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Workplace bullying: To mediate or not?

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Choices in dispute resolution practice

Workplace bullying: To mediate or not?

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In the past 18 years there has been growing awareness across OECD nations of workplace bullying as a significant health and safety issue and 'one of the most common causes of psychological injury, workplace related stress, illness and workplace related suicide'.[1]

It is important to assess the suitability of mediation when workplace bullying is alleged. Is mediation appropriate at all given concerns about power imbalance and public interest? If it is appropriate, what specific knowledge and skills does the mediator require? What strategies might the mediator employ?

Workplace bullying

There are various definitions of workplace bullying. The common threads in the various definitions are that the bully's behaviour is repeated, unreasonable and endangers the health and safety of the person being bullied.

Workplace bullying is often regarded as a sub-category of harassment but is has some quite unique features. Unlike harassment which tends to have a particular focus, for instance gender, sexual preference, colour, race or disability, workplace bullying can focus on anything that challenges or interests the bully in some way.

While harassment is usually obvious to the victim and can be readily identified by an observer, workplace bullying can be difficult to identify and diagnose as it tends to manifest itself as a series of small and apparently insignificant events over time. It is the pattern of these events that constitutes the psychological abuse of the target. (See table for a list of behaviours that may cumulatively amount to bullying).

Examples of Bullying Behaviours

- Harassment
- Constant and/or intrusive surveillance or monitoring
- Inappropriate application of workplace policies such as missing meal breaks or requiring excessive overtime
- Social isolation
- Verbal abuse
- Physical abuse
- Threat of and/or inappropriate performance reviews
- Unfair monitoring of work performances
- Constant unjustified, unreasonable criticism of work
- Being set up to fail
- Promotion proposals denied/blocked
- Withholding information
- Peer isolation
- Unfair criticism
- Sarcasm
- Subtle put-downs and innuendo

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As with harassment, workplace bullying is often not reported due to the target's lack of confidence to speak up, or because they feel embarrassed or intimidated. In order to protect their physical and psychological health, many feel that the only or best strategy available to them is to leave the workplace and find a new job.

While other forms of harassment or discrimination are clearly defined as being illegal, workplace bullying has tended to be dismissed as part of the normal culture of workplaces and/or human behaviour. However the detrimental effects are just as significant.

Writers on the topic refer to similarities between workplace bullying and domestic violence. Behaviours exhibited by both bullies and perpetrators of domestic violence include isolating the target from friends, peers and support, making unreasonable demands, and using tactics of intimidation, emotional abuse, coercion and threats. In both cases the perpetrator intends to gain power and control over the target and will attempt to minimise their own behaviour and blame the target.[2]

The impact of workplace bullying extends beyond the target to other employees and the organisation as a whole. Workplace bullying contributes to poor productivity and performance resulting from decreased morale, stress and insecurity. It also impacts negatively on absenteeism and staff turnover.

Workplace bullying mediations tend to fall into one of the following three categories:

(a) the target has already resigned from his or her position as a result of the bullying and is seeking redress;
(b) the target intends to resign due to the bullying and is wanting to negotiate an exit package; or
(c) the target is still employed and wishes to remain so, but wants some assurance that he or she will not continue to be exposed to the bullying behaviour.

The mediation may or may not involve the workplace bully. If the alleged bully is the actual employer then he or she would certainly be present. That may not be the case if he or she is a colleague or manager of the target.

Imbalance of power

Mediation is not universally appropriate to all disputes and it is arguably not appropriate to workplace bullying (particularly when the alleged bully is the employer or the employer insists on the bully being present) due to the imbalance of power and the fact that power and its misuse is central to workplace bullying.

Mediation is designed to be an empowering process which gives the parties a direct input into the outcome of their dispute, in contrast to litigation where the outcome is decided by a third party. However, the dynamics of workplace bullying may not be conducive to constructive problem resolution. Rather than both parties being empowered by the process, a more likely outcome is that the process will reinforce the existing power dynamic.

There is a significant imbalance of power between a workplace bully and his or her target. This power dynamic will be a strong feature of any interactions between the parties, including any mediation process in which they may participate.

If we cannot change the external power relationship between the bully and his or her target, it is likely to be played out during the course of the mediation. Rather than the parties recognising the difficult position the mediator is in, they may interpret the mediator not acting to address the power imbalance as tacit approval of it.

Public interest

Another key issue for consideration is the effect on the public interest of seeking to resolve workplace bullying claims at mediation.

A court decision achieves two purposes: it resolves the issue between the litigants; and at the same time 'espouses societal norms'.[3] It is this second purpose to which mediation cannot aspire. Because of its confidential nature mediation doesn't contribute to setting community standards of behaviour, and because mediation deals with issues at an individual level, it does not resolve societal issues.

Dealing with workplace bullying issues in mediation prevents increased

public awareness about the extent of the problem and thereby reduces the likelihood of any policy being developed in response. Mediation tends to remove issues from their societal context and deal with them as individual conflicts or issues. It could be argued that without a larger societal response, workplace bullies will continue to cause havoc in workplaces and traumatise individual targets.

Information is not made available as to what settlements are reached in workplace bullying claims or what behaviour amounts to workplace bullying. If a significant number of workplace bullying claims are resolved at mediation, there is no way of measuring the scale and impact of both the bullying and its direct cost of resolution on workplaces and the community as a whole.

Mayer uses as an example the cumulative result of private settlement of sexual harassment complaints with minor reprimands, apology and 'otherwise business as usual'. The questions he then poses can equally be asked when the majority of workplace bullying cases are settled in mediation:

> Does this in the long run result in the protection of workers [from bullying], or in changing organisational culture? Or does this end up instead in contributing to a climate that allows exploitative relationships to continue?[4]

Irvine is of the view that sexual harassment claims are better suited for fact-finding forums because 'ultimately we need to draw bright lines delineating acceptable behaviour in the workplace'.[5] This view also has some merit in respect of workplace bullying. There ought to be socially accepted, objective standards of behaviour which workplace bullying breaches. If that is the case, then both parties' perceptions of the facts cannot be valid, and one or both of the parties may need a determination as to who is 'right' and who is 'wrong'.

It has been suggested that the notion of mediators as neutral or impartial facilitators 'no longer holds' when there is domestic violence and abuse and that mediators must take a stand that violence in a relationship is not acceptable.[6] Like domestic violence, workplace bullying destroys the ability of both parties to negotiate equally and fairly. How does a mediator take a stand that workplace bullying is not acceptable without compromising their impartiality?

The reality is that mediation is 'not well equipped for resolving disputes of fact or arriving at a version of historic reality, unless the parties collaborate to provide it jointly', something which is extremely unlikely with workplace bullying allegations.

Is there potential for mediation to reinforce the bullying?

There are some values and assumptions underlying mediation generally that are worth examining in the context of workplace bullying mediations.

By its nature mediation requires the parties to engage constructively in an attempt to reach joint decisions. There should ideally be a desire to settle the dispute, some capacity to compromise and a level of honesty.

Mediation is most successful where there is value congruence, that is, where the values of mediation are shared by the parties. It is less likely to be successful where those values are not shared by the participants.

A workplace bully may associate the values of mediation with individual weakness and this could render the process open to manipulation by the bully. While the target may persist with his or her attempts to resolve the issue and find some common ground during the mediation, the bully may see it as 'a game to be won — not issues to be discussed, compromised and action jointly agreed'.[7]

The informality and 'user-friendliness' of mediation is often promoted, but, it could be said that mediation requires more extensive and direct participation from parties than litigation.[8] The direct participation required by mediation is likely to be difficult for a person who has been the target of workplace bullying as the target's confidence and self-esteem have already been significantly undermined.

Often where there are allegations of workplace bullying, one or both parties needs the facts of the past addressed and resolved. The target may require his or her version of what has happened to be recognised and validated in order to move on. While this is not particular to workplace bullying, the nature of workplace bullying may increase the need for it. The target may not have been believed by people that he or she has previously disclosed the bullying to, or alternatively, the person to whom they've complained may not have recognised the significance and pattern of the 'small' incidents. Conversely, the person against whom the bullying allegations have been made may require some determination or recognition that their actions did not amount to bullying or that they were appropriate and justified.

The reality is that mediation is 'not well equipped for resolving disputes of fact or arriving at a version of historic reality, unless the parties collaborate to provide it jointly',[9] something which is extremely unlikely with workplace bullying allegations.

Mediation techniques

When we consider some of the techniques used by mediators in order to assist parties resolve their differences and engage in joint decision-making, a number of issues

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are highlighted for workplace bullying mediations.

Throughout the mediation, the mediator will 'reframe' where appropriate and will endeavour to use language that is neutral and mutual. A mediator may therefore listen to an emotive opening statement where a target describes and names the bullying that they have been subjected to. Obviously 'bullying' would not be a neutral and mutual agenda item. The mediator may therefore be tempted to capture that issue and suggest 'relationship' or 'communication' as an item for discussion.

From this the parties are likely to conclude either that the mediator doesn't believe that the bullying has taken place, or that the mediator does not believe it is a serious issue. From the target's point of view the bullying behaviour has been minimised. On the other hand, the bully has been reinforced and further empowered by the mediator's choice of language.

In order for parties to resolve their issues at mediation, they may be encouraged by the mediator to consider the relationship issues and to reflect on their own behaviour and its impact on the other party, particularly if the mediator does not understand the dynamics of workplace bullying. By the time a target reaches mediation they may have already encountered this approach. One of the major mistakes employers make is to imply that the target is in some way responsible for the situation, for example by asking the target whether he or she did anything to provoke the bullying or what they might do to resolve the situation Any questions of a similar nature from the mediator, no matter how carefully they are framed, may very well have the same effect. Workplace bullying is not a relationship issue or a conflict that both parties have contributed to in some way. It is entirely an issue of inappropriate workplace behaviour by the bully.

A suggested approach

Without a thorough knowledge and understanding of workplace bullying dynamics and behaviours and without thorough preparation in advance of the mediation, there is every chance that the mediator may make things worse for one or both of the parties in what is a highly charged and complex situation.

It would be considered unacceptable for a mediator with nothing other than a scant knowledge and understanding of domestic violence to mediate with parties where there has been a history of violence and abuse. Likewise, a mediator who does not have a thorough understanding of workplace bullying ought not to be mediating where those allegations have been made.

Given that there are specific concerns and issues associated with workplace bullying mediations, it is important to begin from the premise that not all relationships are suitable for mediation and that just because it can be mediated doesn't mean that it should. The first task, as always, is to determine whether or not mediation is a suitable process.

Diagnosis of the conflict and consideration as to whether or not mediation is appropriate is particularly important when there are allegations of workplace bullying. In order to engage in a proper conflict diagnosis, there needs to be a formal intake process or pre-mediation assessment. The main purpose of the assessment is to establish whether or not mediation is appropriate having regard to the particular parties and the particular issues.

Given the nature of workplace bullying, the mediator must also turn his or her mind to the physical and psychological safety of the target. If a mediator cannot ensure the physical and psychological safety of one of the parties, then he or she ought to question the appropriateness of mediation.

It is again important to draw a distinction between mediations where the alleged bully is not present, and mediations where the employer is either the alleged bully or insists on him or her being present. Mediation is less likely to be suitable where the bully is present. Keep in mind that the workplace bullying may be taking place because the organisation either endorses it or turns a blind eye to it. That being the case, the process still presents some risk for the target.

Fisher and Brandon list some indicators to be aware of when making a decision in a family mediation context. They include:

> ... the intention of one party to harass another ... parties who have major non-negotiable values differences [and the parties'] capacity to negotiate safely on their own behalf.[10]

These indicators would appear to hold some relevance to workplace bullying mediations and ought to be considered by a mediator as part of the pre-mediation process. The mediator should also consider the ability of the target to 'deal in mediation context' with the bully, having assessed his or her resilience and ability to make decisions.[11]

Mediation is often regarded as being better able to deal with disputes involving ongoing relationships than other more adversarial forms of dispute resolution. While there are some issues and particular considerations regarding mediation of workplace bullying claims, mediation may be more suitable than the alternatives when the target is still employed and wishes to remain so. Provided the bully is not the employer, the parties may be able to reach agreements designed to address the bullying, protect the target and provide other forms of redress for the target through mediation.

Looking to domestic violence mediations, there are some widely accepted principles which can be applied to workplace bullying mediations as well. If mediation is to be a viable option, it has to be voluntary and alternative options ought to be available to the parties. Parties ought to be able to consider the process — its constraints and its risks — for themselves before consenting.

If a decision has been made to proceed with mediation and the parties are fully informed and consenting, the diagnosis can then focus on what interventions and approaches might be appropriate

If the alleged bully is going to be present and both parties wish to proceed, the mediator should consider whether the process needs to be varied,

given the nature of workplace bullying.

While shuttle mediation is regarded by many as potentially counterproductive it is sometimes used to protect parties where there is the potential for violence. It may therefore provide an option for proceeding with a workplace bullying mediation where there is a risk that the bullying will continue or be reinforced if the bully and target were to participate in joint sessions.

Mediation for workplace bullying may be rendered more appropriate if the parties are represented by advocates. Advocates ought to be able to assist with the imbalance of power and they allow the parties to reduce the intensity of their own participation. Advocates can also provide a further check on whether or not mediation is continuing to be appropriate.

For domestic violence mediations, Fisher and Brandon suggest that if the mediation is to proceed, the mediator ought to stress to the parties that the first session will be exploratory and that the mediator and parties will continue to assess the appropriateness throughout the course of the mediation.[12] This approach should also be considered for workplace bullying mediations. As with domestic violence, in a workplace bullying mediation the monitoring must include a continual assessment of the power imbalance and the impact it is having on the parties and the process.

This continual monitoring and assessment also allows mediators to consider, develop and implement the most appropriate interventions. That should also extend to the possibility that the mediation will be terminated where it no longer appears to be in the best interests of one or both of the parties to continue.

For a mediator to continue the process of assessment and diagnosis during the mediation, he or she must be able to take note of the 'paralanguage', being 'those additions to the spoken word which add to meaning of words themselves e.g. tone, inflection, volume, pitch, emphasis, sighs and yawns'.[13] While it is expected that mediators are sufficiently skilled and aware to consider this in all mediation contexts, there will be some subtleties associated with workplace bullying that will require a mediator to apply their understanding of the particular dynamics and behaviours. It is also important in a workplace bullying mediation for the mediator to be able to read non-verbal communication that indicates anxiety or that may be threatening or intimidating to the other party.

Provided the mediator has a good understanding of workplace bullying, and he or she has had an opportunity to assess the parties and diagnose the conflict prior to the mediation, they ought to have pulled together a 'toolbox' of suitable interventions and approaches. Having prepared in this way, the mediator should feel more able to deal with behaviours that might manifest during the course of the mediation.

It would be concerning if a mediator were to approach a workplace bullying mediation with a view that the bully can be 'transformed' through the process and the relationship can be repaired. Mediation is not counselling:

> The focus in mediation is not on personal change.[14]

For the bully, any change in behaviour is only likely to come about after a lengthy process of rehabilitation and a breakdown of the denial that often characterises the bully's behaviour.

Conclusion

The issues in respect of mediation and workplace bullying are numerous and complex. It would be a mistake for a mediator to assume that workplace bullying mediations are capable of being approached in the same way as any other employment relationship mediation.

In terms of its dynamic and pathology, workplace bullying has more in common with domestic violence than, for instance, a personal grievance for unjustified dismissal. It is widely accepted that where there is a history of domestic violence, mediation should only be attempted after careful consideration and after putting in place appropriate safeguards. Likewise where there are workplace bullying allegations, we must start from the premise that mediation may not be a suitable process for dispute resolution.

If mediation is embarked upon, it should only be after a thorough conflict diagnosis by a mediator with sufficient knowledge, understanding and competency to be able to manage the process. The parties must participate in the mediation voluntarily, having been fully briefed about the process and its constraints, and throughout the course of the mediation, the mediator must remain vigilant to the possibility that the process could be doing more harm than good and be prepared to terminate the mediation if that is the case. ●

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Endnotes

1. H Olsen, 'Dealing with workplace bullying', Address to Queensland Safety Forum 2006, accessed on *Workplaces Against Violence in Employment* website <www.wave.org.nz>.
2. A Needham, *Workplace Bullying: A Costly Business Secret* (2003).
3. L Boulle, *Mediation Principles Process Practice* (1996) p 60.
4. B Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (2004) p 161.
5. M Irvine, 'Mediation: Is it appropriate for sexual harassment grievances?' (1993) 9 *Ohio State Journal on Dispute Resolution*, 28, cited in Baylis, fn37, 603.
6. L Fisher and M Brandon, *Mediating with Families: Making the Difference* (2002), Appendix 2, p 229.
7. Above note 2, p 36.
8. Above note 3, p 37.
9. Above note 3, p 39.
10. Above note 6, p 60.
11. Above note 6, p 160 proposed in respect of domestic violence mediations but equally applicable to workplace bullying mediations given the similar dynamic.
12. Above note 6, p 233.
13. Above note 3, p 170.
14. Above note 3, p 69.

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