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KEY NOTES

How to Introduce In-House Mediation

Many more people are advising employers to adopt workplace mediation as a standard procedure to resolve conflicts. Here are some of the issues that arise when you do.

Benefits

Resolving conflict at work at an early stage saves money and jobs. As long ago as 2015, the Chartered Institute of Personnel and Development (CIPD) reported that four out of every ten employees had experienced interpersonal conflict within the last 12 months. This must be a factor in the low productivity that plagues the UK economy and it contributes to high levels of staff turnover. Over ten years ago, research by the Centre for Effective Dispute Resolution (CEDR) revealed that the cost to the economy of unresolved conflict was £33bn a year, due partly to an aversion to tackling conflict. The CEDR memorably reported that over a third of managers would rather parachute jump for the first time than address a problem with their team at work, and just under a third would rather shave their head for charity. This is often confirmed in employment litigation when managers fail to address weaknesses when conducting appraisals and those weaknesses then cause a total breakdown in relationships. While traditional disciplinary and grievance procedures have their place, they have often been shown to be both inadequate and even downright destructive given their tendency to encourage adversarial and defensive behaviour.

What is right for your business?

The range of organisations that have included mediation in their processes is a good indication that there are not many employers for whom it would not be suitable. These include hotels, police authorities, universities, supermarkets, local authorities, department stores, banks, postal services, transport providers, the Church of England, the Royal Navy and telecommunication services. They are mostly large organisations and it may be the case that much smaller businesses do not have the resources to train people internally. Also, there are some businesses where everyone is 'equal', say small partnerships, where it could be difficult to provide mediation in-house. Such organisations might use an external mediator – and they are not all impossibly expensive. Mediation will also not work if there is no real commitment to the process. In a recent report by the Employment Lawyers Association (ELA) into alternative dispute resolution, there is a discussion of the work of Acas to train mediators. Acas is committed to mediation taking place within rather than outside the workplace. While it trains a considerable number of mediators, it also experiences a fair amount of failure by businesses that regard the work as being done once some training of one or two individuals has been completed. The introduction of mediation is likely to fail if the business does not then put the necessary infrastructure in place. This includes integrating the mediation process into policies and linking each to a mediation option, as well as supporting the mediators by encouraging managers to make use of this alternative. One idea Acas has for smaller organisations is to 'buddy up' with other employers of a similar size to form mediation networks to support each other. A number of universities have such a scheme and it seems a sensible solution for groups of smaller firms.

In-house or out-house?

Smaller organisation may prefer to use an external mediator rather than train existing staff to act as mediators. External mediators bring an obvious degree of impartiality, although some trade unions are dubious about their independence because the employer pays the fees. If a qualified and professional mediator is used, this should not be a serious issue and, in any event, there is little to choose in that regard between paying the mediator a salary and paying a fee. The key considerations when issues of an external mediator are that some can be expensive and also many organisations would prefer to keep their problems within the business rather than bring in an outsider. For those for whom the cost is an issue, the 'buddying up' alternative might work as, for example, it has for the Universities of Dundee and London. An advantage of having mediation within the business is that it brings with it a cultural change that is beneficial and that ad hoc use of an external mediator is less likely to achieve.

Who will be your mediators?

According to the ELA report, Kent County Council introduced a mediation programme by training 30 in-house mediators for a low cost of £6,000. Most of those trained were already experienced coaches, so the transfer to mediation was easy for them. For organisations that do not have such a treasure trove, there is encouragement to be found in the words of David Liddle in his book, 'Managing conflict: a practical guide to resolution in the workplace', published by the CIPD. He believes that most people can be mediators but he concedes that does not mean everyone can be. His view is, however, that organisations: "... already possess copious amounts of mediation and diplomatic ability within their HR teams, management teams and amongst their employees.

Core qualities for any mediator are the ability to listen actively and generate trust. The latter requires the mediator to remain overtly impartial, objective and dispassionate and avoid any suggestion that they are taking 'sides'. The former is the ability to concentrate hard on what you are hearing, to glean information not just from the actual words used but from tone and body language and then confirm you understand by appropriate open questions. The ability to analyse any conflict and explore the causes and the triggering event are also necessary attributes".

What training is necessary?

To get the best results, mediators have to be trained and keep up to date with professional developments. There are many organisations that will provide this training but, ideally, courses should be accredited by the Civil Mediation Council (CMC). As mentioned above, Acas has a training scheme, which leads to a Certificate in Internal Workplace Mediation. The course consists of five units delivered over five days. Acas limits trainee numbers to 12 on each course to allow maximum individual attention. There is an assessment based on both written and practical work. The cost for the course is just under £2,000. The length of this course is fairly typical and other well-known providers are CEDR and ADR Group. Once someone is accredited, the CMC and other organisations require annual evidence of continuing professional development, whether that be carrying out mediations or further study. Many providers have separate courses for different areas of mediation

What role is there for lawyers?

When an organisation contemplates introducing a mediation programme, there are three ways an employment lawyer's role is likely to be valuable. First, no one is better placed to encourage the use of mediation. Any practitioner who has experience of standard grievance and disciplinary procedures will know how binary the outcomes tend to be and the way in which parties tend to become adversarial. If that was not enough, when litigation ensues, they observe closely the stress created and are intimately involved in diverting managers from their primary roles to prepare for hearings. Add most managers' fear of publicity and you have every reason to think that adding a mediation option to conflict resolution is sensible given its generally high level of success.

Secondly the lawyer should help integrate the idea of mediation into all the organisation's policy documents, contracts, handbooks and grievance and disciplinary procedures. In doing this, the employment lawyer will know that using mediation does not mean that any of the employer's legal obligations go away. Mediation therefore has to be adopted in a manner that permits any essential investigations, grievance processes and appropriate disciplinary meetings or performance management to take place if required, even if the hope is that in many cases they will be unnecessary. Finally, the nature of each mediation has to be regulated and, when appropriate, it will be the lawyer's responsibility to prepare a separate mediation agreement beforehand and draft an agreement implementing an agreed resolution afterwards.

Getting buy-in

Many organisations that recognise trade unions have succeeded in introducing workplace mediation. There are, however, a number that have met resistance. The keys to success are transparency and involving the union in consultations from the outset. The reasons for reservations need to be recognised so that they can be addressed explicitly. They are:

- a fear of being side-lined;
- dislike of closed processes and secret outcomes;
- worries about lack of impartiality; and
- concern that systematic problems will not be addressed if the outcome is unknown

There also might be resistance from managers who pride themselves on their personal ability to resolve issues in their own way or who cannot see the difference between the traditional functions of HR and a mediation process. Case studies show that the process has to be actively 'sold' to managers and there must be overt support from on high. One key way to secure this is an analysis of the savings to the business from reduced staff turnover and litigation costs that in-house mediation can achieve. Gathering the data involves consideration of such matters as the time spent on managing conflict and the cost of sickness absences, staff turnover, legal fees and awards made, as well as the cost of the lost opportunities to conduct business. This is usually a salutary lesson for all managers and an essential way of making the business case for a mediation programme.

Is anything unsuitable for mediation?

Well, almost nothing is the answer. There will be some cases where the parties refuse to co-operate and insist on litigation. David Liddle in his book recounts a matter where he mediated between two families, one of whose children had been killed, after which the perpetrator in the other family committed suicide. The mediation ended with the father of the dead girl expressing sympathy for the other family. Not many employment disputes will reach that level of intensity.

Conclusion

It is very difficult to come up with good reasons not to include mediation in employers' mechanisms for resolving conflict. The evidence is that it will save money, improve productivity and employee relations, and avoid litigation. It is worth serious consideration.

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