

Pamela Lyall: Mediation tightrope needs careful steps to ensure balance

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WITH the present economic climate and the planned changes in employment law, it is perhaps unsurprising that mediation has been successfully used in a significant number of employment, workplace and management issues over the past few months.

The government has now stated it is even more convinced of the role mediation can play, as one form of early dispute resolution.

Workplace mediations often require different handling from what might be termed “commercial” mediation. One of the most obvious differences is that it is played out against the backdrop of continuing employment relationships. It has been said that all conflicts at work are the sounds of the system cracking – but also, more positively, that these cracks have the potential to let in the light.

Whether between employees or between employee and employer, workplace disputes are referred to mediators by the employing organisation itself and often funded by it. The employer may have a certain outcome in mind and it is important to ensure they understand and respect the impartiality and independence of the mediator. Equally, it is important the employee participants trust mediators and they are not seen to be “doing the work of the employer”.

Preliminary individual meetings for the mediator with participants may be helpful, to begin to understand the real issues, and build the necessary relationships. An important benefit of the mediator’s initial meetings with individuals may well be to gauge their level of commitment to the process.

Secondly, the interplay with grievance and disciplinary procedures can be critical. Ideally, difficult matters would be addressed before they ever reached this stage. When employees are required to engage in mediation as an outcome from such procedures, the extent to which mediation remains a truly voluntary process may need to be addressed. Even if participation is a requirement, no-one should say, agree or do anything in mediation other than voluntarily.

Is it sufficient to deal alone with the presenting conflict or difficulty, or is that a symptom of a systemic or underlying problem? The initial discussion by the mediator may need to be wide ranging and cover the history of the individuals involved, and of arrangements within the department, team or organisation. Indeed, a limited ‘conflict audit’ may be a useful suggestion as part of the referring process. An outcome of the process might be suggestions on how to augment and improve existing systems.

Consideration therefore needs to be given to who should participate in a workplace mediation. If the dispute is clearly centred on two or more individuals, those who need to be involved in the mediation process may be relatively easily identified. Where the situation involves a greater number of people, the mediation may involve more facilitation work among a team or group. It is important that the mediator consults with HR or management (and others involved) about who should attend, mindful of the possibility that if the matter is dealt with too widely then the very process of mediation may escalate the dispute. Careful judgment needs to be exercised.

One of the principal guidelines for mediation is that all the discussions are confidential, unless the participants agree otherwise. How does confidentiality fit into mediation where the employer may wish some sort of report or summary from the mediator – particularly if the mediation does not

produce a conclusive outcome? Such a step can only be taken with the agreement of those involved.

However, a summary is often prepared in these situations, where parties have agreed to that in advance or following their discussions. The key is to discuss these issues at the outset and to keep them in mind throughout, always seeking the agreement of those involved to such a step.

Mediations must be set up thoughtfully and in close consultation with the employer and employees, as well as sensitively tailored to the situation's requirements and circumstances, while at all times preserving the impartiality of the mediator and the integrity of the process.

A "one size fits all" approach is not appropriate.

• **Pamela Lyall is director of mediation services, Core Solutions Group**