

## **Review of Seminar 3 – ‘Mediation and alternative dispute resolution – outcomes and impacts’**

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*This paper provides a summary and analysis of the key themes that emerged from the third seminar of the series held at Swansea University on the 14th February 2013. It is intended to inform, and provide a link to, the rest of the series. It is important to note that the contents reflect the views of the authors and not necessarily the views of those presenters and contributors referred to below.*

The seminar focussed on the growing body of research into mediation and alternative dispute resolution in the UK. While mediation is seen as effective in resolving certain types and disputes, key questions remain in relation to its broader impact on management practice, workplace relations and organisational culture. Therefore the seminar aimed to examine a number of key questions:

- *How can theory be used to provide key insights into the operation, application and impact of workplace mediation?*
- *To what extent do the experiences of disputants match the claims made for mediation?*
- *Can mediation have a transformational impact on management practice, workplace relations and organisational culture?*
- *What are the main barriers to embedding workplace mediation in the culture of conflict management?*
- *Can these barriers be overcome and, if so, how?*

### **1. Theoretical perspectives on workplace mediation**

It could be argued that existing academic debates around workplace mediation tend to be under-theorised, focussing primarily either on the potential benefits of mediation in terms of increasing the efficiency of dispute resolution, or the internal dynamics of the mediation process. In short, research on mediation has been typically empiricist. How mediation relates to broader workplace power relations and notions of organisational culture and change has received little attention.

The seminar examined two important contributions that, in different ways, attempt to fill this gap. Firstly Rory Ridley-Duff from Sheffield Hallam University . He discussed a theoretical framework (developed with Tony Bennett from the University of Central Lancashire ) that examined mediation in terms of classic perspectives of conflict – from writers such as Fox (1966) and Lukes (1974) as well as the nexus between individual and collective resistance discussed by Blyton and Turnbull (1986).

Importantly, Ridley-Duff discussed two key issues – the extent to which mediation undermines the ‘legitimate’ authority of managers to make decisions over conduct and capability and also the extent to which mediation can prevent the ‘democratic scrutiny’ or unfair treatment and other behaviours.

Crucially, he argued that facilitative and transformative mediation were underpinned by a radical perspective of conflict in which authority was removed from the employer and the state and placed in the hands of the disputant. From this standpoint, therefore, mediation represents a clear challenge to unitarist notions of conflict and a rejection of managerial prerogative. Interestingly, for a number of delegates, this approach clashed with the business case for mediation – indeed one delegate questioned whether organisations would be prepared to adopt mediation on this basis. However, Ridley-Duff argued that in offering a way through which workplace conflict was democratised, mediation offered particular benefits for organisations with an ethos based on mutuality and reciprocity.

Louise McArdle argued that there was a need to develop a conceptual approach which acknowledged the role of mediation in the antagonistic political processes through which organisational change was enacted. In particular she argued that traditional approaches centred almost entirely on structure and process and called for a focus on the social practices through which mediation was articulated by organisational actors. Consequently she used critical discourse analysis to examine a case study in which the introduction of in-house mediation had been central to significant changes in the employment relations and the culture of conflict management.

This approach allowed attention to be given to the different meanings ascribed to mediation by organisational actors – for example, for HR managers mediation was a threat to authority, while HR practitioners saw mediation as a possible solution to the ‘problem’ of conflict. Meanwhile trade union representatives initially rejected mediation as a deliberate attempt at incorporation and emasculation. Furthermore key to changing these attitudes and, in particular, that of the union was the development of a discourse of partnership which created a new meaning for mediation revolving around trust and informal social processes of resolution. McArdle concluded that the role played by mediation in transforming workplace relations was dependent on changing the ‘meaning’ of mediation within the wider employment relations discourse – this critical discourse analysis suggests that the meaning of mediation and therefore its influence is fluid and arguably transitory. As a result it cannot be simply ‘dropped in’ as a structural solution to problematic workplace relations.

## **2. Mediation – transforming conflict management?**

The question of the extent to which mediation can contribute to broader improvements in conflict management and employment relations was a central issue considered by the seminar. Academics and practitioners present, agreed that there was an emerging body of UK based evidence that pointed to the direct benefits of mediation compared with more conventional grievance procedures in terms of reduced costs (management and staff time and absence), enhancing the potential for early resolution and thus maintaining employment relationships. However, as we discuss in more detail below, Paul Latreille (University of Sheffield) and Peter Urwin (University of Westminster) made a persuasive argument for the need for more robust quantitative analysis of mediation outcomes and impacts.

Nonetheless, the government has made great play of the potential of mediation to ‘lead to a major and dramatic shift in the culture of employment relations’. Certainly a number of practitioner contributors supported this in broad terms, with Alex Ethymiades (Consensio), Katherine Graham (CMP Resolutions) and David Liddle (TCM Group) arguing that mediation could play a key part in

more integrated approaches to promoting early resolution and more consensual approaches to dispute handling.

Richard Saundry (UCLAN) discussed this issue in terms of a research programme funded by Acas which had examined conflict management within a number of large organisations. He claimed that there was evidence that the introduction of in-house mediation could have a positive 'upstream' effects. For example managers who were involved in mediation reported that it had influenced their approach to managing staff. The broader organisational impact was perhaps less clear – in some organisations mediation had a transformational impact while in others the effect was less pronounced. Saundry argued that mediation could play a profound role where conflict was managed by a small number of key actors – in such organisations, involving such individuals in mediation could not only change attitudes but build important social relationships. This was made more difficult by the devolution of conflict management to the line – dispersing responsibility for such issues. Consequently, Saundry suggested that there should perhaps be a great focus in promoting mediation skills as opposed to building new mediation structures.

### **3. Examining the experiences of participants**

Much of the research into the use of mediation in the UK has tended to focus on organisational perspectives. With the exception of Acas's own evaluation of its services, the voice and experiences of those who participate in mediation has not been explored in any depth. There are good reasons for this – notably, the issue of confidentiality and the problems raised by the exploration of sensitive and difficult personal issues. In this context, Tony Bennett from iROWE (UCLAN) set out the first findings from an Acas funded study of the views of disputants in mediation.

Interestingly, the research revealed that most disputes that found their way to mediation involved attempts to manage performance or capability which in turn had lead to complaints of bullying or unfair treatment. In this way they were characterised by a complex mix of employee grievances and potential disciplinary issues. Critically, mediation tended to be used as a last resort as opposed to an early intervention. This also reflected the experience of delegates – however, delegates also cautioned against using mediation too early as this could undermine the role of managers and lead to an escalation of the dispute in question.

Another key finding from the research related to the extent to which participants entered into mediation voluntarily. Bennett argued that many participants were reluctant to agree to mediation. Moreover, there was evidence that managers, in particular, felt implied pressure to take part, fearing that if they refused this could be held against them at a later date. However, the extent to which this shaped mediation outcomes was complex – much of the mediation literature argues that compulsion reduces commitment to, and engagement with, the process making resolution much more difficult to achieve. This issue was also debated by Katherine Graham of CMP Resolutions and David Liddle of TCM Group with the former arguing in favour of processes which required employees to attend mediation prior to entering formal procedures. Liddle disagreed with this approach maintaining that voluntarism was a key component of successful mediation. Bennett's research certainly suggested that forcing staff to take part could make the chances of success minimal – however he also explained that some respondents who had been initially reluctant were positive about their experiences.

Perhaps most importantly, Bennett's research provided key insights into mediation outcomes. Much of the evidence suggests that workplace mediation enjoys very high rates of settlement, however, little is known about the sustainability or durability of such agreements. In fact, while most of the mediations explored by Bennett had ended in agreement, this was sustained in only a small minority of cases. Furthermore, in others, mediation had not resulted in any substantive changes in behaviour or improvement in attitude.

At face value, this appeared to suggest that organisational claims over settlement rates masked a much more negative reality. However, as a number of delegates also argued, positive outcomes may be found even where there is no settlement. For example, even where there is no change in fundamental attitudes, mediation may simply find a way in which both parties can continue to work together and/or remain in employment. In addition, Bennett argued that even where respondents had failed to resolve their dispute – mediation had either enabled them to 'move on' or provided them with the confidence and strategies with which to deal with conflict more effectively – for example, victims of bullying and discrimination had felt empowered to challenge and confront unfair treatment without resorting to formal grievance procedures.

A key question in mediation research, as discussed above, is whether mediation has wider organisational benefits in enhancing managerial skills and improving the climate of employment relations. Bennett's results here were mixed – there were clear signs that those managers who took part in mediation developed new approaches to dealing with difficult issues and in particular became more aware of how their behaviour may be perceived by their staff. However, there was less evidence of broader organisational impacts. This could partly be explained by the fact that most of the mediations within the sample were provided by external mediators – however there was a general view among respondents that senior management had little interest in learning from or reviewing mediation outcomes as long as the dispute 'went away'. To this extent mediation was not used in a pro-active or strategic way.

#### **4. Key barriers and challenges**

The seminar also identified explored a number of barriers and challenges to the promotion and extension of workplace mediation. Both presenters and delegates highlighted the continuing problem of cost which was particularly a disincentive for small and medium sized enterprises (SMEs). In this respect, while the ethical arguments for mediation were seen as important, it was impossible not to engage with arguments over the business case. Practitioners within the audience reported that there was increased interest in mediation but whether this was converted into the use and implementation of mediation strategies was less clear. Paul Latreille (University of Sheffield) argued that one problem was a continuing lack of robust data that clearly demonstrated the benefits of mediation to the bottom line. While there were some useful estimates, more detailed research was needed. Richard Saundry (UCLAN) also argued that the wider organisational benefits of mediation could be opaque and difficult to quantify – for example while the cost advantages of resolving a dispute through mediation as opposed to litigation may be obvious, savings as a result of early informal resolution may be less apparent.

A number of speakers also highlighted continued resistance from key stakeholders to the use of mediation. Saundry argued that for many line managers, mediation represented an admittance of failure which could prompt internal criticism from superiors. Moreover, it was seen by some as

threat to their authority. Tony Bennett's interviews with managers who had been through the process shed an interesting light on this – there was particular concern from managers over the suitability of mediation to explore performance issues or managerial decisions over capability – as they felt that these were issues of managerial judgement as opposed to negotiable issues. More broadly, delegates argued that a lack of managerial confidence and capability remained a significant barrier to developing more effective approaches to conflict management.

In addition, there was discussion over the role of employee representatives – there was widespread support for the idea that the involvement of trade union and other representatives within in-house mediation schemes was important in generating wider organisational benefits and also in ensuring high levels of mediation usage. However, during discussion some delegates argued that many trade unions were unsure of mediation – indeed McArdle pointed out that unions can see mediation as not only undermining their representative role but as part of a more fundamental attempt to blunt their ability to defend members through conventional disciplinary and grievance procedures.

Furthermore there were concerns over the extent to which mediation was, or should be, seen as an earlier intervention in workplace conflict. There is little doubt that this is the view promulgated by government in the wake of the 2007 Gibbons Report. However, the seminar heard that the reality was somewhat different with mediation often seen by organisations as process of last resort used to deal with particularly complex and intractable problems. As Bennett's research, and also delegates to the seminar, confirmed, this was particularly the case with the use of externally contracted mediators – in contrast in house mediation capacity provided the potential for earlier involvement. Interestingly, a number of practitioners argued that while the passage of time often reduced the chances of a successful outcome that mediation should not be used in place of attempts by managers to 'nip issues in the bud' – in this way mediation should complement and enhance rather than replace managerial conflict resolution capacity.

Finally, there was a clear recognition that both winning organisational support for the development of mediation capacity and subsequently sustaining the operation of in-house mediation schemes was problematic, given commercial and operational priorities. For example, as Paul Latreille, pointed out, ensuring that mediators were able to practice and develop their skills was problematic. Richard Saundry argued that this reflected a more fundamental difficulty in that conflict management was seen as a transactional and not a strategic issue within many organisations – as a consequence mediation was not part of integrated approaches to minimising and resolving workplace disputes but was instead treated as an 'off-the shelf' solution for particular intractable (and potentially costly) disputes. Interestingly, mediation providers were more optimistic arguing that some organisations were beginning to introduce integrated conflict management systems in an attempt to avoid the costs and negative impact of formal approaches to workplace disputes.

## **5. The Policy Agenda**

To date, mediation has played a prominent position in the rhetoric of public policy although there has been relatively limited concrete action. The seminar examined two of these: the place of mediation in the Acas Code of Practice on Discipline and Grievance and also the establishment of a pilot scheme to establish two mediation networks in the Manchester and Cambridge areas.

In 2009, the revisions to the Acas Code of Practice placed a greater emphasis on early dispute resolution and for the first time introduced a reference to workplace mediation. Although this was limited to the foreword, it was nonetheless a significant step. Furthermore there is evidence (Rahim et al., 2011) that this change did trigger increased interest in workplace mediation and led some (larger) organisations to review their dispute resolution processes accordingly. In a discussion chaired by Andrew Wareing, Chief Operating Officer of Acas, delegates examined whether and how any further changes to the Code could enhance resolution through mediation.

Although delegates were broadly in favour of stimulating the uptake of mediation, there was some concern that introducing specific advice to use mediation, within a statutory code, could be problematic. In particular, it was argued that it could simply bypass line managers or simply absolve them of responsibility for seeking early and informal resolutions. Moreover, it was felt that the systematic use of mediation at an early point could escalate and inflame some situations which could be settled through informal discussion.

Some delegates therefore felt that any changes to the Code could be counter-productive – others, however argued that an exhortation to consider the use of mediation within the main body of the Code could provide a necessary nudge to organisations to look at mediation more seriously. Interestingly, earlier discussion within the seminar revolved around the impact of grievance procedures. In particular, David Liddle from TCM argued that the use of the term ‘grievance’ inevitably created an adversarial situation and that a shift towards the language of resolution was needed. Others suggested that there was ‘grievance’ procedures were important in providing individuals with a way of enforcing rights within the workplace – however Liddle was sceptical as to whether grievance procedures achieved this.

The seminar also heard from Nicola Cullen, Team Leader for Employment Tribunal Reform and Mediation in the Department of Business, Innovation and Skills (BIS) who provided an insight into the early stages of the BIS pilot mediation networks for SMEs. This sprang from the BIS consultation into dispute resolution that revealed significant support for the concept of mediation but also low levels of use among SMEs. The main barrier to uptake was the upfront cost of hiring external mediators. In addition, mediation within SMEs inevitably raises questions over impartiality. As a result, BIS decided to fund training for staff within SMEs who would then form part of a network of mediators who would provide mediation to other SMEs free of charge. Recruiting participants proved challenging – particularly given concerns over the amount of time that would need to be dedicated to the initiative. The project is still in its early stages however, BIS have been encouraged by the enthusiasm of those who have been trained and also by the potential to strategically train representatives from the CAB and organisations such as the Federation of Small Business (FSB) who in turn can promote and multiply interest in mediation among SMEs

## **6. Developing the research agenda**

As discussed above, one of the barriers to the promotion of mediation is the lack of robust quantitative evidence as to its impact. Peter Urwin, from the University of Westminster, discussed these issues. He pointed out that the lack of evidence is not simply a barrier to building the business case for mediation and ADR but also to winning government funding. The main problem with the existing evidence base is that while there are estimates of outcomes when mediation is used, there