] 8 WLUK 97, para 21.

52 Employment Tribunal Acts (1996), section 18(7).

Tribunal made clear that the ETs should not have access to any evidence from conciliation about the parties' effort to promote settlement; otherwise, this might undermine the parties' confidence in conciliation[53].

Moreover, in *Freer v Glover*, respondent solicitors sent a letter to the ACAS conciliator stating that the claimant's claim was not genuine and was in bad faith[54]. Against this, the claimant brought a claim contending that the respondent's solicitor's statements were defamatory. Nevertheless, the High Court decided that the letter was protected by confidentiality (WPP[55]).

ADR methods are confidential forums encouraging frankness and pragmatism without fear that the words might be used against the parties later. However, their confidential nature is not absolute[56]. This section will examine the exceptions to confidentiality on several bases. Firstly, section 251(B)(2) of TULRCA has some exceptions to confidentiality: (i) the disclosure of information aims to enable or assist ACAS, the ACAS conciliator, or arbitrator to conduct their duty (ii) there is consent for the disclosure (iii) the information is disclosed for a criminal investigation or complying with the court order[57].

Firstly, the recent decision in *ACAS v Woods*[58] is the first case adjudicated under section 251(B) of TULR(C)A since 2013 when it was introduced[59]. In this case, Woods was dismissed by ACAS because of an allegation of personal misconduct in certain conciliation meetings. Then, Woods brought an unfair dismissal claim to an ET. Before the ET proceedings, ACAS was concerned about whether the details of the conciliations conducted by Woods could be disclosed and thus, applied to the High Court. Against this, Woods relied on the confidentiality (WPP) of the documents. The High Court assumed that the UK Parliament did not have such an unusual case in mind when confidentiality was introduced and granted an order permitting ACAS to disclose the details of conciliation[60]. The Court also recommended taking necessary precautions to ensure that the material presented or referred to in the ET is strictly confined to relevant issues[61]. This case underscores two important

53 *Hughes-Maher & Co v Cowley & Anor* [1991] UKEAT 472_90_1111 (11 November 1991).

54 *Leo Freer v Susan Glover* [2005] EWHC 3341 (QB), para 11.

55 *Leo Freer v Susan Glover* [2005] EWHC 3341 (QB), para 11.

56 Klause Hopt, Felix Steffex, editor, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 399.

57 Trade Union Labour Relations Consolidation Act, (1992), section 251b (2).

58 *Advisory, Conciliation and Arbitration Service v Woods* [2020] EWHC 2228 (QB); [2020] I.C.R. 1581; [2020] 8 WLUK 97, para 97.

59 IDS "Acas Permitted to Disclose Confidential Information in Unfair Dismissal Claim" IDS Employment Law Brief (2020): 21.

60 *Advisory, Conciliation and Arbitration Service v Woods* [2020] EWHC 2228 (QB); [2020] I.C.R. 1581; [2020] 8 WLUK 97, para 67 and 82.

61 *Advisory, Conciliation and Arbitration Service v Woods* [2020] EWHC 2228 (QB); [2020] I.C.R. 1581; [2020] 8 WLUK 97, para 76.

legal principles. First, it provides evidence that confidentiality is not an absolute principle. Secondly, it is essential to carefully delineate the limits of disclosure.

Secondly, according to ACAS guidelines about settlement agreements, there must be no 'unambiguous impropriety' for settlement discussions to be protected under confidentiality[62]. Unambiguous impropriety might include several circumstances such as blackmail, fraud, physical violence, threats, intimidation and so on[63]. It is the most common exception to confidentiality (WPP) in employment disputes[64]. This is regulated by section 101A of the Employment Rights Act 1996, which is about the confidentiality of negotiations before termination of employment. For example, in *BNP Paribas v Mezzotero*[65], an employee was invited to a meeting by her employer during her maternity leave to inform her that her job was no longer available and that it would be best if her contract was terminated but she was also told that the matter would be a redundancy rather than a termination and was offered a settlement package. The EAT did not engage in confidentiality (WPP) since there was no dispute at the time. However, the judge asserted that if the privileges were engaged, the conduct of BNP would have fallen within the meaning of 'unambiguous impropriety' and thus, protection would not be provided[66]. In this case, 'unambiguous impropriety' did not happen in an EC. However, if the will of the parties is sapped by dishonest and unprofessional behaviour in EC, confidentiality (WPP) would not protect ADR proceedings.

Additionally, the scope of unambiguous impropriety should include vitiating factors such as misrepresentation, duress and undue influence, making employees feel pressurised to settle. In the *Farm Assist* case, although the confidential nature of ADR processes was reaffirmed, the High Court upheld a witness summons requiring the neutral third-party to provide evidence to understand whether the settlement agreement was produced as a consequence of duress. The decision to uphold the summons was made 'in the interest of justice' as an exception to confidentiality[67]. In this case, the Court handed down that confidentiality (WPP) exists between the parties and is not a privilege of the neutral third-parties[68]. Hence, they should be involved in the resolution process where both parties waive it. The mediator should not abstain from being a witness unless they have the right to withdraw from the testimony arising from procedural law.

62 ACAS, *Guidance on Settlement Agreements* (December 2018) 19.

63 ACAS, *Guidance on Settlement Agreements* 19.

64 IDS, *Employment Tribunal Practice and Procedure* (Thomson Reuters 2018) 971.

65 *BNP Paribas v Mezzotero* [2004] UKEAT 0218_04_3003, [2004] IRLR, para 508.

66 *BNP Paribas v Mezzotero* [2004] UKEAT 0218_04_3003, [2004] IRLR, para 38.

67 *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 1102 (TCC), para 43-44.

68 *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 1102 (TCC), para 44.

This decision can be criticised because where a court or tribunal upholds a witness summons for neutral third-parties, their functions shift from being a facilitator helping parties to settle to a lawyer advocating one side of the dispute. Nonetheless, in the realm of employment disputes, this decision might be of great importance because, as mentioned above, where there is a loss in employment rights as a result of vitiating factors, the 'interests of justice' might be a legal ground for removing confidentiality (WPP).

The third exception arises if communications and documents issued do not aim to resolve disputes. In other words, statements other than sacrifices and admissions, which are not considered a 'genuine attempt' to settle, might be another exception to confidentiality[69]. In the *Rush* case, the House of Lords clarified that confidentiality (WPP) relies on the consideration of whether the particular statements were given as a 'genuine attempt' to settle[70]. Lord Griffith clearly stated that where parties were explicitly making statements in a genuine attempt to settle, the communication would be protected[71]. In doing so, the House of Lords encouraged the parties to use ADR methods by protecting the admissions and sacrifices of parties.

Therefore, if an action cannot be categorised as a 'genuine attempt' to settle or if it is based on documentary evidence, such as employment contracts, payslips etc., confidentiality (WPP) would not be enjoyed and exceptions to confidentiality (WPP) would be created. Thus, it can be said that oral statements, regardless of whether they are put in writing, are generally protected[72].

Finally, in 2020, *in Duchy Farm Kennels Limited v Graham William Steels*, the High Court ruled on what happens if a confidentiality clause in a COT3 agreement is breached[73]. In this case, the employee brought a claim against his previous employer. The dispute was resolved by ACAS conciliation and the parties signed a COT3 agreement requiring the employer to pay £15,500 in instalments. After paying £2,960, the employer stopped paying the remaining instalments[74]. Then, the employee issued a proceeding for execution in the County Court under section 19A of the ETA, in respect of the obligation to pay the sums due under the COT3 agreement. Against this, the employer claimed that the employee breached the confidentiality clause in the agreement by disclosing the amount of the settlement to his former colleagues[75]. The Court examined whether the confidentiality

69 ACAS, *Guidance on Settlement Agreements*, 19.

70 *Rush and Tompkins Ltd v Greater London Council* [1989] UKHL 7 [1988] 3 All ER 737, [1989] AC 1280, para 3-4.

71 *Rush and Tompkins Ltd v Greater London Council* [1989] UKHL 7 [1988] 3 All ER 737, [1989] AC 1280, para 4.

72 IDS, *Employment Tribunal*, 220.

73 *Duchy Farm Kennels Limited v Graham William Steels* [2020] EWHC 1208 (QB), para 4.

74 *Duchy Farm Kennels Limited v Graham William Steels* [2020] EWHC 1208 (QB), para 8.

75 *Duchy Farm Kennels Limited v Graham William Steels* [2020] EWHC 1208 (QB), para 15.

clause is a condition of the agreement or only a warranty. If it is a condition, the aggrieved party can terminate the contract. If it is a warranty, which is less important than a condition, it does not generally cause a breach of contract but rather requires payment of compensation. The Court stated that the confidentiality clause is not a condition of the contract and not a core element of the COT3 agreement. Therefore, despite the breach, the employer still had to continue to pay the remaining instalments[76]. This case illustrates that the court did not allow confidentiality to interfere with access to justice by decreasing the predominant role of confidentiality in ADR methods.

II. REPRESENTATION

The involvement of a legal representative in ADR processes clarifies the parties' perceptions towards the dispute and helps disputants better prepare for meetings[77]. Moreover, it might help a neutral third-party to expedite the resolution process by moderating the more extreme demands of their clients. Furthermore, their involvement might lend an air of dignity and make disputants respectful to resolution proceedings in their eyes. Their presence might increase the understanding that ADR processes are justly managed under the legal parameters of the case[78].

In contrast, it is claimed that lawyers are 'likely to become a dysfunctional element in the mediation process, not only jealous of its intrusion into their domain of competence but also unable to adapt professionally to a situation of controlled and defused, rather than polarised and contentious, conflict[79].' Their participation may also undermine personal empowerment, which is regarded as one of the values of ADR methods. Furthermore, according to empirical research, since their involvement formalises the process, the resolution process would take longer than for those without representation[80].

Where a marked power disparity exists, as in employment disputes, when neutral third-parties do not take the necessary steps to alleviate any power disparity, the resolution forum might be unable to provide access to justice. This is because a settlement 'reached for example, under one party's cloak of ignorance as to the legal dimensions of their case or in circumstances in which a party has no real option but to acquiesce to the demands of the other, may leave a bad taste in the mouth[81].' Therefore, legal representatives may raise issues on access to

76 *Duchy Farm Kennels Limited v Graham William Steels* [2020] EWHC 1208 (QB), para 68.

77 Roselle Wissler, "Representation in Mediation: What We Know from Empirical Research" Fordham Urban Law Journal, 37, (2010): 431.

78 Bryan Clark, *Lawyers and Mediation* (Springer, 2012), 155.

79 Clark, *Lawyers and Mediation*, 106.

80 Lisa Bingham, Kiwhan Kim, Susan Raines, "Exploring the Role of Representation in Employment Mediation at the USPS" Ohio State Journal of Dispute Resolution, 17, (2002): 375.

81 Clark, *Lawyers and Mediation*, 156.

justice in ADR proceedings by tendering legal advice and information to protect the weaker party against another party's unfair bargaining advantages[82]. In doing so, the presence of legal representatives may help eliminate the imbalance[83]. On this basis, this section will examine the representation of parties in the processes of ADR in employment disputes in Turkey and the UK.

A. REPRESENTATION IN TURKEY

Employees or employers can, as a rule, personally apply and carry out the mediation process in Turkey. Participation in the process in person and acting co-operatively may facilitate reaching a solution since they might be more knowledgeable about their conflicts compared to lawyers[84]. However, if there are psychological obstacles in reconciling the parties, or the parties are in different places, the involvement of legal representatives might be necessary. Even if the parties do not have such reasons, they can participate in the ADR meetings with their lawyers[85]. Furthermore, their involvement would help strengthen the position of the weaker party by investigating the potential interests of both parties and by finding a mutual solution[86]. Nevertheless, according to Article 74 of CPA, there is a need for special authorisation of lawyers in the warrant of the lawyer to represent the disputants and to settle on their behalf in ADR proceedings.

An employee authorised by their employer with 'a written document' can also represent the employer in the mediation and reach an agreement on their behalf under Article 3(18) of LCL. In Turkey, accountants are commonly employees in companies. Hence, the provisions aim to let accountants join mediation meetings on behalf of their employers. It might be seen as an opportunity for those employers who employ a large number of employees to participate in more than one mediation meeting at the same time and to prevent the disruption of business activities. Nonetheless, this argument is not very strong since disputants and mediators can determine the most suitable date and time for all parties as an advantage of ADR methods.

The special authorisation of the lawyer and the written document authorised by the employers are the validity conditions for representation. Where there is a lack of these conditions, the mediator can give a certain amount of time to stakeholders to fulfil them[87]. While giving time, the mediator must always bear in mind the four-week maximum time-limit for concluding the mediation process. In this

82 Wissler, "Representation in Mediation: What We Know from Empirical Research", 436.

83 Clark, *Lawyers and Mediation*, 115.

84 Mustafa Cicek, *Is Hukukunda Zorunlu Arabuluculuk* (Seckin Publishing, 2018), 117.

85 Cicek, *Is Hukukunda Zorunlu Arabuluculuk*, 117.

86 Ermenek, *Arabuluculuk Surecinde Zayifin Korunmasi,* 171.

87 Tugcem Sahin, Yasin Celik, Ahmet Cemal Ruhi, *Is Hukukunda Zorunlu Arabuluculuk Rehberi* (2nd edn, Seckin Publishing 2018), 39-40.

regard, it should be highlighted that as a rule, the mediation process is limited to 3 weeks, but it can be extended by one week in cases of necessity in extenuating circumstances. Nevertheless, the fact that while the lawyer is specially authorised by the notary, an employee can represent the employer with just a written document is not sensible and thus, the special authorisation requirement for a lawyer to represent and reach an agreement on the parties' behalf should be removed.

Besides, according to Article 26(2) of the Trade Union and Collective Bargaining Agreement Act, a representative of the employee's union can represent their members if a member employee makes a written application to the union[88]. In other words, unions can apply to mediation, participate in ADR meetings and sign conclusion agreements on behalf of employees. Employers are 'repeat players' of employment relationships[89]. Being repeat players refers to being more knowledgeable about ADR proceedings and their potential outcomes since while employers may have numerous employees, employees normally only have a few employers. Therefore, trade unions can have a more active role in the resolution of disputes by providing legal representation and advice to reduce the information power imbalance from which employees suffer.

Turkey does not have a free advice provider or *pro bono* on employment rights matters. However, Turkey has a legal aid opportunity for employees who are suffering from economic difficulties[90]. This opportunity is not confined to employment disputes, and it is considered a very positive development in accessing justice[91]. To benefit from legal aid, Article 334 of the CPA stipulates two criteria: impecuniousness and legitimacy. Impecuniousness refers to the cost incurred due to employment disputes causing severe difficulties to afford the daily expenses of the employee (or former employee) and their family[92]. In contrast, legitimacy refers to evidence to show that, at first glance, there is a greater probability of winning the case than losing it[93]. These conditions are considered by a judge in the first instance Civil Court of Peace (CoP) (*sulh hukuk mahkemesi*) as stated by Article 13(3) of CoMCD. However, legal aid in Turkey only covers the cost of the mediator, not the cost of representation. Hence, the strengthening of legal aid in employment mediation is recommended to include the cost of representation to enhance access to justice.

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88 Act of Unions and Collective Labour Agreement, Act No: 6356, Official Gazette: 7.11.2012 No: 28460.

89 J. Eigen, D. Sherwyn, "Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System" Cornell Journal of Law and Public Policy 26, (2016): 270.

90 Yakici, *Bireysel Is Hukukunda Bireysel Arabuluculuk,* 61.

91 Cicek, *Is Hukukunda Zorunlu Arabuluculuk*, 51.

92 Cicek, *Is Hukukunda Zorunlu Arabuluculuk*, 52.

93 Cicek, *Is Hukukunda Zorunlu Arabuluculuk*, 52

Moreover, it is forbidden to make free lawyer contracts in Turkey. Parties have to set a fee that is above the lawyer fee tariff. In other words, a minimum fee in the tariff should be determined even in case of failure[94]. Nevertheless, in addition to the minimum fee, the parties can incur a fee on a success basis, but this fee should not exceed 25% of the award[95]. Therefore, not only because there will be no successful party at the end of the mediation but also because there is an obligation to set a fee in agreements, the economically weak employees cannot sign award-based representation agreements in ADR methods.

Where mandatory mediation is in force in Turkey, necessary measures should be taken to protect employees and enhance access to justice. On this basis, it might be recommended that an obligation for both parties to be represented by a lawyer should be introduced. However, this might pose a dilemma. On the one hand, where there is no obligation, this might cause a loss of employment rights due to the information power imbalance. On the other hand, this would go against 'a right to access to court', because it would mean that an employee, unable to afford the representation fee, will not be able to bring a case to the employment court where mediation is regulated as a pre-condition to bring a claim.

Therefore, the state should allocate more funds for legal representatives to be involved in legal aid. In addition, *pro bono* representation should be encouraged as a government policy. On this issue, intern lawyers[96] (*stajyer avukat*) should take training on mediation and have a role in redressing the information power imbalance of employees as a part of the internship programme by pro bono working.

B. REPRESENTATION IN THE UNITED KINGDOM

In conciliation, parties can be represented by a lawyer or by anyone such as a friend, relative, union official or any experienced person and these representatives can be withdrawn by parties at any time during the resolution processes[97]. The responsibilities of these representatives are understanding what the represented person wants to get from conciliation and importantly agreeing on a settlement on their behalf[98].

Where a representative has been appointed and their details are provided in the EC application form by disputants, ACAS would assist that representative[99].

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94 Metin Polat, "Avukatlık Ücret Anlaşmalarına İlişkin Bazı Yasaklar" Access date: March 15, 2024: https://www.hukukihaber.net/avukatlik-ucret-anlasmalarina-iliskin-bazi-yasaklar

95 Attorneyship Act, No. 1136, Article 164. Official Gazette: 07.04.1969. No: 13168.

96 To become a lawyer in Turkey, it is necessary to successfully complete a 1-year lawyer internship programme.

97 ACAS, "Using a Representative" Access date: February 2, 2024, https://www.acas.org.uk/early-conciliation/using-a-representative.

98 ACAS, "Representing Someone" Access date: February 2, 2024, https://www.acas.org.uk/early-conciliation/representing-someone.

99 IDS, *Employment Tribunal*, 223.

So that the COT3 agreement made by the representatives can be binding on the party, it is sufficient for a representative to have 'ostensible authority' meaning that it assumes the authority of signing the agreement on behalf of the disputant from the perspectives of the other party[100]. For example, in *Freeman v Sovereign Chicken Ltd*, a COT3 agreement was signed by the adviser of the Citizens Advice Bureau (CAB[101]) on behalf of the disputant[102]. The Employment Appeal Tribunal held that where a barrister, solicitor, or even a CAB adviser is involved, 'the likelihood of disproving ostensible authority is slim' because unless *otherwise notified*, the other party is entitled to assume that the advisor has authority to settle[103]. However, it was also recommended that the disputant should see and approve the proposed settlement agreement[104].

There are several types of representation in the UK's employment dispute resolution system. Firstly, because of their high cost, absence of legal aid and cost orders in ETs, barristers generally represent high-worth employers, and their presence is far more common in employment cases brought to civil courts where the losing party pays the cost of litigation including the representative fees[105]. They also participate in settlement meetings carried out by ACAS on behalf of their clients[106].

Secondly, solicitors emerge in the assessment and preparation of mid-value claims. They are less expensive and hence may be more preferred compared to barristers. Like barristers, solicitors can take part in ADR meetings with ACAS on behalf of parties[107]. An ACAS study in 2016 demonstrated that only 24% of claimants were represented in EC and 46% of these representatives were solicitors, barristers or another kind of lawyer[108]. The figures were more positive in post-claim conciliation. 78% of claimants were represented by legal representatives in post-claim conciliation and solicitors, barristers and other kinds of lawyers consisted of 62% of these representatives[109].

ACAS's qualitative research gives insights into the practices of employment solicitors in the UK. It asserts that employees 'were often disappointed and frustrated to

100 IDS, *Employment Tribunal*, 223.

101 These are the local authorities helping weaker parties to bring a claim and to follow legal procedures.

102 *Freeman v Sovereign Chicken Ltd* [1991] UKEAT 514_89_2707.

103 *Freeman v Sovereign Chicken Ltd* [1991] UKEAT 514_89_2707.

104 *Freeman v Sovereign Chicken Ltd* [1991] UKEAT 514_89_2707.

105 Minawa Ebisui, Sean Cooney, Colin Fenwick, editor, *Resolving Individual Labour Disputes: A Comparative Overview* (ILO 2016) 283.

106 Ebisui, Cooney, Fenwick, *Resolving Individual Labour* Disputes, 283.

107 Ebisui, Cooney, Fenwick, *Resolving Individual Labour Dispute*s, 283.

108 Matthew Downer, *Evaluation of Acas conciliation in Employment Tribunal Applications* (ACAS Research, 2016), 6.

109 Downer, *Evaluation of Acas conciliation in Employment Tribunal Applications* (ACAS Research, 2016), 4-5.

find that they could not afford solicitor's fees and that the organisations that offered advice could not actually represent them at the tribunal[110].' Hence, some employees who had paid for the initial consultation did not want to proceed when they realised that the fees were not affordable[111]. When the absence of legal aid for representation is taken into consideration, employees feel disadvantaged because of their lack of legal knowledge and confidence. On this issue, according to research published in 2007, some employers found that solicitors' fees were costly but employers were still more able to make the risk assessment compared to employees about whether the cost of litigation involving representation fees weighed against the cost of ADR[112].

However, 'no win no fee' agreements, in other words, damage-based contingency fee agreements (DCFAs), have existed for many years not only because there is no 'loser-pays' cost rule in ETs but also because the fee can be damage-based meaning that the fees of representatives can be calculated as a percentage of damages[113]. These agreements might help enhance access to justice for the resolution of employment disputes via ADR methods by redressing the information power imbalance. In this context, a study shows that it is probable that DCFAs might make a modest contribution to access to justice where parties would otherwise not be able to afford it[114]. The study also found that DCFAs may encourage early settlement of disputes without tribunal hearings[115].

Therefore, they might have a supporting role for employees who are unable to afford the fees of legal representatives and who seek a settlement via ADR methods. Nevertheless, it should be noted that DCFAs have some inherent drawbacks such as they might increase the number of weak claims in ETs, causing excessive caseload. Additionally, it is controversial whether DCFAs lead to inappropriate settlement agreements due to the pressure from a representative to settle[116].

Thirdly, for those who are unable to afford a solicitor or barrister or to make DCFAs, the Citizens Advice Bureaux (CAB) provides advice on legal issues including employment disputes. The CAB, a registered charity, provides free, confidential, impartial advice to both employers and employees and is the largest advice-giving agency in the world[117]. The importance of the CAB in redressing

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110 Maria Hudson, *Race Discrimination Claims: Unrepresented Claimants' and Employers' views on Acas' Conciliation in Employment Tribunal Cases* (ACAS 2007) 52.

111 Hudson, *Race Discrimination Claims,* 52

112 Hudson, *Race Discrimination Claims,* 51.

113 Richard Moorhead, Paul Fenn, Neil Rickman, *Scoping Project on No Win No Fee Agreements in England and Wales* (Ministry of Justice Research Series 17/09 December 2009) 7.

114 Moorhead, *Scoping Project on No Win No Fee Agreements*, 145.

115 Moorhead, *Scoping Project on No Win No Fee Agreements*, 37.

116 Moorhead, *Scoping Project on No Win No Fee Agreements*, 4.

117 Brian Abbott, "The Emergence of a New Industrial Relations Actor-the Role of the Citizens' Advice Bureaux?" Industrial Relation Journal, 29(4), (1998): 258.

the power imbalance in employment relations has increased with the decline in union membership and the growth of non-union sectors[118].

Some CAB advisers are lawyers working *pro bono* in the evenings. They encourage clients to take ownership by giving legal information. This empowerment can be regarded as a way of educating clients and developing understanding so that employees can use information and experience to handle any similar problem not only for themselves but also for their colleagues[119]. This is because CAB advisors act as translators making the procedure and language of the employment dispute resolution system more understandable for employees[120]. The CAB may also contact the employer on an employee's behalf, make recommendations on potential outcomes of legal proceedings and aid claimants to complete a claim form[121].

Nevertheless, getting advice from the CAB may not always be easy since many applications for appointments are turned away due to excessive caseloads and underfunding[122]. Furthermore, the function and ability of CABs may vary geographically. Some branches may have a close relationship with a *pro bono* legal clinic and the CABs can seek representation for employees through these connections[123]. Thus, while some might give special employment support, including representation in EC meetings and hearings in ETs, others may not[124].

Fourthly, the CAB may contact the Free Representation Unit (FRU) providing representation in social security and ETs via its volunteers, mainly legal professionals in the early stage of their career and law students, but the FRU only takes cases coming from registered referral agencies[125]. These volunteers act like lawyers, preparing the case, advising the disputants and seeking a settlement. Where the FRU is unable to provide legal representation, the claimants would have to represent themselves[126].

Ultimately, for the member of a trade union, a union representative may help with the early evaluation of the dispute. Where a claim is brought to the ETs, the union can aid the employee in preparing the claim and funding legal assistance,

118 Abbott, "The Emergence of a New Industrial Relations Actor-the Role of the Citizens' Advice Bureaux?", 260-261.

119 Abbott, "The Emergence of a New Industrial Relations Actor-the Role of the Citizens' Advice Bureaux?", 262.

120 Nicole Busby, Morag McDermot, "Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings" Industrial Law Journal, 41(2), (2012), 181.

121 Ebisui, Cooney, Fenwick, editor, *Resolving Individual Labour Dispute*s, 283.

122 Busby, "Workers, Marginalised Voices and the Employment Tribunal System", 171.

123 Ebisui, Cooney, Fenwick, editor, *Resolving Individual Labour Dispute*s, 284.

124 Busby, "Workers, Marginalised Voices and the Employment Tribunal System", 173.

125 Free Representation Unit, "Referring clients to FRU" access date: February 25, 2024, https://www.thefru.org.uk/referral-agencies.

126 Abbott, "The Emergence of a New Industrial Relations Actor-the Role of the Citizens' Advice Bureaux?": 263.

but they are selective about the cases they will fund[127]. While employees and employers generally engage with lawyers, when employment relations are terminated, union representatives are mainly involved in the internal disciplinary process, which might be considered in-house ADR methods, before termination.

III. EVIDENCE

Evidence is fundamental for ADR processes for understanding both sides of a dispute. It mainly refers to documentary evidence, witness statements and expert evidence. Documentary evidence can be defined as evidence of inspection afforded by documents such as employment contracts, pay rates, and company handbooks. A witness statement is a written document 'signed by a person which contains the evidence which that person would be allowed to give orally[128]'. Where there are highly technical, scientific or accounting disputes such as involving computer software or complex clinical negligence, the presence of expert evidence provides a better understanding of the case[129].

In the context of employment disputes, evidence has an important function in their resolution. To illustrate, employers, to pay less tax or insurance premiums for employees, may include a lesser amount of money in employment contracts than employees have gained. Hence, to determine the real wages, witness statements and expert evidence are needed to illustrate the amount of wages paid for employees working in the same job[130]. Therefore, where complex cases are dealt with, expert evidence is routine and has a fundamental role in establishing a case[131].

However, ADR methods might have some disadvantages compared to litigation because there might be a need to provide statistical or documentary evidence, but the employee may be unable to access it. The termination of an employment contract with a claim of a decrease in an employee's performance may be an example of the need for statistical evidence. In this case, the employee may be concerned because most proof, such as files, personnel records, or witnesses, who are often co-workers, are under the control of the employer, and limited pre-case discovery procedures in ADR might constitute a barrier for the weaker party to gain these materials[132]. In this context, this section will investigate the role of evidence in ADR in employment disputes in Turkey and the UK.

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127 Ebisui, Cooney, Fenwick, editor, *Resolving Individual Labour Dispute*s, 284.

128 Civil Procedural Rules (1996), sect 32.4(1).

129 Karl Mackie, *The ADR Practice Guide Commercial Dispute Resolution,* (Butterworths 2000), 176-177.

130 Ninth Section of Cassation Court, 7.12.2009, E.2008/11830, K.2009/33853.

131 IDS, *Employment Tribunal Practice and Procedure* (Thomson Reuters 2018) 958.

132 John Budd, Alexander Colvin, "Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice", Industrial Relations, 47(3), (2008): 473.

A. EVIDENCE IN TURKEY

In the mediation process, the parties provide information in turn and the mediator proposes to help parties by asking questions to ensure the dispute is fully understood and their interests and desires are identified[133]. In this context, Article 22 of the LCL states that an expert opinion which can contribute to the resolution of the dispute may be provided in ADR meetings. The purpose of this option is to moderate the demands of the other party. Before analysing this, in the Turkish context, while expert evidence (*bilirkisi*) refers to a legal person who is required by courts to give their opinion regarding cases where special and technical knowledge is required[134], expert opinion (*uzman gorusu*) means a scientific expert evaluation regarding the subject matter of the case applied by parties themselves, not courts[135]. The law permits only expert opinions, but the legislation and regulation are silent about the presence of witnesses and expert evidence in ADR proceedings. On this issue, there are two conflicting opinions.

The first opinion advocates the prohibition of expert evidence, witnesses, and discoveries in mediation processes[136]. In 2013, the Constitutional Court made a decision that supports this opinion. It held that it is not possible to consider that a mediator, who does not perform a judicial duty, has the exclusive jurisdiction of judges, involving examining witnesses, assessing expert evidence and making discoveries[137]. These practices are named 'actions that can be done only by judges' because mediators do not have the power to force them in cases of non-compliance[138]. Therefore, mediators are precluded from taking these actions because the mediator is the person who helps the parties resolve the dispute, not the one who makes the decision by assessing the evidence[139].

Secondly, Article 15(7) of the LCL imposes a duty on mediators to bring a resolution proposal when the parties are unable to find an appropriate resolution for their dispute. However, it is of vital importance to consider evidence such as witnesses and expert evidence for bringing an appropriate resolution proposal[140]. Furthermore, such evidence would provide a better understanding of the conflicting circumstances in the eyes of the parties[141]. Therefore, other kinds of evidence should be involved in mediation processes.

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133 Berkhan, *Dava Sarti Arabuluculuk*, 47.

134 Ramazan Aslan, Ejder Yilmaz, Sema Taspinar Ayvaz, Emel Hanagasi, *Medeni Usul Hukuku,* (Ankara: 7edn, Yetkin Publishing, 2021) 478.

135 Aslan, Yilmaz, Ayvaz, Hanagasi, *Medeni Usul Hukuku,* 492.

136 Sahin, *Is Hukukunda Zorunlu Arabuluculuk Rehberi*, 45.

137 Constitutional Court`s Decision of 2012/94 E, 2013/89 K 10/07/2013.

138 Constitutional Court`s Decision of 2012/94 E, 2013/89 K 10/07/2013.

139 Sahin, *Is Hukukunda Zorunlu Arabuluculuk Rehberi*, 45. Mustafa Serdar Ozbek, "Anayasal Hak ve Hürriyetler ile Yargılamaya Hakim Olan İlkeler Işığında Arabuluculuk" TBB, 215, (2012), 129.

140 Özgür Oguz, Türk Is Hukukunda Dava Sarti Olarak Arabuluculuk (Legal Publishing 2019) 60.

141 Oguz, *Turk Is Hukukunda Dava Sarti Olarak Arabuluculuk*, 60.

There are good reasons to support the first argument. This is because including other types of evidence in the mediation might mean giving ADR methods a judicial character because there must be an assessment of the evidence provided. In addition, the LoMCD requires the mediation process to be ended within a maximum of four weeks. However, the involvement of experts lengthens the resolution process and naturally causes extra costs. Therefore, involving other evidence is neither applicable nor practical in Turkey unless extra time and funds are provided. Therefore, Article 15 allows only an expert opinion to be presented and consciously keeps its silence about other evidence. Thus, it should be recommended where the dispute heavily relies on witnesses or expert evidence, employment courts might be more appropriate resolution forums.

Nonetheless, it has been stated that expert evidence has a dominant role in resolving employment disputes because the judgements revolve around expert evidence, particularly in cases about compensation claims that occupy a large amount (around 65%) of the employment caseload in Turkey[142]. In these cases, it is necessary to take into account several elements such as compensation for unlawful termination, holiday pay, payment in lieu of notice, overtime pay and all these elements may necessitate expert evidence. The expert prepares a report about the calculation of the compensation by considering payrolls, the annual leave book, personal files, payment receipts, release receipts, inspection minutes and payroll records etc[143].

Because these documents are generally under the control of the employer, the employee may agree on a lesser amount of money in settlement than they deserve. On this issue, the importance of having legal representatives and advisors was highlighted above. In addition to this, it is recommended to establish an 'accredited expert evidence institution' exclusive to employment mediation. In doing so, the number of cases brought to courts would significantly decrease and the negative consequences of power disparity might be redressed in Turkey.

B. EVIDENCE IN THE UNITED KINGDOM

This section will examine the evidence in EC proceedings in the UK. Initially, it should be highlighted that no provisions or guidance regulating the use of evidence in conciliation proceedings has been found since it is largely conducted by conversations and thus, it might be quite difficult to put in writing exactly how evidence in the conciliation process works.

Primarily, it should be clarified that EC, in the UK context, is not a process that requires bringing lots of evidence and not a platform where conciliators say who is right or who is wrong. It is an ADR method creating an environment whe-

142 Argun Bozkurt, "İş Mahkemelerinde Bilirkişilik" Ankara Barosu Dergisi, 64 (7), (2009): 117.

143 Bozkurt, "İş Mahkemelerinde Bilirkişilik" 119.

re disputants talk openly and in confidence about their differences in a respectful way. In ETs, any documents that are provided by the parties before the hearing to support their case can be labelled as evidence. However, in EC or the work of ACAS, they are not labelled as evidence. This is because EC is designed to create an environment in which the parties can speak without concern about their dispute and their feelings about the strengths and weaknesses of their cases to understand whether an ET is a better option to resolve the dispute. When documentary materials are assessed by conciliators, it tends to create an adversarial environment. However, this circumstance might be regarded as a disadvantage of EC. This is because, according to research, some claimants assume that ACAS conciliators would accept and assess the evidence provided by them to help build a stronger case. After realising that evidence is not assessed by the conciliators, the claimant might feel disappointed and believe that the dispute has not been handled in an appropriate manner[144].

Additionally, ACAS does neither require parties to submit documentary materials such as employment contracts, payslips etc., nor the exchange of documents before EC. However, a question arises about how to proceed with conversations in EC, which might lead to a legally binding resolution of the case, without considering the evidence. This question might be answered better by an example. For instance, an employee raises a claim because they believe that £50 has been deducted from their salary unlawfully. In contrast, the respondent asserts that they have a contract enabling the employer to deduct £50 lawfully. What the conciliator, who goes between parties, will do is first ask the claimant whether they have a copy of the contract. If yes, the conciliator recommends having a look at it. If no, then the conciliator would ask the respondent to send a copy of the employment contract to ACAS and highlight the relevant clause allowing the deduction. Then, with the permission of the respondent, the conciliator will share the contract with the claimants. After that, the conciliator would want to hear the parties' opinions about the exchange of documents that will affect the case. However, the conciliator would not be able to make evaluations about the documents exchanged.

Moreover, where the disputant states that they have evidence supporting their case, the conciliator would suggest not sharing it with ACAS. Instead, the conciliator would require the party to say what kind of evidence they have and how they feel that it backs up their case. Nonetheless, according to research on this issue, participants have stated that because of a lack of options to support their cases with evidence, claimants have doubts over the strengths of their case and this limitation is considered a barrier to submitting an EC notification[145].

144 Downer, *Evaluation of Acas Conciliation in Employment Tribunal Applications*, 83.

145 Nilufer Rahim, *Acas Early Conciliation Decision-making: Exploring the Behaviours of Claimants*

Consequently, it can be said that there are two ways that evidence might have a role in the resolution of employment disputes. The first way is that ACAS can share the evidence with the permission of the relevant party. Secondly, the details of evidence can be shared through conversation. Then, the conciliator would be able to understand whether parties can resolve their disputes without getting involved in an ET. Nonetheless, where a weaker party is unable to access evidence, another disadvantage of EC emerges since conciliators lack the power to require documentary or witness evidence. In this regard, qualitative research shows that employers often attempt to undermine the EC proceedings by purposely withholding evidence[146].

CONCLUSION

This article has examined confidentiality, representation, and evidence in the employment ADR systems in the UK and Turkey. Confidentiality refers to a private settlement atmosphere. Nevertheless, it should not prevent taking necessary steps to evaluate whether the procedure is justly managed and the extent to which its users have been satisfied with the quality of services provided. The underlying reasons for this are that employment law is one of the areas where the State's efforts to ensure social justice can be observed best as it aims to protect employees against negative circumstances arising from their weak position and to balance the relations with the employer via imperative provisions.

Turkey's mediation and the UK's Conciliation provide a confidential environment for resolving employment disputes. The concepts of confidentiality are almost the same in both countries. Therefore, both countries satisfy this aspect of the criterion. Both the UK and Turkey allow disputants to waive confidentiality and have some exceptions to confidentiality. On this basis, statements, which are not admissions, sacrifices or a genuine attempt to resolve the dispute, are likely to constitute exceptions to confidentiality in both countries but while these are mainly created by case law in the UK, they are created by legislative instruments in Turkey. Besides these, unambiguous impropriety including vitiating factors tends to create exceptions according to the UK case law. Furthermore, the Turkish system stipulates an imprisonment sanction (up to six months) for breaching confidentiality. By contrast, the UK system divides confidentiality clauses into two parts, as conditions of the agreement or only a warranty. If it is a condition, the breach would give rights to the other party to terminate the contract. However, if it is a warranty, the agreement would be still binding but the party that breaches confidentiality would be liable for damages.

Nevertheless, neither country has an inspection mechanism, offering a grievance option for disputants. As a result, as stated above, confidentiality might be

Who Neither Settle Nor Proceed to an Employment Tribunal (ACAS, October 2017) 13.

146 Rahim, *Acas Early Conciliation Decision-making*, 32.

a factor that prevents stakeholders from considering whether there are irregularities in ADR proceedings. On this issue, this article suggests two remedies for eliminating this drawback. Firstly, governments may introduce a role for third-parties, at least, to remind the parties of employment relations that they have a right to waive the confidentiality and inform them about the advantages and disadvantages of this waiving. This is because the problem stems from the fact that the parties are unlikely to know that they have such an option.

Against this argument, it can be asserted that if confidentiality is waived, employees and employers may not have any incentive to use ADR processes. However, both countries' ADR systems force disputants to initiate ADR methods. It means that while Turkey has a mandatory mediation system requiring disputants to apply mediation to go to litigation, the UK system requires an EC certificate for bringing a claim to ETs. Hence, there would not be a need for an incentive for disputants to use ADR.

This suggestion can be based on different grounds. The first ground is that both the comparison countries' legislation and international ADR instruments, such as the EU Mediation Directives (2008[147]) and the UNCITRAL Mediation Law (2018[148]), enable stakeholders to waive confidentiality. Furthermore, the Turkish Constitutional Court has highlighted that waiving might be an important element in preventing the stronger party from taking advantage of confidentiality because it would decrease the possibility of violating the imperative norms of employment law[149].

The second ground is based on the opinion that the importance of confidentiality in choosing and reaching an agreement in ADR processes may be overstated[150]. The value of confidentiality is based on an assumption that people will reveal the information but there is a lack of evidence on this issue. This is because disputants are rarely aware of the implications of confidentiality provisions[151]. Therefore, confidentiality may not be regarded as an indispensable element of ADR.

The third ground is based on the idea that the scope of confidentiality must not be broader than necessary to protect the legitimate interest and should not affect the crucial societal interest that requires limited disclosure[152]. Therefore,

147 Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, Article 7.

148 United Nations Commission on International Trade Law on Mediation Model Law (2018), Article 10.

149 Constitutional Court`s Decision of E. 2012/94, K. 10/07/2013 K (Decision Date).

150 Andrew Agapiou, Bryan Clark, "The Practical Significance of Confidentiality in Mediation" Civil Justice Quarterly 37(1), (2018), 79-80.

151 Brad Reich, "A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege against Disclosure" Journal of Dispute Resolution, (2001), 217.

152 Peter Thompson, "Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota" Hamline Journal of Public Law & Policy, 18, (1996), 358.

when public interest as an overriding benefit justifies the disclosure, confidentiality can be removed. Hence, when the *sui generis* structure of employment law is considered, the public interest is highly likely to override the interest of confidentiality because, otherwise, there might be a gap between theory and practice, undermining the practical importance of employment law, particularly where mandatory mediation is employed.

Last but not least, as a second remedy, where confidentiality is not waived by parties, a *cooling-off* period that enables disputants to agree on a non-binding agreement that will legally become binding later might be important. This is because the *cooling-off* period would have the potential to decrease the drawbacks of confidentiality not only because it would give a chance to employees to be aware of the risks of relinquishing employment rights but also because it would decrease the possibility of signing an agreement under undue influence or economic duress of employers.

In regards to representation, it is required to provide legal aid for the cost of representatives to protect the employee as the less-informed party of the relationship. In this regard, in Turkey and the UK, disputants are allowed to be represented by a lawyer or a trade union in ADR meetings. However, in the UK, parties can be represented in an EC meeting by a friend or relative, unlike in Turkey. In Turkey, employers can be represented by an employee who is authorised by a written document. It should be emphasised that these options are not intended to redress power imbalance but to provide flexibility to employees and employers. Moreover, whereas in Turkey, legal representatives need a special authorisation to represent parties in ADR meetings, in the UK, an ostensible authorisation is sufficient for representation and for signing a COT3 agreement on behalf of disputants.

Turkey does not have free legal advice institutions for the weaker party, unlike the UK. Legal aid is provided for an employee who suffers from economic difficulties, but the legal aid covers only the fees of the mediator not that of representation. Therefore, the Turkish government should allocate more funds for legal aid and encourage *pro bono* work for intern lawyers. Conversely, it is found that the cost of representation might be unaffordable in the UK. Additionally, there is legal aid neither in employment litigation nor ADR methods. However, advice providers such as the CABs, and the FRU, have crucial functions in redressing power imbalance but they are underfunded and have excessive caseloads, making them less accessible. Furthermore, the presence of DCFAs, unlike in Turkey, might have a role in enhancing access to justice in the UK.

Concerning evidence, the Turkish provisions permit only the involvement of expert opinion and remain silent about witnesses and expert evidence in employment mediation. Moreover, the Turkish Constitutional Court has prohibited

mediators from assessing witness statements or expert evidence. Nevertheless, when the prominent role of expert evidence in resolving employment disputes is considered and where mandatory mediation is exercised, it can be recommended that they should establish an 'accredited expert evidence institution' which is exclusive to employment mediation to improve access to justice.

By contrast, in EC, the UK has a tendency not to use any evidence to create an environment where disputants can talk openly and in confidence in a respectful way. Thus, it can be said that where a claim heavily relies on a witness statement or expert evidence, neither the UK's EC nor Turkey's mediation seems an appropriate dispute resolution mechanism for employment disputes.

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