

## Mediation tactics make friends from foes

MIRANDA FETTES

CALL it a dust pie, spud tie, used pit or suet dip, or even tips due to upset Di, a dispute remains a dispute, however much you try to disguise it. The world of work, as much as personal and political life, is fraught with such unappetising disagreements.

Some conflicts are minor, but others can be deeply damaging. Morale and performance can plummet, at a personal, group and even organisational level.

At the heart of most workplace disagreements are people. Other factors, such as commercial contracts and business objectives, of course play a part, but the majority boil down to two or more people unable to reach agreement because of personal differences and breakdown in communication.

"I have had people who refuse to be in the same room as the other person at the start of the mediation process, and some hours later hug one another when they understand where the other is coming from," says John Sturrock QC, founder and chief executive of Core Mediation, a division of Edinburgh-based Core Solutions Group.

"Often, misunderstanding and lack of communication is at the heart of the problems. It can take a very small incident to trigger off a major dispute. Once disputes escalate and formal procedures kick in, it is very difficult for people then to find common ground. People tend to polarise and antagonise.

"Mediation enables people to get together early to have a conversation about the issues that are troubling them because many of the issues raised in a tribunal are symptomatic of underlying concerns - lack of communication, lack of understanding - which can be addressed in a process designed to build communication bridges."

Mediation is becoming big business. Sturrock, who left the bar to set up Core Mediation, says it is really taking off in the workplace.

"Our figures are showing a very significant increase in the number of mediations in the past year - an increase of 140 per cent," says Sturrock. "One of the major growth areas has been helping people who have differences at board room level or in senior management situations as well as the more traditional employer-employee disputes. More than 80 per cent of matters that come to mediation resolve successfully."

Of the remaining 20 per cent, some reach resolution at a later date, while a handful end up in a court or tribunal.

"It is not a panacea but it has a very good track record, largely because people are making decisions for themselves," says Sturrock.

"The important thing is to get people to view a particular matter from another person's perspective. Once they do that, they begin to understand where the other person is coming from and the hostility can then diminish."

While ancient tribes and civilisations are known to have understood the value of a neutral third party in resolving a dispute, modern commercial mediation originated in the US in the early 1980s and is a relative newcomer to Scotland.

"Scotland has been slower to pick this up than other countries, but there is a growing awareness in corporate Scotland of the potential that mediation has to deal with disputes," says Sturrock.

Kirstie Ross is a senior corporate lawyer in the dispute resolution team at the National Australia Group (NAG), which owns the Clydesdale and Yorkshire banks, is a firm believer in mediation, having seen it used in her previous job at law firm Shepherd & Wedderburn and now at NAG.

"We have a policy that we consider mediation in every dispute that we've got going on with the two banks. We've got a range of different disputes: employment tribunals; disputes with customers. Being voluntary, it depends upon whether the person you are having a dispute with is willing to consider it.

"If you have two people round a negotiating table, each has their own interests, but an independent mediator should be able to bring a bit of realism to matters. I firmly believe that if you have a good, skilled mediator you can get a good resolution for everybody involved and you can get the dispute resolved pretty quickly."

For anyone considering retraining as a mediator, Sturrock advises: "You have to be somebody who is genuinely interested in other people and in helping them to resolve differences.

"But it's not just about being empathetic; you've got to work people through to the stage where they're able to develop and examine the options, look at these fairly rigorously, make decisions about the best solution and then go forward, because sometimes it's difficult for people to put a problem behind them.

"There can be a time where the mediator has to be fairly robust, challenging, checking reality and encouraging people to look forward; it's not touchy-feely and can be a rigorous, emotional process."

Sturrock says the remedies which can emerge from a mediation can be far more imaginative than those at the disposal of the courts. "You can look at all sorts of creative outcomes," he says. "You're not stuck with just money or the more limited remedies that might be available elsewhere; you can look at a whole range of possibilities."

In one mediation that Core undertook, the bulk of the niggles between two firms had been resolved, but one issue remained unsettled. Over dinner, it emerged that a director in one company had undergone cardiac surgery and was participating in a sponsored cycle to raise money for a heart charity.

"The problem was resolved by the other company offering to make a payment to the charity," explains Sturrock. "It was a lovely gesture which acknowledged where this guy had come from and dealt with the underlying issues."

He does not believe mediation short circuits people's capacity to solve problems for themselves, if they are always having to call in help.

"We help people to acquire the skills to address issues which are difficult. A mediator is only called in if and when people are unable to address issues for themselves.

"Mediators try to end the adversarial approach and find common ground. A mediator is not a decision maker or somebody who is going to impose a judgment or a solution on people; the mediator's role is to work with people to enable them to make decisions for themselves. All I do is to help people to re-engage. Ultimately it is a process in which people make choices for themselves, being equipped with more information and understanding than they would otherwise have."

Core's work is equally divided between mediation and training - in dispute resolution, conflict management and dealing with differences. Some people who attend the company's courses are seeking to become mediators themselves; others take their knowledge back to their organisation in order to manage differences, prevent disputes arising or deal with them quickly and effectively if they do arise. Many HR departments are learning that mediation skills can save an untold amount of stress, angst and financial costs later.

With his professional mediator hat on, Sturrock must be, and appear to be, impartial, but does he never find himself judging, or sympathising more with one party than the other? "We all try really hard not to be judgmental, but we are all human," he admits.

"The more I do this, the less judgmental I am because the more I learn that most of us make assumptions about people, the more I find they're often wrong. There are two sides to every story. My job is to try to understand the two sides and, if I can, convey that to the other side. The training humbles you. The more you realise the less you know, the less likely you are to be too partisan."

Most mediations are held over the course of one day, often in an independent location, during which the mediator will talk to each party individually in complete confidence, and together once they feel ready, until they reach their best solution. More complex issues or those which require time for further information gathering or reflection, can take a little longer.

While there is no overriding regulative body, a number of recognised providers of mediation training can award certification in mediation skills.

Mediation, says Sturrock, "enables solutions to be found reasonably quickly and much more cost effectively than can often be the case with something that is ongoing and festering. There can be a loss of morale, a loss of productivity, and a lot of stress associated with these kinds of matters that tend to drift on."

The cost is hugely variable, depending on the nature of the dispute, but can range from several hundred pounds per party per day to a few thousand pounds or more for a large commercial matter. Even sums such as these, however, can be considerably less costly than allowing a volatile situation to worsen, with the incalculable financial, human and business costs involved, coupled with an unwelcome detour down the tribunals road.

Even though it would put him out of a job, Sturrock acknowledges: "The aspiration would be that mediators would become redundant because everybody is able to sort things out for themselves. That would be great.

"The fact is that this won't always happen, so you're better to have a mediator who facilitates an outcome rather than somebody who makes an arbitrary pronouncement of right and wrong," he concludes.

"What we're trying to move away from is a blame culture to an acceptance of the present situation and to then find solutions that work."

### **Solving situations**

- A SERIOUS rift has developed in a firm of financial advisers. At a moment of high tension, a leading executive is told to leave. He does so and seeks legal advice. A claim is launched in court for unpaid bonuses, commission allegedly due, and damages for breach of contract.

The whole affair is damaging to all concerned and, while monetary issues are important, personal reputation is critical.

A day of mediation provides the platform for full discussion of the options. A deal is struck, made possible by personal acknowledgements, undertakings on future communications with others and a financial settlement.

- A young mother dies in hospital after a routine operation, leaving behind a husband and two children. Questions arise about the extent to which the medical staff were responsible for a failure to diagnose and effectively treat the patient's condition. The case is advancing towards a court hearing six and a half years after the death of the patient.

Mediation resolves the case in one day through a series of private meetings. It is agreed that a sum of money will be paid to the patient's family. It is also agreed that the husband can discuss current procedures with the hospital.

Mediation has brought closure and certainty for each of the parties, avoiding what could have been a lengthy court hearing along with the continuing stress, additional expense and unwanted publicity.

- There is a serious breakdown in communication between a senior public sector employee and the employer. Claims are made which could result in possible court action or referral to an employment tribunal, and there is a great deal of anger on all sides. In the course of one day, the parties find a solution which avoids the matter being taken to a tribunal. Given an opportunity to express how they feel, the parties move on from what was becoming an intractable and damaging conflict.