

# Mediation Processes



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## Chapter outline

### Mediation Processes

- Agreement on a mediator
- Terms of Reference
- Skills of a good mediator
- Sample Mediation process
- Building trust
- Searching for common ground
- Agreeing Values and acceptable on-going behaviours
- Review of on-going relationships

## Introduction

Many organisations provide for the mediation of more difficult B&H claims that have not been amenable to resolution at the local level or the other processes outlined in the previous chapter. Some of these organisations train internal mediators and a particular mediator is usually agreed between the parties who have the disagreement. Alternatively those organisations which have not trained individuals as mediators or where issues are of a sufficiently difficult nature may well go outside to look for an experienced and skilled mediator.

In either of the above situations mediation should be seen as the first semi-formal approach to resolving the issues between the individuals. We say semi-formal insofar as once one has passed from the truly informal local stage one arrives at this stage where there is an increase in the degree of formality; however, this level of formality is nowhere near the formality of a full investigation, the subject of our next chapter.

When using an external mediator it is usual that the parties will also have to agree on the appointment of a particular individual in their case. Normal practice here is that organisations usually have access to a number of mediators and they propose she/he whom they regard as the most suitable for the particular case with each of the individuals hopefully subscribing their agreement.

Failing immediate agreement on the nominated mediator a consultation process would continue until a mediator agreeable to all sides would be appointed.

The terms of reference need to be agreed between the organisation and the mediator. This task is usually undertaken by the manager within the organisation charged with trying to bring the matter to a satisfactory conclusion. It could for example be the manager of the complainant or the respondent,

or alternatively it could be the HR Manager. The substantive task for such a person is to write to the mediator requesting them to mediate, delineating some of the parameters around the mediation and perhaps passing to the mediator relevant internal policies, such as the Dignity at Work Policy.

**Panel 7.1**

## **Skills of a good mediator**

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- Experienced in handling B&H mediations
- Good attending skills – focus, impartiality, caring and withholding judgement
- Strong listening skills
- Good questioning skills – consistent across all interviews
- Skilled in conflict diagnosis, analysis and resolution
- Good consensus building skills, including re-framing techniques
- Ability to look at the total picture and help the parties to do likewise

The next stage of the process should see the agreed Mediator sharing with the principals the process and procedures that he/she proposes to use. The mediator may be required to modify his/her normal process depending on particular nuances that exist in an individual case; in addition there may be some negotiation around the fringes to satisfy particular viewpoints about the process that may be held by either party.

In some situations it may be appropriate to provide a formal pre-mediation agreement that would include such items as roles, dispositions of the parties, process, confidentiality and clarity about nothing said at mediation being able to be raised in any court action.

In addition the ‘non-discussables’ or non-disclosables that are told to the mediator by either party in their first meeting – the pre-mediation meeting – should be agreed and adhered to throughout the process. A mediator upon hearing both sides, will make a determination on whether this dispute is mediatable or not and will withdraw in a situation where, if for example, they feel that either party is not fully committed to the process.

It is usual that the mediator will talk with each of the main characters in the dispute commencing with the claimant. The first task during this

consultation is to establish what is the unacceptable behaviour in the view of the complainant and how regularly this behaviour is occurring along with the resultant feelings within the claimant. The Mediator should be at pains to let the claimant clearly see that she/he fully understands the situation; he/she should put in place whatever checking mechanisms are available so as to ensure that the claimant is confident that their situation has been fully ‘heard’.

The mediator will then go through a similar process with the respondent again taking pains to clearly understand the respondent’s view of their behaviour towards the claimant.

In these meetings with both parties the Mediator should make strenuous efforts to build trust with the parties as this is one of the principal building blocks for a potential settlement. The disputing parties will develop this trust if the Mediator adopts a caring, understanding mode and clearly appears not to take sides in the listening part of his/her data gathering.

It is preferable that the mediator not ‘carry messages’ between claimant and respondent. Hopefully the mediator will be able to ultimately create a climate where each of these individuals will be able to address the issues at hand and their feelings during later

Panel 7.2

## Sample Mediation Process

- The mediator(s) will meet separately with both parties for pre-mediation meetings, gather a brief outline of the complaint and response, clarify the process and terms of engagement, explain the ground rules and other alternative approaches available to the parties should mediation not succeed
- It is important that parties understand that they are responsible for the solutions derived at in mediation and that coming to such solutions will be within their control, but will be facilitated by a skilled mediator
- The mediator should clarify what is confidential in the issues discussed to ensure that those issues are not transferred in discussions with the other party
- The mediator will then meet with both parties simultaneously so as to briefly outline the process that will be used for this mediation and to take any further questions of clarification concerning process
- The Mediator will then meet separately with the parties, listen to and fully understand their issues; he/she will provide opportunity to each individual to check that he has correctly heard their issues
- The Mediator will help the parties to clarify one another's issues to the extent that they can at least understand where the other person is coming from; this part of the process will initially involve individual meetings but may quickly/slowly get to clarifying these issues in a joint meeting between the Mediator and both parties.
- The parties, with the help of the Mediator, will attempt to identify some values and future behaviours that each would find acceptable from one another and hopefully move towards a 'solution' that builds on some common ground and is focussed on the way in which each of

the parties should treat one another in the weeks/months/years ahead

- If this future-oriented solution is mutually acceptable the parties would need to work with the Mediator to:
  - a** Anticipate roadblocks and find ways around same, and
  - b** Put in place the enabling conditions for the success of the new arrangements
- The parties would also need to put in place review mechanisms whereby they themselves could monitor progress with the outcomes above; some assistance may be required from the Mediator in the early phases of these reviews and from line management in the latter phases

**The above outline is just that, an outline. The parties would need to invest sufficient credibility in the mediator's experience and skill that they can accept that she/he may well deviate from the above if circumstances warrant such a move.**

face-to-face meetings rather than have the messages transmitted as it were by a messenger.

The next important phase for the mediator is to develop the bones of a way forward from what emerges, as it were, from the 'stories' of the complainant and the respondent. At these meetings (or later ones) the mediator is likely to propose some values to which both sides could subscribe and to develop these further into some specific behaviours that would give expression to these values. In so doing the mediator should look for behaviours around particular flash points that may have been occurring between the individuals. We have earlier shown a sample set of such Values and Behaviours in Panel 5.2 within Chapter 5.

Once the mediator has achieved his/her own clarity about these values and behaviours it will be necessary to perhaps initially discuss them with each of the parties. In other cases he/she may decide that the first airing of these values/behaviours will be with both parties present. The particular advantage of doing it individually is that the mediator is able to gauge perhaps more accurately how both individuals will respond to these values beyond the meeting when they are back in the real world within the organisation.

If the mediator has discussed these values separately and has seen a clear understanding of them within the two individuals and, perhaps more importantly, a commitment to living these values and behaviours in their daily interaction at work then it may be close to ‘sign-up’ time – the time when both parties commit fully to working together with full dignity and respect being afforded by both sides.

Most competent mediators will also establish some review mechanism to monitor progress in the weeks/months ahead. It is not unusual for one or two of these review meetings to be chaired by the mediator who would want to hear from each individual how the intervening period has gone. This review process would then be passed back to the relevant line manager who would carry out subsequent periodic reviews in a supportive manner.

Following several successful reviews it would be safe to say that the mediation would appear to have been successful. However sometimes events can occur that push the settlement off the rails. In the case of any such flare-up it is important to get the parties back talking directly about the issues or back into mediation.

In some situations either prior to mediation or post a failed mediation it may be necessary to consider a formal Investigation and it is to this process that we turn in the next Chapter.

## Summary of Chapter 7

- Mediation should be the first recourse after local resolution efforts – it offers the best semi-formal opportunity for progress
- The mediator to be used is usually agreed by the parties to the dispute as in his/her terms of reference
- The mediator should ensure that the process to be used is agreed at the first meeting
- The mediator talks separately with each side so as to understand each set of issues
- Mediators should strive to build trust and not ‘carry messages’ from one party to the other
- The mediator should then look for common ground where he/she can build towards improved behaviour between the parties
- Mediator should strive to agree values/behaviours for the on-going relationship of the parties
- A monitoring and review mechanism should be agreed prior to the end of the mediation