Conflict Resolution and Mediation Within the Workplace

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Workplace mediation is one means of resolving disputes within the workplace. "Disputes are usually the most visible evidence of a conflict; they are the by-product of conflict."[1] And the aim of dispute resolution is to resolve, not only the particular dispute, but also the underlying conflict which gave rise to the dispute.

1. Conflict in the Workplace

Conflict is "the process that begins when an individual or group feels negatively affected by another person or group".[2] Certainly in the majority of cases in the workplace a conflict is first identified as such when an employee believes his or her position to be under attack or that it is being interfered with. The concept of "conflict" is wide enough to deal with issues where there is a perceived future threat to an employee. But, if an appropriate system is in place, it should be easier to address and deal with a conflict whilst it is still at this "anticipatory" stage before it becomes critical. This is essential "dispute prevention" within the workplace, the precursor stage before dispute resolution.[3]

The types of conflict between individual employees are manifold. Constantino and Merchant set out a long list of manifestations of organisational conflict which fills over a page in Ch.1 of their book.[4] The types of situation evidencing conflict are categorised into a number of broad groups: disputes, competition, sabotage, inefficiency, low morale and withholding knowledge. Conflict, of course, is not all negative. Some types of conflict can be very positive—such as competition between employees or departments. Workplace mediation is concerned with situations where the conflicts between individual employees are negative and damaging.

Conflicts are generally either between individual employees at the same level or between subordinates and supervisors. In their study Bergmann and Volkema found that in the area of conflict between co-workers about 61 per cent of the issues involve co-workers not carrying their fair share of the workload, personalities, different work ethics, downgrading co-workers and goal conflict.[5] Where the conflicts are between subordinates and supervisors, 62 per cent of these conflicts result from issues concerning goal conflict, rejection of employee input, vague task assignments, unfair performance evaluations, downgrading co-workers, bad work scheduling, unrealistic workloads and misuse of power. It takes little imagination to feed all these manifestations of conflict into the Constantino and Merchant categories. To both disputes between co-workers and those between subordinate and

[1] Cathy A. Costantino and Christina Sickles Merchant, *Designing Conflict Management Systems: How Organizations and Individuals Respond to Conflict* (San Francisco: Jossey-Bass Publishers, 1996), p.6.

[2] K.W. Thomas, "Conflict and negotiation processes in organisations" in M.D. Dunnette and L.M. Hough (eds), *Handbook of Industrial and Organisational Psychology*, Vol.3, 2nd edn (Palo Alto, CA: Consulting Psychologists Press, 1992), pp.651–717.

[3] See F. Glasl, *Konfliktmanagement: Ein Handbuch für Führungskräfte, Beraterinnen und Berater*, 6th edn (Bern: Verlag, 2004), pp.236 and 237, where the author looks at the progression of the stages from dispute prevention to dispute resolution.

[4] Cathy A. Costantino and Christina Sickles Merchant, *Designing Conflict Management Systems: How Organizations and Individuals Respond to Conflict* (San Francisco: Jossey-Bass Publishers, 1996), p.6.

[5] T.J. Bergmann and R.J. Volkema, "Understanding and Managing Interpersonal Conflict at Work: Its Issues, Interactive Processes, and Consequences" in M.A. Rahim (ed.), *Managing Conflict: An Interdisciplinary Approach* (New York: Praeger Publishers, 1989), pp.7–19.

supervisor, I would add as major causes of workplace conflict: perceived bullying, and discrimination either by co-workers or supervisors, or indeed in some cases by subordinates.

It has been suggested that individuals must transfer interpersonal conflict into a dispute for it to become an actionable event.[6] This, in turn requires that there be "naming", "blaming" and "claiming", the essential elements of a dispute.[7] One of the difficulties is that, as Bergmann and Volkema[8] observe, an employee is more likely to talk to a supervisor where there is conflict with a supervisor; thus taking the conflict on to the "claiming" stage. But Bergmann and Volkema contrast this with the more likely response of an employee to conflict with a co-worker, which is avoidance, i.e. the employee will stop talking to the co-worker.[9] In these latter cases, whilst there is clearly naming and blaming, the employee is unable to give voice to the "claiming" stage at which the conflict is ultimately crystallised into a "dispute". But clearly it is important that a conflict which is even at this inchoate stage be resolved. This is especially so since the typical avoidance response to conflicts with co-workers brings with it other issues for the organisation such as a reluctance to work, bad feelings within a department and a lower work rate.[10] This is inevitably so. Where the other employees in a department are aware of the conflict they will tend to take sides. Where they are unaware of it they may blame the grievant (who may appear to have withdrawn from the general employee group); such a situation is likely to make the conflict even greater. Clearly it is essential for corporate well-being, as well as for individual well-being, that conflicts be sought out and resolved at the earliest possible stage, before positions become entrenched.

Unresolved conflict leads to "enhanced escalation of the problem in the longer run".[11] Baron points to a further problem which is that those with unresolved conflicts may also suffer from "hostile attribution bias"—seeing any ambiguous actions by the other party to the conflict as being hostile towards themselves.[12] I would extend this to say that a grievant employee in such a situation is also likely to extend that "hostile attribution bias" to perceive any ambiguous actions by other employees within the group as appearing to support the person with whom the employee has a grievance. So it is essential to try to identify and to resolve conflicts within the workplace as early as possible.

2. On the Lookout for Conflict

The way around the "avoidance" type of reaction to conflict is to try to make supervisors aware of, and be on the lookout for, potential conflict in their departments. Does an apparent frostiness between two employees show an underlying issue or is it just a temporary lapse? Does the fact that an employee is eating lunch alone signal that there is an issue with colleagues or just that he or she has a bit of a hangover? Avoidance, by employees who consider themselves subject to conflict, is noted as being the least overt way of enacting conflict. It may, therefore, take some time before other members of the team, or even the

[6] T.J. Bergmann and R.J. Volkema, "Understanding and Managing Interpersonal Conflict at Work: Its Issues, Interactive Processes, and Consequences" in M.A. Rahim (ed.), *Managing Conflict: An Interdisciplinary Approach* (New York: Praeger Publishers, 1989), pp.7–19. And see Sandra E. Gleason (ed.), *Workplace Dispute Resolution: Directions for the 21st Century* (East Lansing: Michigan State University Press, 1997), p.4.

[7] W.L.F. Felsteiner, R.L. Abel and A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming" (1980–81) 15 *Law and Society Review* 631.

[8] T.J. Bergmann and R.J. Volkema, "Understanding and Managing Interpersonal Conflict at Work: Its Issues, Interactive Processes, and Consequences" in M.A. Rahim (ed.), *Managing Conflict: An Interdisciplinary Approach* (New York: Praeger Publishers, 1989), pp.7–19.

[9] Sandra E. Gleason (ed.) *Workplace Dispute Resolution: Directions for the 21st Century* (East Lansing: Michigan State University Press, 1997), p.2.

[10] Christine Pearson and C.L. Porath, "On the Nature, Consequences and Remedies of Workplace Incivility: No Time for 'Nice'? Think Again" (2005) 19 *Academy of Management Executive* 1. Although this article deals with incivility in the workplace the effects are the same for all types of avoidance behaviour.

[11] J.L. Hocker and W.W. Wilmott, *Interpersonal Conflict* (Dubuque, IA: William C. Brown Publishers, 1991).

[12] R.M. Baron, "Positive Effects of Conflict: Insights from Social Cognition" in Carsten K.W. De Dreu and Evert Van de Vliert (eds), *Using Conflict in Organizations* (London: Sage Publications, 1997), Ch.12.

other parties to the conflict, realise that there is a conflict.[13] Sorting things out at an early stage is both helpful and important. As things escalate, any solution becomes more difficult, more structured, more time consuming, more expensive and less attainable. Also, inevitably, the "incidental" damage within a department and in working relationships which are touched by the conflict, although they are not directly part of it, will become greater the longer the conflict remains unresolved.

Being able to resolve issues at an early stage depends in part on supervisors being trained to spot and deal with the signs of conflict. It also depends on the employer providing employees with a forum and/or a process for interaction and conflict resolution which is open to them. As Sandra Gleason points out, the early stage:

> "is the stage in which the dispute remains closest to the parties and therefore is relatively easy to resolve. It has the potential to be resolved by the parties involved, perhaps aided by some objective or neutral person such as an ombudsman of the employer."[14]

In many modern organisations supervisors and managers are trained to be on the lookout for situations of conflict. Some organisations may also have counsellors, ombudsmen or other designated employees who are there to try to help resolve conflict at an early stage.

Glasl's *Conflict Escalation Theory and Hybrids*[15] shows the way in which disputes progress from the stage of "dispute prevention" to "dispute resolution". The importance of early dispute resolution is also well illustrated by the Feuille and Chachere "continuum of dispute stages".[16] At one end of the continuum is the dispute that begins as an interpersonal conflict between two employees and is transformed into an actionable event, e.g. harassment by a co-worker. At this stage the dispute is closest to the parties and would therefore be relatively easy for the parties themselves to resolve, "perhaps aided by some objective or neutral person such as an ombudsman of the employer".[17] The other end of the continuum can be at the point of litigation.[18] The difficulty is that a dispute, once it becomes such, can progress away from its origins at a considerable pace in the sense that many other employees may become involved in it quite quickly. After all, most people spend the majority of their waking hours at work, certainly during the week; and a dispute between co-workers will often be "good gossip" to while away some of those hours.

Where dispute prevention procedures find that there is a conflict but fail to resolve it, it is important for the organisation to have a procedure set up so that employees who have reached the "claiming" stage can have their concerns dealt with as quickly as possible before the grievant's beliefs become case hardened and before others within the department or workplace get drawn into the dispute.

It is at this stage that workplace mediation processes come into their own. By the time the "claiming" stage is reached the alternative, for many employees, will be formal legal action.

[13] Carsten K.W. De Dreu and Evert Van de Vliert (eds), *Using Conflict in Organizations* (London: Sage Publications, 1997), p.15.

[14] Sandra E. Gleason (ed.), *Workplace Dispute Resolution: Directions for the 21st Century* (East Lansing: Michigan State University Press, 1997), p.4.

[15] See F. Glasl, *Konfliktmanagement: Ein Handbuch für Führungskräfte, Beraterinnen und Berater*, 6th edn (Bern: Verlag, 2004), pp.236 and 237.

[16] R. Feuille and D.R. Chachere, "Looking Fair or Being Fair: Remedial Voice Procedures in Non-union Workplaces" (1995) 21 *Journal of Management* 27.

[17] R. Feuille and D.R. Chachere, "Looking Fair or Being Fair: Remedial Voice Procedures in Non-union Workplaces" (1995) 21 *Journal of Management* 27.

[18] S.E. Gleason, "The Decision to File a Sex Discrimination Complaint in the Federal Government: The Benefits and Costs of 'voice'", *Proceedings of the 36th Annual Meeting of the Industrial Relations Research Association*, San Francisco (December 28–30, 1983), pp.189–197. See also Sandra E. Gleason (ed.), *Workplace Dispute Resolution: Directions for the 21st Century* (East Lansing: Michigan State University Press, 1997), pp.4 and 5.

3. "Conflict is Inevitable, but Combat is Optional"[19]: the Case for Mediation

Mediation is a private process

The privacy of mediation is important from the point of view both of the company and of the parties. Having a procedure in place under which the parties agree not to take any further action, including publicising the situation whether inside or outside the company, until the mediation has been completed is an essential part of trying to contain the dispute until mediation has been given a chance to resolve the issues. If the issues have already received publicity internally within the company it may be important that the parties agree to a statement being put out to relevant employees to the effect that:

- the company has invited a mediator to help resolve the issues;
- the parties have agreed to deal with the matter in this way; and
- the parties have asked that the issues should be kept confidential and should not be discussed outside the process to which they have agreed until that process is concluded.

The most important consideration at this initial stage is to make sure that the dispute is contained. Getting the parties to agree to deal with the matter privately is, in my view, the best way of helping a company to pull the dispute back, in Glasl's terms, into the "dispute prevention" area; or in Feuille and Chachere's terms to the proximal end of the continuum of dispute stages where the matter can be settled between the parties with "a little help" from a mediator.

Allan Stitt talks about conflicts concerning assets which "are losing their value over time".[20] He gives the example of a dispute over the ownership of fruit; unless the matter is dealt with swiftly or there is an agreement as to how to deal with the fruit in the interim, the fruit will become worthless. In terms of what happens to the fruit while the dispute is under way he suggests, "[t]he fruit … could be sold and the money put into trust pending resolution of the dispute".[21] In employment cases too it is important that the company has an eye to the main issue which is not merely the dispute in hand, but also the damage, potential and actual, to employee relations and possibly to its public relations if the issues are discussed within the company or made public. One can, for example, see that a discrimination allegation which becomes public could be very damaging to a company's external reputation, as well as leading to polarisation of employees' loyalties (to one or other of the disputants) within the company.

One of the advantages of the privacy of mediation is that the terms of the final mediated agreement can specify what the workforce will be told. (The workforce may well be told no more than that there has been an amicable resolution of the situation.) This, of course, will be a matter of negotiation and agreement between the parties.

The privacy of mediation also allows the parties to deal with the matter without having to sway work colleagues to their side of the dispute. By the time a conflict develops into a dispute, views are polarised. In some cases one party will be right and the other wrong. In many cases, however, there will simply have been a difference in interpretation or understanding of a situation by each of the disputants. The privacy of mediation gives the parties an opportunity to look at the issues with an eye to a constructive resolution rather than concentrating on the attribution of fault or blame. Where employees, or indeed anyone else, needs in any public way to defend their position, views tend to become

[19] A much quoted statement by Max Lucado (US author and preacher).

[20] Allan J. Stitt, *Alternative Dispute Resolution for Organizations: How to Design a System for Effective Conflict Resolution* (New York: John Wiley & Sons, 2008), p.77.

[21] Allan J. Stitt, *Alternative Dispute Resolution for Organizations: How to Design a System for Effective Conflict Resolution* (New York: John Wiley & Sons, 2008), pp.77 and 78.

entrenched—with concentration by the parties and their followers on arguments which sustain the views of that party. The mediation process allows both sides to look at the issues in a less divisive way, by concentrating on the potential solutions rather than the issues that gave rise to the dispute. Where mediation is used, because the matter is being dealt with privately the parties will not feel the need to draw in other employees or to get them to take sides. There will also be no fall-out at the other end of the mediation process by one or other employee "losing face". The solution, as well as the mediation, will be private to the parties.

The solution in mediation is in the hands of the parties

Since the solution is in the hands of the parties things like apologies, which are not available as a legal remedy, might be asked for and given. The parties are free to arrive at a solution which will improve their working relationship and potentially the working relationships between others in the company too. In some cases parties will agree that if certain processes had been in place, their conflict would have been manageable and managed at a much earlier stage—the dispute prevention stage rather than the dispute resolution stage. In such cases, subject to the agreement of the company, the mediation process may help to establish procedures which will, in turn, make it more likely that future similar situations can be controlled at an earlier stage.

One of the important aspects of the solution being in the hands of the parties is that the parties can also agree on the terms of a statement to be given to work colleagues regarding the dispute and its resolution. This means that rather than there being rumours about what has happened, there can be an agreed statement. This, in turn, can defuse the situation from the point of view of other employees and reduce the risk of further sympathetic action by other employees.

The success rate of mediation

"Obviously one of the most striking advantages of mediation is its success rate. For cases that go to voluntary mediation, upward of 70–80% settle."[22] The success rate of mediation is clearly an important consideration from the point of view of both the disputant employees and the company. Neither the parties nor the company would generally want to embark on a process which is unlikely to lead to a conclusion of the dispute.

The cost of litigation

Not every case that fails to find a resolution by mediation will necessarily end up in litigation, but many will. The costs of litigation are almost invariably higher than those of mediation. I say "almost invariably", but I cannot think of any case where it would have been cheaper in terms of fee costs to litigate rather than mediate—other perhaps than in those cases where mediation fails.[23] But even where mediation fails, the mediation process can help to narrow the issues between the parties and thus help to reduce the costs ultimately incurred in litigation. As Lightman J. noted in *Hirst v Leeming*,[24] "the mediation process itself … may produce a recognition of the strengths and weaknesses by each party of his own case and of that of his opponent".[25] I have acted in mediations where the issues have only become clear during the mediation process itself. Clarification of the issues in this way may well

[22] Allan J. Stitt, *Mediation: A Practical Guide* (London and New York: Cavendish Publishing, 2004), p.7; see also M.S. Gillie, "Voluntary Mediation" (1990) 26(10) *Trial* 58.

[23] Even where mediation fails, of course, the overall high rate of success and low costs of mediation mean that for organisations that have a number of disputes over time, the costs of any "failed" mediation will be far outweighed by the savings from the successful ones.

[24] *Hirst v Leeming* [2001] EWHC 1051; [2003] 1 Lloyd's Rep. 379.

[25] *Hirst v Leeming* [2001] EWHC 1051; [2003] 1 Lloyd's Rep. 379 at 381.

mean that even an unsuccessful mediation will pay for itself by leading to a significant reduction in the costs of the litigation that follows.

When we look at "the costs of litigation" in an employment matter, it must be remembered that these costs include not only lawyers' and other professionals' fees, but also the time costs of all the employees who are involved in the litigation. These will include both the salaries and costs of witnesses and other employees in the company who are required to spend time tracking down paperwork and other evidence for disclosure and the costs of instructing lawyers. A further consideration is the loss of productivity brought about by time wasted by employees discussing the issues and the bad morale brought about by people taking sides. So the headline costs of litigation, the lawyers' fees, are generally just the tip of the iceberg. An empirical exercise collected data for three years, from 1995 to 1998, from 430 US companies. These companies estimated that altogether the use of mediation had saved them about $65 million during this period.[26]

Speed of mediation

The next essential matter in employment cases is that the issues are resolved quickly. A situation which is unresolved will fester. Mediation can be set up very quickly.[27]

The more serious an issue in the employment context, the more important it is that it is dealt with quickly so that the remainder of the workforce or the work group do not become involved and/or take sides. It is not just the speed of access to the mediation itself which is important here, but also the speed at which a solution can be delivered by mediation—assuming an agreement is reached. Indeed, 89.2 per cent of the US companies interviewed in the 1998 survey referred to above suggested that the use of ADR led to significant cost savings and had a beneficial impact by lessening the amount of employees' time spent on dealing with disputes rather than doing their jobs.[28] In some cases the direct cost saving element of a speedy resolution may just be a nice bonus. The primary consideration will often be to prevent other employees from becoming embroiled (or further embroiled) in the issue, to prevent the bad feeling and low morale which can accompany such issues.

Neutrality and independence

One of the benefits which mediation can provide is the use of an independent, impartial and neutral person to help the parties to resolve their dispute. There is some argument that the best way to ensure that the mediator is independent, impartial and neutral is to use external rather than internal mediators.

As with any other dispute resolution process, it is essential that the parties have faith in it, its neutrality, fairness and its independence. I am sure that many, if not all internal mediators would consider themselves to be neutral and impartial. The difficulty is that they are not independent. It is a principle of natural justice that any decision-maker must not only be neutral and independent, but be seen to be neutral and independent. Of course mediators are not "decision-makers", but nonetheless they are in a position which is not dissimilar in terms of the perceived need for neutrality and independence. Indeed, it is a fundamental term of any mediation agreement that the mediator is "independent, impartial and neutral". It is also a general term of all mediation agreements that mediators must disclose any connection which would detract from their neutrality. This includes informing the parties if any such connection comes to light during the course of the mediation. So the

[26] CPR Institute for Dispute Resolution (2000) 18(8) *Alternatives* 148.

[27] By comparison even an employment tribunal claim may take many months to get to a hearing.

[28] Results of a survey conducted by Cornell University in co-operation with PricewaterhouseCoopers LLP, USA in 1998. See also D. Lipsky and R. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (Ithaca, NY: Institute on Conflict Resolution, 1998), p.17ff and K.A. Slaikeu and R. Hasson, *Controlling the Costs of Conflict* (San Francisco: Jossey-Bass Publishers, 1998), p.34ff.

need for both actual and perceived impartiality in a mediator is very much akin to the requirement for actual and perceived impartiality in a decision-maker. Whether someone is independent in this sense is measured against the yardstick of "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [person] was biased".[29] If the observer would conclude that the person was biased then that person is not "independent, impartial and neutral". An employee may well take the view that another employee of the company, who is put forward as a mediator, is not neutral. The mediator employee will certainly not be seen to be independent. Some internal mediation processes even allow for complete abuses of what would be seen as these fundamental requirements in mediation. I was horrified to find, for example, that in one large organisation, which had internal mediators, the system provided that the company's management would be told about issues which arose at mediation if they might amount to a breach of contract. The case with which I was involved concerned discrimination. For the employee against whom the case was brought to admit that he had done anything approaching discrimination would, of course, have been a breach of his employment contract and, hence, would have been reported to the organisation. This was not the most helpful of procedures for dispute resolution!

By contrast, the impact of having someone involved in the process as mediator who is perceived by the parties to be neutral and independent is well illustrated by the following observation by Folger, Stutman and Poole[30]:

> "[J]udgments about procedural justice depend on how outcomes are determined rather than the specific outcomes themselves. In many cases, procedural justice is more important than the actual distribution of outcomes. Parties will sometimes accept great disparities in outcomes if they believe that the allocation was fairly made."[31]

Although a mediator is not "allocating outcomes" as such, the same acceptance of disparities in the outcome in a settlement is likely if the mediator is seen to be independent. It has also been noted that where an organisation decides that a particular type of dispute resolution mechanism is appropriate—here mediation—"disputants are somewhat less resistant as long as they retain a degree of control over the selection of a neutral".[32] Those they choose will generally be people who are external to the company who will be seen as having "the independence necessary to gain the [trust of] disputants … who may not perceive other employees as neutral, impartial or objective".[33] Where an organisation insisted that anything which could be a breach of the employee's contract had to be reported to it, unsurprisingly, disputants would feel unable to use the process.

[29] *Porter v Magill* [2001] UKHL 67; [2002] 1 All E.R. 465 HL per Lord Hope of Craighead.
[30] Joseph P. Folger, Randall K. Stutman and Marshall Scott Poole, *Working Through Conflict*, 5th edn (Boston, MA: Pearson, 2005).
[31] Joseph P. Folger, Randall K. Stutman and Marshall Scott Poole, *Working Through Conflict*, 5th edn (Boston, MA: Pearson, 2005), pp.11 and 12.
[32] Cathy A. Costantino, *Designing Conflict Management Systems* (San Francisco: Jossey-Bass Publishers, 1995), p.133.
[33] Allan J. Stitt, *Alternative Dispute Resolution for Organizations: How to Design a System for Effective Conflict Resolution* (New York: John Wiley & Sons, 2008), p.78.