

It makes sense to mediate

Marjorie Hurwitz Bremner of Berg Kaprow Lewis LLP explains the success of mediation in solving commercial and employment disputes

What is mediation?

The Centre for Effective Dispute Resolution (CEDR) defines mediation as “a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution”.

Mediation, or facilitation as it is sometimes called, is the most common form of ‘alternative dispute resolution’ (ADR), a body of dispute resolution techniques that avoid the expense and inflexibility of litigation, focusing instead on enabling the parties to achieve a better or similar result, with the minimum of direct and indirect cost.

An effective solution

A recent CEDR audit of the UK mediation market shows that it is growing strongly, with approximately 6,000 mainstream commercial and civil cases mediated in the last year – and this figure does not include workplace mediations or Ministry of Justice small claims mediations. Mediators report that around 75% of their cases settled ‘on the day’, with another 14% settling shortly afterwards, giving an aggregate settlement rate of 89%.

The annual value of cases mediated now stands at £5.1bn, an increase of £1bn

in the last three years. By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession will this year save the British economy around £1.4bn in wasted management time, damaged relationships, lost productivity and legal fees.

Such statistics make a powerful case for firms using mediation. The courts are pushing it too and legislation introduced in April 2009 repealing the Statutory Disputes Procedures actively encourages its use in settling workplace disputes.

Workplace mediation

Mediation can be tremendously effective in dealing with a range of issues in the workplace such as relationship breakdown, allegations of bullying and harassment, discrimination, personality clashes and communication problems. Compared with conventional methods of resolution, such as recourse to grievance and disciplinary hearings, a tribunal or litigation, mediation is far less procedural or adversarial and will almost always reduce delays, costs, stress and confrontation. It can be used to either avoid the formal disciplinary or grievance process, or even after litigation has commenced.

Irrespective of how skilled a director or internal HR manager is, it is often much

easier for an external mediator/facilitator who is completely uninvolved in a situation to be considered impartial by both parties and to bring a new perspective to a problem. In many cases, mediation can stop a difficult employee relations issue from escalating. It does not attempt to determine the rights and wrongs of the case, but identifies and focuses on real issues and creates ‘win/win’ options for resolution that satisfy the needs of both parties.

The vast majority of mediations are successful, but in the event that the mediation does not work, the parties would then revert to following the usual grievance and disciplinary procedures.

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Marjorie is an accredited CEDR mediator and qualified to mediate commercial and employment disputes. CEDR is a non-profit organisation that encourages and develops cost-effective dispute prevention and dispute resolution in commercial and public sector disputes and in civil litigation. Visit www.cedr.com.

Negotiate, mediate or arbitrate?

CEDR suggests a three-step approach to dispute resolution. Negotiate first. Where negotiations break down or parties are unable to agree a common solution, mediate. If it then becomes obvious that a judgement is needed, arbitrate or litigate. A mediator can often provide a new dimension to the negotiation process by:

- Restarting negotiations that have stalled when trust between the parties may also be low
- Bringing a fresh, neutral pair of eyes to an old problem. Conflict tends to narrow focus and entrench positions
- Taking a broader perspective and helping the parties to explore creative solutions, even in disputes where money is the only issue to be resolved
- Exploring and challenging the strengths and weaknesses of each party’s case in the safety of private meetings.

Arbitration and litigation provide a binding decision imposed by an independent third party. A party’s only recourse is appeal. Mediation, on the other hand, seeks to help parties achieve their own binding agreement on a mutually-acceptable

commercial and legal solution. When mediation fails to achieve a settlement, parties are free to explore additional dispute resolution processes, including arbitration or litigation.

