



MEDIATION MECHANICS

Where Conflict Becomes Opportunity

WHAT IS WORKPLACE MEDIATION?

1. Introduction

“How have we come to this“

“I don’t know what else I can do”

“HE SIMPLY DOESN’T OR WON’T UNDERSTAND”

“I’ve told him if he doesn’t like it he can always raise a grievance”

If these statements resonate – you are probably in a grip of work based conflict! That will not come as a revelation to you I’m sure but read on and I hope to tell you something that you might not know.....

I’d like to tell you about a mechanism available to you that has a 70% -80% chance of achieving a long lasting win-win solution. Mediation repairs the relationship for the parties involved and restores a healthier environment for all who are affected by the fallout from the conflict.

2. Why do we need mediation.....we have a grievance procedure?

The grievance procedure is an adversarial process, the parties in conflict present their own perceptions of what the solution to the conflict should be. The solutions tend to be incompatible. The hearing chairman makes a decision, which is not always satisfactory to either party. There are often residual unresolved relationship issues, which continue to be more problematic for not just the parties, but their colleagues too.

Mediation requires the parties to take responsibility for the process, and to help them identify shared interests to bring their positions close together.

Mediation repairs the relationship for the parties involved and in so doing restores a healthier environment.

(source:CIPD, XperHR: Steve Hindmarsh: ACAS)

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The Mediator is an independent 3rd party, who facilitates the dialogue and assists the parties in reaching a solution. The mediator focuses on the needs and interests of the parties and helps the parties take responsibility for the outcome.

Mediation is a cost and time efficient process and produces sustainable solutions.

3. Disputes suitable for mediation

Issues that are suitable for resolution through mediation include;

- Conflict over working
- A conflict over scarce resources, often occurring between the departmental or functional heads
- A conflict resulting from individual behavior
- Conflict perceptions of performance, which can lead to a grievance or accusations of discrimination
- A conflict arising out of allegations of discrimination, or unfair or unequal treatment
- A conflict arising out of inequality of pay issues
- A relational issue an allegation of bullying or harassment
- A sever breakdown in communication(which is often the manifestation of some of the issues listed ab¹ove)
- A grievance of disciplinary situation, although in certain circumstances mediation may be unsuitable. (see below)

4. Timing – when to start the process?

Mediation is appropriate for use at any stage in the dispute, but there are more opportune times than others to activate the mediation process. Early intervention will avoid the views of the parties becoming entrenched over time and reduce the likelihood of others being brought into the conflict.

5. Mediation approaches

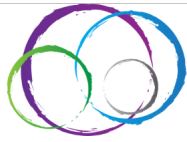
There are 3 main approaches to mediation; facilitative, evaluative and transformative. Only facilitative and transformative are used in the workplace.

5.1 Facilitative

The key principle of facilitative mediation are self-determination, free and informed consent and impartiality. People end up in conflict because they perceive their interests, goals and concerns to be incompatible. They are unintentionally in ways to pursue their goals or interests at the expense of

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others. The mediator helps the parties to focus on the things that are important to them, like their needs and interests and helps them to move closer together, getting them to reach a mutually acceptable resolution. The mediator manages the process by setting ground rules, clarifying issues and setting an agenda and helping parties to generate options which ultimately shape the terms of the agreement. The mediator uses a number of skills, empathetic listening, summarizing, reframing and questioning. The mediator remains impartial, suspends judgement and prejudice and acts compassionately throughout the process. Keep in mind the parties are responsible for the outcome, and the mediator is in charge of the process.

The facilitative method has boundaries, if parties reach an outcome, it will usually occur within one or two days. On a practical level it means that organizations can allocate a budget to mediation.

5.2 Transformative

It is based on the premise that, when people or groups end up in conflict and the conflict escalates, the quality of their interaction degenerates. It happens because humans are susceptible to weakness and vulnerable and have a limited capacity to consider the needs of others when faced with sudden conflict. The transformative approach is based on the proposition that people have an inherent capacity for strength and connection that is activated when they are challenged by conflict or difficult situations. It seeks to tap into these capacities and reverse the degenerative spiral of conflict, by accessing their strength and connection, they are in much better place to make decisions that enable them to resolve their conflict. The mediator is there to create the opportunity for this shift to happen, by helping the parties to appreciate each other's viewpoints (recognition) and strengthening their ability to handle conflict in a productive manner (empowerment).

6. The principles of facilitative mediation

Facilitative mediation is based on a number of principles:

Confidentiality: Mediation is a confidential process: anything discussed during the mediation cannot be disclosed to anyone outside the process, unless the parties expressly agree to do so. Confidentiality begins when the mediator first makes contact with the parties. All notes taken by the mediator during the mediation are destroyed at the end of the process. However, there are limits to what is protected by confidentiality: it does not cover admissions of criminal activity or threats of imminent harm to others. One of the challenges facing the parties in mediation is to what extent this privilege can be enforced: the parties might reasonably expect to discuss the outcomes reached and the substantive issues raised with the family members. Mediators should discuss this with the parties to help manage their expectations.

Impartiality: The mediator is completely independent: he or she is an impartial third party with no vested interest in the outcome. Organisations that establish an internal mediation programme usually select mediators from a different part of the organization to where the parties work to help ensure independence and impartiality.

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Non-judgemental: the mediator does not establish who is right or wrong, as the process is non-judgemental. The emphasis is on learning about different perspectives and empowering the parties to take ownership of the solution. ²

Without prejudice: The term “without prejudice” means that anything revealed or discussed during the course of the mediation cannot be used to disadvantage either party in any subsequent litigation.

Flexible and informal: Parties can bring their dispute to mediation at any stage before, during or after formal workplace or legal process takes place. The mediation process itself is entirely flexible: there are no limits as to what the parties can consider as agreement terms, provided that they are, in their view, realistic and achievable. The process is informal, to help the parties feel at ease, and is designed to be a safe and productive conversation, rather than a formal and restrictive process.

Voluntary and self-determining: One of the core strengths of mediation is that the parties are free to choose mediation to resolve a dispute, but are not compelled to do so. This puts responsibility and ownership of the process firmly in the hands of the parties. They decide whether or not they attend and stay for the duration, and what they agree to at the conclusion of the process. The process is designed to empower the parties to make decisions that best serve their interests. This helps to ensure that the parties are committed to the outcome.

7. The mediation process

It is made up of;

- **Individual sessions**
- **Joint meetings** to explain the mediation process in detail to the parties and make sure that they understand the process and their commitment and explaining the key principles and recommends some ground rules to enhance the quality of the conversation ie. Listening without interrupting or avoiding insults.
- **Opening statement**, each party has a short, uninterrupted period, to tell their side of the story, and explaining the conflict from their perspective, and how it has affected them. It can be uncomfortable at times, but both parties have to listen to what is being said by the other. The mediator will summarise what the parties have said, including the facts and the feeling they have expressed.
- **Exploring**, the mediator invites the parties to respond to what have been said. The purpose of this is to improve the understanding of the issues and begin to formulate an agenda for further discussion. Mediator will elicit the parties interests and needs.
- **Problem solving and negotiation**, once the parties interests and issues that are a priority have been identified, they will be addressed during mediation process, the mediator can now assist the parties to generate ideas and options that will satisfy each party's interests.

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This process is not about finding a compromise, but rather about exploring a wide range of creative options that meet the parties needs.

Designing a settlement agreement, indicates the agreement reached between the parties between mediation. This agreement is not legally binding or enforceable. They reflect the parties commitment to follow through the outcomes reached. The parties are the ones that will keep a copy of the settlement agreement. A written agreement is designed to represent an explicit joint commitment to improve the parties situation going forward and can remind the parties of how well they worked together during the mediation process to reach agreement. The mediator will help the parties to design a 'SMART' agreement:

- Specific
- Measurable
- Achievable
- Realistic and
- Time-lined.

One challenge of workplace mediation is the possible imbalance of power between the parties. It could be gender, culture or where one party is line managed by the other. This could possibly derail the mediation process if not appropriately addressed. The mediator will explore this concern if it exists during the pre-mediation meetings or discussions, and ask the parties to let them know if they feel disadvantaged as a result of the differences of power.

8. The mediation process: general consideration

The mediator and both parties to the conflict should be present at the mediation meeting. Mediation is a confidential and informal process. It is not unformal for parties to request moral support at the mediation meeting in the form of a colleague, or a trade union representative. If either party wishes to bring along another person in a supportive capacity, the mediator ensures that the other party is notified of this in advance on the mediation meeting, so that they can also bring someone if he or she chooses. Everyone that attends the mediation meeting must agree to the confidentiality of the process. Anyone acting in a supportive role should not actively take part in the mediation meeting. The venue of the meeting should be off site at a neutral venue, and somewhere where confidentiality can be protected. Facilitative mediation process can be achieved in one day. Approximately in 1-2 hours for the individual sessions each and around 3-4 hours of the joint session. In addition there will be a half day to administer and set up the mediation process. There are no notes from these meetings and none of the trappings of more formal adversarial processes.

9. Disputes unsuitable for mediation

There are a number of issues and contexts where mediation may be unsuitable:

- **Performance management:** mediation cannot be of use when a manager is using the process to avoid his or her managerial responsibilities, including performance management.

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- **Coercion:** mediation is inappropriate when the mediator feels that either party has been coerced into using mediation.
- **Mental health concerns:** mediation should not be used when one of the parties has learning difficulties or is experiencing mental health problems.
- **First resort:** parties to a dispute are often tempted to take advantage of mediation as the first signs of a disagreement. They should be encouraged to resolve their differences by talking directly to each other in the first instance. If this fails the parties can resort to mediation.
- **Safety:** mediation is unsuitable when the parties to a dispute feel unsafe in each other's company, or where the mediator is lead to believe that the other party's safety is at risk.
- **Disciplinary situations:** it can be difficult to judge whether or not mediation is appropriate for matters relating to conduct and capacity issues, particularly when the employer feels that the line manager has acted fairly and wishes to reinforce a message that certain standards or behaviors will not be tolerated. Employers should evaluate each situation on a case-by-case basis.
- **A breach of ground rules:** if one of the parties to the mediator disregards the ground rules, or becomes aggressive, abusive or threatening, or if one of the parties becomes too distracted to continue or request a halt to the process, the mediator should stop the process.

10. Overcoming resistance to mediation

Despite government and private sector companies measures to encourage early resolution of conflict through mediation, employers have been slow to implement organization-wide mediation programs and to explore the possibility of addressing workplace conflict through mediation.

Introducing a mediation initiative into any organization can generate significant business benefits, but its success will hinge on a number of factors. An employer that wishes to introduce mediation as a dispute resolution method will need to brief key stakeholders about the benefits of mediation.

10.1 Senior management

Launching a successful mediation initiative requires senior-level stakeholder buy-in, so that adequate resources can be made available for the initiative. For some employers, mediation can appear to be a weak approach to resolving disputes, partly due to its informality, but mostly due to lack of understanding by senior management. However there is nothing "SOFT" about mediation, as it puts the responsibility on the parties for addressing their conflict directly with each other. Other employers might view mediation as a last resort, and something to explore in the days leading up to an employment tribunal hearing. Organization that advocates and support a collaborative culture for addressing workplace conflicts are more effective. Research shows that the most successful organizations adopt a more strategic approach to resolving conflict and pursue collaborative win-win channels of resolution. These organizations are more profitable, maintain stronger relationships and customers and stakeholders and have greater confidence in the management of the organization.

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Approximately 80% of mediations reach some form of agreement on all or some of the issues. This can save the business significant costs. The direct costs involved in mediation, when using an external mediator, are generally limited to the mediator's fee and the costs attached to hiring a venue for the day if so required. These are the only costs to be paid by the employer.

The direct cost associated with defending a claim in an employment tribunal far exceeds this, on the basis that the employer's legal representatives are likely to spend considerably more time preparing for the case in the lead-up to the tribunal, on top on the day or days spent at the employment tribunal hearing, and may incur further cost on instructing expert witnesses and barristers.

Other costs that can be incurred as a result of workplace conflict include an increase in staff turnover and absenteeism, and wasted management time and resources. Areas that HR can explore to evaluate the cost of workplace conflict to the business include;

- The frequency and volume of grievance and disciplinary processes, and the time and resources absorbed in pursuing them (including management and workforce time taken up with the conflict)
- Staff turnover and reasons cited for leaving the organization during exit interviews
- Recruitment costs for replacing members of staff who have departed for reasons associated with conflict and
- Sickness and stress-related absenteeism and the opportunity costs associated with under-resourced teams.

Less tangible but equally valid cost implications of workplace conflict include poor-quality decision-making, theft, sabotage, and neglect of company property. Employees typically exhibit these behaviours when their organization fails to deal with an issue. Another cost implication of workplace conflict is the business opportunities that can be missed as a result of delayed or inadequate information that arises out of poor communication between colleagues in conflict.

10.2 HR

There is often a lack of understanding among HR professionals about the mediation process. Some HR professionals are concerned that employees will use process as a tactic to delay a formal process. Others are concerned that their workload will increase, as every employee with a grudge will use the process to vent his or her frustration. However, with adequate procedures and an informed HR function, cases can quickly be categorized as those suitable or unsuitable for mediation. When used effectively, mediation can reduce the emotional energy, time and resources that are absorbed by workplace conflict, thus freeing up HR professionals time to work on other tasks.

In many organizations, the HR department is stretched to capacity. HR professionals might perceive that a mediation initiative will add to their workload. However, they often find that using external or internal mediators to resolve disputes frees up more time to perform their duties, as the administrative burden of dealing with grievance processes is reduced as a result of agreement being reached on disputes during mediations.

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Employers should demonstrate to HR the value of mediation and the role it can play in improving relationships and enhancing employee agreement. Unresolved conflict is problematic and damaging to employee relationships. When employees are in conflict with each other they tend to act in ways that generate negative consequences for themselves and others. They often share their frustration with colleagues through gossip, without being accountable for their behavior or addressing their concerns directly with the other person. This generates a climate of mistrust, where people seem to attribute to blame each other and avoid acknowledging the possibility that they have in some way contributed to the conflict.

Mediation helps to improve employee engagement because its central purpose is to encourage the parties to engage directly with each other and discuss the things that matter most to them regarding their work relationships. It empowers people by making them accountable and creates the opportunity for them to influence directly how they are treated.

10.3 Trade Unions

If employers involve trade union representatives early on when introducing a mediation initiative, they create an opportunity to address any concerns that they might have about the interference of mediation with employee rights. The implications of mediation in relation to employee's rights and the role of trade union representatives as protectors of those rights are normal concerns and can be addressed by emphasizing the principles of mediation. (confidentiality, its voluntary nature and free and informed consent). Providing reassurance that employees statutory rights are not affected can help get trade unions on board and encourage them to promote the mediation initiative. Inviting external mediators to discuss mediation proposals directly with trade union representatives will maximize the effectiveness of any promotion efforts.

10.4 Employees

There are a number of reasons why employees might be resistant to mediation:

- They might be concerned because it is a new and unfamiliar process
- They might fear the prospect of feeling vulnerable when having to address the issue directly with another party
- They might need to overcome psychological barriers. For example, having to consider the possibility that their behaviour has had a negative impact on the welfare of another employee can be difficult

Some employees invest emotionally in the conflict, which can serve to perpetuate the difficulties. The prospect of resolving a conflict can represent a huge loss to the employee, including a loss of face, a loss of support from peers and allies and even a loss of attention, as it is likely that the spotlight would have been on him or her throughout the conflict.

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10.5 Promotion of Mediation

The first step to overcoming resistance to mediation is to educate the stakeholders about the process. It is crucial that all key stakeholders understand what mediation is, what it is not and how it works and that they appreciate the benefits that the process can offer.

Employers can inform stakeholders about mediation by organizing mediation awareness seminars and workshops. These sessions can be an effective way to inform perspectives on mediation and influence key stakeholders. Increasing transparency and awareness can increase the likelihood of the mediation initiative being taken seriously and getting off the ground.

11. Internal v External mediators

Employers should consider a number of factors when deciding whether their mediation services should be provided by in-house or external mediators.

The following factors might influence an employer to choose an external mediator over an internal one. The complexity or sensitivity of the dispute may call for a more experienced mediator, preferably one from outside the organization. For example, the parties to the dispute may need to discuss confidential information relating to the organization's strategy.

A conflict involving senior managers might require an experienced and independent mediator.

Employees might perceive that the organization is failing to take the matter seriously if it draws from a pool on internal mediators.

For some organizations, introducing internal mediation is the most effective way of addressing workplace conflict. Some large public-sector organizations have trained a proportion of their staff in mediation skills, and they now operate as internal mediators.

For small organizations, or those that are new to the idea of mediation as a means of addressing conflict, it may be more appropriate, in the first instance, to explore the possibility of using experienced mediators, from outside the organization to help solve disputes.

11.1 Choosing an external mediator/ mediation provider

Ensuring the mediator is adequately trained. There are a number of organizations;

- CEDR
- Mediation Mechanics (Botswana)
- RICS
- Civil Mediation Council
- ADR group
- ACAS

Other considerations include;

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- Training and accreditation
- Mediators approach and methodology
- Whether the mediator adheres to a code of conduct
- Mediators relevant experience
- Mediators availability

Employers that choose to train some of their own staff as mediators should consider a number of factors;

- **Selecting candidates**, developing a team of internal mediators in an effective way of addressing a high volume of minor workplace conflicts and developing a culture of addressing conflict through dialogue. Following points to consider
- **Employers should ensure that candidates have enough interest** in and understand the process and commit their time and energy to the process
- **Employers should ensure that the workforce is fairly represented**, by selecting candidates from a broad cross-section of the organization, taking into account, for example gender, culture, race, age, position and location.

Skills that a successful mediator will need include;

- Empathetic listening
- An inquisitive nature that will allow him to ask questions to explore and closed questions to clarify or test assumptions
- Being alert to emotional needs, reflecting back observations and testing hypothesis;
- Awareness of interferences made by him or herself and other people and not treating those assumptions as facts
- Being alert to the reactions of others
- Being able to assist in brainstorming and problem-solving exercises
- Being able to keep conversations on track
- The ability to keep conversations on track
- The ability to show even-handedness
- Being able to maintain momentum
- The ability to use a flip-chart and;
- Time management skills

It is sensible for employers to consult with a mediation training provider to help identify which candidates would be successful mediators.

11.2 Training of mediators

Once in-house mediators have been selected, they should be trained. Employers can train mediators by inviting an external provider to develop and run an in-house mediation training programme, which can be tailored to the particular needs of the organization, taking into account the typical nature of

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the conflicts that exist across the organization and the approach that will most suit the organisation's culture.

Employers should also appoint an internal person to act as a single point of contact for all mediations. The role of the mediation scheme co-ordinator might be suitable for an HR professional. All referrals to the mediation service should be channeled through this point of contact. The mediation scheme co-ordinator can evaluate the suitability of cases for mediation and appoint an appropriate mediator from the organisations internal pool of mediators should they have trained mediators, or if necessary, an external supplier.

11.3 Supporting of mediators

Employers can use a co-mediator to develop the competence and confidence of newly trained mediators. Co –mediation is an effective way for mediators to learn and develop skills. It involves teaming a new internal mediator with an experienced external mediator, who shadows or co-mediates with the new mediator during his or her initial mediation sessions. Over time this allows the organization to build its capacity to mediate the majority of its disputes in-house. The employer could agree an arrangement with an external mediator, whereby the internal mediators are able to call on him or her for assistance when necessary.

Beyond the initial stages, employers should continue to provide adequate supervision, coaching and support for internally trained mediators, to ensure that they remain confident and competent. It is normal for internal mediators to have less opportunity to practice than professional mediators. Therefore employers should ensure that they have in place a supervision and support plan to develop their mediators. It is advisable for employers to arrange for supervision of their mediators by someone from outside the organization, for example the external mediation provider that helped to set up the internal mediation service.

12. Mediation policies and procedures

It is important that employers embed mediation into the policies, procedures and culture of their organization when setting up a mediation initiative. The mediation policy and procedure needs to take into account and reflect the interests of the employees and other stakeholder groups affected by it. Employers should draft their policy in consultation with representatives from these groups. This will increase the likelihood that employees will use the mediation service appropriately, and enhance the credibility of mediation as an effective means of tackling a broad spectrum of workplace conflict.

Once developed all parties should be informed of the process and how to access it. And how mediation can exist within and alongside existing frameworks and procedures. Mediation clauses can be embedded within existing grievance and disciplinary procedures and other policy documents relating to employee welfare, referring to the process as an informal first step to resolving conflicts in the workplace.

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13. Monitoring the mediation process

Some organizations monitor and evaluate the mediation service, to gather information that might reveal organizational problems, and help to promote and improve the service across the organization.

Data that the employer can gather include, demographic information on the users of the service, the nature of the disputes, and whether or not an agreement is reached in each session.

Permission of the parties needs to be sought if the organization wishes to make public any data, for example promotion purposes.

14. What can be done if mediation does not produce an agreement ?

If the parties fail to reach an agreement at the conclusion of the mediation meeting, the fact that they have gone through the mediation process can be a positive step towards reaching agreement. Sometimes have a day or a week to reflect on the conversations, or discussing the mediation with family can generate new thinking.

At conclusion of the joint meeting the mediator can discuss options available if they cannot or decide decided not to settle. It helps the parties to make an informed choice about their decision going forward. The mediator should refer the parties back to the internal contact and convey that they were unable to reach an agreement.

All notes taken must be destroyed and only information to be kept is that they were unable to reach an agreement through mediation.

15. Mediation in context

While no law exists that mediation is compulsory, it is becoming increasingly clear that mediation is the preferred way in which to resolve disputes throughout the world. The success rate indicates that mediation is a fast growing area in Alternative Dispute Resolution. The reason for this.

MEDIATION IS SUCCESSFUL

This free booklet is brought to you by workplace mediation experts:

Mediation Mechanics, for further advice or to discuss workplace mediation consultation or workplace mediation in-house training for your organization contact us on: +267 3115867

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