Mediation explained

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Facilitative mediation defined

Mediation should be a process where:

(a) a skilled mediator aids those in dispute to reach a mutually acceptable resolution to their dispute;

(b) the participants take part on an entirely voluntary basis – and can walk away from the mediation at any time

(c) all discussions are confidential and "without prejudice";

(d) the mediator does not hear evidence but holds informal joint and private meetings with the participants;

(e) the mediator's function does not include making a binding decision; instead

(f) the mediator guides and facilitates the parties' negotiation;

(g) if settlement is reached, as it is in the majority of cases, the parties may conclude by making a binding agreement.

The participants to a mediation can be very sceptical at the beginning. Many lose their scepticism very quickly. The great majority finish the process of mediation, within hours, with a satisfactory outcome. Potential participants can be encouraged to trust a process with a mediator acting as a neutral facilitator. They should be allowed to select or approve the mediator for their mediation. The outcome is in the hands of willing participants. That is why mediation works so often.

Another reason mediation why mediation can be helpful is that it encourages the participants to manage expectations in the context of the prospects outside and beyond the mediation. Mediation can also encompass possibilities outside formal processes that can aid settlement. In the employment context mediation should seek to maintain the working relationship where possible.

Employees and workers who are involved as potential participants to a mediation and who have the advantage of trade union membership should have the opportunity to consult with and be represented by the union. Others should also be invited to have assistance and advice in relation to the mediation process.

Employees and their representatives frequently don't trust the employers' grievance or discipline process, or HR managers. They can trust a process with a mediator with clear antecedents acting as a neutral facilitator that they have accepted.

Senior members of the judiciary have set out their views on the benefits of mediation. One such comment is that:
"Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide." Dunnett v Railtrack [2002] EWCA Civ 2002, [2002] 1 WLR 2434, Brooke LJ at para. 14.

Some disputes are more suitable for mediation than others. Some cases like those involving discrimination, harassment, stress or any combination of those issues may cry out for it. Two case studies are attached to this note at the end.

Acas and the Employment Act 2008

Employment Relations Minister, Mr. Pat McFadden on 14 July 2008 said the Act: "will reform the mechanisms for dispute resolution by repealing the statutory workplace dispute resolution procedures and replacing them with a package of non-legislative measures to help employers and employees resolve disputes earlier." He went on: "The Government are making substantial further investment—up to £37 million over three years—to improve the accessibility of the advice services provided by ACAS and to provide additional ACAS conciliation services for disputes before they become the subject of an employment tribunal claim."

Acas' recent comments are perhaps less encouraging for mediation or even conciliation. In relation to the latter, they say that the "early conciliation service (or "Pre-Claim Conciliation", or PCC for short) is a free service for both employers and employees in appropriate circumstances...The Acas helpline advisors will be able to identify whether a particular case is suitable for referral to the pre-claim conciliation service, and if so, will put the parties in touch with a conciliator. Either party can ask for Acas' free conciliation service before putting in a claim, if the dispute is one that could be taken to a tribunal.

However, it is essential that all efforts are made to resolve the issue within the workplace before conciliation may proceed."

It is important to note Acas can't help in relation to any issues relating to personal injury.

In this context in relation to mediation Acas say "A mediator can sometimes help resolve disciplinary or grievance issues, although may not be suitable for serious offences." That appears too restrictive in relation to the potential for mediation to help.

Acas go on to say that "The mediator may be a person who works within the same organisation (so long as they are properly trained and not directly involved in the issue) or may come from outside. There is usually a charge for externally sourced mediation services." Acas promotes its training for a "Certificate in Workplace Mediation". This would seem to involve a number of concerns for trade unions.

Employers should pay for the cost of mediation by an external mediator that the employee approves. It is very much in their interests to resolve disputes in this way. Dispute resolution saves cost, reduces the use of resources, improves workplace relations and prevents those managers tasked with dealing with discipline and grievance and providing evidence for Tribunals and courts suffering the increased workload and stress that comes with the process.

Stress at work also involves substantial cost to unions. Unions generally in particular might need to consider their response to the threats and opportunities from workplace mediation and in relation which disputes they may wish to encourage it. If mediation is happening they should be there involved in the process alongside their members. They should avoid attempts at being excluded. They should know that good mediation practice encourages preparation by the participants.

Case studies...

Stephanie Jones' and her employers' experience – an ordinary story

Stephanie Jones was a useful member of the management team. Another manager in an open plan office rang her and on finding she was not at her desk, left a message to call and put the receiver down. He did not put it down properly and turned to colleagues mimicking Stephanie's welsh accent and referring to her "a muppet". The message recorded laughter from others present.

Stephanie complained. She lodged a grievance, including a reference to race discrimination. She received an apology of sorts from the employer, but remained dissatisfied with the grievance procedure throughout. There were delays and appeals. Meanwhile, lawyers were instructed and ET proceedings taken close to a hearing.

Stephanie told her union lawyers she wanted the event never to have happened and was concerned that the respect for her had been undermined to such an extent she was tempted to leave. The lawyers told her that she had a good case before a tribunal but that they could only achieve a financial settlement.

The employers' lawyers advised that an offer of less than £1,500 was all that was required. Stephanie's lawyers told her that if she did not accept they would advise the union to withdraw support as the tribunal would not award more. But they offered to try for an increase.

An offer of £2,000 was made and reluctantly accepted. The grievance had to be abandoned as part of the final settlement. Stephanie did not have faith in the grievance procedure and doubted the independence of the internal appeal.

The union's and the employer's lawyers incurred costs at least three times the final settlement. The employer used up valuable resources. The outcome was unsatisfactory to all involved. The employee remains disgruntled.

It would seem that early mediation was likely to have resolved the matter to the satisfaction of all for a fraction of the cost with Stephanie still in post.

Dave Singh and his employer's experience – another ordinary story.

In 2003 Dave Singh was appointed to as a deputy head. The employer knew Dave had a constitutional medical condition that could be aggravated by stress. No one knew, however, that the next few years would be dominated by allegations of stress caused by work overload and lack of support, lengthy absences, suspension following an allegation that, some months later, turned out to be unfounded, disciplinary proceedings and a claim for damages for personal injury/stress.

By 2004 difficulties had surfaced with Dave's performance of his duties and these gave rise to absences and a series of meetings concerning personnel and occupational health issues. In January 2005 Dave was suspended, only to be cleared by an investigation

some months later. He was then absent from work on account of sickness, returning after a break of 8 months overall. Discussions about a termination of his employment at that stage did not reach a conclusion.

The unsatisfactory employment relationship continued, with further absences, during 2006 until an incident (which most would describe as minor) at the beginning of December 2007. The disciplinary proceedings that followed created further stress and Dave started a period of absence that was to last until the mediation, over 2 years later.

Proceedings were started, with the support of Dave's union, in 2007 and these were put on hold in 2009 for a mediation. In 2009, at a one day mediation, Dave and his employer settled the personal injury claim and also agreed other matters which the court could not order, namely a redeployment.

The fact that Dave was able to participate in the mediation process was clearly important to him and was most probably a factor that contributed to the parties' ability to reach agreement about this complex set of facts and legal issues surrounding the personal injury and employment claims.

In the context of mediation and the costs of stress three things are clear. First, the savings arising from settlement at this stage compared to proceeding to trial were immense – many tens of thousands of pounds. (And the trial would only have dealt with the personal injury claim.) Secondly, it seems very probable that the nature of the case and the state of the evidence was such that a technical legal assessment and a joint settlement meeting would not have resulted in settlement at this stage. Thirdly, the total cost of stress in this case cannot be measured in legal costs alone.

Dave's career has suffered a major setback and his and his family's life was dominated by the problem for years. The management time involved in dealing with these issues amounted to several hundred senior man hours – and that is before the considerable task of liaising with and providing instructions, evidence and documents to legal advisers. The union also incurred significant expenditure of resource and there could have been a substantial cost if the claim had not settled.

Taking all this into account it is not hard to make a case for a modest investment in attempting early intervention. It was agreed that the costs of the mediation followed the result in relation to the personal injury case, so the costs were borne by the employers.