

Mediation, Conciliation & Arbitration: Alternative Dispute Resolutions (ADR) –

Reducing Job-Stress and a better way forward?

The DTI (now replaced by The Department Of Business, Enterprise & Regulatory Reform) launched a consultation in March 2007 with a view to abolishing the statutory dismissal and grievance procedures introduced in 2004 under the Employment Act 2002. The consultation followed publication of an independent report on employment dispute resolution by Michael Gibbons, which was commissioned by the DTI in after it became clear that the new procedures had not cut the number of employment tribunal claims.

There is general consensus that the statutory procedures in relation to disciplinary and grievances led to great complexity, the need for expensive legal intervention and added stress for all involved. In addition to repealing the statutory procedures, the Gibbons report recommended simplifying tribunal applications forms, encouraging use of Alternative Dispute Resolution (ADR) methods such as mediation services for employment disputes and strengthening tribunals' powers to award costs, including taking into account the efforts the parties have made to resolve workplace disputes or settle the case. The government proposals in this area have now been set out in the Employment Bill currently before parliament.

The Bill, expected to come into force in April 2009, will repeal the statutory procedures and give tribunals power to increase or decrease compensation awards by up to 25% if either side has unreasonably failed to follow a relevant code of practice. It also follows that there will be a greater demand for ADR which is expected to fill the void once the statutory procedures are abolished.

While a brief summary of Conciliation and Arbitration follows below this article expands upon the role, practicalities and application of Mediation as a process which allows two parties in conflict to come together to attempt a mutually agreeable resolution. In mediation, an impartial expert talks to both sides separately, as well as together if needed and helps come up with a solution that both can accept. It's usually quicker than taking legal action, often lasting less than one day and almost always less expensive and stressful. Both sides must agree to mediation.

The mediator doesn't just tell you what you should do, but advises on issues, asking questions that help people look at their own behaviour.

Mediation is best used early in a dispute. It's sometimes used as part of a grievance procedure. Some companies have their own trained mediators, and organisations like Acas and the Labour Relations Agency (LRA) in Northern Ireland offer professional mediation services. The Acas and LRA services are used mainly to:

- help sort out disagreements between workers, like personality clashes
- help sort out problems between staff and employer
- hear appeals against disciplinary action, often in smaller companies

If you go ahead with mediation it's best to be prepared by writing down the problem, the history and possible outcomes that you would find acceptable.

Agreements reached through mediation aren't legally binding, unless this is agreed in advance.

The Gibbons review heard evidence that early mediation or conciliation in the workplace is the key to resolving disputes before irretrievable breakdown in relations occurs and this view is shared by the CIPD who wholly agrees with this proposition. The issue is how far it may be possible to place more weight on such "alternative dispute resolution" (ADR) mechanisms so as to reduce the volume of claims reaching employment tribunals and improve the quality of outcomes. The lessons learned here from the experience of resolving disputes in other areas such as family or commercial law may be applied to the field of employment.

Conflict in the workplace is a reality; anecdotal evidence suggests it may be increasing. The CIPD survey `Managing Conflict at Work` found that the main causes of conflict in order of importance were:

- behaviour/conduct
- performance
- sickness absence
- attendance
- relationships between colleagues
- theft/fraud
- bullying/harassment
- Sex discrimination.

Workplace conflict damages business performance by reducing levels of employee engagement.

[The full report can be viewed on line here.](#)

Business case

There is a clear business case for mediation and other forms of ADR, some of which are summarised as follows:

- Time-mediation is often completed in one meeting, compared with the two days or more typically required for tribunal hearings
- Less stress-full than other options and as the aggrieved parties are heavily involved there exists a better probability to achieve a realistic and sustainable resolution
- Legal representation for the parties is optional and, in the absence of a legal framework, less critical to outcomes
- Proceedings are confidential so that parties are less likely to be trapped by positions adopted earlier
- Mediation takes a problem-solving approach to complaints, which reduces disruption and future problems
- Agreement is less likely to mean that one party wins and the other loses, leading to lower employee turnover
- The process is evidently fair since both parties contribute to finding a solution
- “Win-win” solutions support trust-based relationships and a culture of good people management.

For many employers, however, the business case will be founded largely on the cost of dealing with tribunal claims. The CIPD survey *Managing Conflict at Work* (Reference 1) found that the average annual costs to employers of dealing with ET claims (excluding management time) was almost £20k. But management time is highly significant: businesses spend almost ten days on average dealing with an individual claim (including 7.7 days senior managers’ time). 33% of employers also report non-financial negative effects. The Gibbons review quotes data suggesting that the average cost of defending an individual ET claim in 2005 was around £9000.

Other costs fall on the Government in terms of supporting the employment tribunal system and associated conciliation services, and on individuals who may suffer adverse effects on their health, strain on relationships inside and outside the workplace and damage to future career prospects.

What can The Institute do to assist with, encourage and support the wider use of mediation?

- Even mediation is not stress-free as either the history leading up to or the actual process itself can bring its own stress. The Institute can ensure participants are allowed to engage in a manner which is constructive and not damaging for them.
- Urge employers to include provision for mediation in employment contracts. The procedures relating to individual grievances should provide for some recourse to mediation or conciliation at an appropriate stage
- Raise awareness and understanding of mediation, for example through participating in conferences, talking to members and encouraging them to hold workshops on early dispute resolution and undertaking further research into dispute resolution. The objective would be to raise awareness and make the business and clinical case for mediation
- Undertake, hopefully in partnership with others, a survey and case studies of mediation since evidence about the use of mediation in the UK is currently very limited. This could explore why some employers use mediation and why others do not, and the circumstances in which mediation is most likely to be successful
- Review the emphasis on conflict resolution and mediation skills in the context of the professional standards.
- Mediate in respect of any disputes and provide all necessary expertise and documentation e.g. drafting of legally binding compromise agreements.

Constraints on the use of mediation

How far can mediation be expected to take more of the strain of handling workplace conflict? Some employers, particularly in the public sector, have invested in training their staff to undertake mediation; others make use of mediation services provided by Acas or other external sources. However mediation is not the only option for organisations that seek to reduce or deal with workplace conflict. Investigations by outside persons may help to create a shared understanding of the facts which will facilitate early resolution. Employee Assistance Programmes can also be useful in providing employees with a way of raising issues which are worrying them.

There are a number of practical constraints on the use of mediation, particularly if it is seen as a vehicle for reducing the volume of claims to employment tribunals:

- The Gibbons review shows that more than 9 out of 10 individuals leave their employment before or shortly after submitting a tribunal claim. Mediation is unlikely to be attractive to employers as a means of resolving issues affecting people who are no longer employed, or to those individuals themselves
- As the Gibbons review fully accepts, mediation is more likely to be effective if it is deployed at an early stage, before attitudes have hardened. But this depends on organisations' ability to identify and deal with issues at an early stage, which is in turn dependent on the quality and skills of line managers. This can be

tackled by raising awareness and providing training but it is important to recognise that this will take time

- In any case, by the time issues reach the stage where individuals are seeking to pursue their claim at a tribunal, the scope for mediation to achieve mutually agreeable outcomes will often have been seriously compromised. This does not mean that mediation may not be worth attempting at this stage, but it does mean that it is less likely to be attractive to one or both parties
- Some managers are resistant to the idea of mediation since it seems to take responsibility for dealing with issues out of their own hands. Managers may also feel that by accepting mediation they are admitting they may have made a mistake. Managers may prefer that potential disturbance of relationships should be managed and remedied internally, with recourse to third party intervention seen essentially as a backstop
- Members distinguish sharply between discipline and grievances as suitable subjects for mediation. Disciplinary procedures are essentially management decision making procedures with provision for appeals; grievances procedures are concerned with addressing complaints and arriving at an acceptable settlement or other outcome. Mediation is seen as less appropriate in disciplinary cases where employers believe existing procedures generally work well. Mediation will generally be less effective where one or other party believes that an issue of principle is at stake.
- Will mediation be seen as fair to both sides? Any suggestion that mediation will inhibit individuals accessing their statutory rights will damage the chances of tribunals' actively supporting and promoting mediation. If the "sisting" pilot in Scotland (aimed at encouraging parties to use mediation before pursuing claims at the employment tribunal) is judged to be successful, this might encourage the adoption of similar pilots in England and Wales.

There may also be more practical constraints on the ability to increase take-up of mediation significantly in the short term. For mediation to be effective, it needs to be available at short notice. In any case it is not always helpful for mediators to be "parachuted in", since they will generally be unfamiliar with the background to the dispute. Internal mediators can often be brought in more quickly; however their skills may become rusty if they are not required to be used very often.

"Transactional" mediation and compromise agreements

A distinction can be drawn between "relational" mediation, which aims to produce a meeting of minds between the parties, and "transactional" mediation, which is primarily aimed at agreeing a settlement figure – perhaps with some conditions - which will compensate the employee for losing his or her job. Where a complaint has been resolved internally within an organisation through relational mediation, a compromise agreement may be considered as a means of endorsing the outcome. With the passage of time from an initial conflict emerging, the chances of successful relational mediation diminish but there may still be value in pursuing transactional mediation as a way of "drawing a line" under the relationship.

Where the aim is to agree a compensation figure in return for an employee leaving the organisation, whether or not there is a process of mediation, employers increasingly rely on concluding a compromise agreement with the employee. This is in order to ensure that no further statutory claims can be brought against the employer in respect of the employee's service with the employer. The Government should recognise the value of compromise agreements in resolving issues in a way that meets the interests of both employer and employee, without the use of statutory machinery, provided that the employee receives independent advice.

Conclusions

- There is a strong business case for mediation, and the Institute will take action as outlined above to encourage and support employers in making more use of mediation and other methods of resolving conflict at an early stage
- Mediation is a better and more cost-effective method of resolving workplace issues than dealing with claims through employment tribunals, and produces better outcomes for both employers and employees
- Small firms in particular will be dependent on external sources of mediation, and significant investment of public funds through Acas will be needed to support increased uptake. Without such a commitment by the Government, no significant increase in the use of mediation is likely to occur, with the resulting impact on the costs of employment tribunals
- The Government should recognise that many employers use compromise agreements as a means of escaping the straitjacket of statutory enforcement mechanisms and should focus effort on ensuring that employees who sign such agreements do so on the basis of qualified and independent advice.

Interest by employers in mediation is part and parcel of good people management. Its successful use relies on line managers' ability to identify emerging problems and take effective steps to deal with them. Mediation does not offer a quick fix to stem the flow of applications to employment tribunals. Promoting the wider use of mediation is a long-term process that can most effectively be undertaken in the context of a wider strategy for improving people management practice generally.

[View the survey here.](#)

Conciliation

Conciliation is similar to mediation but is normally used when there is a particular legal dispute, rather than more general problems. A conciliator will normally be there to encourage the two sides to come to an agreement between themselves whereas a mediator will often suggest their own solution.

Conciliation through Acas is free of charge and is automatically offered if you make an Employment Tribunal claim (or an Industrial Tribunal claim in Northern Ireland). If your claim might go to Employment Tribunal, you can also ask for conciliation before you put in a claim. Both you and your employer have to agree to conciliation before it can happen.

www.ergology.org

The decision of an Employment Tribunal is not affected by your decision to try conciliation. So if you decide not to go through conciliation, or if you try it but it doesn't work, this does not make any difference.

A trained conciliator:

- talks through the issues with each side
- explains the legal issues involved
- looks at opportunities for settling the case
- helps you and your employer agree a legally binding agreement

The conciliator is impartial and independent (so they are not on anyone's side, and have nothing to gain), and all discussions are confidential unless agreed otherwise. They'll try to help you make your thoughts clear, and look at ideas you may have for sorting out the problem.

The benefits are that:

- you'll get a better understanding of the issues
- you might sort the problem out without a tribunal hearing
- you could reach a solution on your own terms
- a settlement can include things that won't be covered in a tribunal judgment (like getting a good reference) .

Settlements reached through Acas and LRA conciliation are legally binding. You'll sign an agreement called a COT 3, and once you've agreed it – even verbally – there's no going back on it. If either party breaks the agreement, litigation against that party is possible.

Another form of legally binding settlement is a 'compromise agreement'. These agreements are used where Acas and LRA are not involved. There are strict requirements on a compromise agreement - putting it down in writing and signing it isn't enough. For this to be effective it must be in writing, relate to your claim and you must have taken specialist advice from someone who has appropriate insurance, usually a lawyer.

With either form of legally binding agreement you'll no longer be able to pursue your Employment Tribunal claim.

Arbitration

Arbitration uses an impartial outsider (an arbitrator) to decide between two claims. The arbitrator acts like a judge, making a firm decision on a case. The two sides of the dispute will normally agree in advance whether the arbitrator's decision will be legally binding (so they have to go along with the decision) or not (so they can still decide to go to a court or tribunal).

Arbitration is often used in collective disputes. For example, if a trade union is considering strike action because they simply can't agree with an employer, then they may agree to get an independent arbitrator in (usually from Acas or LRA) to look at the situation and make a reasoned decision.

Arbitration can also be used to settle individual disputes. If you and your employer agree to go to an arbitrator, then it may be a quick way of resolving a problem without the stress and expense of an Employment Tribunal.

Both sides have to agree to go to arbitration. It's faster and less formal than an Employment Tribunal. Acas, LRA and some commercial organisations, offer the services of specialist arbitrators.

References / Sources:

www.caracall.co.uk

www.cipd.co.uk

www.peoplemanagement.co.uk