



MEDIATION

“You can’t shake hands with a clenched fist”

Mediation is seen as an amicable process for settling workplace disputes outside the courts. By resolving conflicts independently, HR can significantly reduce costs and time, not to mention employee stress and absenteeism. **Andy Moore** examines what mediation means to Scottish HR.

The old adage ‘you can’t shake hands with a clenched fist’ speaks volumes how HR should communicate effectively with employees to avoid disputes and conflicts in the workplace. Mediation is fast becoming the newer kid in the block as practitioners seek to reach amicable agreements without dragging matters through a costly and time-consuming legal process.

Unlike lawyers, who may, on

occasion act as referees between two boxers, a mediator will typically act as an independent party between line managers, HR and the employee who has grievance with their employer. The process can be defined as a procedure for handling disputes that assist the people involved to reach an agreement, working with an impartial independent mediator. The parties in dispute, rather than the mediator, decide the terms of any settlement.

Mediation is increasingly being chosen by those involved in civil and commercial disputes as their preferred option for grievance resolution.

Based in Edinburgh, Core Solutions is a leading provider of mediation services and training. It takes an innovative approach to addressing and resolving business problems and organisational conflicts. Core Solutions reports that, across



Scotland, mediation in the commercial, public and professional sectors grew by 100% in one year alone. On a UK level, the Department of Constitutional Affairs claims that over £17m was saved across government departments over a three-year period as a result of using mediation and other forms of consensual dispute resolution.

But the public sector paints only half the picture of mediation uptake: The Centre for Dispute Resolution, Lewis Silkin and Barclays, has shown that companies spend on average of £277,000 in resolving an employment dispute. This could be cut to £9000 if the dispute is mediated in earlier stages of consultation. In addition, a survey of 570 business managers throughout the UK showed that internal disputes are more common than disputes with customers.

Mediation offers an excellent opportunity to employers and employees, managers and teams to address difficult situations and tensions speedily, constructively and much less expensively. Such disputes include harassment, bullying, discrimination, whistle-blowing and ongoing tension in boardrooms.



John Sturrock

John Sturrock QC, who heads up the Core Solutions Group, is well versed on what mediation means to Scottish HR. He explains: "There is both a narrow and a

wide understanding of mediation in the context of HR. The narrow view is that mediation is a process that enables people to resolve conflicts and disputes that would otherwise be settled by the courts. In the much broader sense, mediation can address issues using a third party facilitator to resolve them before they become serious or litigious problems."

Nipping in the bud potential workplace conflicts such as unfair dismissal, together with sex, disability



and race discrimination not only saves costs and time, it can also increase staff retention and morale.

So how does mediation work in practice? Mr Sturrock explains the following points about how the process operates. The first is that the process is voluntary. It is important, he says, that the parties come to the table in good faith, with a will to settle the dispute. It is also confidential. This means that issues and ideas for resolution of the conflict can be discussed without fear of them being used again in the future. Mediations are easily arranged. They usually only take a few phone calls for a session to be set up at a neutral venue.

Mediations tend to be informal. The mediator is trained to make mediation sessions as accessible as possible for everyone involved. It is also balanced so that everyone gets a fair chance to be heard. Mediation provides an opportunity for people to say what's important to them and hear the other person's perspectives.

The agenda and outcome are controlled by the parties. The mediation approach is problem-solving rather than adversarial and so this often results in creative options for settlement. People speak for themselves and make their own decisions.

In practice, mediation usually involves some preliminary discussions on the phone between all parties who then agree to meet for a mediation

day. The meeting itself typically involves the employee, the manager and/or HR and a lawyer.

Conventionally, each of the participants is allowed their own room in which the mediator can work with them privately, together with a central meeting which accommodates all parties.

"The mediation process is very hands on and is hugely about communication and rebuilding trust between all parties," Mr Sturrock stresses. "A good mediator should be the conveyor of messages and an effective communicator. They must create a framework in which people can confidentially get to grips with the certain issues which are worrying them."

He believes that grievances can point to underlying issues which are more profound in terms of internal relationships and communication. Some of the most powerful mediation techniques are when recognition is given to employees who have had a difficult time, and are helped to feel valued again. Two-way communication between all parties, he says, is invaluable for enriching ongoing business relationships.

More and more legal professionals are seeking training that will allow them to advise their clients on different resolutions available to them, and then go on to represent them in mediation, if required.

Professionals who are regularly

involved in disputes include accountants, architects, quantity surveyors, HR managers and medical professionals. Collectively, they can learn the skills involved in mediation by training to become mediators themselves. According to the CIPD, employers whose HR specialists are trained in mediation techniques have 50% fewer Employment Tribunal claims than those who do not offer such training. This may be more an indication that well-trained staff will inevitably get better results than those who act in a haphazard way in terms

making contractual arrangements in situations where employment terms and conditions have not been broken. Within HR, Mr Sturrock believes that mediation can be used across a range of situations where employees have differences in views, concerns about others behaviour, or a break down in relations and communication.

In Scotland, using mediation to pre-empt potential employment disputes and conflicts is becoming more common. "While it is difficult to comment about mediation across Scottish HR, we are seeing a

Core Solutions believes the uptake for mediation by Scottish HR is being driven by two factors: The first is influenced by people being much more aware of the benefits of co-operative problem solving. This is not just occurring at employee level - but also at a global, commercial and organisational level. The second major trend towards mediation is the appreciation that proper business relationships and communication impact upon the bottom line.

In short, paying extortionate legal fees and keeping someone out of their job will cost an organisation and its HR dearly. Rather than adopting a Big Brother mentality, Mr Sturrock says that mediation is being increasingly enveloped into the HR function.

"Within any organisation there is a huge scope for using the skills and processes of mediation. This includes questioning, listening and exploring different issues," he says. "By working proactively between the employer and employee, an effective mediator should seek to find non adversarial outcomes. All of this is integral to a good HR manager's responsibilities."

Across large organisations, Core Solutions believes there is a move towards implementing internal mediation processes, using a facilitator to resolve matters. At the same time, Mr Sturrock considers it appropriate for organisations to have external mediators who can bring a neutral and detached view on the situation. In addition to reaching amicable settlements, Mr Sturrock also re-emphasises that mediation can save substantial costs and time, compared with resolving matters in the courts.

The time scale for mediation processes can last between one to two days, compared with some court cases which can take several weeks or even months to resolve.

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of dispute resolution. However, it does underline the benefits of having a developed mediation strategy.

Part of Core Solutions' extensive experience in mediation is taking a strategic approach to addressing employment issues before they reach the litigious stage.

The organisation is also engaged in

significant increase in employers using the practice every year," he points out. "Employment mediations account for around a third of our business. An increasing amount of the mediation we carry out is within the workplace. This suggests an upward trend of employers using the practice."



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Such grievances, he warns, can result in employees leaving work, which may not only cost HR vast amounts of time and legal fees - but extra time and expense to recruit, train and pay their replacement.

For cases that do end up in court, HR has to contend with downturns in productivity and performance due to employee stress and discord. The types and sizes of organisations where mediation can achieve amicable settlements are characterised by those which have a busy and target-driven workforce. These may include managerial or sales roles with the need to deliver the goods, exerts pressure in the workplace.

Adding extra heat to the melting pot of conflicts and disputes is found in diverse, dual-gender and multi-ethnic workforces. While the function of mediators is separate from lawyers, the qualifications between both parties are also disparate. Mediators are required to avoid taking sides, make judgements or give guidance.

In this way, mediation is different from processes like advocacy, counselling, arbitration, and advice giving. The mediator is responsible for developing effective communication and building consensus between the parties. Meetings are all completely confidential and cannot be used later as evidence in court. At the end of the process the parties very often agree on a settlement for the future. Sometimes this agreement is put into writing.

Here's an example of where mediation has resolved a dispute due to a serious breakdown in communication which took place between an employee and her manager.

A relatively small incident had resulted in the employee feeling discriminated against and bullied. Her manager felt that the employee was taking advantage of the situation to cause trouble. There was a great deal of anger on all sides and concern about the way in which the dispute had escalated out of control.

Claims were made which would have resulted in a possible Employment Tribunal. Questions were also raised about whether the employee could remain in employment or be moved to another job. The employee went off work with a stress-related illness which she claimed was due to her employers' treatment of her. The employer indicated that the employee had other unrelated family concerns which led to her being absent from work.

However, this is where the mediation reached an amicable agreement: In the course of one day of mediation, the parties were given an opportunity in private to discuss the issues, listen to each other and to express what concerned them.

The employer acknowledged the difficult situation in which the employee found herself, and the employee accepted a move to another position with some training to enable her to get back to work. This solution avoided the matter being taken to an employment tribunal or an action being raised in court. The parties had been given an opportunity to express how they felt about the situation which arose, and to move on from what was becoming an intractable and damaging conflict. Source: Core Solutions

So what should HR look for in an effective mediator? Mr Sturrock advises that a proficient mediator should have good people and listening skills and have a sense of credibility to deal with different individuals in varying situations. Finding someone who can build trust and a rapport with individuals, regardless of their background, is an important prerequisite, he says. Choosing a mediator with proven experience, and someone who understands how organisations work should be high on HR's wish list. HR should also look for mediators with good training and certification under their belts.

The Scottish Executive echoed the UK government's policy on the use of mediation and other forms of alternative dispute resolution in a guidance document issued by the Scottish Procurement Directorate in October 2003.

The Civil Justice Department stated that: 'The Scottish Executive supports the use of Alternative Dispute Resolution (ADR) where appropriate

and is keen to encourage the use of methods of dispute resolution which offer advantages over court-based processes in terms of speed, cost, reduction in conflict and the preservation of relationships.' The Scottish Parliament itself has supported the increased use of mediation, particularly in relation to issues of access to justice.

A recent example of a case in Scotland where mediation may have reached a more amicable outcome was for media sales manager, Jonah Ditton. He claimed he was harassed and suffered sex discrimination from his employers because of his homosexuality. Mr Ditton was awarded almost £120,000 compensation - the highest award ever granted by an employment tribunal for bias on the grounds of sexual preference. The award of £118,309 for discrimination on the grounds of his sexual orientation amounts to about £30 for every minute that Mr Ditton worked for the Glasgow publishing firm.