

## **Are people losing out because mediation is voluntary?**

by Katherine Graham

I have for many years been a lone voice in the workplace mediation world in advocating the use of mandatory mediation. Recently, at the Civil Mediation Council Workplace Committee meeting, I had a brief exchange about whether mediation ought to be mandatory, and discovered a kindred spirit in Paul Randolph, Chair of Lamb Building ADR. While he comes to his conclusion from a different perspective, I am pleased that there are others in the mediation community who are giving this issue serious thought. I raised some eyebrows when I spoke at an IRS conference on employment law last year about the matter, as there has long been an assumption that mediation ought to be voluntary and that anything else is undermining the values of mediation and somehow almost violating people's human rights...

The emotions described in Paul's article <http://www.newlawjournal.co.uk/nlj/content/litigation-v-meditation> are the very reason why mediation ought to be mandatory. When we are in a conflict as a result of our emotional state of mind we are not in the best frame of mind to make wise judgements for ourselves and will too often choose the path with the poorer outcome – litigation or formal action. In a real sense, when we are in a conflict we are our own worst enemy. To not make mediation mandatory is to collude with someone who has an illness which is treatable, but whose very symptoms include a passionate rejection of the cure they are being advised to take.

The numbers makes sense, too.

Let us say there are 1000 disputing parties at work in UK plc who are, variously, off with stress, underperforming, taking up HR and managerial time, making poor work decisions because they are avoiding the 'enemy' with whom they need to consult. Colleagues are fed up with the situation but feel powerless to intervene and the rumour mill is distracting everyone from getting on with what they are paid to do. HR is bracing itself for a formal complaint, or simply wishing one would arrive on their desks so at least they can get moving on sorting this out. Let us say (rather optimistically) that HR manage to persuade 10 per cent of these people to try mediation "voluntarily". Of these, 9 mediations end in agreement; a 90% 'success' rate.

UK plc now has ninety people who as a result of mediation feel able to go back to fully productive lives at work, 10 people who still have a conflict despite a mediation, but are perhaps clearer about what they need to do to resolve the matter, but 900 parties still in dispute and under performing. What is to be done with them? Very little, if they don't make a formal complaint that can bring an end to the matter, albeit a win-lose end.

So UK plc does the right thing and introduces mandatory mediation – by which I mean that it makes clear employees are expected and required to attempt to resolve their conflicts through mediation in the first instance. It takes away none of their rights, they are not obliged to reach agreement, they are not obliged to even actively engage. What they are obliged to do is initially meet a mediator privately and take part in a joint meeting which they may or may not wish to engage in fully, it doesn't matter. Let us say that this approach reduces "success" levels by a whopping 50 per cent. (I don't believe it would be this low, as resistance to mediation is simply a "position", and like all positions can be explored and 'overcome' and a new way of meeting that person's needs arrived at.)

So 1000 disputing parties take part in mediation, and only 45 per cent reach agreement. This represents 450 people who can go back to productive working, innumerable teams who breath a collective sigh of relief that it's all sorted out, HR staff who can move on to other matters – the collateral from a successful mediation is extensive. The number of people who now have a dispute in UK plc has gone down by over 60% from 900 to 550. Surely this is a positive outcome? I'd be very interested in hearing other people's views.

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CMP Resolutions work to Close, Manage and Prevent disputes at work through skills development, mediation and investigation services.

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