

Workplace mediation – a Perspective

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Workplace mediation redefined

Mediation, as it took off in the United States in the 1960s and 1970s, predominantly evolved in the legal field of Alternative Dispute Resolution, largely controlled by the legal profession¹. Workplace mediation also evolved apace in the States, possibly because of a stronger history of civil rights legislation². In the UK, however, workplace mediation has not been embraced by industry with the same level of interest. All this may change, however, with recent policy changes and industry perception.

The Gibbons Report on *Better Dispute Resolution*, released in March 2007³, exposed the high cost of conflict in the workplace and inadequacy of formal, statutory dispute resolution procedures. The Gibbons Report advocated early, informal resolution of disputes at work, and in particular the use of mediation:

"Mediation and other alternative dispute resolution techniques are effective means of achieving early resolution... Early resolution can also involve outcomes not available through the tribunal system such as a positive job reference, an apology, explanation and changes in behaviour."

The Employment Act 2008 repealed the "three step" statutory dispute resolution procedures and implemented a new ACAS Code and Guidance⁴ which advocate early, informal resolution of workplace conflict. The Code – which has statutory force, or "persuasive authority" – allows Employment Tribunals to increase or decrease awards by up to 25% where the employer (or employee) have acted "unreasonably" in dealing with a grievance. The Guidance specifically suggests that mediation is a reasonable and sensible way of tackling disputes at work.

There is therefore a new interest in "workplace mediation", from employers at least, who need to ensure compliance with the new HR framework. This

¹ Cf Harvard Negotiation Project work at the time, such as *Getting to Yes* by R Fisher and W Ury, or *Beyond Winning* by R Mnookin, S Peppet and A Tulumello

² Title VII of the Civil Rights Act of 1964

³ Better dispute resolution: a review of employment dispute resolution in Great Britain (2007), available at http://www.berr.gov.uk/files/file_38516.pdf

⁴ Cf. <http://www.acas.org.uk>

paper attempts to look at the scope of workplace mediation in the UK. I will start by putting the issues into context, touching on the social justice concerns which arise. I will then give a brief account of the business case for tackling conflict in the workplace early on, touching on the nature of workplace conflict. I will then address which areas may be suitable for workplace mediation and which may not be, before drawing some comparison with other fields of mediation practice.

A number of mediation service providers, such as the ADR Group, are creating specialist workplace mediator panels. The competencies needed for workplace mediation can be quite different from other fields of practice for the reasons touched on at the end of this paper.

A little context

There has been profound change in the work environment in the past ten years. Electronic communication has taken over all other forms of communication at work, creating a whole new dynamic to issues of productivity and putting strain on communications and relationships. Working remotely apparently offers new levels of flexibility to workers, yet increases the pressure on the employee to be online all the time and isolates the individual.

Much of this has benefitted the employer in terms of productivity, and the employee in terms of reward. However, the cost in human terms can sometimes be considerable, as the high incidence of stress and mental illness at work illustrate. The Casey Report (June 2009) found that *“four in ten people on invalidity benefit now are off work because of mental illness – twice as many as 20 years ago”*.

Add to this the huge increase in diversity and forced cultural integration we experience from higher worker mobility and immigration, economic shocks such as the current recession and widespread restructuring through mergers and acquisitions, and it is no wonder workplace conflict is endemic and here to stay.

Research carried out by OPP⁵ found that the vast majority of employees (85%) have to deal with conflict in their working lives. The question is, how much of this is productive and how much undermines the individuals concerned and the organisations? The primary causes of workplace conflict, according to this research, were: personality clashes and warring egos (49%) followed by stress (34%) and heavy workloads (33%).

The business case for workplace mediation

The main intended benefits of the new Employment Act were to simplify the law but also to provide significant savings for businesses, trade unions,

⁵ OPP research report Fight, Flight or Face It (in association with the CIPD, published 2008).

individuals and public sector bodies. The Gibbons Review estimated the benefit to business would potentially be up to £180 million per year.

In his excellent book *Workplace Mediation and Managing Conflict at Work*⁶, Clive Lewis makes a forceful case for introducing mediation at work. Not only does conflict take a huge toll on individuals in terms of wellbeing and productivity, it also costs the economy a considerable “wasted opportunity” cost:

*“A survey ... responded to by 116 chief executive officers, 76 vice presidents and 66 middle managers, indicated that these managers spent 24% of their time resolving conflicts. Lets take this example and apply it to the UK. To do a quick calculation, if we take this sample of 258 managers and say that on average they each earn a basic salary of £70,000, this equates to £16,800 per individual per year and over £4 million per year for the whole group. There are, of course, many additional costs outside of base salary, such as lost revenue, lost bonus, employee turnover, management time, impact on customer service and so on. **Whichever way the maths is done, conflict is expensive.**”*

Some of the costs associated with conflict at work include:

- Time
- Potential health issues (stress, anxiety)
- Other resource (HR function)
- Turnover and recruitment costs
- Legal costs
- Continued breakdown in relationship
- Productivity affected
- Damage to reputation

The CIPD ran a survey on the use of mediation in workplace conflict resolution in 2008⁷, to which 800 companies took part. Some of the findings of the survey speak for themselves:

- Among employers who use mediation, more than 80% report that it improves relationships between employees;
- 71% believe mediation reduces the stress associated with the use of formal grievance procedures
- 49% see mediation as a way of reducing costs of defending employment tribunal claims
- 63% see mediation as valuable in retaining good staff
- Mediation is better suited to treat relationship breakdown, bullying, harassment and discrimination issues than formal HR processes, according to these employers

Yet in contrast to these findings, the survey also uncovered:

- Only 2 in 5 employers train their managers to deal with conflict
- More than half had not used mediation (although those that do use it say they use it 20% more than they did 3 years ago)

⁶ *Workplace Mediation and Managing Conflict at Work* by Clive Lewis, 2009, RoperPenberthy Publishing Ltd, referenced here p 63.

⁷ Chartered Institute of Personnel and Development – *Managing Conflict at Work survey report 2008*. www.cipd.co.uk

- There is still widespread lack of understanding of mediation at employer, line manager and staff levels
- Fewer than 1 in 10 organisations currently incorporate mediation in the employment contract

The results of the survey suggest that those employers who have tried mediation see it as a good investment, and will embrace it further. However, there is still a widespread lack of understanding of the process of mediation, how it fits in with other HR processes and how to promote it internally, both at employer and employee levels.

Public bodies are more likely to embrace workplace mediation, partly as a result of the ADR Pledge but also because employment relationships tend to last longer. Small and medium sized employers without the luxury of an HR function also tend to be more open to mediation, perhaps because the cost of employment disputes is disproportionate to their resources.

The nature of workplace conflict

The reason mediation is so well suited to the workplace, I believe, is because of the nature of workplace relationships and team dynamics. We do not choose our colleagues yet have to work with them interdependently. As a result, there are countless opportunities for misunderstanding, poor communication, cultural differences, ineffective management styles and psychological clashes.

There is a blurred line between working in what feels like an unsupportive or resistant environment and full blown conflict. My belief is that mediation can be tremendously beneficial all along this spectrum. Mediation seeks to uncover the underlying drivers, or needs, of the individuals, to better understand their aggressive or defensive positions. Mediation is the only workplace tool which enables individuals to choose to modify their behaviour because it is in their interest, as well as for the benefit of others.

Workplace conflict involves huge amounts of negative emotion. Anger, resentment, fear or shame are debilitating and exhausting emotions which affect the individuals concerned but inevitably seep out to the wider team. Gossip and aligning with one or other party further entrench the conflict and in some circumstances team mediation or facilitation will be required for the team to operate effectively again.

People get stuck in conflict for a number of reasons. We identify with the conflict, it gives us a sense of identity and meaning. It gives us energy and hides our weaknesses. It protects our personal space. It makes us feel powerful and vindicated, even in the sense of furthering our feelings of being a victim.

Using mediation in the “transformational” sense can enable a party to move from conflict to new, more beneficial, strategies. It is about managing the

person's difficult journey from living a conflict they have invested in, to new possibilities. The mediator is therefore entrusted with a very significant responsibility, above and beyond the duties of confidentiality and best practice, without falling into the risk of counselling.

When is mediation suited, or not suited for in the workplace?

Before looking at the specifics of workplace mediation, it is worth addressing the social justice concerns expressed by some⁸. Mediation should not, of course, attempt to deliver social justice – the essence of mediation is that the parties alone are responsible for finding a solution they can live with. However, the reality is such that there is a power imbalance inherent to any mediation which is between an employer and staff. This is all the more likely where the employer is legally represented (or has access to legal advice) and is a “repeat user” of the process. Further, there is always a risk that the mediator will unconsciously influence the parties, sometimes simply by virtue of the authority vested in him/her as guardian of the mediation process.

Bernard Mayer⁹, when analysing resistance to mediation, reports: *“from a variety of political and professional perspectives, critics suggest that conflict resolution processes are not only ineffective but also dangerous, unfair, exploitative, naïve and disempowering.”* I think we mediators should always be alive to the risk that collaborative processes can undermine the less powerful and subvert wider, policy issues. In particular, there are inherent risks where women are involved in conflict, as they are more likely to seek to preserve harmonious relationships even at the detriment of their rights. We also need to beware our own, sometimes stereotypical, approach to mediation (rooted in white, middle class cultural norms). However, provided we bear these concerns in mind and are careful not to mediate conflicts which have a policy dimension or risk entrenching systemic discrimination, I believe mediation can bring a “voice” to those for whom the system does not otherwise protect or simply a better way of approaching conflict on a day to day basis.

Although most employment discrimination cases settle (around 70%¹⁰), in large part because of the disparity in means between the parties, the truth remains that when these cases go to trial, plaintiffs win around half as often as plaintiffs in other claims. This trend is further entrenched on appeal. A number of reasons have been given for this disparity: complexity of discrimination legislation, highly contested and confusing facts and societal need for clear and public precedents to guide future conduct and deter future misconduct.

⁸ Richard Delgado or Jeffrey Stempel for instance.

⁹ Bernard Meyer, *Beyond Neutrality – Confronting the Crisis in Conflict Resolution* (Jossey-Bass 2004), p.44 and further.

¹⁰ Clermont & Schwab, *How Employment Discrimination Plaintiffs fare in Federal Court* (2005) – data not found for the UK.

There should, therefore, be a strong incentive on the employees endorsing mediation. It is generally paid for by the employer and is relatively risk free as it is confidential and within the control of the parties. However, I believe there is still a fundamental lack of understanding, at individual level, of the value of mediation. I was involved in one case where the parties (of ethnic minority background) believed “mediation is second rate justice...”. Others are worried there is a stigma attached to mediation, or that it indicates there is a problem, which they do not want to be tainted by.

In my view, mediation will be valuable in most cases where workplace tension or conflict have escalated to a point where the parties involved cannot resolve their differences through direct negotiation or open, respectful communication. Once emotion, anger, power games or poor communication become entrenched, mediation can be effective in tackling the situation. What is needed is a communications programme which effectively delivers this message at all levels of an organisation, for it to be embraced properly.

The mediation process itself starts the journey of resolution – I have seen people come to mediation saying that relationships had improved simply knowing that mediation had been arranged. Thinking about how one’s behaviour may be interpreted when laid bare before a mediator and other parties can make people consider their approach in a different light. Getting the emotional “hurt” out in the open does also tend to have a cathartic effect and changes the dynamic in a troubled relationship. In one, very moving, instance one person was able to share the fact they had been brought up in care, with no known relatives, which greatly affected the individual’s approach to relationships and kinship ties. Simply revealing this fact moved the other parties from anger to forgiveness in a heartbeat.

Mediation is therefore suitable at any moment in the employment spectrum, either before or after an employment tribunal claim is made. It is particularly well suited to conflict involving perceptions and subjective assumptions, such as bullying, harassment or even discrimination. Employers can no longer rely on the employee giving a written grievance, as trigger for HR action. Employers now face the unquantifiable risk of failure to deal with grievances which are not formalised by staff, in unfair constructive dismissal cases.

The ACAS and CIPD guide to mediation for employers¹¹ provides:

“It is grievances that most obviously lend themselves to the possibility of mediation... the line between disciplinary and grievance issues may in specific instances become blurred, in which case the employer may prefer to tackle the underlying relationship issues by means of mediation rather than impose a disciplinary sanction.”

According to the 2008 CIPD survey on workplace mediation (referenced above), the main benefit in using mediation is improving relationships between individuals (cited by 83% of respondents). Any tension, conflict or blockage at work which involves difficult communication and relationships (as

¹¹ Mediation: an Employers’ Guide by ACAS/CIPD, published by CIPD 2008

opposed to purely a process blockage) will be suitable for mediation, whether at individual or team level.

Mediation would not be suitable, however:

- As a substitute for performance management
- As an alternative to constructive line manager discussions or to manage difficult conversations
- Where a message needs to be sent out to a wider audience
- In the case of a disciplinary issue
- Where there may be mental health issues

What differentiates workplace mediation from other mediation practices?

One of the more fundamental differences between workplace and commercial mediation is the fact the parties face an ongoing working relationship. In most cases, they cannot avoid contact and communication after the mediation. It therefore requires a fundamental change in their outlook, assumptions and psyche. The mediation process has to follow a slightly different dynamic to achieve this.

In the initial, private, meetings with the parties the mediator has to allow enough space and time for emotions to be “ventilated”. Sometimes it will be difficult to articulate the needs and hurts behind the emotion. The mediator is there to absorb and validate these feelings, in order for the individual to even be prepared to truly listen to the other party.

There are likely to be power imbalances (unless in a colleague to colleague dispute) and the mediator has to somehow address this without appearing biased in favour of the weaker party. It may be appropriate for the less senior party to bring a “friend” with them, for instance, but this adds another layer of difficulty to the confidentiality of the process.

Confidentiality is a tricky aspect of workplace mediation. The mediator must explain this in some detail to the parties and ensure they fully understand and embrace the confidentiality which attaches to the process. However, human nature being what it is, it would be unrealistic to assume there will be no leaking of information, simply because the parties have signed up to a confidentiality clause. The mediator needs to be careful to manage this by making as much use of the private, or break out sessions, as possible for sensitive information. It is also critical to address what can – and cannot – be communicated (and in what manner) after the mediation has taken place, in the settlement agreement.

The mediator also has to be careful to manage the expectations of the employer, or HR department which has commissioned the mediation. The mediator needs to be clear from the outset that the confidentiality of the process belongs to the parties, and the mediator cannot “report back” on the outcome. This can be tricky for HR departments who see the mediation as an extension of their processes, or as a “benefit” granted to the employees and for which they can expect some form of feedback.

It is unlikely there will be lawyers or any advisers involved. This can be refreshing, but can also be quite a challenge. There is no support for the mediator who is working with the parties on changing behaviour which has become entrenched. There are no legal fees mounting up, or other economic incentive for settling the dispute, and possibly even more pride and heartfelt emotions than in commercial cases.

N Doherty and M Guyler refer to workplace mediation as “travelling through the eye of the storm”. After navigating through the very difficult sticking points, hurts and recriminations, there comes a moment when the dynamic begins to change. Maybe one party offers an apology, or one makes a small concession which allows a spirit of collaboration to replace the accusations.

“It is the point of change that many mediators will recognise. It is here, at this point, that I will leave some silence, some space. It is as if the world sits still for a moment: we have reached the “eye of the storm” when after some moments, something else becomes possible, something different begins to happen. Once we have reached this point, the mediation often moves more quickly and clearly towards a whole list of agreements and solutions... the parties to the mediation may not reach such a point of understanding and open communication again, so it is important that what is needed to be said is said – so that they can go back to everyday work life with something better, something completed”¹²

Conclusion

Government is increasingly engaging with mediation. Employers who use it for workplace conflict are overwhelmingly positive about mediation. Individuals who have tried it, feel it has helped – and sometimes been a revelation. So why is workplace mediation slow to get off the ground?

I believe there is a dearth of understanding of what workplace mediation is and how it can help. It needs to be de-mystified and seen to be used, successfully, to achieve the recognition it deserves. Most importantly, employees need to understand that it is not a sign of there being a “problem” with their work, or a stigma attached. There is a significant communications campaign required to employers and by managers within the organisation.

Hopefully, employers who are willing to address the cause of conflict in the workplace – rather than just put out the “fires”, will come to realise the huge potential value of embracing mediation as a culture within their organisations. Who knows, it might even bring some humanity and respect back to communications in our fragile world of virtual relationships.

¹² The Essential Guide to Workplace Mediation and Conflict Resolution/ Rebuilding Working Relationships Nora Doherty and Marcelas Guyler (p120) Kogan Page 2008