

Up for discussion: Mediation

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Workplace disagreements are expensive; last year, employment tribunal claims cost British businesses £1.6 billion in fees, awards and out-of-court settlements, according to recruitment consultancy Ambition. The average cost of defending a claim, it says, is £8,500, while the average settlement is £5,400. And that's even before you factor in the cost of management time, sickness absence, lost productivity and damage to reputation. Five years ago, the Centre for Dispute Resolution, a not-for-profit organisation, estimated the total annual cost to the country at £33 billion.

So it's no surprise that the government wants to find out how disputes can be resolved earlier and at less cost. "We believe that there are too many tribunal claims and that many of these could probably have been dealt with at an earlier stage," says Edward Davey, minister for employment relations. "This is why we launched our consultation in January. We wanted to identify ways to encourage earlier resolution of workplace disputes and – where parties do end up in tribunals – to ultimately streamline the system."

The consultation, which closed on 20 April and is now awaiting a response from the government, sought views on how more workplace disputes could be resolved fairly without going to tribunal, and how tribunals could be as fast and effective as possible if they were used.

One of the most interesting tools being used to solve problems before they reach tribunal is mediation. This is an informal technique whereby the parties to a dispute work out their own solution, with guidance from a trained mediator either from within the company or brought in from outside. It's a voluntary approach that stops people hiding behind process and gets them talking, says Alex Efthymiades, co-founder of Consensio, a mediation provision and training company. "What we are trying to do is re-humanise people, to allow them to sit in a room together and talk about what's bothering them about their behaviour or their relationship, without blaming anyone or jumping to conclusions." This approach leads to longer-lasting solutions and is more sensitive to the feelings of people involved, she says.

It's also considerably cheaper. Acas figures suggest that the average cost of an internal mediation is £700, rising to £2,000-£2,500 where external mediators are used – still considerably lower than the estimated £4,000 cost of formal procedures. East Lancashire Primary Care Trust claimed direct cost savings of £213,753 in the first 18 months of implementing an internal mediation scheme. This was calculated by comparing the cost of a typical three-day mediation with the cost of management, staff and union time taken up by formal processes, including employment tribunals, plus the cost of settlements, legal advice and any related sickness absence. These calculations may be over-optimistic, according to an Acas study of the case, which suggests that mediation costs a little over half the amount of a formal process, rather than a fifth, as the earlier figure suggests. But there are definitely savings to be made.

However, the main advantages are not simply financial, according to Gill Catlow, HR business partner at East Lancashire NHS Trust. "Benefits include improved relationships between staff, a reduction in sickness absence and stress and better staff retention," she says. Changing from a system that relied on a formal grievance process to one that encouraged mediation cut out a lot of bureaucracy and allowed many disputes to be solved much faster, she says. Most mediations were successful and those involved found the experience positive.

Despite evidence that mediation can have very real benefits, only 5 per cent of businesses studied by Acas have actually used it to resolve workplace disputes. So why isn't it embraced more widely? "That is the question that gets asked about every good management practice and the answer is elusive," says Mike Emmott, CIPD employment relations adviser. "One aspect is that you need an investment of imagination, effort and resource to change the way that organisations behave. Although those of us who have looked at these issues believe that it is a no-brainer, we have to persuade people who have many other distractions to adjust their mindset," he says.

Unions, too, can be disinclined to support it, perhaps because they see it as undermining their role in negotiating on members' behalf, says Richard Saundry, reader in international employment relations at the University of Central Lancashire.

Any attempt to win people over needs to start with ensuring they know what mediation is – and what it isn't. "There is a lack of clarity and understanding about what we mean when we say a case has been mediated," Efthymiades says. "People think that it is part of a formal process, and it's not. For example, sometimes we work on cases where parties do not understand that it is voluntary, that it is supposed to be outside the formal process or that it does not mean that a case won't then go to a grievance or disciplinary hearing."

Mediation does have its limitations. It can be very useful in some types of disputes, such as those stemming from interpersonal conflict or relationship breakdown, but it is less likely to be appropriate for dealing with contractual disputes. Acas believes that it may even be counterproductive if used where the problem is only one aspect of wider bad behaviour, such as harassment.

John Crawley, founder and chairman of CMP Resolutions, does not think forcing people down a particular route, through legislation or other approaches, is a good idea. Instead, he'd like to see more work done to "nudge" people towards mediation. This is an approach often associated with public health: not telling people what to do, but subtly reframing issues to steer them in a particular direction. "We should start by renaming grievance procedures as grievance resolution procedures," he says.

And there's a lot to be said for training all managers – not in mediation per se – but in how to deal with disputes as soon as they arise, rather than letting them grow and fester. The government certainly likes this idea: "We support the view that workplace problems could be prevented from escalating into disputes if line managers were better able to manage conflict when it first arises," Davey says. "This could be achieved through the ability to have what are often termed 'difficult conversations'."

Crawley agrees that the ultimate goal should be creating a culture that supports effective conversations between people. "Helping people to think 'I can have that difficult conversation' is the place where mediation can have a major impact and can avoid things going to any sort of procedure, let alone a formal one," he says.

The move to mediation had a clear effect on the culture of East Lancashire PCT, according to Richard Saundry, who studied the case. "The introduction of the scheme had a significant impact on the way employee relations were managed," he says. Previously, distrust between management and unions had meant that disputes tended to go along a formal path because no one felt able to pick up the phone to try to nip it in the bud. However, as the scheme was introduced and union representatives, managers and HR staff trained together as mediators, this started to change.

"The mediation scheme and the way it was introduced provided a mechanism through which these key individuals started to trust each other a bit," Saundry says. "It changed the focus of these individuals from a dispute being something that you fight to being something that you try to solve."

A force for good – mediation and the met

Police officers and their civilian colleagues don't generally want to waste time fighting among themselves when they have a community to protect, which makes them good candidates for mediation, according to Superintendent Chas Bailey, who runs the Metropolitan Police Force's internal mediation service.

"People don't like to [raise formal grievances] if they can help it, as they don't want to risk getting their colleagues in trouble, but they do want disputes resolved," he says. Mediation gives them a way of doing that without going down the grievance route.

The Met's success rate is good, at 70 per cent, but not all cases can go to mediation. "We look at the attitude of both parties... and if it isn't going to work, we don't do it," Bailey says.

Even mediations that do not result in agreement can still have a positive effect. "If you put anybody through a process like this, they go away and reflect on their behaviour," Bailey says, adding that

he's changed his own management style and become a better listener since training as a mediator.

Conciliation or mediation?

The main difference between statutory conciliation and mediation is not so much in the techniques involved – both use an independent third party to help disputants find their own answer to their problem – as in the framework underpinning them.

Acas offers conciliation once all internal efforts to solve the problem have failed and where a claim has been or could be made; if a solution is reached this way, the parties cannot continue on to the tribunal. Mediation, however, should happen as early as possible, and any solution reached will not legally prevent the party from continuing to an employment tribunal hearing, although the hope of course is that it will stop everyone wanting to do so.