

Overcoming resistance to workplace mediation

Eve Pienaar

Background

Over the past quarter of a century we have witnessed a shift in terms of workplace conflict, from collective expression of conflict (strikes and industrial action) to individualised claims in the Employment Tribunals. The nature of conflict has also changed, broadly from disputes over pay and terms to claims based on infringement of individual worker's rights. This shift to rights-based, private claims should, on the face of it, provide a rich field for mediation as an effective means of conflict resolution, particularly on the workplace front, before the employment contract has come to an end.

Following the Gibbons review¹ in 2007, advocating early, informal workplace resolution, the Employment Act 2008 revoked the much maligned "three step" disciplinary and grievance processes, replacing them with the new ACAS Code and associated Guidance². Although mediation has not been imposed on employers, in keeping with its key principles of voluntariness and confidentiality, it is strongly encouraged in the Code and Guidance. ACAS' growing role in offering pre-claim conciliation (under the new system) demonstrates Government's policy shift in favour of mediation.

Practitioners expected the floodgates to open in relation to workplace mediation, following implementation of the ACAS Code and Guidance. It is true that ACAS have seen an increase in workload as a result, but this has not yet been felt on a widespread level by mediation service providers outside ACAS. There remains a real resistance to workplace mediation. This article tries to analyse the different factors creating resistance to workplace mediation, and offers some thoughts as to how these can be circumvented.

Nature of workplace conflict

A study on the pattern of disputes in Britain since 1980³, by ACAS, traces the analogy between the introduction of individual statutory employment rights (from unfair dismissal to the raft of discrimination legislation in place today⁴) to the huge incidence in claims brought before the Employment Tribunals. The outcome today is an atomised workforce, made highly aware of its "rights" by high profile media cases, increasingly willing to seek legal representation and raise grievances. Unfair dismissal claims have increased significantly with the recession, and unfair dismissal

¹ Better dispute resolution: a review of employment dispute resolution in Great Britain (2007), available at <http://www.berr.gov.uk/files/file38516.pdf>

² <http://www.acas.org.uk>

³ ACAS Research Paper – Conflict at Work: the Pattern of Disputes in Britain since 1980 (Ref: 03/08)

⁴ From the time the Industrial Relations Act 1971, creating the right not to be unfairly dismissed, was enacted to the introduction of non-discrimination legislation in 2006, the number of Employment Tribunal claims has increased from less than 20,000 p.a. to over 130,000 (ACAS Research ref 1 above, p.9)

claims sent to ACAS have increased by 22% to 55,000 in the year to end March 2009 (after falling over the last two years)⁵.

OPP and the CIPD carried out a study of how conflict is managed at work in Europe⁶, in 2008. Overall, a vast majority of employees (85%) feel they have to deal with conflict to some degree and a third do so “always” or “frequently”. In the UK workers are the most likely to experience negative emotions as a result of conflict, with two thirds admitting to feelings of anger and frustration in the face of conflict at work. The emotional intensity with which they experience workplace conflict explains to some degree the very high incidence of stress related absence (30%). The survey concludes that *“the average employee spends 2.1 hours a week dealing with conflict. For the UK alone this translates to 370 million working days lost every year as a result of conflict in the workplace”*⁷.

It is little surprise that the workplace provides such a rich tapestry for conflict. The complex interaction of rights, dynamics of management and commoditisation of the worker, which make up the employment contract, operating against a backdrop of an increasingly diverse workforce working in highly competitive conditions is a heady mix for conflict. Yet even now, with Government policy and a statutory framework encouraging informal and early resolution of workplace conflict, mediation is still on the fringes. What are the reasons for its relatively slow take up?

Resistance by the employer

There is still a feeling that mediation is a “last resort” before litigation. Based on the experience of commercial mediation, where mediation is increasingly embedded in a stepped dispute resolution clause, it is seen as appropriate to use when a dispute is sufficiently highly evolved that a Court hearing is in sight. This does not easily translate to workplace conflict, which is by nature amorphous and highly emotive, so impossible to quantify in a linear manner the way commercial litigation risk is. Unfortunately there is a real deficit in understanding by management (and the HR function of many organisations) of the benefits mediation can afford from the moment conflict sets in, between individuals or in team dynamics, as opposed to its use in a commercial context.

When delivering workplace mediation awareness training to employers, it quickly becomes apparent that the HR function of organisations (in the private and public sectors) are very divided about offering mediation to staff. Some will see the benefit in terms of reduction in cost of conflict and well-being of the workforce. Others, however, have a real concern that staff will “take advantage” of it and “string out” grievances further. Work needs to be done to show employers, and their HR functions in particular, that mediation is not a soft option. It forces parties to confront the core of the conflict, to address their behaviour with honesty and be prepared to listen openly to justifications for the other parties’ behaviour. It requires honesty, courage, forgiveness and strength of character to change.

There is still the need to create awareness of the scope for mediation in workplace conflict, through training. There is also the need to prove in economic terms what the cost of conflict represents for organisations and how mediation can reduce this

⁵ Telegraph article 23rd July, 2009

⁶ OPP and CIPD Research, Fight, Flight of Face it? Celebrating the effective management of conflict at work (July 2008)

⁷ OPP report (Cf 5), p. 4

significantly. The mediation field needs to formulate a better communications strategy than simply hope to ride off the coattails of commercial mediation.

Resistance by employees

It is one thing to go into a commercial mediation surrounded by advisers and talking about issues which are not personal, usually broken down in financial and risk terms. It is quite another to go into a workplace mediation, usually unrepresented, and having to bare emotional and highly personal matters. It is frightening, stressful and takes a lot of courage. It would be far easier avoiding the conflict altogether (which accounts for the many sickness due to stress and anxiety days). Once employers have accepted the potential value of workplace mediation, there is another, complementary, awareness training requirement with staff.

There may be a divergence between the employer/HR function's understanding of what mediation can achieve and what the process entails, and what workplace mediation really is. Employees may mistake it for counselling, or expect some arbitral determination as an outcome. There is always a risk of disappointment or lack of engagement if the principles of mediation have not been made clear. Again, there is a need to carry out extensive awareness training and possibly demonstration of the cathartic and transformative qualities uniquely inherent to workplace mediation. In the words of Doherty and Guyler: *"It is our consistent experience that once staff have been introduced to what mediation is actually about, they have welcomed it with interest and enthusiasm"*⁸

Emotional hurdles

People get "stuck" in conflict at work for a number of reasons. Conflict defines us, validates our behaviour and strengthens our bonds with allies. It is very difficult to move on from conflict without compromising this identity and losing face. Yet remaining in conflict makes us lose perspective and the opportunity of self development. It is also toxic to the person involved and those surrounding the conflict.

Conflict is addictive, we invest in it to justify our position. It hides our weaknesses and keeps us from confronting its underlying issues with honesty and courage. In so doing, it creates stress and anxiety and permeates everything we do (within and outside work) with constant, draining dread. Mediation is unique in its ability to take people in conflict on a journey of discovery, unpicking misunderstandings, gaining insight into how behaviour is interpreted and providing a safe process to slowly rebuild trust and communication. The transition from conflict to constructive communication is difficult and requires skill and experience from the mediator, but it is also hugely empowering for the individuals concerned. Workplace mediation does truly embody the transformative qualities of mediation.

Systemic hurdles

The employment relationship is hierarchical and based on power imbalance from the outset. This informs the nature of conflict and also what systems are in place to resolve conflict. Because the employer largely determines the framework of the employment contract grievances are generally dealt with in policies which deal with conflict from an investigative, evidence based approach. This is understandable: the

⁸ The Essential Guide to Workplace Mediation and Conflict Resolution – Rebuilding Working Relationships , Nora Doherty and Marcelas Guyler (p 109) Kogan page, 2008

employer needs certainty and consistency to devote as much resource as possible to extracting profit. Corporate culture and organisational approach to conflict will only embrace mediation when the employer is convinced this will afford a material economic benefit.

There is much work to be done to convince the employer that mediation is an economic benefit. Only then will systemic hurdles be removed and mediation introduced to staff policies and employment contracts.

Political hurdles

There is a tension between the traditional role of HR in handling workplace conflict, and the loss of control over process and content which workplace mediation suggests. There is work to be done with HR functions to address this perception, and align mediation alongside (rather than instead of) the very valuable role and processes of HR.

Mediation may also be perceived as undermining an individual's right to have a grievance investigated and aired publicly. The private and confidential nature of mediation does reduce conflict to individual expressions of grievance and fails to address behaviour which may be discriminatory or bullying in the wider, cultural sense. Yet there is a role for mediation of a private dispute to inform wider organisational policies and perhaps for protagonists in a conflict to gain the "voice" to broaden the debate for the collective good – something a grievance rarely allows.

Conclusion – a preventative approach to workplace conflict

Assuming management, HR and staff accept the benefits and opportunities that mediation offers, how then to introduce it to the workplace. In his Guide to Workplace Mediation⁹ Clive Lewis considers a range of preventative measures to head off conflict. Some of these include, for the employer:

- Agreeing a common vision which incorporates mediation values
- Carrying out a conflict audit to assess the cost of conflict in the organisation (essential to later analyse the cost / benefit value of introducing mediation)
- Training managers in mediation skills and carrying out mediation awareness for staff
- Incorporating mediation in HR policies and employment contracts
- Sourcing experience mediators – either externally or building up an internal function
- Setting conflict reduction targets, monitoring and reporting results with transparency
- Promoting mediation effectively, internally
- Reviewing service levels and outcomes on a regular basis.

Much to be done. Workplace mediation provides an exciting opportunity to combine cost efficiencies with self development potential for staff on a truly material level.

ends

⁹ The Definitive Guide to Workplace Mediation & Managing Conflict at Work, Clive Lewis, Roper Penberthy Publishing Ltd 2009