



WORKLOGIC

NEWSLETTER

October 2010



“ If the relative positions of the participants are unequal then this may give rise to concerns on the part of the more junior employee that the interests of the company will be considered more important than those of the individual.”

Mediation - Why D.I.Y. Is Not Always A Cheap And Easy Solution

Mediation is well recognised as a practical tool for resolving employee complaints. When used strategically, it can improve an organisation's prospects of resolving a complaint expeditiously and efficiently. The employer shows its employees that it cares about their concerns and takes them seriously, while at the same time giving responsibility to the employees for resolving their differences. Mediation can be an inexpensive and quick way to resolve a dispute. Many organisations are challenged, however, by how best to arrange a mediation and whether to use an internal mediator or an external provider.

Proponents of internal mediation argue that an internal mediator has the advantage of being part of the organisation's environment. The internally-appointed mediator understands the context of the dispute and knows the participants. The internal mediator may also be better placed to identify possible solutions which are workable within the organisation's structure and processes.

Whilst this "internal knowledge" may be viewed as an asset, it can also be a liability. If handled badly, internal mediations can actually escalate the conflict, necessitating further investigations and leading to further liability for the organisation.

Creating a dispute resolution framework

So how can an organisation ensure it approaches the mediation process in a fair and transparent way? Firstly, the organisation needs to consider how mediation fits into its dispute resolution process. Mediation is often used prior to embarking upon an external investigation, however, there is also a place for mediation after an investigation where the key goal is to repair and rebuild relationships for the employees who must continue to work together.

If mediation is a formal part of an organisation's internal complaints-handling process, this should be clearly documented. The employment policy should set out what the process is, when it applies and the parameters within which the mediation operates. It is the obligation of the employer to ensure that all employees are educated about this option. The employer should periodically review the complaints-handling process and the outcomes obtained to ensure that the process is working efficiently and fairly.

Independence and confidentiality

Whilst an organisation may consider that an internal mediator is independent and impartial, in practicality this may not be the case. For example, the mediator

might be a human resources employee who has had previous contact with the participants through that role, and as such has a history with one or more of the participants which may affect his/her judgment. The mediator must be impartial and also be seen to be impartial. Participants may be reluctant to enter into a full and frank discussion of all the issues with someone whom they perceive to be too invested in the organisation to be impartial, or someone who has previously helped the other employee. If the relative positions of the participants are unequal then this may give rise to concerns on the part of the more junior employee that the interests of the company will be considered more important than those of the individual. HR managers may also need to participate later in decisions about the matter – such as disciplinary decisions – and if they have acted as mediator this will be complicated.

An external mediator can participate in the process with neutrality. They have no pre-conceived ideas about the organisation or the participants, they have not assisted any of the participants in the past, and they are not conflicted by a duty to the organisation. An external mediator is not required to fulfill any other role than that of mediator. The mediation process is therefore not competing with any other commitments of the mediator.

Their role finishes at the end of the mediation, and the HR manager is free to participate in any further decisions which the employer needs to make. External mediators are usually trained and accredited, and, as such, they bring specialist skills to the process that an internal mediator is unlikely to have.

Where to hold the mediation

Ensuring that the mediation process is confidential is also key to gaining the trust and good faith of the parties. The mediation should take place in a discreet location. Organisations conducting internal mediations can make the mistake of conducting the mediation in a location where the participants can be seen by other work colleagues. This reduces the likelihood that the process is kept confidential, as well as increasing the pressure for those involved. The mediation may take place at the workplace, but, if it does, it must be in a quiet and discrete office which cannot be seen by other staff.

Quality mediators

In a recent survey¹ by the Australian Commercial Disputes Centre (“ACDC”), 226 mediation participants identified the important elements of the process.

Interestingly, participants in the survey did not consider their own personal



involvement in the selection of the mediator to be important. The perceived impartiality of the mediator, however, was considered extremely important (100%). The mediator's reputation and accreditation also rated highly.

The author of the ACDC report says that this raises interesting questions about how participants in mediation can ascertain the “quality” of mediators. Either participants in the process rely solely on the judgment of their lawyers, case managers, or HR managers to select the appropriate mediators, or, participants assume that mediators have a universal level of skill and experience. Either way, it is vital that the mediator is perceived by the participants to be impartial.

This survey confirms that there is a significant onus on an organisation to select a quality mediator who is not in any way involved with the dispute, the employer or either of the parties. In order for the mediation to be successful, the participants also need to participate in good faith, to feel safe and secure. To enhance trust and confidence in the mediation, the participants involved should be fully informed about the process prior to mediation. This usually includes the mediator having a discussion with the participants a day or so before the mediation, to answer any questions they may have about the process.

Flawed mediation

A recent case resolved by Worklogic demonstrates how a matter can escalate as the result of a flawed internal mediation. An employee contacted an HR staff member for advice regarding a complaint he had about a colleague. An HR officer suggested that mediation might be appropriate. Both parties agreed to mediation and an HR officer was appointed to conduct the mediation. The mediation failed and the HR officer then reverted to the role of advising the parties of other mechanisms to resolve the matter. The organisation was then obliged to conduct a full and independent external investigation into the original complaint as well as a complaint

regarding the conduct of the HR officer's efforts as mediator on the basis of bias.

In *Perananthasivam v Telstra Corp Ltd* [2007] FCA 1584 the court emphasised the importance of independence in the internal management of complaints and disputes. In the *Perananthasivam* case, the respondent, Telstra, used the same law firm to conduct an investigation into an employee's allegation of bullying, and then to oppose that same employee's unfair dismissal and discrimination claims in the Federal Court. Whilst the court did not find in favour of the employee, the judge did criticise Telstra's "so called independent investigation" stating that the decision to use the same lawyers was not sensitive to the employee's position. Whilst this case relates to the investigation process, the lessons about the importance of independence also have relevance to mediations.

Conclusion

Mediation is a fast and effective way of bringing disputing participants together to explore resolution. With the assistance of a mediator, the goal of mediation is for the participants to resolve the dispute themselves, by making an informed decision. The mediator provides the opportunity for each employee to discuss their concerns constructively with a view towards reaching a resolution, if resolution is possible.

Even if the participants cannot resolve the dispute, they will at least come away from the mediation with a better understanding of each other's perspective.

When the mediation process has the commitment of all the parties then its potential can be fully realised.

¹ Lynne Richards "Theory and practice: what empirical study tells us about the future of the NMAS" published in Update, September 2010

Stop Press!!

Worklogic is excited to announce that we have now moved to new premises at Level 3, 620 Bourke St, Melbourne 3000. Our new office number is 9981 6500.

Our website address remains the same - www.worklogic.com.au

Please note that our office contact numbers have changed:

Grevis Beard	9981 6555	0433 590 360
Deanne McLennan	9981 6566	0431 180 253
Rose Bryant-Smith	9981 6577	0400 311 712
Lisa Klug	9981 6557	0431 470 607
Margaret Noall	9981 6578	0402 492 436
Lisa Scully	9981 6579	0414 267 495
Carolyn Monod	9981 6567	0432 239 798
Vanessa Cullen	9981 6568	0422 392 729
Danielle Calder	9981 6547	0415 875 620
Sarah Tidey	9981 6501	0409 162 897



WORKLOGIC

Worklogic Consulting specialises in preventing and resolving disputes within organisations, sexual harassment, misconduct, bullying and discrimination. Our goal is to assist organisations to minimise and manage inappropriate conduct in the workplace, before negative behaviours become entrenched and before complaints escalate outside the company.

Our services include:

- Fact-finding investigations;
- Conflict resolution through mediation;
- Drafting and reviewing employment policies;
- Audits in relation to employee complaints, discrimination, bullying and other areas of concern - a "health check" of your organisation against best practice benchmarks;
- Training programs to help staff understand their responsibilities in the workplace, and the organisation's expectations regarding appropriate employee behaviour;
- Trouble shooting the "hard cases" in human resources; and
- Research and consulting projects, such as diversity and culture change programs, focus group facilitation and organisational surveys.



Worklogic Pty Ltd
Level 3, 620 Bourke Street, Melbourne 3000
www.worklogic.com.au
{Grevis Beard} +61 433 590 360
{Deanne McLennan} +61 431 180 253
{Rose Bryant-Smith} +61 400 311 712
enquiries@worklogic.com.au