

The Definitive Guide to Mediation and Managing Conflict at Work

CHAPTER 4

Introduction to mediation in the workplace

In Chapter 1, I provided some thoughts about how the world of work is changing and shy, as a result, conflict is increasing. In Chapter 2, I attempted to put some context to the topic of conflict. I did this to try and provide a setting for the remaining chapters of the guide. You can read the remaining chapters of the guide in isolation of chapters 1, 2 and 3 and still gain a full understanding of mediation at work. The book is structured in this way, because one of the things we have learned as a result of working with organisations in this area for a number of years, is that context is important. Being able to demonstrate the business case and how mediation fits with other HR or organisational processes is crucial for buy-in. The remaining chapters will provide more detail about the concept of mediation and the principles that make it such an effective dispute resolution tool.

Background

There is a mood swing across organisations in the UK relating to how conflict and its related elements can be managed. This has been developing for a number of years but can be particularly attributed to some notable happenings such as:

- The 2007 Gibbons Review
- More data about the costs associated with conflict
- Staff, line managers and HR professionals feeling increasingly stressed
- Companies' increasing accountability to shareholders
- The spread of success stories relating to alternative dispute resolution
- A waning desire for people's willingness to give a significant portion of their lives to conflict situations

In the UK the uptake of mediation and conflict resolution practices in the workplace has been slow, although the public sector has picked it up much more quickly than the private sector. One of the possible reasons for this is, arguably, the willingness of some sections of the private sector to throw money at problems to make them go away through things such as compromise agreements. Whilst this provides a temporary reprieve, it is unlikely to unearth and provide a solution for what might be ingrained cultural issues within an organisation. Therefore, the organisation enters a cycle of throwing financial resources at problems for a quick fix. The infection is likely to remain untreated as the root has not received attention. There is a high likelihood of another injury, possibly worse than before, being sustained at some future stage. This is also a method of rewarding poor management and systems. In the most extreme cases, this could lead to problems such as those faced by Enron in 2002. Documents show that at Enron, merely talking about what was going on was off-limits. Organisations that fail to support open communications are doomed to fail. With the emergence of more and more data on the costs of conflict and the increased Government focus on this area, organisations are likely to embrace conflict resolution strategies more swiftly over the next few years.

Few of us want to be in conflict or involved in some form of litigation procedure. I mentioned in Chapter 1 that UK businesses are increasingly paying millions of pounds each year on litigation costs. Mediation is not intended to be positioned as the be all and end all of dispute resolution tools. It is one of a number of Alternative Dispute Resolution (ADR) options. It is, however, probably the most flexible. ADR as a range of formal techniques emerged firstly in the US in the 1970s and the UK followed around twenty years after. The three main areas in which mediation first became established are commercial, family and community. Other ADR choices include arbitration (where an arbitrator or panel of

arbitrators will hear a case and then make a binding judgement) collaborative law (in which two sets of lawyers attempt to resolve a case and agree to stand aside to allow other lawyers to try and reach agreement I the event that discussions break down) and negotiation.

Until recently, it has been the legal profession that has done the most to raise the profile of mediation. In a commercial context, the use of mediation has grown phenomenally due to the pressure being put on the established Courts to adopt it as part of the reforms recommended by Lord Woolf. These reforms mean that in many cases, parties are compelled to attempt mediation prior to going to trial. Something similar for the UK employment tribunal system is long overdue. The uptake of employment and workplace mediation will only become significant when this happens.

The Legal Framework

The increase in the type and complexity of employment legislation since the early 1990s has had a major impact on HR professionals and line managers to manage people and introduce change. Today, employees generally have less loyalty to organisations, are well informed of both their statutory and human rights and are more willing to invoke them at the earliest opportunity.

In an employment context, the employment tribunal caseload is growing rapidly. This is because since the early 1990s numerous pieces of employment legislation have been imposed on UK organisations. This has included changes such as:

- Maternity and paternity provisions
- Age discrimination
- Equal pay monitoring
- Protection for part-time workers
- Sexual orientation legislation
- Religious belief legislation
- Harassment and bullying discrimination legislation

Perhaps the piece of employment legislation that has had the most day to day impact on organisations is the statutory grievance and disciplinary procedures regulations introduced in October 2004. Until 1st October 2004, every employer, whether they operated a formal grievance procedure or not had to include in every statement of particulars of employment a note of the person to whom an employee could apply for the purpose of seeking redress for any grievance relating to his employment, and the manner in which any such application should be made. If they had a formal grievance procedure and had 20 or more employees they were also obliged to include details of the procedure in the written particulars of employment.

These rules were substantially changed from 1st October 2004. The changes were made by the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution Regulations 2004).

All employers became obliged to operate minimum statutory grievance procedures and the small employer exemption to provide details was abolished. Employees and employers would suffer a severe penalty in the event that they failed to use the statutory grievance procedure process. The time limits for making applications to an employment tribunal were also extended to allow time for proper discussion between employer and employee in implementing the grievance procedure.

Unfortunately, the introduction of this legislation didn't have the desired effect. What was intended as an opportunity to increase transparency and help both employees and employers alike went horribly wrong. As a result, the number of grievance cases lodged with employment panels rose by a third after the new rules were introduced. The

government had intended a sizeable fall in cases. According to research by the CIPD, 29% of employers feel disputes are less likely to be resolved informally following the 2004 introduction of the statutory dispute resolution procedures.

In December 2006, the DTI launched a root and branch review of government support for resolving disputes in the workplace. Michael Gibbons was asked to review the options for simplifying and improving all aspects of employment dispute resolution, to make the system work better for employers and employees. The review involved business representatives, unions and other interested parties considering the options for change. The review looked at all aspects of the system, including the current legal requirements, how employment tribunals work and the scope for new initiatives to help resolve disputes at an earlier stage.

In its document – *The Government of Britain* – the government's draft legislative programme, HM Government announced plans to simplify the employment regime through the 2008/9 Employment Bill.

The purpose of the Employment Bill is to simplify, clarify and build a stronger enforcement regime for key aspects of employment law.

The main intended benefits of the bill are:

- To provide significant administrative savings for businesses, specifically through legislation to implement the Gibbons Review of workplace dispute resolution, with an estimated benefit to business of up to £180m per year
- To deliver further cost and time savings for businesses, trade unions, individuals and public sector bodies
- To have a more straightforward and transparent enforcement and penalties regime for the national minimum wage (NMW) and employment agency standards, to provide greater support to vulnerable workers, fair arrears for the underpaid and a level playing field for compliant businesses
- To provide a greater clarity for employers, trade unions and employees

One of the main elements of the bill is to implement the outcome of the Gibbons Review of workplace dispute resolution (including a repeal of the statutory dispute resolution procedures) and implementation of the replacement measures to encourage early/informal resolution and changes to the employment tribunal system.

This is where mediation fits and it is at this point that this guide moves into providing a deeper understanding of the mediation concept.

What is mediation?

Mediation is a process used for resolving disputes in which a third person helps the parties negotiate a settlement. It is future focused and less concerned with who is right or wrong, and concentrates on solving problems so that they don't occur again. The parties retain responsibility for achieving a solution. At another level, mediation can be described as an invisible bridge that connects one person to the other. Or, as a path by which each warring person can be guided to find a new beginning. These types of descriptions should not be translated as a process for wimps. It certainly isn't. In mediation the parties are put under pressure to find a settlement to their dispute. The mediator, as a third party, manages or facilitates a process to help the parties get to a point where they can reach settlement. The mediator, however, does not impose any settlements.

The strength of mediation lies in its flexibility of practice, where it has helped to introduce new ways of thinking and tabling options for parties engaged in a dispute to consider. If the mediation succeeds, and over 90% of cases do, then it ends with a written settlement agreement.

If anyone is dissatisfied with the process, either party or the mediator may terminate the mediation at any time. The aggrieved individual may then proceed to assert their statutory rights through the organisational, tribunal or court system.

Mediation is **voluntary** in the sense that it takes place as a result of the parties agreeing to enter the mediation process. It cannot happen if one or more of the parties refuse to participate, although it is quite possible that parties who initially refuse may agree to mediation at a later stage. Recently, some non-voluntary mediations have taken place. These happen in commercial disputes when parties are required by a court or contract to mediate before or instead of arbitration or litigation.

Mediation is **non-binding** unless and until an agreement is reached. Until this point, parties may walk away from the mediation at any time, as entering the process itself does not bind any party to settlement.

The mediator is a **neutral person** who is there to assist the parties in their negotiations. The mediator provides a clear head, impartiality, process management, encouragement, optimism, and above all, brings hope to situations that may seem hopeless, whilst always leaving the problem and the decision to settle it in the hands of the parties. A skilled mediator doesn't necessarily need to be an expert or specialist in the field to which the dispute is linked.

The mediatory also operates by a principle called 'omni partiality', which means being on both sides at the same time. This is not an easy skill to develop, but can be built over time with experience.

Mediation is **private**, conducted **without prejudice** and with total confidentiality. This means in the event the parties are unable to settle their dispute and they go to tribunal or some other recognised legal process, the specific content of the mediation cannot be discussed. The mediator, however, will agree with the parties how information from the mediation will be shared with the organisation.

Why mediation works

In Chapter 2, I mentioned the physical, mental and emotional blocks on which conflict begins. This is captured in table 1.0 on p.34. Mediation works because, unlike other dispute resolution processes, it fully addresses emotional needs. You can see this indicated in table 5.0. Whilst the opportunity might be given to discuss aspects such as injury to feelings in the litigation or grievance process, the opportunity is rarely given for the disputing parties to discuss emotional issues in detail with each other. In an employment tribunal, for example, where the employee wins the tribunal claim, although a judgement may take account of the emotional effect that the dispute has had on someone, it is unlikely to result in full closure for the 'winner'. Issues probably still exist between them and their former employer about how they felt as a result of the way they were treated.

Table 5.0

Physical	Mental	Emotional
2 + people	Point of difference	Anger, fear or shame
Litigation/grievance Process √	Litigation/grievance Process √	Litigation/grievance Process ×
Mediation √	Mediation √	Mediation √

There are typically three ways to attempt to resolve a dispute. The first is to use **power**. To take an extreme example, in a work context, this could mean a manager saying to their direct report “I’m the boss, you’re not. Do what I have asked you to do”. This intimates that the line manager wants to use their position in the hierarchy to get something done. I acknowledge that in day to day working life, there may be circumstances in which using a direct style might be necessary. This might be required, for example, in cases where a patient might be at risk, or where the failure to take swift action may result in losing a customer. In a broader sense we might see power being used to resolve country to country conflict. A country might use its size and ability to employ weapons to overthrow a country that is smaller and has less human, financial and military resources.

The second way is to use **rights**. The last twenty years has seen a plethora of legislation being introduced to bolster each of our rights as human beings. It is possible for us to use this enhanced level of protection as a bargaining tool to get what we want. For example, a person might use their race or gender as a reason to state that their rights have either been violated or not considered. Using this platform could even dis-empower the manager we just read about, who used their authority to get things done.

The main leaning point from using either of these methods to resolve disputes is that they both result in a winner and loser, or perhaps two losers. Let me explain a little about the two losers’ theory. Take the employment tribunal setting again. The employee who has just ‘won’ their tribunal claim may have their celebrations cut short. They are likely to realise quickly that they may have:

- Lost a huge amount of their life preparing for the case
- Suffered damage to their reputation
- Suffered poor health
- A legal bill to pay
- Reduced their chances of re-employment within the same industry
- Still failed to resolve emotional issues with their former employer

The third option is **interests**. Using interests to find out what someone wants and, more importantly, why they want it, is the only method that is likely to result with the emergence of two winners. This might require taking an extra 30 seconds to consider an appropriate response to a situation that looks like it could escalate into something more menacing. It is this third option on which mediation is based. Through mediation, the mediator engages the parties in a process that aims to find out what they want and why they want it. It uses the combination of getting parties together (physical), providing each with the opportunity to hear the point of difference in their dispute (mental), and gives them the opportunity to express what needs to be addressed in order to be able to move on (emotional).

There are a number of aspects to mediating a dispute rather than litigating:

- It's quick. People do not like being in conflict. It is worrying, time consuming and a drain on both financial and management resources. Mediation sessions can be set up very quickly – within days if necessary. Most mediation sessions are completed in one day.
- Mediation does not affect statutory or human rights. The mediation process can run in tandem with any statutory or organisational processes. As it is without prejudice, mediation poses little or no risk to parties who engage in the process.
- It saves money. Issues can be settled quickly and can avoid direct and/or indirect costs.
- It gets people talking. People in conflict tend to take up rigid positions and will avoid communicating with the party with whom they are in conflict, or communicate with them through an intermediary. The face-to-face meeting which occurs at the joint session allows open communication directly between the parties again. This can help ensure that methods for prevention of future conflicts arising in the future are addressed within the process.

This is probably a good point at which to outline some of the things that mediation is not:

- It is not an easy way out. Organisations are entitled to invoke and enforce organisational processes such as the grievance and disciplinary procedure instead of conflict resolution principles such as mediation. Where an employee may be in dispute with the employer, the employer may feel that it has acted properly in every sense and that an employment tribunal should decide who may have been right or wrong. This may be an appropriate course of action where the organisation wants to send a message to its employees about its willingness to defend itself. Even if an organisation wins its legal process, it must of course weigh up the costs of such action and consider whether this is the best use of its resources.
- It doesn't stop you litigating. Mediation does not preclude the use of other methods of dispute resolution. In some cases an action may have commenced before mediation is adopted. Proceedings may or may not be stayed pending the outcome of the mediation. Parties may also want to bring litigation to demonstrate seriousness and engage with mediation to obtain a more secure, viable and speedy result.
- It is not a waste of time and money if it fails. If settlement is not reached in mediation it is often reached soon afterwards. This is mainly because it has revealed the issues on which the dispute has been based. Parties then have better clarification of these issues and on reflection may choose to move to settle issues of difference.
- It is not soft and fluffy. The value of using mediation as a conflict resolution tool can be financially proven. In an environment where a return on investment is critical for business leaders, mediation is a justifiable investment. Mediation helps to reduce unproductive management time and enhances the skills of line managers and the HR function. It is a period of concentrated negotiation that requires focus, persistence, agility of thought, flexibility and imagination. It is hard work for everyone involved intellectually, physically and emotionally.

- It is not counselling. The mediator and counsellor share a number of core skills. Both mediation and counselling can take various forms but, in general, the mediator preserves a neutral relationship with the parties, whereas the counsellor develops what can sometimes be described as an intense relationship with the client. The mediator uses problem-solving techniques; the counsellor applies psychological analysis; the mediator acknowledges feelings whereas the counsellor explores emotions.

Mediation style

Mediators must be careful not to be perceived as judgmental in any way. Facilitative mediation is the most common form of mediation used in the UK and supports this objective. It requires the mediator to be discreet in presence, allowing the parties to achieve settlement simply by greasing the wheels of communication. It is important, however, to note that simply by being 'present', it is unlikely that any dispute is likely to move towards settlement. Mediation is hard work, and hardest of all on the mediator. It is the mediator who must front all the stages of the process, such as chairing the meetings, setting the direction, thinking through strategies, soaking up the emotion, the facts and arguments.

Other styles of mediation include:

- Evaluative - where the mediator gives an opinion about the parties' positions based on legal rights and entitlements. Evaluative mediators are normally experts in the field of the dispute e.g. employment, property, tax.
- Directive - where the mediator may take a more direct role in offering the parties formal recommendations.
- Transformative - where the mediator uses techniques to persuade the parties to take ownership of the process as well as the outcome. In transformative mediation the objective is to help the parties solve disputes for themselves and achieve long lasting change where an ongoing working relationship is required.

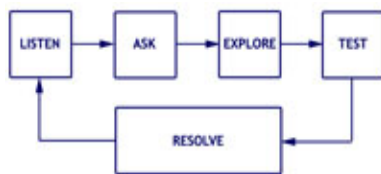
Irrespective of the style used, it is the mediator who has to check any issues of confidentiality and remain as engaged and focussed at the end of the day as at the start. Based on this pressure, the mediator may become tempted to offer the parties thoughts or suggestions for settlement. This must not happen in any circumstances. The dispute should always remain the responsibility of the parties. It is upon this principle that mediation differs from other forms of ADR. This can cause some people, such as those in the legal profession, difficulty as mediators. This is because their day job requires them to give their views and opinions and they may continue to see it as their duty to do so. I remember one mediation training delegate struggling to demonstrate the skills used by mediators. He had been a senior legal professional for about 30 years and found difficulty in putting aside some of the skills used in cross-examination. This is understandably difficult, but it can be overcome. If in mediation, the parties want expert or legal advice, they should seek it from an advisor, not the mediator.

It is the responsibility of the mediator to ensure that parties attend the mediation with a full understanding of the mediator's role and the responsibility placed upon them (the parties) to attempt to find solutions to their dispute.

Whilst the mediator should not give advice on any course of action a party might take, they do have a role to play in 'reality-testing', questioning and challenging to help parties to be flexible in attempting to solve their dispute.

Being involved in training hundreds of people each year to become mediators themselves, I began to think about a model that could help people follow the normal mediation cycle. The LAETR mediation cycle was the result. Its purpose is simply to help when developing core mediation skill areas. The LAETR model is outlined below.

Fig. 5.0 LAETR Mediation Cycle



The LAETR Mediation Cycle

Listen: Listening within another person's frame of reference to understand fully the issues that have led to the dispute.

Ask: Ask appropriate and relevant questions that help clarify your understanding of the background to the dispute.

Explore: Explore options for resolution that will help the parties focus on the future rather than on the past.

Test: Test and reality check that any potential solutions have been thought through and are workable for the parties.

Resolve: Resolve the dispute by summarising the parties' position and bringing the mediation to an appropriate close.

As you begin to build your experience as a mediator, you could keep an image of the LAETR Mediation Cycle hand to view how you progress around the various stages of the cycle.

Things to think about

- What effect is the introduction of increasing amounts of employment legislation having on your organisation?
- How would you explain the benefits of mediation over other dispute resolution methods?