



## **XpertHR Podcast: Workplace mediation - what is it and why use it?**

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- Laura Merrylees: Hello and welcome to this XpertHR podcast with me, Laura Merrylees. Today we will be looking at mediation. What is it and what might it offer your organisation? Joining me on the phone to take you through what you need to know about mediation and when you might want to use it is Aled Davies, an expert in mediation and contributing author to XpertHR.
- Aled, can we kick off with a pretty basic question, perhaps one that isn't entirely understood – what is mediation in the workplace?  
[0:00:41.8]
- Aled Davies: Hi Laura. Essentially mediation is an informal process which involves an independent third party, often called a mediator, who facilitates a conversation between parties that are in dispute. Now in the context of workplace mediation you might not necessarily have a dispute, let's say, but there could be a conflict of some sort, a break down in relationships between parties themselves.
- So this third party will be brought in and essentially help facilitate a really productive conversation between the two parties, and if there's more than two parties in that conflict, to help them reach an outcome that is mutually agreeable between everyone.
- Laura Merrylees: It has many benefits to recommend it, but you've helped many organisations address extremely challenging workplace conflicts through mediation. But I think within my experience there can be a reluctance on the part of employers to engage in it. There's perhaps some cynicism, scepticism about whether it's going to be effective, whether it'll just involve a lot of time but not a positive outcome. Why do you think that is and are employers essentially missing a trick here? [0:01:39.7]
- Aled Davies: Well I think they are missing a trick. I think the reluctance on the part of employers to engage fully with mediation is more of a lack of information problem. Employers are not really that aware of mediation, how it works, what stage they should bring a mediator in, how they even get hold of a mediator, how they bring the mediation process in line with some of their policies.
- So I think mediation's a relatively new process when you look at other processes of resolving conflicts and disputes. So I think it's more that people are just not aware of what it is and what it can do and how they can really benefit from it.

Laura Merrylees:

Well let's try and cast some light on perhaps some of the lesser known points about it in our conversation.

So let's turn to the specifics of mediation, then. Now I understand that facilitative mediation is the one that tends to be most commonly used in the workplace. What is facilitative mediation? [0:02:34.6]

Aled Davies:

Well facilitative mediation is the most common type of mediation used. So essentially you've got an independent third party – the mediator – who will come in and facilitate a conversation between the parties around the table. The main sort of principles of facilitative mediation are confidentiality – so it's an entirely confidential processes. So whatever gets said – perhaps it's in the mediation room when all the parties are there, but any correspondence between the mediator and the parties leading up to the mediation. We can talk about something like the mediation agreement without prejudice in a moment. But essentially it's a confidential conversation and that reassures the parties that they can come to the table and talk about the things that matter most.

I'd say the second most important principle of mediation is party self-determination. So you've got the fact that the parties are in control of the outcome. So the mediator would help manage the conversation, manage the process, but the parties ultimately determine what they talk about, what agreements they reach at the end of the mediation, if indeed they decide to reach an agreement. But there's a voluntary nature about the mediation process, which again is designed to empower the parties, and the premise of that is that parties are far more likely to commit to a sustainable solution if they're part of that solution, rather than it being imposed on them by somebody else or the organisation.

Laura Merrylees:

Yeah, and I think as you say, the confidentiality is a huge reassurance to the parties, to know that these discussions can take place and at the end a decision isn't imposed on them, that they have the ability to try and self-determine the outcome that they get to.

Looking at the process itself, what are the mechanics of the process, because as you were mentioning earlier, I think sometimes that's an area that isn't fully understood – so how do employers go about setting up facilitative mediation? [0:04:19.1]

Aled Davies:

Well that's the six million dollar question. I mean, ultimately if we were to strip it all back, I would look at the process in three phases, really.

The first phase is engaging the parties in the mediation process. So you're an employer and you've got, let's say, two employees that for whatever reason there's a break down in relationship or something's happened that up to that point they haven't been able to resolve themselves, nor internally, and the employer at that stage doesn't want to engage in a formal process just yet.

Now they need to get the consent of both parties to engage in the mediation process. Coming back to your question a little earlier about why are employers reluctant to get employees engaged in mediation, often it's that the parties themselves are scared to get into the conversation. So early on in the process, an effective mediator should

be able to listen to the concerns of the parties, give enough information to the parties about the mediation process so that they can make an informed choice about whether they engage in the mediation process. So I would often talk to the parties on the phone, describe the process, describe my approach, ask what concerns they've got, try to understand a bit more about what they want to achieve, and also about the conflict that they have with the other party. And that's before anyone sits in the room together. At that point I can help decide whether I think the dispute or the conflict is suitable for mediation, but also the parties can make an informed choice about a) whether they want to engage in mediation and b) whether they think I'm the right person to do that.

If they agree and they want to carry on with the mediation process then you move to the next stage, which is getting the parties in a room together. There may be a number of conversations before that, just to establish some of the logistics, but essentially then you get the parties in the room and the job of the mediator is to help the parties have a productive conversation about the things that have been getting in the way of them working effectively together, or to address some of the issues that have been problematic in their working relationship, or any other number of issues that might have led them to the dispute.

At the end of that meeting – and it may be one meeting, it may be a series of meetings – if the parties reach an agreement then great. The parties go back to the employer, continue working together effectively with some new understanding or having repaired a relationship or with an agreement to carry out certain changes in their behaviour.

Laura Merrylees:

So how long does the process normally take, Aled? [0:06:39.0]

Aled Davies:

Well the process can be very quick. So often I would spend a little bit of time with the parties on the phone, so maybe an hour phone call beforehand just to establish whether they want to participate in the mediation process, and also whether I think it's a suitable situation.

And then the meeting itself...sometimes I have done mediations that last a day, and often those are fairly exhausting for the parties. I tend to do them two half-days, maybe three half-days at the most. But from an employer's perspective they can expect a day or a day and a half, either in half-day segments or one and a half days, to reach a suitable conclusion.

At the end of that you'll probably reach a stage where you'll be able to say, 'Okay, it's worked, it's been useful, it's been effective,' or, 'No, we need to try another process.'

Laura Merrylees:

So although there is an investment of time compared to how long disputes if they're being dealt with conventionally, as it were, can be far shorter than a conventional, protracted, adversarial process, can't it? [0:07:40.5]

Aled Davies:

Absolutely. If you address a dispute early on in the process you can avoid someone going off on stress-related absenteeism for three, six, twelve months. Done at the right time it can be hugely beneficial.

Laura Merrylees: I think for many employers they want to know that mediation can produce an agreement that resolves a dispute, and clearly that's at the centre of why the process is being embarked upon. Is that agreement binding? How does that work with the agreement itself? [0:08:08.0]

Aled Davies: What's really important with workplace mediation agreements is to understand they're not legally binding. They are binding in the sense that the parties themselves are willing to commit to a change in behaviour or doing something different or working in a different way.

And again, I think the types of disputes that often come to workplace mediation – certainly speaking from my experience, anyway – they're often as a result of a fairly severe breakdown in communication that has impacted on other people as well, but often what arises out of those conversations are new understanding, empathy, and a commitment or willingness to try and do something differently to avoid getting into the situation that brought them to the mediation in the first place.

I often say to parties, 'Look, this conversation is a learning conversation. So it's about learning how you've got to this place in the first place, learning about how you get out of this situation in a helpful and productive way, and also learning how to avoid getting back into this situation in the future.'

There are a lot of benefits that come from mediation, not least saving time and saving money, but also it is really a learning conversation and parties can have real light-bulb moments in those conversations where they have some new understanding or they've recognised their contribution to a particular problem, and it has huge benefits for the organisation in that it can really improve the way that people work together.

Laura Merrylees: You were mentioning there about yourself getting involved in assessing the suitability of the dispute for mediation and meeting with the parties. What point in a dispute is the best time to consider mediation? I'm guessing early on, but does there come a point if it's later down the line where it's not going to work, or is it always worth having it in mind at any stage? [0:09:49.5]

Aled Davies: I wish I could say there's a sweet spot but I don't think there is because sometimes a conflict can be so low-level that whoever's involved internally within that organisation in the conflict may think, 'We'll be able to resolve it.' They'll maybe say, 'Oh, it's a personality clash,' or 'We'll brush it under that carpet,' or 'We've got too much on – we're too busy. It's not serious enough yet.' And I think that's quite easy to do.

I think the risk in doing that, obviously, is the further along the conflict spiral the worse it gets and the more entrenched the parties get in their position. So sometimes you could say early is better. But then again, if you've got a skilled HR person involved, employee relations, or even a skilled manager involved that can help facilitate that dialogue between the parties early on so that they can clear up any

misunderstandings and have them work through any difficulties they've got in their working relationship, that's great.

Also you could say it's a good last-chance saloon. In other words, if things have got so bad, they've gone through an investigation, they've had formal processes, and they're at a loss as to what to do, they've got two valuable employees, even then it can be a really effective process. And anywhere in between.

So there isn't a sweet spot and I think one should always consider mediation. I think earlier is better because it just saves time and money and pain and suffering. But I also wouldn't rule it out further down the pipeline.

Laura Merrylees:

The suitability of a dispute for mediation. Are there some disputes where it is simply not right or the dispute inherently doesn't lend itself to mediation? What type of disputes would employers be looking at there that just aren't going to be capable of being resolved by mediation? [0:11:25.2]

Aled Davies:

The first one would be on health grounds. If one of the parties has been off on stress-related absenteeism, which is often the context when mediation is utilised. Certainly speaking from my experience, you've got a conflict between two parties. One's off on stress, they're managed back in, helped back in, supported, and they want to continue working in that team and mediation is used. But obviously if that party is either still off or for whatever reason – it could be other health grounds, but they're not well enough to engage in that process – then obviously I think that's an important consideration to make.

I think another one is coercion. So where a party feels coerced into the process. And again that's part of the intake process, and by the intake process I mean when the mediator speaks to the parties right before they get into a room, just to give them that information. The mediator should be able to establish whether a party feels in some way coerced into the process. I don't think those are suitable. Again, from my experience, when a party feels that way it just never ends well. You can try to set the mediation process up but the party won't turn up. The parties have to be 100% committed to the process, and those are the best opportunities for getting a satisfactory outcome.

And again I think maybe the most obvious one is where there are allegations of a criminal nature, so fraud or anything like that, where again that's not suitable at all for mediation.

Laura Merrylees:

We've spoken about and you've highlighted the enormous benefits that mediation can offer employers, but we've touched on this to a degree. This point that we've been discussing around reluctance and that people want to follow a conventional route and take it down perhaps a formal grievance process or otherwise, that there can be resistance to embracing the idea of exploring a dispute through mediation, have you got any tips there in terms of how that culture change, I suppose, could be brought about within the organisation? [0:13:22.4]

Aled Davies:

Yeah, I think maybe three things. One is definitely information. Providing information on the mediation process, making it an option

for parties, making it easy for parties to access that information within an organisation.

Secondly, looking at the policies and procedures of an organisation. So if you've got a disciplinary process, is there an element within that process where the first option is an informal conversation, a mediation process? Are your policies and procedures adversarial or are they collaborative in nature? Because again if you've got a real adversarial approach then sometimes mediation can be just seen as a box-ticking exercise. Not just educating the parties either, but educating whoever is within that organisation and typically HR positions or employee relations, for them to really understand the mediation process.

And ask parties what their concerns are about engaging in the process. I think that's a really helpful question. Well, it's always a question I ask, if the party has any explicit concerns and what are they, because more often than not all the features of the mediation process that I outlined earlier – for example the confidentiality, informality, flexibility – all of those things can often reassure parties that you know what, it's a really safe space to have a conversation, talk about things that matter most. You're in charge of whatever you decide, so no one's going to impose something, and you can still carry on a formal process if you don't reach an outcome.

So by really understanding those benefits and the features of the process, you can often just satisfy people's concerns so that at least they'll go onto the next phase and maybe have a chat with a mediator or sit down with the other party and just have that conversation.

Laura Merrylees:

Yeah, and I think it's definitely worth reinforcing that point that if at the end of the day an employer's followed a process of mediation but unfortunately it's not been possible to reach an agreement, the employer won't have acted to its detriment. It won't have prejudiced its position by doing so. It's confidential. It should be possible for the employer then to start off on a different footing without having acted to its detriment.

Aled Davies:

Absolutely. So something I touched on right at the beginning is it's a without-prejudice conversation. So anything you talk about within that conversation can't be used in any subsequent formal process of litigation. So if something comes up in the conversation, whatever's said in the room stays in the room. Unless, of course, both parties or all the parties involved in the conversation make it explicit that that can be talked about outside the mediation room. So again, that should give employers and parties reassurance that again they can have a really candid conversation but in a safe context. Again, the role of the mediator is to ensure that parties feel listened to but also feel that they can advocate for themselves and have a really good quality conversation.

Laura Merrylees:

Now some employers may be concerned about the cost around mediation – are they going to be investing a lot of cost in a process that ultimately may not produce an outcome at the end of the day. What's your view on the fees of mediation and how that can compare

to the costs that can be racked up if you're not going through the mediation process? [0:15:22.9]

Aled Davies:

If we look at, first of all, the potential costs of not going through a mediation process, because once we've exhausted that it feels like a no-brainer. Not only you've got the direct costs of processing a dispute internally, getting it investigated and all the direct costs involved in that, but it's the indirect costs that I think most employers aren't aware of, and certainly some of the mediations that I've been involved with and the things that employers have done to try and address the conflict and the costs associated with those. So for example, just accommodating people and moving them around in organisations or changing the structure of a team. Even changing the layout of an office where people sit. People going off on stress-related absenteeism. Just unproductive working relationships where you've got two parties that were working closely together in a team and now they refuse to talk to each other, so all their correspondence is through email, even though they sit in the same office. Just the missed opportunities for learning, or the opportunity cost of people being in conflict and dispute.

And then of course if you get to the end of your tether as an organisation and you're unable to address it, then you're into the conversation of compromise agreements. Then you've got to recruit somebody else. All of those costs are realistic costs that employers should consider, whereas if you think about the cost of mediation, you've got maybe a day, a day and a half, and I don't imagine you'd spend more than £2,000 or £2,500 for an entire mediation process.

Laura Merrylees:

Yeah, that's interesting, and particularly if you get to the point where the dispute ends up in an employment tribunal and you start looking at the costs of lawyers and time and everything else that that involves, then those costs can clearly be very substantial. [0:18:08.9]

Aled Davies:

Huge, huge, yeah.

Laura Merrylees:

Absolutely. Well thanks very much, Aled, for joining us.

Now if our discussion has encouraged you to delve deeper into the benefits of mediation there's plenty of information in our [Good practice guide on mediation](#) on the site.

Well that brings us to the end of this XpertHR podcast. Thanks very much for listening and we look forward to you joining us next time.