

Specimen Examination Questions

1(b) Identify and comment on the advantages and disadvantages of these alternatives compared to a claim through the civil courts

Going through the civil courts can be a long, arduous process and many people seek other means of gaining justice. However these means can have disadvantages as well as advantages. Mediation, Negotiation, Conciliation, Arbitration and Tribunals are all routes, which can be taken to avoid going through the courts.

Many people avoid civil courts because of the long delays in deciding a case and the costs, which are huge. There is also the fact of formality in courts, which can ruin the relationship between parties and complicate simple disputes, and legal representation, which is expensive, slow, and a factor that increases the formality. However, there are also advantages to going through the civil courts such as the formality that means the parties know what to expect and are therefore prepared; and the legal representation, which means that people have professional assistance in preparing and presenting a case.

The delays in the County Court average 20 months and cases, which end up in the High Court, take an average of up to 3-4 years. This seems absolutely ridiculous, especially when compared to the matter of months a well-run arbitration takes. To aid in this problem in the courts, the fast-track scheme has been developed. This process allows for claims of under £15,000 to have a hearing within 30 days, shortening the delays dramatically.

The cost in the Civil Courts is huge and very often the costs may actually exceed the amount awarded in damages/claims. In the High Court the total cost for both sides averages at around 75% of the total compensation. Not only is the cost huge, there is also the fact that Legal Aid is only given to people in very poor circumstances, which means that most people are expected to pay for their own defence, even though they cannot often afford it. To an extent arbitration is also expensive as the arbitrator and venue both have to be paid for. However this still works out much cheaper than going through the civil courts. Mediation and Tribunals cost very little in the long run and Conciliation should be no expense at all.

Another problem with the Civil Courts is that if the action is unsuccessful the problem is unlikely to be resolved and there are no further avenues for you to explore. Whereas, a Mediation or Consolidation meeting that is not successful can be taken to the courts. In some cases of Industrial Tribunals, the matter is discussed beforehand in a Mediation or Consolidation meeting and then it is

taken to the Tribunal, this often results in a solution without the need for a full hearing, therefore saving time and money.

Confidentiality is something that can be offered in Mediation, Conciliation and Arbitration cases and in certain circumstances, Tribunals also follow the same programme. Civil Courts however, are free for the public to witness; this may make a lot of people unwilling to take their problems to court.

An excellent advantage of Arbitration is that the arbitrators are experts in the matter of the dispute and can apply their knowledge effectively. Whereas the majority of the Judiciary in a civil court would perhaps struggle with the complex legal terms and end up deciding a case with very little or no legal experience or expertise. In Tribunals, lay members are appointed for their expertise in the area to which the tribunal relates. This ensures consistency and a good application of legal knowledge.

Many independent Mediators and Mediation services report that in more than four out of five cases, the parties are able to settle all issues in dispute to their mutual satisfaction. Compared to court, where the losing party is almost always angry, this can definitely be considered a success. Unlike the courts, Mediation is very informal and this could be seen as part of the reason to why it is so successful. People feel more relaxed in the environment that Mediation takes place in, as they have less pressure on them, which makes it easier for the two in dispute to discuss matters properly. In Court, they are pushed into a win-lose situation and for most people, the procedures may seem quite complex, making courts, on the whole, a very daunting place to speak in.

However, despite all these disadvantages the civil courts are still undoubtedly needed. In the courts a definite conclusion is reached and legal precedent for future cases may be established. Also, in the Courts, procedures for enforcing decisions are made to exist in the future and hence the situation may be prevented from happening again.

A disadvantage of certain alternative procedures, such as Conciliation, is that it has no chance of being successful unless both parties are willing to resolve their disputes amicably. Also, even after Conciliation, you may still have to take your dispute to court to be resolved.

Mediation also falters in areas. It has become apparent that some people are caught up in the idea that something has to be 'settled' by the end of the process, and therefore, they end up accepting an inappropriate agreement in order to appear cooperative. Also, to mediate effectively the parties would generally need to reveal enough about the strengths of their positions to persuade the other side to compromise and settle. But, if the case is not settled and there is a further need to litigate, in some circumstances, the information

one party revealed in mediation may help the other side plan a more effective defence. Another problem with Mediation is that there can be a great imbalance of power where one party can be stronger, financially, intellectually or even emotionally. For example, a person dissatisfied with the purchase of a product may find himself seated across the table from the products' district manager, who not only knows far more about this particular product, but has also been trained extensively in negotiating techniques for this exact situation. This makes it hard for the weaker party to put their argument across, leaving them vulnerable, whereas in court a barrister or solicitor could represent them.

When discussing Tribunals, there is a clear unfair imbalance between parties that are represented and those that are not. It is unfair to people who cannot afford legal representation and cannot get Legal Aid to come up against a rich corporation. Since richer parties are allowed to employ skilled laypersons, they are consequently more likely to win.

Clearly, there are advantages and disadvantages to all of the dispute resolutions including the Civil Courts and so it would be impractical to have some without the others. The ADR's provide cheap and fast options to the Civil Courts; however, it could be argued that disputes are not always fully resolved and that many of the disputes that are resolved are not done so fairly. Hence, it shows that the Court provides a more stable and rewarding sense of justice that cannot be exploited as much as the ADR's can be.