

WHERE THERE'S A WILL, THERE'S A WAY (AT LEAST, NEARLY ALWAYS).

BREAKING THE DEADLOCK

by Clive Johnson and Jackie Keddy

Mediation is often selected as the preferred means or attempting to resolve personnel issues, and especially since the introduction of the Employment Act (2008) has added another incentive for organisations to attempt Alternative Dispute Resolution (ADR) before conflicts escalate to litigation. However, mediation may be doomed to fail and end up being a costly adventure unless it's approached correctly.

Why it's makes sense to consider all options

Very little effort and expense is required to determine which form of mediation - or another form of ADR - will have the best chance of working, whilst the savings in monetary, time, energy and staff motivation terms can be very substantial by getting your approach right.

All things being equal, mediation, arbitration or some other form of ADR might normally be favoured as a means for attempting to resolve staff issues which threaten to escalate to litigation. A skilled third-party can often help individuals get to the bottom of their disagreement, recognise the options available to them and determine if they share any common ground. Within the space of a day or perhaps even just a few hours, a bitter argument which may have consumed time and energy over many months may be brought to a cost effective and clear, if not always fully satisfactory, close.

Of course, the reality is often very different. Those coming to ADR who feel aggrieved may be convulsed with pent-up emotion, determined to achieve a 'decisive victory' over their perceived aggressor, or otherwise to be vindicated. Attention it is normally strongly focused on what individuals are experiencing in the here and now, based on an argument which may have been growing in intensity over time; with this state of mind, few are able to think objectively about their situation will alter take a longer-term perspective.

What's more, some who approach ADR do so reluctantly, believing that it's a necessary stage to go through before moving on to their day in a court or before a tribunal. Hidden agendas and in-genuine statements to work towards a resolution are often paid lip-service to in ADR.



Seeing clearly

It's a common mistake to follow the same old course, just because this is what's known and the way things have always been carried out. The circumstances and needs of each dispute are different, hence it's important to think clearly about what options may offer the best prospect for achieving a satisfactory ending.

A consequence of this is a further breakdown in dialogue and deepened entrenchment in positions. Such an outcome is obviously stifling for each individual's wellbeing and productivity, not to mention the excessive time, money and resource which will be brought to bear on HR and others who have to prepare an organisation's case for a court hearing.

Even if the dispute doesn't explode into the public domain and direction of lawyers, agreements reached reluctantly through ADR are unlikely to ensure a lasting peace between the individuals involved. If a legal case is pursued and the organisation is found liable, having attempted ADR may at least reduce the financial compensation which it may be required to pay. However, this may be small beer compared to the costs and time of taking two or more individuals into a mediation room for perhaps a day or more.

Mediating with meaning

It must then make sense to ensure that mediation is appropriate and has a reasonable chance of succeeding before launching into the process. This is not an insurmountable problem, but rather one which can normally be achieved quite simply.

For this, there are two essential tasks: (1) to confirm whether each party is ready to give ADR a fair try, and (2) to determine the most appropriate way forward. Where the first of these is concerned, we like to talk in terms of qualifying whether or not we have two "clients" for mediation -- or whatever form of intervention may be appropriate. This should normally become quickly apparent in initial consultations ahead of any subsequent joint dialogue.

Individuals who are likely to be unsuitable players in ADR include those who are adamant about not moving from their position, demonstrate a narrow view

in their interpretation of the situation, and who rebut every alternative suggestion which is put to them, such as to reflect on the part they themselves have played in the course of the dispute's escalation. Not infrequently, highly emotionally charged individuals may believe that the only acceptable resolution for their current predicament is nothing less than for heads to roll or for them to receive substantial financial compensation. Clear thinking and reasoning is often all but impossible in such circumstances.

The disputing parties may actually look forward to meeting across a table (although, of course, the reverse can as equally readily be true), seeing ADR as a fresh opportunity to state their case in expectation that a mediator may be more sympathetic towards them than others who were involved in earlier grievance investigations and the like may have seemed to be. Such high expectations don't make life easy for a mediator, and especially if an individual is baying for blood.

Alternatively, a mediator or other intermediary may be seen slowly as an agent of the organisation, working to a predetermined hidden agenda. In such case, encouraging openness and a readiness to self challenge is likely to be a hopeless cause.

Send in the coaches

What is needed then is another form of intervention before any decision is taken to engage a mediator or other ADR specialist. Coaching is an obvious skill to bring into the mix at this point, although coaches need to be aware that they are not dealing with a "normal" client relationship in which there is a clear focus on achieving a realistic and positive outcome, and in which a coachee is ready to give their all to help the process succeed.

In fact, coaching may be expected to achieve quite limited objectives at this stage.

Primarily, a coach should aim to explore what really underpins an individual's state of mind and feeling, something which must result from the individual reflecting for themselves. In turn, the reality of the current situation may be put in a better perspective for the person who is embroiled in the dispute, and they may be more ready to appreciate the options available for them moving forward, be able to suggest their preferred ADR option (if appropriate) and to set realistic objectives for themselves.

Such matters may be covered in just one or two coaching sessions, providing a very much improved base from which an individual can face ADR, as well as providing an early indication of the likelihood of which form of ADR is most likely to achieve a resolution.

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Discussions may also help individual reflect on the part they will likely need to play for ADR to succeed, and so help qualify whether they are indeed ready to give this process their genuine commitment.

Of course, mediators will themselves typically spend a little time with each party ahead of a joint dialogue, and so should be able to ask similar questions with to qualify whether or not they are working with ready "clients". This may help and mediator know what challenges they may be facing, but if an organisation has already committed itself to mediation (or other form of ADR) -- as is usually be the case if a mediator is carrying out pre-session talks with the disputing parties -- then there will not normally be a break and viewpoint before a joint dialogue swings into action.



Lead us not into confrontation.
A readiness to engage in Alternative Dispute Resolution (ADR) shouldn't just be about avoiding the possibly punitive consequences of allowing a workplace dispute to escalate straight to litigation. But to avoid costly and unhelpful detours, care must be taken to ensure that the right course for ADR is followed.

What's more, there would not usually be obvious motivation for a mediator to suggest postponing mediation unless they might be financially compensated for their own lost time.

Overt conflicts of interest may not necessarily be at play, however most mediators -- as with any professional engaged by an organisation to undertake a particular task -- are most likely to want to satisfy a contract they have agreed with their client.

The value of involving another individual as a coach is not just that any possible conflicts of interest should be avoided, but that the "coachee" may be less suspicious about their motives, and so be more likely to express their honest views and emotions.

The question then remains: what should happen once these brief coaching sessions have taken place?

The content of conversations held between the coach and coachee should of course be kept confidential, however it would not be unreasonable for a coach to check whether an individual feels that mediation or some other form of intervention would be appropriate, having confirmed that they are ready to play their part in making it work. This outcome at least might be shared -- and of course if an individual has not reached this point, then it would be relevant to recommend against ADR (assuming, of course, that everyone

appreciates that this particular decision will need to be raised outside of the coaching conversation).

Individuals may suggest alternatives to mediation as a way of attempting to broker a conclusion to their dispute, or this may be proposed following feedback from a coach. For

example, if an individual is convinced that there is a legal case for their opponents to answer, then evaluative mediation or arbitration involving a legal specialist may be most appropriate. Similarly, further coaching, facilitative mediation or some combination of interventions may be suitable to moving forward.

Either way, whatever is proposed will be better informed than a decision to move straight to ADR, and therefore be offer most chance of success. Time, cost and energy can be better directed, and indeed in some cases, further intervention may be avoided altogether.

Taking a little time to qualify individuals' true expectations and commitments to a third party's formal intervention in dispute resolution must make sense for all parties involved.

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