MODEL FOR MEDIATION - A tool for equal opportunities on the labour market

Models of Workplace Dispute Resolution in the UK

COUNTRY REPORT

United Kingdom

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1. Introduction

This report is written with the underpinning perspective of workplace disputes being about some element of discrimination, rather than having been generated by some other type of behaviour that has produced a conflict situation.

There are two principal models of workplace dispute resolution available in the UK and these apply whether the dispute involves discrimination in any form or are untainted by such behaviour.

Generally speaking, where an employer recognises a trade union for negotiating terms and conditions of employment and for representation of staff in individual work related problems, the most common approach will be that of traditional workplace representation. However, as detailed below, a limited number of unions in specific sectors have begun to train specific types of their representatives in mediation and to use it as a method for resolving disputes.

Having said that, mediation, in which an impartial third party helps two or more parties in a dispute to reach an agreement - one of the processes in the spectrum of alternative dispute resolution - is most commonly used in a workplace setting where there is no trade union organisation.

Outside of workplaces mediation is more commonly used for a variety of disputes and as a mechanism to avoid involvement in civil court proceedings.

2. Trade Union Approach

The traditional trade union approach to the resolution of workplace disputes is for the union – in the form of a staff side made up of a combination of lay representatives and/or full time union officials – to negotiate a set of policies and procedures for dealing with disciplines and grievances.

Depending on the size and complexity of the employing organisation those policies may have a number of stages before the final appeal stage is reached and the procedure exhausted. Generally speaking, the larger the employing organisation, the more stages there are likely to be in the agreed grievance and disciplinary procedures

When a specific problem occurs a trained lay official (most often called a shop steward or staff representative) will represent a union member through all stages of the agreed procedure. This may occur either when the member has

submitted a grievance to their employer, or their employer has issued a disciplinary notice to the member because of an alleged act, or acts, of misconduct.

2 i) Grievances

The current minimum legal requirement for progressing a grievance requires that an employee who feels aggrieved by something that is happening in their workplace set out in writing the nature of their grievance to the employer. Where a grievance could become actionable in an Employment Tribunal – the type of civil court that is charged with the responsibility of deciding legal questions relating to employment matters – the grievance must be something that the employer has the power to resolve.

For instance, if a woman believes she is not receiving equal pay, then she must begin her claim with a written grievance. However, if an employee feels aggrieved that they are paying too much tax that could only be a grievance where the employer knew they were making incorrect deductions but had refused to correct the mistake. In the first instance the employer has the power to change the situation – albeit that the resolution may affect other employees – but in the second instance the employer has no way of influencing the situation.

Once a valid grievance is submitted to the employer they must, as a legal minimum, hold a meeting to allow the employee to state their case. If the decision goes against the employee, then the company must advise the employee of their right to appeal against the decision. There should be no unreasonable delay in arranging the meetings and reaching a decision. This requirement lays on both parties to the dispute.

In a negotiated procedure there may be the right to have more than one appeal, with increasingly senior managers hearing the subsequent appeals until all agreed levels are exhausted.

In an organised workplace the individual who has submitted the grievance has a legal right to be accompanied by a representative or full time union official. Indeed even in an unorganised workplace, if an employee is an individual member of a trade union, they then have a legal right to have a full time official represent them in any internal proceedings.

The role of the representative then becomes to assist the member in putting forward their case. The expectation is that the representative will be fully conversant with the agreed internal company policy and procedure. Indeed the training they should have received would stress that they not only know what it contains, but that they have a copy of it with them at all times throughout the conduct of the case.

As well as ensuring the member's case is most advantageously expressed and explained, any procedural failings will be brought to the attention of the hearing officer(s) involved.

There may well be occasions when the representative seeks to manage the expectations of the aggrieved member about what the employer is likely, or able, to decide in a given set of circumstances. In some limited ways that has similarities with the approach of a mediator. However, there is no absolute duty on them to do so. They are what their designated title implies – the representative of the employee. Their prime duty, therefore, is to look after the interests of their member, usually from the member's perspective. This may well mean, of course, that the member gets the representation they want, rather than the representation they need or that will promote enhanced future working relationships.

2 ii) Disciplines

In disciplinary proceedings there are similar legal requirements to those detailed in relation to the conducting of grievance procedures, and they rest on both parties.

When an employer wishes to discipline an employee for some instance of misconduct, they must detail, in writing to the employee, the charges that are being levelled against them. They must advise the employee that they are entitled to be represented by a work colleague or trade union representative, and they must invite them to a disciplinary hearing. Again, there is an expectation that the issue will be dealt with without undue delay, and that responsibility rests with both parties.

Once the meeting has been held and if there is a disciplinary penalty awarded, there must be a right of appeal against the decision.

Currently, although this will change in April 2009, if an employer does not comply with all of these three minimum stages – the three stage procedure of letter, meeting and appeal – the dismissal will be held to be automatically unfair should a claim be made to an Employment Tribunal.

As with the grievance procedure detailed above, the role of the trade union representative is to ensure that the member is able to put their case as effectively as possible and to ensure that the procedural requirements are adhered to.

In addition, in disciplinary cases the representative will ensure that any mitigating circumstances are brought to the attention of the hearing and appeal officers. They may also seek to argue that the employee was led into the position of breaking some rule, operating instruction or behaviour standard because of the failings, mistakes or negligence on the part of management.

The tactics are wide and various that are available to the representative. However, since their prime duty is, again, to represent their member their approach tends to be targeted on any failing or argument that will enhance the chances of saving the member's employment or of keeping any penalty awarded to the minimum possible.

The approach is therefore very different from that of a mediator where the role is to encourage the parties to find some common ground that will ensure a better working relationship into the future. Indeed, rather than having the potential for building positive relationships the basically adversarial nature of the traditional approach may sow the seeds for further conflicts and disputes because the process involves identifying faults and reinforcing a blame culture on both sides.

3. Trades Union Congress

The Trade Union Congers (TUC) organises training for workplace representatives and professional officers. The training programme covers the skills and knowledge required of workplace representatives. It concentrates on developing negotiating skills and the various skills associated with the representational role described above in sections 2 i) and 2ii).

A more recent initiative in the TUC training programme is to develop courses for a new type of representative, equality reps. The training, though, concentrates on organising and campaigning skills, together with an introduction to the various strands of discrimination legislation.

Individual trade unions appear to be taking different approaches to what they require their equality reps to do. However, there is almost universal feedback from the 110 reps who have undertaken the training to date that their unions will not allow them to do case work – the UK trade union movement jargon for dealing with members' problems. Having said that, the TUC equality reps' course has a single session within the three days covering "dealing with members' problems" but the essence of that training merely replicates the approach for general representatives detailed elsewhere in this report.

Mediation has never featured in any part of the TUC training programme and there are no current plans to add such courses to it, although some senior members of the TUC education staff have completed the ACAS training course descrobed below.

Clearly, despite their awareness of the potential for the use of mediation to resolve difficult workplace problems the traditional philosophy and approach remains the only item on the agenda. This both reflects and illustrates the commitment and reliance on traditional approaches of representation and negotiation. That approach, based as it is on conflict and blame, is more likely to lead to heightened levels of antagonism and less likely than is mediation to build good future working relationships.

4. TSSA

TSSA has 25 full time negotiating and organising staff. As part of the preparation for this report they were all asked to report on any experience they had of using mediation to resolve workplace problems.

Only one officer was able to provide an example. In that case mediation was only accessed after the decision to dismiss had been made. The dismissal was not related to discrimination in any way. The company had merely used ACAS to assist in the determination and agreement of a compensatory payment.

5. Other unions

Unison, the largest public sector union in the UK, has begun to train some of their representatives working in the National Health Service and Local Government in mediation skills, and to advocate their use to resolve workplace grievance situations.

The University and College Union (UCU), the largest UK union for academics, lecturers and tutors, is also taking some initial steps in training reps in mediation skills.

Clearly there are some early developments beginning to take place in a limited number of unions.

6. Civil court proceedings

The practice of using mediation in civil court proceedings began in the late 1990s following a change to legislation.

It is now an option for use in family disputes such as divorce and child custody issues, in neighbour disputes and in what are termed small claims – retail disputes of relatively small monetary value.

It is also an option for use in commercial disputes for such matters as contract and copyright breaches.

7. Employment Tribunals

The court system that deals with employment rights is called the Employment Tribunals Service (ETS). The option of using mediation to resolve discrimination disputes prior to the holding of a full formal hearing of a case is more recent than in the civil courts.

The current statutory requirements (described above in relation to both grievance and discipline procedures) for dealing with workplace issues came into force in October 2004. The impact of the legislation was to require all employers to have proper internal policies and procedures for resolving discipline and grievance situations, and also to require those procedures to be completed before an application to an ET can be made.

Mediation by the Advisory, Conciliation and Arbitration Service (ACAS) – the government body that provides help and advice about employment rights and duties - was also introduced as a pre-hearing option available to parties on their own volition, or indeed for the employment judge to recommend as part of a pre-hearing procedure.

The original intention of the 2002 legislation that became operable in 2004 was to reduce the number of cases lodged with the ETS. In practice the number of ETS applications increased. There were potential monetary penalties on either side for non-compliance with the minimum statutory requirements of an initial letter, a meeting and an appeal.

If an employer fails to complete the three stage minimum process in a dismissal situation it is automatically unfair regardless of the merits of the case. If an employee fails to put their grievance in writing they are unable to make an application to the ETS. If a dismissed employee fails to make an appeal, however useless they feel it to be, any compensatory award may be reduced by up to 50 per cent.

As a result of the trend of increasing ETS applications a government enquiry was commissioned and as a result these requirements will end in April 2009. The statutory requirements will be removed, a new and shorter Code of Practice has been developed and greater emphasis is being given to the availability of mediation at an early stage following the submission of an application. This is especially true where the claim is for one of the many heads of discrimination.

8. Workplace mediation

A brief search of the internet shows there are numerous companies that offer workplace mediation services, most commonly around grievances raised by employees and disciplinary actions by employers. While no study has been carried out, it is likely that, where companies access these services there is no union operating.

Clearly some of those grievances may well relate to discrimination in some form, although the word discrimination does not feature in any of the promotional materials on those websites.

9. Advisory, Conciliation and Arbitration Service

The Advisory, Conciliation and Arbitration Service (ACAS), is the government agency responsible for assisting both businesses and individual employees with a range of workplace problems. In addition to the other services identified in their title it offers both a mediation service and a training programme for potential workplace mediators.

The five day ACAS training course examines the sources and causes of conflict in the workplace and then goes on to explore in detail the skills required of a mediator. Finally, their four stage mediation process is explained and analysed, with students taking part in relatively intense role play sessions.

Their four stage mediation process starts with the mediator interviewing each of the parties to the dispute in separate sessions. The parties are encouraged to explain the problem from their perspective. They are advised that the next part of the mediation process involves a joint meeting with the other party (or parties (if more than two people are involved in the dispute).

The second stage of the process provides an equal period of uninterrupted time to each party in which they can express their feelings about the situation, their perspective and position, with the other party listening to their perspective.

The third stage allows the parties to engage in a free discussion about the conflict situation facing them. The role of the mediator is to lightly control the discussion, prompting the parties with appropriate questions so that they are able to convert their position statements into statements of their interests. From there the parties are encouraged to identify what they each consider would be a workable outcome for an improved future relationship.

In the final stage the mediator uses the expressions of interests to identify a number of possible agreements that the parties can make. The agreements are formally noted for the sole use of the parties.

The essential elements of the whole process are that it is:

- voluntary – either party can stop the process at any time
- informal – no records are kept and nothing is placed on either parties' personnel file
- confidential – parties agree not to divulge anything that is revealed during the process to other colleagues within the organisation
- trust based.

While there may be a written agreement at the conclusion of the process, it is not essential for one to be produced, so long as there is an agreement made between them. If a written document is produced only the parties keep copies.

Notes that are taken by the mediator during the process are destroyed once agreement is reached.

ACAS has substantial experience in the field of mediation and has recently produced an employer's guide to mediation in partnership with the Chartered Institute of Personnel and Development (CIPD), a copy of which is available at: www.cipd.co.uk

10. Mediation vs Representation

There are major differences between the traditional trade union mechanism for resolving workplace disputes and that of mediation. Representation takes place when the formal internal policy and procedures have been invoked whereas mediation occurs outside of those procedures, and preferably before their use.

The tendency in traditional representation is to stick rigidly to the procedures, and indeed to identify failures to adhere to them in order to protect and enhance the members' position. Mediation, by contrast, focuses on the problem itself and seeks to identify a workable solution.

Use of the formal procedures involves a hearing officer making a decision about the problem, and how to resolve it. Indeed, a solution will necessarily be identified by the hearing officer and then imposed on the parties. In mediation the parties themselves explore their own and the others' perspective and create their own solution.

Blame is absent from the mediation model, whereas it is likely to be an inherent part of the formal process in one way or another.

10i) Mediation and Discrimination

Workplace conflicts involving discrimination, harassment or bullying are notoriously difficult to resolve. Mediation, based as it is on principles of equality between the parties, voluntary involvement and confidentiality, appears to offer greater potential for finding workable solutions to such problems than the route of formal investigation, fault finding and imposed solutions.

By encouraging the parties to explore, and implicitly, therefore, to learn to appreciate the perspectives of the other party there is a heightened potential for building greater respect for each other. And that must be a better foundation for a successful future working relationship than would be the outcome from a formal procedural process.

Since mediation is a voluntary process either party can decide to withdraw and access the formal discipline or grievance procedure as an alternative

route, just as is the case if there had been progress to an Employment Tribunal when the right to return for a judicial decision remains an option.

11. Conclusion

Mediation as a mechanism for the resolution of workplace disputes is at a relatively early stage of development in the UK.

However, there are some signs that its potential – especially in the field of discrimination disputes – is gaining some recognition and credence. Key TUC officials have completed the training. Individual unions are beginning to train their representatives in the techniques.

For greater usage to be made there will need to be a change in policy at the TUC level. That may yet be an outcome of this European project. Although it would take some time to achieve, it may be that TSSA could adopt a policy of training representatives and then put forward a motion to the main TUC to facilitate such a change in policy direction.

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