Mediation in Employment Disputes

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Issues

- Characteristics of the mediation process
- Mediation in UK employment/workplace disputes
- Does it work?
- Controversies and future policy issues
What is mediation?

• Generally, parties are assisted to reach their own resolution to their dispute by a third party neutral
• Key aspects: voluntariness, confidentiality, empowerment, self-determination
• Focus generally forward looking, on interests not positions, seeking to develop options for mutual gain – a ‘problem solving’ approach
• The dominant model is ‘facilitative’
What does it look like?

• Varies hugely. May take place entirely in joint session or entirely by private meetings (‘shuttle mediation’), by combination of joint and private meetings, or by telephone.

• Parties may or may not have legal representatives.

• Duration ranges from under an hour, all day or over a series of meetings.
The Basic Mediation Process

1. Introductions (rapport building)
2. Identify the issues
3. Explore the issues
4. Consider options
5. Record agreements
In practice mediation not so linear

Record Agreement

Identify the Issues

Consider Options

Explore the Issues
Employment/workplace mediation developments

• Employment/workplace mediation relatively well developed in UK
• Bolstered by judicial support through e.g. judicial mediation schemes in employment tribunals
• Some drive from HR professionals and employment lawyers
• Many active mediation providers in the employment/workplace field
Judicial Mediation in Scotland

• Since 2009 scheme operated in complex discrimination and then also unfair dismissal cases
• ET Judge mediates suitable cases identified at the Case Management Discussion
• Model is facilitative; judges do not express opinions on the merits of the case
• The scheme hitherto free but since 29 July 2013 a charge of £600 has been levied.
• Evidence (self-reported) is positive: clients & lawyers hold generally favourable views; high success rates (c. 70%); judicial time and money saved; but initial take-up lower than expected
Does mediation work? The evidence

- Little Scottish evidence
When it works, why does it work?

- Party participation and creation of solutions can lead to ‘ownership’ of agreements
- Can alleviate cognitive biases and miscommunication
- Assists parties to reality test their positions
- Can meet extra-legal needs of parties and serve the aims of procedural justice
- Potential for repair of broken relationships
Future issues and policy concerns

- Promotion of ACAS ‘Early Conciliation’ from April 2014 may limit scope for mediation
- Charging for the judicial mediation scheme likely to have a negative effect
- Mediation ‘justice on the cheap’ in context of new tribunal fees?
- Concerns over whether mediation can eradicate power imbalances between parties and whether settlements are ‘just’