

An Unbalanced Workplace - Discrimination and Equality Issues in Workplace Mediation

By *Andrew Fiddy and Fiona Colquhoun*

Disputes involving allegations of unlawful discrimination and the topics of prejudice and equality are arguably some of the most difficult, complex and sensitive to deal with and affect many organisations and employees in one way or another. The third event in CEDR's Mediation Matters series focused on how mediation could be used to manage and resolve workplace and employment disputes involving allegations or complaints of discrimination chaired by CEDR Director and Chambers Mediator Fiona Colquhoun. The panel included Chula Rupasinha, leading mediator and former Superintendent of the Metropolitan Police; Oliver Jones, Managing Associate at Simmons & Simmons; Deirdre Knox, Head of Employment at King; and Dr Zaza Johnson Elsheikh, CEDR Accredited Mediator.

What is the issue and how are our workplaces unbalanced?

The issue of discrimination is complex. While, for practical reasons, we all use social categories when we interact, sometimes the way people categorise one another can be influenced by prejudice. Prejudice is a bias that devalues people because of their perceived membership of a social group and can manifest itself in different forms which can result in marginalisation, victimisation and discrimination (Equality and Human Rights Commission). In the workplace, prejudice can appear in many forms. It can be direct and explicit but are more often indirect, subtle or unconscious, caused by misunderstanding, ignorance and poor judgement, either in language or behaviour.

While undoubtedly progress has been made in relation to protecting minority groups from unfair and unjust treatment, there is clearly a long way still to go. The 2010 Equality Act merged 116 separate pieces of legislation tackling discrimination in the workplace and in wider society. The Act makes it unlawful to discriminate against someone because of one or more protected characteristics including: age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex (gender) and sexual orientation.

While acknowledging Employment Tribunal statistics are not always the best measure, especially due to the recently overturned decision regarding fees, between 1990 and 2010 the number of claims increased 500% when they hit an all-time high of 240,000. In 2012-13, the last full year before the controversial Employment Tribunal fees were introduced, there were approximately 37,000 discrimination claims (with over 86,000 claims if unfair dismissal claims are included) shows that the issue is a serious one.

Ultimately, it's often about behaviours

Discrimination allegations and claims can sometimes be particularly challenging as they are invariably about 'behaviours' and the impact one, or a number of, individual(s) behaviours have on others. Despite the progress, there remain serious cases of discrimination in all of the protected characteristics. As we write, the recent revelations in Westminster concerning allegations of workplace sexual harassment and misconduct, indicate that attitudes and actions of certain politicians towards minorities and those with lesser power (women in particular) may have been part of the culture, and become 'acceptable' over time. Most people would agree that the response now needs to be proportionate. We would suggest that the less serious incidents need to be resolved through a 'shift in dialogue'; whilst those of a more serious nature need to proceed through fair and pragmatic disciplinary (and criminal) processes.

Time and timing is often very relevant to discrimination allegations. Mediation can deal with issues in 'real time'; fast and quickly, facilitating conversations before matters become too frustrating, misunderstood and embellished. Contrast this with tensions and stress growing, a breakdown in relationships and the manifestation of extreme behaviours, often very defensive; and lives and careers are more likely to be damaged and in some instances destroyed.

Case Study: The Disability Case Offering Choice

This dispute was between a dyslexic Sales Manager and his Senior Manager. The mediation helped the organisation understand the Sales Manager's disability and the impact on his work. Although the

organisation had already put in place some reasonable adjustments, they had not understood how difficult it was for the Sales Manager to undertake some daily reconciliations. He, in turn, found it difficult to explain the impact of his disability to his colleagues.

The mediation allowed the individual to make choices which, in this case, for example, was whether to exit the organisation and start afresh elsewhere (as this coincided with an office relocation) or to establish a different modus operandi where the individual had more support to focus on the issues he found very difficult.

As a result of very open discussions, the Sales Manager worked in the company with revised adjustments in place for the next 3 months, which restored his self-worth and esteem, and then chose to work with the company on an agreed exit package which helped him manage his career and find alternative employment nearer his home.

Case Study: Very Sensitive Sexual Incident

This was a very sensitive case between a male and a female senior director peers concerning a sexual incident after a Christmas party. The female director did not want to press any sort of discrimination or criminal charges as she felt she was equally responsible for the situation, but it had resulted in her being very stressed and depressed. Mediation allowed for there to be reconciliation between the two colleagues, an agreed framework and working relationship re-established (albeit with a change of office location) and sustained.

Case Study: Intra-department Discrimination Dispute Finds Practical Solution

A dispute arose between the deputy head of department and the head of department of a further education institution. The deputy head complained of bullying, disability and race discrimination by the head. Internal investigations found that the deputy head had been poorly managed but that the behaviour did not warrant disciplinary action against the head of department, who was to continue as the line manager for the deputy.

Subsequently, the deputy head took a number of periods of sick leave and submitted a series of applications to the employment tribunal for race discrimination, victimisation and disability discrimination. A 25 day hearing was due to take place and both parties agreed to mediation. The mediator contacted the parties' legal representatives prior to the mediation session and it was agreed that the mediation would not proceed with the usual joint opening session, as the relationship between the parties was very strained.

After discussions on the day with the mediator, the parties agreed to spend the day focussing on a practical and working agreement. With time and reflection, the deputy head accepted that the internal investigations had been genuinely and fairly dealt with by the organisation and felt able to tell the mediator privately that she did not wish to return to work.

Although the mediator was not able to disclose this confidential discussion and continued to run options in parallel, it was helpful to know that both parties were on common ground. After some lengthy discussions with plenty of reality testing and reflection for each side, which negotiations progressed and a settlement agreement was reached.

The purpose of mediation and why it matters

It is clear that mediation has had a significant and unique role in employment and workplace dispute resolution. Mediation can provide a process and space for parties to understand the nature of an allegation in a confidential environment. This has the benefit of allowing the parties to voice the impact that certain actions may have had on them and potentially others. As one of the panellists from our recent event highlighted, the benefit of the mediation process is that it allows for parties to revisit their risk assessments through reality testing positions, assumptions and behaviour, in order to develop a new understanding and awareness of the situation.

This time to explore and reflect has the benefit of encouraging progress towards a workable settlement, if both parties think it appropriate, or an alternative to a negotiated agreement where one or both parties believe that allegations are better litigated. Bringing or defending claims in Employment Tribunals, both before and after the introduction of fees, is rarely an inexpensive exercise, with costs only being recoverable in certain circumstances. Mediation offers an opportunity for legal costs to be minimised whilst also limiting adverse media exposure, potentially damaging for both the parties and witnesses.

Furthermore, an early mediation process will offer to the employer an opportunity to understand pitfalls in its organisational culture, and reflect on working practices which may have contributed to and exacerbated the situation. Mediation can become a tool to create a culture of dialogue, reducing the number of escalated discrimination claims.

Adapting the mediation process

There are various considerations that should be taken into account when managing and mediating disputes with discrimination and equality issues. Who should be used to mediate? Is a process using an internal mediator or an external mediator more appropriate? Which skills and experience does the mediator require? Where should the mediation take place? Should the mediation be held in their organisation's premises or is a neutral venue appropriate? When should the mediation take place? The answer to all of these questions is "it depends."

The flexibility of the mediation process allows adaption on location, timing of the day when sessions take place, when breaks are taken and how parties work together. There may be a need to establish a framework for how the parties convene and ground-rules for how they interact. One of the strengths of mediation is that the parties have a major input into the process and complete control over the final decision. The parties control the level of their participation and direction and pace of mediation.

What are the specific challenges for the mediator when dealing with Discrimination and Equality issues?

In disputes concerning discrimination and equality issues, there are often complex group dynamics that the mediator may need to be alive to. One of those is power imbalances, which could be due to a party's gender, race, age and so forth, which could be inherent in the claim itself. While mediator intervention is not always necessarily needed when there are power imbalances between the parties, as there is so often, it is required when it affects a party's ability to self-determination, a cornerstone of the mediation process.

In this instance, the mediator needs to firstly recognise the dynamic and address this challenge if he or she believes self-determination may be at risk (Rick Voyles, 2004). There are various ways in which a mediator can maintain their impartiality while ensuring that power imbalances don't compromise party self-determination. This can be achieved through managing a process whereby parties can be heard and are able to think through all of their options. An example of an intervention technique is through controlling the tempo of discussions, encouraging everyone to participate and using a range of questions and other active listening skills for understanding, expanding, probing and challenging to encourage decision-making.

The mediator however, perhaps ironically, needs to manage the perception of bias in their own particular style and behaviour. To safeguard the integrity of the process, they need to be sensitive to the specific issue at hand, to the parties' history and needs, but also to their own preconceptions.

In conclusion

This passed Mediation Matters event raised a number of interesting questions and issues from both the panel and the participants and far more than are briefly covered in this piece. However, we were left

with the firm belief that it is very important and necessary for organisations to embrace dialogue-based processes, such as mediation, to actively manage tensions that can arise from difference, to benefit their workplaces but also to encourage an open and diverse society.