

**byrne-dean
mediation
team's
thoughts**



The three very experienced employment lawyers spearheading our workplace mediation efforts share their insights on the pace of the change towards the new era of workplace dispute resolution.

Mediation in the workplace: your support needed!

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For the last two or three years there has been a sense that the time for workplace mediation is now. The Gibbons Review in March 2007 recommended 'a greatly increased role for mediation' and specifically targeted resolution *in the workplace*. Yet anecdotal evidence (and formal research) suggests that there hasn't been take-up. Articles are beginning to appear suggesting that mediation is not a panacea for workplace disputes. The new ACAS code stops short of requiring mediation. What's really happening?

The truth is that in today's advice hungry, risk focused workplaces, conducting workplace mediations successfully is extremely hard. It requires a strong, flexible and professionally credible mediator with highly developed emotional sensitivity. It requires the organisation's HR gatekeepers proactively to support a process consisting of potentially two or three stages that may initially appear to be making little progress. And it requires the legal advisers (on both sides) to have confidence that the process will bring about a good result for their client.

“inspiring awareness”

What is resolution in the workplace?

The Gibbons Review recommended that the Government should:

- support employers and employees to resolve more disputes *in the workplace*; and
- actively assist employers and employees to resolve disputes that have not been resolved in the workplace.

The primary focus was resolution ***in the workplace***. Michael Gibbons has a background in mediating family disputes. The analogy between resolving workplace and family disputes can be very instructive for those of us primarily involved in workplace disputes. As a family relationship breaks down, before one or other partner leaves the family home or decides to turn their back on the relationship, there will be a maelstrom of emotions on both sides: fear, regret, hope, bitterness, anger, sadness. And there will be no clear view on the part of either party of the way out of the situation. To a greater or lesser extent the same is true as many workplace relationships breakdown. This needs to be recognised.

Workplace mediation interventions can be categorised as either taking place in the workplace – before the situation has crystallised, before the matter has ‘gone legal’ to use a popular phrase. It is at this point that the emotional landscape is probably at its most unpredictable. The more traditionally understood, more transactional situation arises once the situation has crystallised and the matter has ‘gone legal’. Here the mediation is in effect an alternative to tribunal or court. Some commentators refer to these as ‘Employment Mediations’; they typically take place on a single day, in a lawyer’s office.

One of the many unforeseen and unwelcome consequences of the soon to be replaced 2004 Regulations was the creation of a sense that matters had ‘gone legal’ at a much earlier stage, typically once the grievance was filed. This sense has had the effect of hindering the prospects of mediation in the workplace. It is hoped that one benefit of the new regime will be the removal of the sense that a matter has ‘gone legal’ at such an early stage, thereby increasing the take up of resolution opportunities in the workplace.

What do mediations in the workplace actually look like?

The typical hallmarks of situations where we get asked to help and where we believe that mediated outcomes can add most value include the following.

- An **aggrieved person** who is:
 - in a state of extremely high anxiety (that inevitably impacts on how they act and how they perceive the situation);

- scared and uncertain about the position they find themselves in;
 - functioning poorly in their job but either unable to see that or unwilling to admit it;
 - blaming the current situation on the treatment that they have received from the other party(ies); and
 - focussed principally on the past – how things were and who is at fault for what has happened.
- A **manager** (or management team) who:
 - has limited or no understanding of how upset/anxious the aggrieved person is;
 - is primarily focused on the fact that the job is not being performed well and the impact that this is having on them and their career;
 - blames the current situation almost entirely on the aggrieved person who they are now seeing and openly referring to as the problem; and
 - wants to move forward as quickly as possible (typically without the aggrieved person).
 - An **HR function** which :
 - recognises the value and importance of the mediation process; but
 - to a greater or lesser extent has taken up the position of their principal client (the manager/management team) and is seeing and openly referring to the aggrieved person as the problem;
 - wishes to move forward quickly; and
 - is very conscious of the need to minimise legal risk in the situation.
 - **Legal advisers** who:
 - may know that a mediation process works often (but not always);
 - need to position their client as favourably as possible for the litigation that may follow;
 - (particularly in the case of the respondent's adviser) will not usually have had direct contact with the aggrieved person enabling them to understand the contextual picture; and

- will often instinctively support the emotional or reactive position taken up by their client.

So, if a mediation in the workplace is going to be successful, there must be

- An exploration, understanding and possibly a recognition of the aggrieved person's emotional state;
- a period in which trust is developed between the mediator and in the first instance the aggrieved person but also with manager/management team, HR and any advisers. This can take time and requires flexibility of approach;
- an effort to change the focus of the aggrieved person, from the blame fuelled retrospective to a more future orientated view;
- some work done with the manager/management team to assess whether their actions or those of others may have added to or exacerbated the situation and how their future actions could add to a solution; and
- trust expressed in the mediator and the process being followed by those advising and supporting the process.

In practice what sort of flexibility of approach is actually required?

At the very least we have found that a couple of preparatory and diagnostic calls or face to face meetings between the mediator and the aggrieved person may be required. In those initial meetings and certainly as the mediation process advances, it can be helpful for the mediator to utilise some self-awareness techniques; to show the person they are trying to engage with exactly how they are coming across to their colleagues. We have also found that our traditional coaching and counselling work with all of the parties at the centre of workplace problems can be very valuable in these early interactions.

It may be that there are three or more intervention events before we get to the traditionally understood mediation event – what might be termed the 'mediation day'. This is where the mediator facilitates joint or caucus meetings and the parties move towards resolution. It's our view that this preparation work is a necessary part of a successful mediation in the workplace (or what we typically term 'early reconciliation'). It's about changing the orientation of the parties and often of their advisers.

In our experience, those involved can get dispirited when no progress seems to be being made in these early stages. This is partly because no-one, apart from the aggrieved person, knows how emotionally damaged that person is by their recent experiences. It's also because being in dispute is wearing on all those involved: they are often receiving daily emails that are relentlessly critical of them or those 'on their side'; stamina is being worn down and sides being taken.

We may never actually get to the mediation event!

Occasionally we don't actually get to the mediation event. But in a number of situations we have found that the work done by the independent neutral (someone who has advised on a multitude of employment breakdowns from both sides and can speak with that voice) and the aggrieved person can be of great benefit. The expectations of the aggrieved person can be managed very effectively. The future trajectory of the dispute can be altered even if the pace of achieving that outcome remains steady, rather than accelerated as it does in a traditional mediation.

Trusting the mediator?

The CIPD's 2007 Workplace Mediation survey found that 35% of employers were training managers, employees or employee representatives to act as mediators. We are aware and have been involved in setting up a number of schemes using internal mediators. Wider understanding of the use of non-adversarial (side-by-side) techniques to resolve workplace disputes is of crucial importance in the cultural change required in workplaces. Internal mediators will, however, always need to overcome a fundamental challenge in the eyes of the aggrieved person; that of their perceived impartiality.

A successful mediator needs to be an experienced workplace practitioner, able to see and share the perspectives of both sides in a manner untainted by the partiality that is an inevitable by-product of an adversarial system. It is easier for an external party to position themselves in this way. That said, advisers often question our perceived independence – if the mediator is retained and paid for by the organisation, can they be perceived as independent? The questions of trust and independence in our experience come down very simply to the skill, integrity and work of the mediator. Building trust is at the heart of the mediator's skill set and without this, mediators would fail consistently. Remember that the track record of traditional mediations is one of success in 70 to 80 % of situations.

For many years we have coached people at the centre of workplace disputes. Those individuals have never questioned the fact that we are paid by their employer. They have typically engaged 100% with us in discussing ways that they may change their behaviour. It is very much the same when our mediators engage with aggrieved persons in early reconciliation or mediation processes.

It's all about taking a step into the unknown!

This is a developing process and we've been lucky to work with some perceptive lawyers and HR clients who have involved us in some very challenging situations over the last few years. In none of those situations has there been a quick fix. Mediation in the workplace is not easy, not at all. But the thing that we think is holding the development of this process back more than anything is the lack of trust and support for it amongst the advisory populations. Perhaps the new ACAS code will tip the balance? Let's hope!

What does the new law say?

- On 6 April 2009 the Statutory Dispute Resolution Procedures (SDRPs) will end (subject to some complex transitional rules).
- Employers will no longer face automatic unfair dismissal claims for failure to follow through the 3 step disciplinary procedure.
- Employees will not have to file a grievance before being able to bring a tribunal claim.
- But a new ACAS Code of Practice will take effect.

A bit on the ACAS code

- The Code sets out "the basic requirements of fairness" for disciplinaries and grievances. Unreasonable breach of the Code may lead to adjustment of a Tribunal award (up or down) of up to 25%.
- These basic requirements include the 3 step procedure from the SDRPs but go much further in setting out what is fair (e.g. the Code says employees should be able to call witnesses in disciplinary hearings).
- The Code also **encourages informal resolution** – employees need not put a grievance into writing until informal resolution attempts have failed.
- Crucially the Code makes BOTH employers and employees responsible for dealing with issues fairly and promptly
- The Foreword to the Code states that both parties **should try** to resolve issues in the workplace and consider using an independent third party (such as a mediator) to help.
- The Code is supported by an ACAS Guide which also encourages the use of mediation in appropriate situations.
- However, neither the Foreword nor the Guide form part of the Code and thus do not attract the 25% adjustment regime. But mediation has been given a higher profile as a sensible means for resolving issues in the workplace. With the Code's renewed emphasis on workplace resolution and the onus being placed on both parties to achieve this, employers, employees and their advisers have a strong incentive to embrace mediation as a way forward.