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FSB response to the increasing the use of mediation in the civil justice system

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the increasing the use of mediation in the civil justice system.

FSB is a non-profit making, grassroots and non-party political business organisation that represents members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

Larger businesses have the financial reserves and resilience to withstand the disruptions caused by legal disputes meaning that they can often be better managed than by small businesses who are more vulnerable to sudden shocks, not only financial but also in terms of time that they need to dedicate in preparation. Larger businesses are often able to call on in-house legal expertise whereas for small businesses, and in particular micro businesses, resources are dedicated to running their business. Therefore, it is not surprising that larger businesses are better able to anticipate and address any legal disputes.

Our 2016 research found that an average value of the most recent dispute for a small business is £18,000 and the average cost to resolve it is £17,000, comprising both direct and indirect costs, meaning that the cost of resolving disputes are disproportionately high [1] It is not surprising that our research shows that 17% of small businesses have said that their most recent dispute has been left unresolved. In many of those cases, this would involve not being able to recover money that they are owed. As nearly three-quarters (72%) of small businesses reported that their disputes were in relation to late and non-payment, that is significant economic damage.

We also found that only 3% of small businesses used mediation to resolve their most recent dispute, compared to 8% that reported using any form of ADR to resolve a dispute in the same time period.[2] On average, for every dispute that went to ADR, 2.9 went to civil courts, with 15% of small businesses reporting the Small Claims Court as a method of resolution. The legal costs associated with court action often exceed the ability of SMEs to be able to dedicate resources to them, which is why we welcome the proposal to introduce automatic mediation for small claims as this would potentially help small businesses from incurring the continuing cost of litigation. This would of course not be of assistance for all small value claims cases, as low value does not necessarily equate to low complexity, and therefore it is expected that some cases will avoid the Small Claims Track and automatic referral to mediation, but Fast Track cases with low value could still be made subject to it. However, the Small Claims Track proposal

[1] FSB report, Tied Up: Unravelling the dispute resolution process for small firms, November 2016, https://www.fsb.org.uk/resources-page/tied-up--unravelling-the-dispute-resolution-process-for-small-firms.html

[2] *ibid.*

is a welcome step to which should increase the knowledge and understanding of mediation amongst small businesses and encourage its use generally, provided that it remains cost and time effective for small businesses.

There are a number of general points which we would like to add with regard to the Small Claims Track mediation process as it is currently operated. First, although it is appreciated that this is a human resources issue, mediations should take place as soon as possible after a case becomes defended, and in any event before the parties become locked into the time and cost of complying with case management directions. Secondly, encouraging engagement with the mediation process can be improved by making the presentation and marketing of the opportunity appear more attractive. Businesses can be put off mediation if they think there is an obligation to compromise, and they are unwilling to do so. There are many cases where the mediation will serve a beneficial function by clarifying the real issues, reducing the issues, or enable immediate exchange of documents which can resolve disputed facts, all of which possibilities may lead to settlement after mediation if not during the session itself. Thirdly, there may be room for confidential answering and exchange of questions prior to the mediation session to enable it to be more effective given the limited telephone time available. This might be promulgated by the mediator reviewing the claim and defence and raising any questions which obviously require clarification in the mediation appointment letter or email. Finally, many litigant in person small and micro businesses may be unable to pick out important paragraphs from long court notices or orders, so the presentation of them is important. In other areas of law such as Landlord Notices to Quit, important obligations are flagged at the top of page one in box format. The Court Service needs to look at its orders and notices from the standpoint of litigants in person in order to achieve clarity of presentation and effective communication, rather than following a word-processed standard order or notice format document printed in relatively small type using the minimum of paper. It is appreciated that there must be some format compromises, but a review of practice by non-lawyers with this aim in mind might be constructive.

We have not responded to every question in this consultation but, only to those where we can offer a valuable and unique perspective.

(1) Introducing automatic referral to mediation for small claims

1. We propose to introduce automatic referral to mediation for all small claims (generally those valued under £10,000). Do you think any case types should be exempt from the requirement to attend a mediation appointment? If so, which case types and why?

Our research found that 70% of small businesses experienced at least one dispute over a five year period, with majority of these reporting disputes in relation to late and/or non-payment, creating not only cash flow issues, but also their ability to grow and innovate. The automatic referral to mediation for all claims is welcome, provided that it enables small businesses to resolve a dispute without unjustified delays and in the most cost-effective way possible. We refer to our general comments above in relation to trying to make the mediation opportunity and process more attractive and effective.

As is mentioned within the consultation document, judicial time could be saved and expertise usefully applied to other cases if lists can be thinned out by automatic referral to mediation. If the proposed automatic referral is a valuable development, we would like to see it expanded. We have long advocated for the Small Claims Track limit to be increased to £25,000 to enable more small business disputes to be dealt swiftly and in a proportionate manner. If the automatic mediation requirement is placed on all cases of under £10,000, now would be a good

opportunity to review the track limits, and allow for capacity to increase the limit to £25,000. This is particularly critical given that our research found that the average overall cost of resolving a dispute is £17,000 and disproportionate compared to the average dispute value of £18,000. If the Small Claims Track limit remains at £10,000, it would mean that many small business disputes will not benefit from the automatic requirement to mediate, and will face disproportionate costs and a longer route to resolution. Even if the Small Claims Track limit was increased to a lower level than £25,000, it would still in the interests of proportionality be possible for Fast Track rules to provide for automatic referral to mediation for cases with a value of up to £25,000, which step would accord with the over-riding objective.

We do not think that any case in the Small Claims Track should be exempt in the first instance, however this should be reviewed following a suitable period after the implementation of the automatic referral to mediation, to take account of any issues with the process that become evident.

2. Do you think that parties should be able to apply for individual exemptions from the requirement to attend mediation, assessed on a case-by-case basis by a judge? If so, why? And what factors do you think should be taken into consideration?

We agree that it should be possible to apply for exemption. Vulnerable parties may wish to minimise their exposure to the legal process. As mentioned previously, the cost of the dispute does not necessarily predict the complexity of the case, which should be taken into consideration, but perhaps a judicial discretion to schedule a longer mediation period (say two hours) should be introduced in relation to more complex Small Claims Track cases. Significant delay in resolution should be avoided, as should wasteful mediations where there is either a clear-cut issue that must be tried, or where resources would be disproportionately engaged and it would be better proceed to a hearing without delay. These points may be partially addressed by adding question and response boxes to the usual Questionnaire.

The consultation document also states that if an exemption from mediation is requested, then a judge will need to decide if the case is or is not suitable. However, there is no set time limit for this to occur. Without setting a time limit during which a judge should review, there is a risk that the request procedure could be exploited. We therefore suggest a time limit by which a judge should determine the exemption request (and reviewing the Questionnaire responses generally). This would ensure that small claims cases could progress efficiently.

3. How do you think we should assess whether a party who is required to mediate has adequately engaged with the mediation process?

If a party has attended the mediation the mediator should be able to evaluate the degree or engagement (or not). Failure to attend the mediation appointment without good reason will speak for itself.

4. The proposed consequences where parties are non-compliant with the requirement to mediate without a valid exemption are an adverse costs order (being required to pay part or all of the other party's litigation costs) or the striking out of a claim or defence. Do you consider these proposed sanctions proportionate and why?

The only effective sanctions to compel attendance at and engagement with mediation are staying the claim or threatening to strike out the claim or defence. Both should be 'on notice' of that eventuality in advance of mediation or following failure to attend or engage with a mediation appointment, and with a 'liberty to apply' possibility based on reasonable excuse and raised within the post mediation period specified before a stay or strike out bites. There could

be a re-arranged mediation as an intermediary step with the sanctions thereafter, but that would extend the process in time terms. An order could be issued as part of the mediation appointment notice to save additional court and case duration time. Adverse costs orders, relating to the mediation appointment only, do not sit happily within the Small Claims Track costs regime, but consideration could be given to an automatic 'unreasonable behaviour' costs order against a losing party at the final hearing where that party had failed to engage with the mediation process and where hearing costs could have been saved or avoided if they had so engaged. Any process introduced should not allow unscrupulous parties the opportunity to game the system to achieve delay.

5. Please tell us if you have any further comments on the proposal for automatic referral to mediation for small claims.

We are supportive of the automatic referral to mediation for small claims provided that it does not cause delays and cases are not stayed for more than the period of 28 days suggested in the consultation. This will mean that the small claims mediation service will need to be adequately resourced to be able to cope with the increased workload.

6. Do you have experience of the Small Claims Mediation Service?

Yes. The process appears to be successful in well over 50% of cases, and even where not successful but there is inter-party engagement, issues can be clarified and sometimes reduced.

7. Did you receive information about the Small Claims Mediation Service? If you received information, how useful was it?

Please see our general comments above regarding mediation documentation.

8. How can we improve the information provided to users about this service?

Please see our general comments above. Clear and accessible language and clearly stated options and consequences are essential, especially for litigants in person.

9. What options should be available to help people who are vulnerable or have difficulty accessing information get the guidance they need?

See exemptions comment above. Lay representatives should be allowed to participate in the mediation process in all cases to assist and support litigants in person.

10. What else do you think we could do to support parties to participate effectively in mediation offered by the Small Claims Mediation Service?

See our general comments above.

(2) Strengthening the civil mediation sector

11.Does there need to be stronger accreditation, or new regulation, of the civil mediation sector? If so what – if any – should be the role of government?

Any provisions imposed upon the civil mediation sector through stronger accreditation or regulation should ensure that these options result in services which remain affordable and accessible for small businesses. Increased accreditation and regulation inevitably pushes up overheads and these pass through into mediator charge rates. Mediation costs outside the Court

Service's Small Claims Mediation Service need to be proportionate to the amount in issue and affordable by smaller businesses. As mentioned earlier, only 3% of small businesses use mediation to resolve disputes and 72% of businesses that do have disputes face late or no payment disputes, which can affect their cash flow and their ability to dedicate resources to resolving their dispute appropriately or at all. The mediation market already has a number of successful players and the Civil Mediation Council and others appear to address many of the present commercial needs adequately. If accreditation were to be introduced, it would be imperative to have a 'layered' approach so that those practising at the smaller value disputes end of the market are not priced out of the reach of smaller businesses.

Larger businesses and larger scale and value disputes already use accredited and experienced mediators and so no government regulation will improve that market, but may simply add to costs unnecessarily. At the lower value dispute end of the market, regulation would drive up costs unhelpfully, and tend to be counterproductive to the aim to extend business awareness of and engagement with ADR processes.

Additionally, the mediation and ADR market is so varied that there would have to be numerous exemptions to enable parts of it to continue to function, so the value of having any compulsory accreditation system would be watered down from the start and its value in terms of cost versus benefit highly debateable.

Finally on this section of the consultation, we wish to highlight FSB's longstanding proposal for Government to create a business Disputes Advisory Service.

Many smaller businesses are reluctant to seek expensive legal advice or to engage with a court process which they regard as boarding a train from which they cannot easily disembark. One of the problems with court related ADR is that it comes far too late and usually long after the claim has commenced. If there are court-related ADR processes (whether online or on paper) which automatically pass unsuccessful mediation parties into a court or other determinative process, parties are less likely to engage with them. ADR awareness and engagement needs to occur much earlier in the dispute history and preferably well before any court or other formal adjudication action is taken. The solution we have proposed is to have a 'Disputes Advisory Service' akin to ACAS which can provide trusted and across the board dispute resolution including IPO options information, triage disputes, and refer the disputants to third party mediation, neutral evaluation, arbitration, adjudication or even court processes, as seen most suitable. The fact that such a service would not be perceived to be part of a court process would be an enormous advantage and more likely to achieve the aim of extending ADR usage. The well-known and extensive economic damage caused by disputes could be significantly reduced. The next logical step after an advisory service would be the institution of a related dispute resolution tribunal, as has been established in some overseas jurisdictions, which would also be a more helpful way of extending cost effective and fast dispute resolution, using procedures more akin to those deployed in the Employment Tribunal. There are especially many online commerce disputes that would benefit from this type of fast and costs effective dispute resolution approach.

13.What is your view on the value of a national Standard for mediation? Which groups or individuals should be involved in the development of such a Standard?

The mediation and ADR market and the needs of businesses and others are so varied that we suspect that any attempt to standardise processes will be doomed to failure. One of the advantages of ADR is that the process can be flexible and tailored to the needs of the individual parties and the dispute. Creating a 'standard' (even if possible) will simply get in the way of those criteria.

14. In the context of introducing automatic referral to mediation in civil cases beyond small claims, are there any risks if the government does not intervene in the accreditation or regulation of civil mediators?

The risks of intervention may well be greater than leaving the market as it is. As we have suggested above, information provision from a trusted source plus help and support from the suggested independent 'Disputes Advisory Service' would be much more likely to extend ADR take-up. Regulation of mediators comes low on the list of important steps that could be taken to increase awareness and mediation and ADR take-up.

15. Some mediators will also be working as legal practitioners, or other professionals and therefore subject to regulation by the relevant approved regulator e.g. solicitors offering mediation will already be regulated by the Solicitors Regulatory Authority. Should mediators who are already working as legal practitioners or other regulated professionals be exempt from some or any additional regulatory or accreditation requirements for their mediation activities?

We do not agree with the suggestion that all professionally qualified lawyers should be regarded as accredited to mediate for a number of reasons. Mediation is often an art and not a science, and there are many very creative and successful mediators from non-legal backgrounds including from commerce and industry and even psychotherapy. Such an automatic accreditation might encourage the idea that non-lawyer mediators were somehow second rate or unqualified. There would also be the secondary question as to how professionally qualified lawyers should become trained or accredited as mediators if that is not a required part of their qualification training. Automatic accreditation to mediate would presumably have to involve some internal training and accreditation to enable insurance cover, and would drive up costs for smaller legal practices and make them less able to compete. It would be far better for there to be a concentration on trying the excise the still prevalent aggressive dispute related tactics deployed by some lawyers, and to impose upon them a more rigorous professional obligation to achieve dispute resolution by ADR means. Additionally, those within the various professions who are not engaged in contentious work still require ADR training, so that when they encounter disputes and issues, their first response should be to address them early by an ADR process.

16. Are there any measures that the Small Claims Mediation Service could take to ensure equal access for all to their services, considering any specific needs of groups with protected characteristics and vulnerable users?

We have nothing to add to what we have summarised above.

Thank you for considering our response to this consultation. If you would like to discuss any of the points further, please contact me via my colleague Kristina Grinkina, Policy Advisor, on Kristina.Grinkina@fsb.org.uk.

Yours sincerely,

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