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# Tips and traps in workplace mediation

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# ADR bulletin

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## Practical dispute resolution techniques

# Tips and traps in workplace mediation

Mieke Brandon

### General Editor



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Workplace disputes are often more complex than first thought. One workplace conflict may resemble another, but in order to discover what each workplace dispute is really about we need to be mindful, remain client-centred and be curious. By allowing stakeholders to divulge their initial concerns we will be provided with the necessary tips to work out collaboratively what would serve the parties and the workplace best. What for one mediator is a tip can become a trap for another as we use different 'lenses' to view and deal with diverse issues in organisational and interpersonal dynamics. This article examines some of the complexities that face us as workplace mediators.

### Background

Historically the airing of conflict was seen as something destructive and adversarial in nature. More recently we can observe shifts in this belief and consider that managing conflict in the workplace can be constructive, resulting in the implementation of structures and processes to support change.<sup>1</sup>

Ideally, organisational conflict management systems are designed and implemented to include preventative strategies for imparting knowledge and developing skills. Such systems should also assist workers to become familiar with and have easy access to ADR methods.<sup>2</sup> An appropriate system identifies the best ADR process for each dispute, allowing parties maximum control over the process choice, including the option to revert to other processes within the system. To measure how successfully a system works, an evaluation of its effectiveness, satisfaction levels with the process, relationships and outcomes (including durability) and perceived efficiency must all be considered.<sup>3</sup>

Many workplaces have such a system. However unless all stakeholders were involved in its creation, workers may still feel that any process has been imposed on them. Hence they may resist or even sabotage any process which forms part of a dispute system design.<sup>4</sup>

### Culture

A system that will work best needs to fit the organisational culture. Management and employees require a positive attitude towards conflict. Employees, at all levels, need to trust that disclosures about conflict can be handled without fear of reprisal. Any process should also meet the needs and interests of the disputants and dispute. The choice of process depends on the disputants' tolerance for risk, their work relationship and their individual emotional state, motivation and goals.<sup>5</sup>

### Starting low key

Ideally any procedure starts in a low key manner so conflicts are resolved at the lowest organisational level with the least bureaucratic interference, saving both financial and psychological costs.<sup>6</sup> If two or more workers are in conflict, ideally they will discuss their differences and find a way to resolve them themselves,



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or use a colleague to assist. If this does not work the parties may invite the assistance of an immediate supervisor or manager.

The workplace needs to be an environment in which workers are free to raise questions and express concerns about behaviours they consider unreasonable, unfair, discourteous, oppressive or unsubstantiated.<sup>7</sup> In such a climate supervisors or managers need to remain open-minded, neither taking sides nor having a stake in the outcome. They must also believe in using a process that fosters openness, constructive feedback and party control over the outcome.

Any workable design should provide options and choices for disputants in voluntary and flexible formats. The design should encourage disputants to raise issues early before they harden into adversarial or litigious positions and should actively defend users against retaliation.<sup>8</sup>

### **Reasons for not taking action**

In most organisations the main reasons workers do not take action is through fear it may do more harm than good and damage the relationship with co-workers or supervisor or because it is not seen to be worth the time and energy invested. Many workers express concerns over the futility of challenging a person of higher-status. Conversely, the supervisor or manager may have reservations about handling these problems, perhaps out of concern that taking action may upset a valued employee and cause their resignation.<sup>9</sup>

### **Sources of conflict**

Hart states that the possible causes of conflict in the workplace are unmet needs and wants, values, perceptions, knowledge, assumptions, expectations, and the willingness and ability to deal with conflict.<sup>10</sup> Ford elaborates on these needs that have not have been satisfied, resulting in problematic behaviours.<sup>11</sup> Unmet psychological needs, he states, may be caused by a lack of control, recognition, affection and respect. Some difficult behaviour, such as ignoring, refusing to talk, foot dragging and being rude, can be seen as accidental. But it can also result from intentional thought, sometimes sporadic, taking us by surprise. At other times it is ongoing

and forms patterns. Most people get angry when they feel attacked, vulnerable or shamed, causing them to defend or retaliate against those who are doing them harm.<sup>12</sup> Other sources of disputes are harassment, bullying, disciplinary processes and invalid reasons for termination, and employees taking positions on their legal rights.

### **Using a third party**

A third party can assist with dispute resolution other than through the legal avenue. They may be an 'in-house' expert in conflict resolution or an external mediator, conciliator or arbitrator. The person within the organisation could be an ombuds-person, human resources staff or CEO.

The use of 'in-house' persons may create difficulties regarding neutrality and confidentiality. They may be hearing complaints about a respected colleague or be influenced by previous experiences with one or more of the parties. The parties may perceive the in-house person as biased because of their previous knowledge and loyalties, personal and professional alliances, or political leanings.<sup>13</sup>

A process facilitated by a third party needs to be perceived by the parties as fair, objective, confidential and independent of other aspects of the grievance procedure. The in-house third party needs to be a 'disinterested' facilitator and should have no direct managerial responsibility or formal decision making power or role in making workplace changes. They should not represent any employees, impose decisions or demand compliance by or disciplinary action against those parties who have acted inappropriately. They should act even-handedly, despite personal preferences or partisan commitments.<sup>14</sup> For instance, a sexual harassment contact officer, in the role of in-house mediator, should not proceed with any subsequent investigation if the mediation fails to settle the dispute.

A benefit of using an in-house person is that they have in-depth knowledge of the organisation, its values and goals, its workplace guidelines, contracts and grievance procedures. They can provide information, as opposed to advice, explore options, examine possible

consequences and empower parties to decide whether to take any action and, if so, how to proceed.

## Challenges to neutrality

Neither in-house nor external mediators can ever be seen as completely neutral. They face challenges to their 'neutrality' on the basis of race, gender, ethnicity, sexual orientation, disability, age or religious orientation.<sup>15</sup> Our historical background or affiliations, our relationships, family value systems, friendships, professional goals, our beliefs in relation to workplace politics and our economic well being, all send certain messages about us.<sup>16</sup> All mediators must be constantly aware of their professional and personal biases.

If the choice fell on an external mediator, this person would need to be acceptable to all parties, and have the ability to secure trust and cooperation. The mediator needs to be perceived as knowledgeable, demonstrate competence, patience, an understanding of antagonistic positions, and have the procedural and communication skills to take it on. He or she needs to demonstrate an attitude of non-biased curiosity necessary to act impartially, and have stamina and a sense of humour.<sup>17</sup> The mediator also needs to know how to analyse and challenge those ideas, beliefs and norms that may be embedded in the dominant culture, for example stories about groups marginalised in the workplace.

## Duty to report

While any in-house conflict resolver must have adequate training and standing within the workplace, they have the same duty as an external to warn or report any apparent or imminent threat of serious danger to people or property or abuse. Mediators need to be mindful of public interest considerations and the rights of any unrepresented stakeholders. To flush out a possible ethical dilemma before it arises in any mediation, it is important to do homework.

## Pre-mediation

To become more familiar with any workplace dispute I recommend a pre-mediation assessment process. The assessment aims to ascertain the

most appropriate method of dispute resolution in each case. This could include training, mentoring, leadership coaching, facilitation, counselling, mediation, conciliation, early neutral evaluation and arbitration or a combination of these methods. It is important to consider in what role you enter the organisation – if you are hired as a mediator, the likely expectation is that mediation will occur!

The assessment can be completed by phone and/or face to face and needs to include stakeholders in the identification and resolution of the conflict. For example, a department head may suggest mediation because a group of people do not seem to meet deadlines. It is important to get a feel for what has gone on before and how the difficulties were dealt with previously, including the success or failure of those interventions.

The assessment process needs to provide the mediator and parties with some understanding of the history of the dispute, who the disputants are and where they fit in the organisational structure. The parties need to explore the levels of knowledge and skill they have to engage in an interest-based negotiation. The mediator may need to consider whether potential participants have the communication, empathy, negotiation and teambuilding skills to participate in a collaborative process.<sup>18</sup> Conflict coaching may be needed. It is also wise to consider in what way the organisational culture reflects what people say they do and what is actually done. In most circumstances superiors also need to be consulted.<sup>19</sup>

Bercovitch's notion of 'the contingency approach' needs to be considered at intake.<sup>20</sup> This means the key task of the assessment is to differentiate between situations where mediation can be effective as against situations where it cannot achieve anything. This approach treats the outcome of mediation efforts (be it successful or not) as dependent or contingent upon the environment of a conflict and the behaviour within it.

It is therefore important that any mediation should give all parties a voice and the space to create alternative options for their future working relationship. Underlying

assumptions, emotions and values can surface while the mediator protects the process of mediation and prevent its abuse, for example through 'fishing expeditions'. The mediator also needs to be wary of any organisational pressures. For example, some conflicts have gone on for years and mediation may be used to attempt the impossible.

During the assessment period the parties and mediator need to become familiar with opportunities for any 'loop-back' process, for example, going a step back in the procedure to more informality, or 'loop-forward' to deal with legal rights.<sup>21</sup> Instead of an issue working its way through the system, parties may choose to seek legal advice, use representation, seek arbitration or use tribunals to achieve the outcome they seek.

Understanding the organisational dispute system also helps to establish whether the timing for mediation is appropriate. It is important to know whether management has ordered a report on one of the staff members. An impending annual appraisal or physical or mental health assessment may need to be considered in the light of a party's ability to participate and the consideration of options.

## Power, perceptions, emotions and wisdom

The smaller the disparity in power and the greater the recognition of power and legitimate differences, the more easily the issues and concerns between employees can be resolved. One of the first questions should concern the nature of the power imbalance between the parties and whether there is likely to be an ongoing relationship. It is essential for mediators to understand exploitation of imbalances, shifts in power distribution and power balancing.<sup>22</sup>

As workplace disputes often involve asymmetries of power it is important that mediators remain sensitive to what is happening and treat everyone equitably.<sup>23</sup> The parties' perception of the effects of the dispute on their interaction at work, in their lives generally and at home will be potential emotional issues to be addressed. Possible corruption or abuse of power could be raised, together with parties'



understanding or misunderstanding of their rights and responsibilities. At all times, mediators need to use the participants' wisdom and readiness for change to build bridges.

### Rights to be considered

Van Gramberg describes three types of justice in the workplace: procedural, distributive and interactional justice.<sup>24</sup> She suggests the ADR practitioner should apply these principles to help resolve workplace disputes. Their consideration may be helpful to determine which processes a disputant prefers to participate in: negotiate a settlement; request to have allegations investigated and determined; or enter formal legal proceedings. Federal and State legislation on workplace relations, discrimination and health and safety protects employees from unfair dismissal, discrimination and harassment.<sup>25</sup>

A fundamental assessment for consideration is whether mediation can prevent further conflict and protect or extend interests for all participants. Will parties have any leverage and are their resources adequate? In what way can participants be non-coercive and stop themselves from continuing to blame or label certain behaviours? For example, if all participants were to agree that a particular worker is a bully, how willing do you think they are, as alleged victims, to listen and grapple with their perceptions against the alleged perpetrator's image of themselves? In return, the alleged perpetrator in being labelled a 'bully' may feel mobbed.

Pre-mediation interviews determine which parties are enthusiastic about mediation, which party prefers an investigation, which party has already applied for a transfer and which party has decided to resign. Structural issues are also raised at the interview. There are usually concerns about hierarchical mentality, in contrast to self-managing teams, or bottom-up communication in flattened organisational structures. However, competitive and adversarial attitudes and behaviours, gossiping or lack of uniformity, transparency or consultation can be rife in any structure. For example, in non-government organisations with voluntary management committees, conflict between how the committee members,

the co-ordinator and the staff see their roles is fairly common.

The assessment will help the mediator discover how much of the conflict is intra-personal, inter-personal, inter-group, and whether it reflects societal, national and international concerns – for example, a workplace dispute based on religious vilification of individuals post-11 September, the Bali or Madrid bombings, or the war in Iraq. This also raises the question of whether a party would benefit from counselling or having an advocate, interpreter or support person present in mediation.

In consultation with the parties the mediator decides which interpersonal conflict should be addressed first before group facilitation takes place in order to avoid one or more persons within the group becoming the scapegoat. The assessment should establish who the parties or groups of parties are and who should be at the mediation and who should not. The CEO or manager, while not an actual party to the dispute, often has a stake in the resolution when there are allegations of discrimination.

### Confidentiality

Many mediators use an agreement to mediate but it will not make all communication in mediation confidential. Limitations relate to child abuse, threats of imminent harm to self and others, admission of criminal activities and unlawful employment activities.<sup>26</sup>

Workplace mediators may be asked to report on the outcome of the mediation. While this may be on a need to know basis, mediators need to be clear that their position is independent of reporting, or they must be willing to ask the parties to draft an agreement about what to report to whom.<sup>27</sup> If more than one session was scheduled, what should remain confidential and what can go public in between sessions? It is inevitable that parties will discuss their concerns about the mediation with family and friends.

As the mediator will be paid by the organisation (whether as an in-house or external mediator) what are the expectations of the employer? It is highly recommended that you discuss with all participants your *modus operandi* and be transparent about why you work the way you do. This avoids

any possible misfit between how you prefer to work and unarticulated expectations anyone may have of you. Can parties, when tabling documents, foreshadow that they will use these later as evidence, in case the dispute proceeds to legal action? How can you protect yourself from any liability when a party, in hindsight, felt pushed to settle for something that subsequently appears unacceptable to them?

### Establishing a mediation process as a catalyst for change

If after an intake procedure the mediator and parties agree that mediation is the best option it is important for the mediator to remain mindful of and monitor the pattern of power distribution, between the parties and also between the mediator, the parties and any other stakeholders, before, during, and between mediation sessions. The mediator may want to commence with phone or shuttle mediation, depending on the parties' geographical locations, abilities to cooperate and any emotional or physical safety concerns.<sup>28</sup> Alternatively the mediator may prefer to start with all parties together and make procedural interventions by using private sessions and end with a shuttle negotiation.

### The mediator as change agent

Mediators organise a neutral venue and create an environment in which they balance structure and informality, freedom of expression and guidelines for constructive behaviour. The mediator channels communication as a go-between, or directs discussions between the parties. Like an organisational change agent he or she traverses between high and low process interventions in assisting negotiations. The mediator uses techniques to influence and persuade parties of their cooperative and joint interests.<sup>29</sup>

Through their participation parties' communication styles, personal attributes (including self-esteem) and attitudes to defensive and aggressive behaviours will be demonstrated. Unresolved issues from the past and hidden expectations and agendas will be some of the emotional concerns

which surface in any mediation. Mediators need to be able to work with emotions and diverse expressions of feelings, as well as the myths and assumptions about the suppression or discounting of emotions. They need to be able to create an environment in which confusion, anxiety, fear, anger and any escalation of emotion can be interpreted to foster behavioural change. Tears or accusations, insults, cynicism, withdrawal and other disempowering reactions need to be channelled into sources of information. Typically in workplace disputes, frustration and anger may have been triggered by misrepresentation, excessive demands, overstepping authority, showing personal animosity, going over someone's head and seeking to undermine others. A legitimate expression of anger can demonstrate intensity and sincerity and can sometimes play a positive role in getting agreements.<sup>30</sup> From time to time some parties need to be helped to save face; others may wish for an apology before they can move on.

Throughout the mediation process the mediator motivates and assists through listening, acknowledging, reframing and summarising parties' recognition of common needs. Parties can undertake a better way to communicate and relate to each other, transforming their relationship. Future behaviours can be modified and become more respectful. Most parties need to clarify misunderstandings, misinterpretations and assumptions before they can find a way to bargain constructively. They will ideally clarify roles and functions, set boundaries and develop short and longer-term creative solutions. Options and agreements need to be reality-tested so these can become acceptable outcomes. For example, two workers agreed to greet each other when meeting in the common room so other staff members would feel more comfortable, instead of giving each other the cold shoulder with negative effects for others.

By recording the parties' intentions (including a review period and/or further meeting) and drafting comprehensive agreements (including what is, and what is not, divulged to other stakeholders) there is accountability for future intentions. These intentions do not have to be shared

equally. One party may agree to more than another. This creates high performance workplaces in which conflict is no longer feared but seen as a catalyst for change.<sup>31</sup>

### Post-mediation review and reflections

After mediation workers may want a review of how they are going. It is up to the mediator and the organisation to decide if this is available and in which way it could take place. It is important to mention and cost this in your initial contact with the organisation, if this is the way you prefer to work.

Mediators are encouraged to use a mentor, peer or supervisor to reflect on their assessments, practice dilemmas, and personal and professional challenges. The mediator is not an external observer of the change process of the parties but an integral part of it and as such 'use of self' is critical to effective service delivery.<sup>32</sup> Additionally there is always the choice of including a co-mediator.<sup>33</sup> Self-reflexivity and critical reflective skills are recommended, as is belonging to a network of workplace mediators to discuss issues, complexities and challenges. This can be most valuable for increased awareness and learning about the practice/theory dichotomy of the process.<sup>34</sup>

Mediators construct their own worlds through their language and stories<sup>35</sup> and can fall into the trap of categorising workplace problems and labelling parties, impeding the notion of mindfulness and client-centred practice. By using an extensive assessment process mediators can avoid being contaminated by any anxiety and pressure to fix things quickly.

Therefore each dispute should be unpacked within its organisational context for workers to find the best possible intervention to maintain a healthy workplace. Such a workplace embraces diversity and discussions are open and authentic. The norm is that conflict is managed and resolved at the earliest detection so disputes become much less complex and emotionally and financially less costly.

I am reminded of the following words of wisdom:

Our 'opponents' are our co-creators, for they have something to give which we

have not. The basis of all cooperative activity is integrated diversity ... . What people often mean by getting rid of conflict is getting rid of diversity, and it is of the utmost importance that these should not be considered the same. We may wish to abolish conflict, but we cannot get rid of diversity. We must face life as it is and understand that diversity is the most essential feature ... . Fear of difference is dread of life itself. It is possible to conceive conflict as not necessarily a wasteful outbreak of incompatibilities, but a normal process by which socially valuable differences register themselves for the enrichment of all concerned.<sup>36</sup>

I believe it is our role to foster this approach not only from the moment we interact with any workplace but also in our lives and relationships. As role models with such attitudes and congruent behaviour we can remain open, impart our knowledge of dispute management and work confidently and competently within organisations. ●

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## contributions

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