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# "Should I try mediation?"

# A discussion paper for trade union members

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***The author: David Bleiman MA, MBA, Chartered FCIPD*** has been a full time union official since 1979. He is Assistant General Secretary Scotland of the University and College Union, a member of the Scottish TUC General Council and serves on the Employment Appeal Tribunal. For almost thirty years David has advised and assisted union members and their local representatives with individual problems at work. He became aware of the potential benefits of mediation through accompanying members in mediation and has since been involved in developing the awareness of mediation in the higher education sector. In September 2008 David was elected to the board of the Scottish Mediation Network.

## *Executive Summary*

***Employees in the UK are likely in future to find mediation suggested as a way of resolving some issues at work. There is still limited experience in employment mediation for union members and this discussion document is intended to set out the issues and start discussion. At the end, the author invites comments.***

***Mediation is a way of sorting out disagreements or disputes. A neutral third person works with those in dispute to help them reach an agreement that will sort out their problems.***

***Mediation progresses through five stages: mediator's introduction, opening statements by the parties themselves, discussion, exploring options and, where possible, moving towards reaching agreement. The parties are in control of any agreement and the process is facilitated by the mediator.***

***A wide range of issues may be brought to mediation including a dispute between colleagues as well as concerns about the behaviour of a line manager or a potential employment law claim. Mediation may not be appropriate in some circumstances, for example if one of the parties is too vulnerable or there are allegations of criminality which should be reported to the police.***

***Using mediation is quite different from going to law to resolve a complaint. Legal hearings place the outcome in the hands of a judge and are usually held in public.***

***Mediation is confidential and the settlement involves only what the parties themselves are all agreed upon.***
***Mediation also differs from some internal workplace procedures in which there is a process of investigation and adjudication, such as a disciplinary procedure. Grievance procedures have in recent years often become adversarial, with a hearing and decision by an adjudicator. However, a good grievance procedure may have much in common with mediation, where it is used to facilitate discussions leading to an agreed resolution.***

***A union member should only proceed with mediation on the basis of informed consent. I look at some of the detailed <u>pros and cons of mediation</u>.***

***Points in favour of mediation include:***

***A. You retain control of the outcome.***
***B. The agreement can be creative and customised by the parties to meet their needs.***
***C. Mediation is confidential.***
***D. Mediation is not adversarial.***
***E. Mediation can address unfairness even if it is not unlawful.***
***F. It can enable people to work better together after the issues have been dicussed.***
***G. It can enable an amicable parting of the ways.***
***H. Mediation can be quicker and cheaper than formal procedure.***

***Points against mediation include:***

***A. Mediation does not publicly expose bad practice.***
***B. No precedents are set.***
***C. An employee may be time barred from Tribunal proceedings.***
***D. A vulnerable person may be at risk in mediation as in other types of meeting.***
***E. Managers as well as employees can vent their feelings in mediation.***
***F. The mediator may not be genuinely independent or may be ineffective.***
***G. An employer or another party may enter mediation in bad faith.***

***Where mediation is introduced in any unionised workplace, the unions should be involved at the design stage. <u>Issues for union reps</u> to consider include:***

- ***Insist on early union involvement- through negotiation or partnership working as appropriate.***
- ***Seek a joint approach to advisory and training services, considering ACAS as well as other potential providers.***
- ***Negotiate the links between mediation and existing workplace procedures, safeguarding employee rights.***
- ***Consider the merits of using in-house mediators or external providers.***
- ***Consider how union advice and accompaniment will be provided for members considering mediation.***
- ***Ensure union reps have access to mediation awareness training.***
- ***Check your own union's approach to advice and support for members in mediation.***
- ***When a member is considering mediation, discuss the pros and cons and help the member to make his or her own decision on the principle of informed consent.***
- ***Keep an eye on a member's best interests when mediation is being set up.***
- ***During mediation, be constructive and let the mediator facilitate discussion and progress towards agreement. Keep an eye on your member's well-being and be ready to ask for a break.***
- ***Maintain confidentiality and, where agreed in mediation, participate in any necessary follow up.***
- ***Where appropriate, help to identify aspects of a mediation agreement which, in the mutual interest should be followed up by management and the union to rectify a systemic problem brought to attention by an individual employee's experience.***

***A <u>checklist of safeguards</u> is provided which a union member entering mediation can reasonably expect. These are:***

- ***Are you well enough to go to a mediation meeting? If you are concerned, medical advice may be required.***
- ***Times of mediation meetings should be reasonable and locations neutral.***
- ***The mediator should be independent and trained. You and management should agree on the choice of mediator.***
- ***Your rights to use a formal procedure should be safeguarded, in case mediation does not result in a mutually acceptable outcome.***
- ***If you have a legal claim or potential claim, check that any time limit will not expire during the mediation process. You may need to take advice about how to protect your legal position.***
- ***You may ask to be accompanied by a union rep during mediation and you may wish to have a way of consulting a close relative or friend during breaks in the mediation.***
- ***Mediation is voluntary. Only agree, at the end of the day, to what you are genuinely willing to agree.***

## 1. Introduction

Employees in the UK are likely, in future, to find that *mediation* is more frequently suggested as a way of resolving an issue at work. From April 2009 it is expected that the conciliation service, ACAS, will recommend mediation in appropriate cases to callers to their expanded helpline service. What is mediation? What conflicts, difference and disputes can it be used to address? How does mediation suit along side other ways of addressing problems at work? What are the pros and cons? Should I try mediation and if so what safeguards should I expect? These are questions which every employee who is offered or is thinking of suggesting mediation will need to consider.

Mediation is not yet embedded in most workplaces nor is it something on which trade unions have much experience on which to base advice to members. But that is changing and union members may well look for union guidance on mediation in larger numbers in the future. This discussion paper is intended to help you, as a union member or as a union representative working with a member considering mediation. If you decide to try mediation, then that must be your own voluntary decision. No-one else can take that decision for you. This discussion paper aims to help you reach an informed decision of your own.

Sometimes unions produce one set of guidance for members and another set, perhaps going into greater detail, for reps. I have deliberately decided to raise the issues for union members and for union reps in the same document. That is because, in my view, one of the most important aspects of choosing mediation is that it should be based on informed consent. As mediation on UK employment issues is still at a relatively early stage of development, we cannot assume that by the time a union member in a particular workplace is offered mediation, the recognised union will already have engaged in a negotiation to establish a sound procedural framework with appropriate safeguards for members. Indeed sometimes it may be the individual attempts at mediation which trigger for the union negotiators the need to engage the employer in a collective process. Sometimes it will be union members who have had a good (or a disappointing) experience of mediation who take the initiative in that collective process. So I think that, for now at least, a single discussion paper gets all the issues out on the table for union members as well as reps. In due course as unions and the TUC develop their policies on mediation, I expect that members may be able to access shorter “quick guides” to mediation and reps may have access to more detailed briefing.

## 2. What is mediation?

> The Advisory Conciliation and Arbitration Service (ACAS) describes mediation as ***a way of sorting out disagreements or disputes without having to go to court. A neutral third person works with those in disagreement or dispute to help them reach an agreement that will sort out their problems.*** (ACAS website).

Mediation is a recognised process of discussion which is used in a variety of situations – from divorce settlements to international conflicts - across the world. There are numerous definitions, of which I have chosen the ACAS one simply because ACAS is familiar to many trades union representatives as being an authoritative source of advice on industrial relations. In fact I think one can go further than ACAS and say that mediation can be used to sort out disagreements without having to use any sort of adversarial process, not only tribunal or court action.

You might understand mediation by comparing it to other ways of handling disputes.

Take an example from outside the world of employment. If your neighbours are disrupting your life by noisy late night parties spilling out onto the street, you might seek to resolve this in a number of ways. Ringing the police would be to assert and exercise your legal rights. Approaching your neighbours for a discussion with a view to agreeing how they – and you – will behave in future would be a kind of negotiation, seeking an agreement by direct discussion between the parties in dispute. Alternatively, asking another neighbour, across the road, who is trusted by you both, to help you sort the disagreement out, would be a kind of informal mediation. In fact in many parts of the UK mediation services are now offered to help with such disputes between neighbours. Mediation is similar to direct negotiation, in that any agreement is a voluntary one reached between the parties concerned. What mediation adds to negotiation is the involvement of an impartial third party. That person, the mediator, may also use a variety of techniques to facilitate discussion, look at all the options and help the parties move towards agreement, if possible.

## 3. How does a mediation progress?

There is no hard and fast rule about the format of mediation in the UK. However, within the community of mediators, the following format will usually be followed.

**Stage 1 – Mediator's introduction.** The mediator will introduce him/herself and the parties and will describe mediation and explain the process to be adopted including any ground rules such as on politeness and confidentiality. The parties will usually be asked to sign an agreement to mediate. Generally this will include agreement to respect the confidentiality of the process.

**Stage 2- Opening statements by the parties.** The parties will each, in turn, have an opportunity – without interruption – to explain to the other party and the mediator what has happened and what concerns them. The mediator will seek to summarise each party's concerns and develop a list of the issues in dispute. Sometimes the mediator will already have met the parties separately, in advance of the mediation, to

identify the issues and explore whether the person wishes to try mediation. Even where this has happened, the act of listening to each other's opening statements is an important preparation for exploring options and crafting mutually acceptable solutions.

**Stage 3- Discussion between the parties**. This stage can be quite vigorous and sometimes heated. The mediator will not suppress argument but will try to ensure that both sides have their say and listen to each other. The mediator will gauge and check with the parties when it may be possible to move the discussion on to exploring options for resolution. The emphasis is usually on looking to the future rather than back at the past.

**Stage 4- Exploring options.** The mediator will ask the parties to each consider what ideas they have and what ways of addressing the other person's needs and interests as well as their own. The mediator will seek to get out into the open what each party really needs in the future rather than only how they feel they have been wronged in the past. Sometimes this is described as moving from an agenda based on *rights* to one based on *needs.* Often there may be private side meetings between the mediator and one or all the parties, so that an option may be explored in complete confidence before, if the party gives permission, the mediator introduces this for discussion with the other party. [Note that private side meetings may be held at any stage on the initiative of the mediator or of any of the parties who feels that it is necessary.]

**Stage 5- Reaching agreement.** Where the parties are able to reach agreement, the mediator will usually help the parties record the agreement in writing. The agreement should be specific, will probably be in the words of the parties themselves and may cover a wide range of issues – from money to personal behaviour. The agreement may well include how the parties will handle any problems arising in the future. Although the mediator will normally give the parties copies of their agreement, she or he will have no responsibility for implementing it – that is up to the parties themselves (and possibly others such as wider colleagues, managers and HR, if the parties so agree).

## 4. What matters can mediation be used to resolve?

In principle, mediation can be used to resolve almost any problem which you experience at work. In practice, it may not always be the most appropriate method so see below for some guidance on the pros and cons of mediation. Mediation is simply an additional option in the range of dispute management tools available.

Among the issues which might be brought to mediation are:

- A dispute between two colleagues (whether on a specific issue or a more wide-ranging personality clash resulting in a state of chronic dispute)
- An employee's grievance about the behaviour of a line manager
- An employee's concern about unfair treatment or discrimination at work
- Management concerns about employee performance or conduct
- A potential employment law claim which has not yet been submitted to an Employment Tribunal

- An employment law claim which has already been submitted to an Employment Tribunal but has not yet been heard by the Tribunal
- An issue between an employee and another person, for example a student, a customer/client, an external organisation.

Mediation may not be appropriate if:

- One of the parties feels too weak or vulnerable
- There are allegations of criminal activity which should be reported to the police
- There are allegations of serious misconduct which the organisation is bound to investigate properly using a formal process
- In the view of the mediator it would be unsafe to progress to or with mediation.

The serious misconduct for which mediation may not be appropriate may include instances of bullying or harassment which are so severe or have been so damaging to the employee affected, that it is not realistic to think that the perpetrator could conceivably put matters right by discussing and agreeing to change his or her behaviour.

I have found that there are different views among union officials and also among mediators and solicitors, about which topics mediation is or is not suitable to address. I must therefore make clear that the guidance above is tentative. A union representative can only seek to assist a member concerned to think about the overall situation and to make an assessment, on the best information available, as to whether mediation or some other avenue, is most appropriate in all the circumstances of the case.

## 5. How does mediation compare to other ways of resolving problems at work?

We can easily distinguish mediation from use of the law such as by making a claim to an Employment Tribunal. The comparison between mediation and internal procedures such as raising a grievance, is more blurred.

- **Mediation compared to using the law**

There is a large body of employment law rights in the UK. These legal rights, many of which derive from our membership of the European Union, give employees protection over a wide range of issues. Examples include the right not to be unfairly dismissed, rights in redundancy situations and transfers of undertakings and the right not to be discriminated against on grounds of race, gender, disability, age, sexual orientation and religion or belief.

Making a claim to an Employment Tribunal is in most cases the established route to complaining where you believe that your employer has infringed your employment rights. The Employment Tribunal can decide whether or not your employer has

broken the law and, if so, can provide a remedy of the type and up to the limit set in the relevant legislation.

An Employment Tribunal hearing will, with very few exceptions, be held in public. A judgment will be given which will include the Tribunal's findings on the merits (the rights and wrongs) of the matter. This will generally include which witnesses they believed as part of the Tribunal's job is to decide, through hearing the evidence, what they believe happened in the areas of dispute. The decision may be appealed by the losing party on a point of law.

Mediation will focus on seeking a mutually acceptable resolution. The employee's concerns about breach of employment rights will often be aired in discussion but there is unlikely, except in unusual circumstances where an employer readily concedes that the law has been breached, to be an agreement about what laws have or have not been broken in the past. The mediator will not make any judgment on the rights and wrongs of the case.

Mediation will be an entirely confidential process (unless there is a risk of serious harm to someone or criminal behaviour is disclosed). Colleagues, other line managers and the general public will not get to hear about what happened in the mediation, unless the parties specifically agree to that.

There are no set types of remedy available in mediation, nor set limits. This means that remedies can be agreed which are beyond those available to an Employment Tribunal.

As a mediated settlement involves only what the parties themselves decide to agree, there is no appeal. The mediation agreement is not legally binding unless both parties wish that. Sometimes, where a mediation agreement has resolved issues which might otherwise have gone to an Employment Tribunal or other court, the employer will wish the employee to formally give up any right to pursue these matters at law. You would have to be given the opportunity to take legal advice before making a legally binding agreement of this kind.

- **Mediation and internal procedures**

Some internal procedures are clearly different from mediation. A disciplinary procedure, which involves the possibility of formal warnings and may lead to dismissal, will involve a process of investigation, hearing and rights of appeal. An employee may receive warnings and be required to improve their conduct in specified ways, without their agreement. Ultimately an employee may be dismissed, which is of course a unilateral action by the employer. Subject to the right of appeal and any legal challenge, such actions may be taken without agreement.

Where a manager has concerns about an employee's performance or conduct, mediation would only proceed to outcomes by way of agreement. The employer and employee would need to agree that any disciplinary procedure would be put on ice, most likely for an agreed period, while mediation is used to seek an agreed resolution.

Mediation may be suggested by an employer when the employer believes that an individual should consider moving on, with employer support such as a financial package or retraining and relocation assistance. Mediation can be a way of arranging a "parting of the ways" without anyone- manager or employee- having to admit or be seen to be at fault.

Some internal procedures may – or may not – have elements in common with mediation. A good grievance procedure may well have the objective of resolving an employee's concerns as soon as possible and may bring the employee and the other colleague or the line manager aggrieved against, together for a discussion at which the person hearing the grievance may deploy mediation skills to facilitate discussions leading to an agreed resolution. However, in recent years workplace grievances have more often been seen in an adversarial context, with the role of the person hearing the grievance being to investigate the facts and then determine the merits. The employee may then, if dissatisfied with the outcome, have a right to appeal.

In 2002 the government introduced statutory dispute resolution procedures with a view to encouraging both employees and employers to use internal procedures before taking cases to Employment Tribunal. This had the unintended consequence that employee grievances were more frequently treated as the first stage of an adversarial process leading to a Tribunal and less often used to seek a mutually acceptable resolution. It remains the case that as an employee you can enter a grievance procedure with a view to seeking a mutually acceptable resolution of your concerns with the other party – the colleague or line manager whose actions (or inaction) have caused you concern. The government has now agreed to abolish the statutory dispute resolution procedures and, at the time of writing, it is expected that this will be implemented in April 2009. This may have a beneficial impact on the functioning of grievance procedures by making them less of a rehearsal for legal action and more of a genuine attempt to resolve concerns close to the source of the problems raised.

There are likely to be other internal procedures available to you. Many employers now have a bullying and harassment procedure. There may be bullying and harassment advisers available for confidential discussion. Generally, such procedures will give you an opportunity to discuss your concerns in confidence and you may then have the option of lodging a formal complaint, such as a complaint of bullying, or of a more informal attempt at a resolution of your concerns. The latter may well involve mediation.

## 6. The pros and cons - points *in favour of* mediation.

### A. In mediation you retain control of the outcome.

Unlike a Tribunal or other formal hearing in which the merits of your case and the remedy are determined by a judge or someone in authority, in a mediation nothing is decided except with your own agreement. If you are unable to reach agreement, you can walk away from mediation without agreement. Where a court is asked to decide an issue, the parties have given up control of the outcome and sometimes both sides may be unhappy with the details of the judgment and/or any remedy awarded. A typical example is where a Tribunal finds that the

employee has been unfairly dismissed, to the indignation of the employer. But the remedy may be a very small financial settlement, wholly unsatisfactory to the employee concerned. A mediation agreement is one which, though it may not be ideal, both parties can accept and work with.

**B. The agreement can be creative and customised by the parties to meet their needs.**

A Tribunal can only award a remedy within the range and up to the limits set by legislation. In mediation, the parties themselves can agree to put things right by detailed actions customised to meet their own needs. Sometimes this may include things which may not have monetary value but are important to you, such as a personal apology or a face to face commitment to change behaviour. Sometimes there may be a financial settlement which is more than a Tribunal has power to award or more than it is likely to award. Often there can be elements in a settlement which are developed around the needs of the parties – for example, to attend a particular training course, changes in job description or location or line management arrangements.

**C. Mediation is confidential.**

Unlike Employment Tribunal proceedings, which are held in public and may be reported in the local press, if you wish to have your concerns addressed in complete confidentiality, that will usually be possible through mediation.

**D. Mediation is not adversarial.**

You may be able to address issues through mediation without the other person feeling themselves to be on the defensive and taking counter-measures. For example, sometimes a grievance against a colleague may trigger a counter-grievance against you. A complaint of discrimination may result in detrimental action amounting to victimisation of you for raising the complaint. You would of course have legal protection against such victimisation but may find yourself caught up in lengthy and distressing adversarial proceedings against individual managers and/or your employer generally. Mediation, by way of contrast, may provide a safe space within which you can air your concerns and the other person may be ready to listen and be encouraged to consider whether they need to change their behaviour, without anyone needing to be found at fault.

**E. Mediation can address unfairness even if it is not unlawful.**

While much unfairness is now unlawful, there are still unfair practices at work which are not actually against the law. For example your line manager may have favourites and, if these are of the same sex, age, race etc as you, then you might have no legal case of discrimination. Even if they are of different sex, race, age etc, there might be another reason why they are a favourite- they support the same football team, enjoy a common out of work hobby or whatever. Whatever the reason, lawful or unlawful, you may well suffer serious disadvantage and want to do something about it. You

might raise a grievance under your formal grievance procedure. Mediation is also an approach which is not restricted to matters which concern breach of the law.

**F. Mediation can enable people to work better together after the issues have been discussed.**

Often an Employment Tribunal hearing comes after an employment relationship has come to an end. Unfortunately, taking a case to a Tribunal can sometimes make it hard for an employee to carry on working harmoniously for the employer as you are having to challenge the employer's behaviour in court and in public. You may, for example, have to give evidence on oath against your line manager and/or senior managers, challenging any lies they may tell while their lawyer may cross examine you and seek to destroy your credibility in front of the Tribunal. By way of contrast, mediation focuses on the relationship aspect as well as the bread and butter of a settlement. The process of mediation encourages the parties to listen to each other's viewpoint. Doing so and working together to explore options and ultimately identify a basis for a mutually acceptable agreement, is a kind of training in working together and resolving matters, even between colleagues who have previously found it hard to discuss matters, let alone resolve them. Where relationships between individuals have broken down irretrievably, mediation may involve setting up new arrangements e.g. a new line manager. Either way, mediation does facilitate an ongoing working relationship.

**G. Mediation can enable an amicable parting of the ways.**

There can be situations where, even if you are utterly blameless, it would be better to move on. You may have numerous potential complaints about breaches of your employment rights. But you may prefer to get out and into another more positive working environment, rather than spending months or perhaps years of your life, in combat against a bad employer. You may have made mistakes at work and may wish to move on without having to admit fault or to face protracted disciplinary proceedings in which you either deny fault or plead mitigating circumstances. You may be the proverbial square peg in a round hole, a person with excellent skills and qualifications but in the wrong job. Mediation can be a method whereby you and your employer could agree the terms – financial and/or other- for parting.

**H. Mediation can be quicker and cheaper than formal procedure.**

If your employer has available an early intervention type of mediation – such as people in the organisation who are trained to mediate outside their own department or location- then it may be possible to resolve a problem more speedily than through a formal process. Even where a problem is more advanced and an external mediator has to be brought in, the process is still likely to be much quicker and cheaper than legal proceedings. Unlike an Employment Tribunal, there is no need for witnesses and testing of evidence. Most workplace mediations are completed in a single day, with occasionally a need to resume on a second day if the process is progressing well but has not been completed. If you go to an Employment Tribunal, you are likely to

incur legal costs for advice and representation at the hearing. Your union may bear these costs where they have agreed to support you. However, union legal schemes will generally involve a weighing of the legal assessment of the merits and value of your case (your chances of success and the remedy you are likely to be awarded, if successful) against the costs of providing you with legal representation. So you cannot ignore the legal costs of going to law if there is another, cheaper method by which you might achieve a reasonable outcome. In mediation, the costs of the mediation are usually paid for by the employer. You would only incur costs if you or your union have to pay for a lawyer to accompany you, which may be necessary in a mediation of a case which is mainly about the breach of your employment rights. Even then, the legal time to be paid for is likely to be much less than for an Employment Tribunal hearing covering the same issues.

In some cases, where an employee has multiple claims or where points of law are vigorously contested and may be appealed up to the higher courts, adversarial proceedings may continue for years. An employee may devote enormous time and energies, sometimes to the detriment of their health and of family life, in pursuing justice, with no guarantee of success. It may take years to achieve finality and closure on the dispute. Mediation can achieve closure much more quickly with corresponding benefits because the employee is free to concentrate time and energy on more life-enhancing activities.

## 7. The pros and cons- points *against* mediation.

### A. Mediation does not publicly expose bad practice.

This is the downside of the confidentiality of the mediation process. There will usually be no public exposure of an employer's breach of employment law or other bad practice. Managers will not face the need to give evidence in public and to be cross examined on what they have done.

### B. Mediation sets no precedents for this or other employers.

A mediation agreement is between the employer and the employee or between employees and anyone else in dispute. There are no findings on the merits of the case or on any points of law at issue. Where you and your union are seeking to establish that a particular practice or procedure used by your employer is unlawful, that may be achieved by taking a case to an Employment Tribunal. On particularly important or contested areas of law, it may be that binding precedent will be sought by unions or employers, resulting in cases being appealed by the losing side, so that a higher court (such as the Employment Appeal Tribunal) rules on the law at issue in the case. In a situation where you are only one of a large group of employees all suffering the same injustice, it will often be most effective for the case to be lodged by all employees concerned with the Employment Tribunal and either proceed to a hearing (with like cases joined to be heard together) or a settlement which includes agreement between the union and the employer about improving practices in the organisation in the future. It would not be impossible to include agreement to improve work practices in a mediation agreement but it would be unusual to achieve this in an individual mediation which will be focused on resolving your individual case. Of course, a quick individual resolution may be what a union member prefers

and unions can only proceed to test cases with volunteers who understand what they are taking on.

### C. Mediation may result in the employee being timed barred from Tribunal proceedings.

During the time which it takes to arrange and undertake mediation, if you are not careful you may miss the deadlines for exercising some of your legal rights. For example, you may fail to lodge a grievance and you may miss the deadline – which can be a strict deadline- for lodging a Tribunal application. This may be no problem at all if the mediation proceeds well and a settlement is reached. However, if mediation drags on, your employer may be less inclined to reach a reasonable agreement with you if and when you have passed the time limit for an alternative course of action involving a Tribunal claim. If mediation ultimately fails, you may be left with no further options.

This potential drawback of mediation can be avoided by proper safeguards arranged at the time of agreeing to enter mediation (see below).

### D. Mediation may put a vulnerable person at risk

An employee may be offered mediation and expected to place faith in the impartiality of the mediator and the robustness of the process to provide adequate safeguard. This may often be reasonable, however many employees experiencing problems at work may (sometimes for reasons connected with the behaviour of line managers or colleagues) be vulnerable as a result of ill health or in other ways. Mediation is widely advertised as an entirely voluntary process and to proceed on the basis of informed consent. However, someone who is in ill health or otherwise vulnerable may find it difficult to refuse to enter mediation and, once in the mediation process, may feel under pressure to move towards an agreement which they may later come to regret.

In the worst case, an employee suffering from ill health, may even place their health at further risk if there are pressures associated with the mediation process or with its duration. Some mediators, especially those familiar with commercial mediation, believe that it is effective to keep the parties in mediation discussions for as long as it takes. This could be damaging to an employee who is vulnerable.

These pressures of mediation are no different from those which a vulnerable person will experience in any kind of extended meeting or negotiation. Usually the involvement of a mediator who has responsibility for proceeding with the mediation only when it is safe to do so, will provide some reassurance. This type of risk can also be avoided by proper safeguards arranged at the time of agreeing to enter mediation (see below).

### E. Mediation allows venting of feelings by managers as well as employees.

At the third stage of the typical mediation process (discussion between the parties) there can be vigorous and sometimes heated discussion. Mediators sometimes refer

to this as "venting" – letting off steam about how the parties feel about the issues and each other. One of the concepts of mediation is that the mediator should create a "safe space" for such venting. This can indeed be a helpful stage, so long as the parties then progress to the next stage and start exploring options for resolving the dispute.

One potential problem is that managers as well as employees are thereby enabled to say what they really think and feel about a situation. Sometimes a line manager will feel that it is safe and appropriate, in the confidential context of mediation, to say things which he/she would not say in any other place. This may include comments which can be very hurtful, especially to an employee who may have entered mediation to deal with an issue of bullying by that same manager. An experienced and skilled mediator should be able to manage a dialogue between the parties which is becoming damaging, however it is only realistic that anyone participating in mediation should expect, as part of the process, to hear things said which are uncomfortable and may be hurtful.

**F. The mediator may not be genuinely independent or may not be effective.**

Employers offering a mediation option to their employees do face a difficulty about how to provide an appropriate and cost effective service. While external mediators may be contracted to provide mediation, this will generally come at a significant cost. It may be seen as more cost-effective to have a cadre of in house mediators professionally trained so that they can then provide mediation across the organisation.

Will someone from another department or location in your own organisation be sufficiently independent to provide impartial third party mediation for you and another employer or your line manager with whom you are in a dispute? Only you can ultimately answer that question. It may well depend on the stage and seriousness of your problems. For example, if you are at a relatively early stage of experiencing problems with a colleague, it could well be that someone from another part of the same organisation, who knows neither of you personally, could be accepted by both of you as a totally impartial mediator. If, on the other hand, your issues are with senior management and concern practices which apply across the organisation, it could be very difficult for anyone in your organisation, even from another department or city, to be completely impartial, or to be seen as impartial.

Many organisations which are convinced of the advantage of offering mediation, may have at least in reserve the option of engaging external mediators even when the more usual approach is to deploy one of a team of trained in house mediators.

The problem of mediator ineffectiveness is a different one. The issue of the variable quality of mediators has been raised by trade union officials in different countries where mediation is available to employees. Part of the difficulty is that mediation is still a relatively young profession so that, even for the paid professional mediators, there is no single qualifications authority or accepted minimum standard for practising mediation. However, given that there can be great value in line managers and trades union reps being able to help resolve matters by using mediation skills, it is not necessarily the case that only people who have a specific mediation qualification should be allowed to mediate. Otherwise we would be preventing some of our most

experienced managers and union reps from doing what they have always done – working to bring people together to resolve problems after open discussion by mutual agreement. So the danger of having a personally ineffective mediator remains. I consider below what safeguards may be adopted to ensure that effective mediators are engaged.

### G. Your employer or another party may enter mediation in bad faith.

Mediation works best when all parties involved are keen to resolve a dispute. This may be at an early stage of a dispute but it can also occur in a long running dispute when all concerned have realised how costly and damaging the battle has become. Sometimes this can happen even on the brink of Tribunal proceedings, when for example an employer realises how high the legal bills will be, how many managers will have to attend as witnesses and how much reputation damage the organisation may suffer from attendant publicity. An employee likewise may draw back from the stress of a multi-day Tribunal hearing and the uncertainty of the outcome.

Sometimes an employer may attempt to use mediation to achieve a very specific result, such as to leverage out an employee without having to use the normal disciplinary procedure. Or a colleague or line manager may enter mediation with no real willingness to listen to your concerns and to have an open mind about how these may be resolved.

The cure for such a situation may only arise when the bad faith emerges. Of course if it is clear at the outset that your employer is not open and serious about mediation, you would not agree to enter mediation in the first place. But bad faith may become apparent in the course of the mediation. You may not be able to proceed with the mediation and may need to withdraw entirely. In some circumstances the mediator him/herself may close down a mediation if he/she believes that one of the parties is not approaching the mediation process in good faith.

## 8. Union representation and mediation.

Mediation schemes may be introduced by employers who do not recognise unions as a way of providing a non-union channel for employees to resolve problems at work. Even in unionised workplaces, there is a danger that mediation may be brought in informally, without full consultation with the recognised unions or may be introduced on top of existing procedures, without proper consideration of how mediation relates to other well established ways of dealing with grievances and disputes.

Sometimes unions are sceptical about mediation, as it may be feared as a way of undermining the role of the union in representing members with individual problems at work. But often union full time officials and local representatives welcome mediation as an additional way of helping members which they recognise may be appropriate in some cases.

A sensible employer, paying regard to international experience and good practice in the introduction of mediation systems, will understand that in a unionised environment, a new offering of mediation services to employees can only work successfully if the recognised unions have been fully involved at the design stage.

This accords with partnership working principles advocated by the TUC. It is also likely to be a requirement under the local recognition agreement, since the introduction of mediation will inevitably involve some review of existing agreed procedures especially the grievance procedure. That must be done on a joint basis between the employer and the unions.

Mediation is unlikely to have a large take-up if it is simply made available by an employer. Employees may understandably be suspicious about any new service and will look to their union reps for guidance before using a new approach in place of more familiar ways of progressing complaints. In unionised workplaces in the UK it seems to me much more likely that mediation will be widely taken up and will be experienced by employees and their managers as successful, if the growth of mediation is demand-led. That is to say when employees and their union reps know what it is that they want to achieve by using mediation to resolve problems, rather than simply having mediation publicised by circulars from the HR Department or suggested to employees by their managers.

Union reps are trained in union courses to consider at all times the interests of the member they are advising. In my view, this focus is compatible with ensuring that, when accompanying and assisting a member in an informal discussion or in a formal grievance procedure, the member concerned listens to what others are saying as well as having their own views heard. Union reps are often very effective at helping line managers and senior managers to understand the needs of a union member who is experiencing problems at work. They are equally effective in helping the union member to clarify his or her objectives, to be realistic and flexible and to understand the management point of view. Union reps also have access to any relevant formal collective agreements, information about conditions of employment and wider information available from the union at regional or national level. Management in unionised workplaces generally value the work of the union reps and find it much easier to resolve matters with an employee who is accompanied by a union rep than one who is on his or her own.

For all of these reasons, union reps experienced in advising and assisting union members with problems at work, will generally find that they can identify easily with the approaches to negotiation based on “interests” or “needs” and the problem solving methods which are conveyed in most mediation training courses. In some cases union reps, after appropriate training, may make good mediators. In many cases, union reps will be better able to advise and assist members after mediation awareness training.

Union reps may find this short discussion paper helpful as an introduction to the issues involved in mediation for members. In addition, here is a checklist of points which union reps should consider when mediation is being introduced in your organisation.

- Insist that the employer engages the union, whether through traditional negotiation or partnership working (where that is the agreed approach) at the earliest stage – the design stage - before any mediation service is introduced.

- The Advisory Conciliation and Arbitration Service (ACAS) is a well established tripartite agency, with union and employer involvement, which has public funding to assist in the resolution of individual as well as collective disputes. ACAS offers specialist advice to organisations helping them to develop mediation schemes that meet their needs and to train their employees in mediation skills. There are also reputable commercial mediation providers who offer similar advisory and training services. You should seek union involvement, alongside the employer, in hearing what potential providers have to offer and being part of the selection process. ACAS do have the advantage of having a great deal of experience of working with unions as well as employers and their specialist advisers should be comfortable working with both union reps and management in a unionised environment.

- Part of the negotiation should be about how mediation will relate to existing procedures. In particular, will mediation be seen as a side-step away from the grievance procedure or will it be a parallel route through the grievance procedure? Where mediation is an alternative to grievance, it is important to ensure that employees do not lose their rights. Mediation can be designed in such a way that there can be a "loop back" to the established grievance procedure where mediation has not resulted in a mutually acceptable outcome. Negotiations should also cover the time scale for mediation. In order to minimise the danger that employees opting for mediation become time-barred from Tribunal proceedings, mediation, where agreed, should be offered quickly and completed promptly.

- Will the mediation service be offered by an in-house panel or by external providers? Or by a combination of both? If the service is to be provided by an in-house panel, will all groups of staff and managers have an opportunity to participate? Some of the best mediators may come from a union as well as from a management background. What ground rules will be established to ensure that in-house mediators only mediate in situations where there impartiality is clear and is accepted by the participants? Where external mediators are used, insist that the employer meets all the costs. Where ACAS are used, they will make no charge for a mediation where someone has a complaint about their employment rights which they have already taken, or potentially could submit, to an Employment Tribunal. If the conflict or dispute has not got that far, ACAS will have to charge for mediation. Mediation service providers will tend to charge for mediation work undertaken in almost all cases, as they have no public funding to undertake this work.

- Employees who decide to use mediation should feel they can be supported and even accompanied by a union representative, as they would in any other process used to resolve problems at work. It is important to note that mediation is a kind of negotiation but is a negotiation under in a distinctly different environment operating under special ground rules, so that a representative has a rather different role and will need some training (see below).

- Training will be needed for union representatives advising members who are considering mediation and accompanying members in mediation. It is not

necessary for reps accompanying members to be trained mediators but it is likely to be necessary to have at least some mediation awareness training. The employer should commission such training from ACAS or other professional mediation trainers.

- Clarify within your own union who is best suited to accompany members in mediations if this would be helpful? It is likely that this may depend on the complexity and seriousness of the case. For example, where the union's lawyers have already been involved in assisting a member with a Tribunal claim and the case goes to mediation ahead of any Tribunal hearing, the lawyers may well be instructed to accompany the member at mediation. Where mediation is introduced as an option for members for early stage grievances, personality clashes with colleagues and so on, it is much more likely that local union reps will be best placed to accompany and assist the member, just as you would in a local grievance procedure. In some cases, unions may use full time officials to assist members in mediation. Each union will have, or need to develop, its own approach to advice and support in mediation. Details will differ and it is most important that you check with your own union.

- When a member is offered or is considering requesting mediation, always discuss the pros and cons in an open and honest way. See the lists of pros and cons of mediation above. Never push a member into mediation, nor tell them not to enter mediation. It is the individual's own decision. Mediation should be entered on the basis of informed consent. Where union officials and reps can help is to ensure that the member has the necessary information and is capable of making an informed choice. You can also help a member to resist any management pressure to enter mediation or to overcome management reluctance to make mediation available on your member's request.

- Once mediation has been agreed, safeguard your member's interests during the setting up stage. Ensure that you as well as the member are consulted about dates, so that you will be free to accompany the member if this would be helpful. Ensure that the safeguards referred to below are put in place.

- If you are accompanying a member during the mediation itself, be constructive and don't interfere with the mediator's work in facilitating discussion and progress towards agreement. Keep an eye on your own member's well-being. In particular, watch out for signs of exhaustion and be ready to call a break if you feel that your member needs a rest or a private discussion with you before continuing. The mediator should be looking after this aspect, so this guidance is really intended as an additional safeguard where a union rep is involved. Don't encourage your member to walk out but don't force him or her to stay if he/she finds the mediation to be going badly. Where a member is inclined to walk away from the mediation, you may be able to help by a "reality check" process- ask the member to go over what are the other options, if any, for resolving the matter. Remember also that it is normal for there to be a lively, and robust dialogue in a mediation, before discussion progresses to a more constructive mutual exploration of options. You can help your member to assess whether the discussion is beginning to move things on to the point at

which a way forward may emerge. Participants in mediation can find the process very demanding and tiring. That goes for union representatives as well. It may be necessary to ask for a break and to resume later in the day or on another day. The management may resent the extra cost. However, if the alternative is that your member agrees to something out of sheer exhaustion which he/she later regrets, then an break is far better.

- After the mediation, help to maintain confidentiality. The mediator will always explain to both parties the importance of confidentiality. A union rep accompanying a member in mediation will be within the circle of confidentiality. You may have a role in following up the implementation of the mediation agreement. For example, where management have agreed to do certain things, you can check and if necessary chase progress.

- Union representation in mediation may well increase the likelihood that, where an individual's bad experience reveals a systemic problem in the organisation, management will agree measures to rectify that (or at least to place it on the collective bargaining agenda) as part of the undertaking given to the member in mediation. Often an employee who has suffered problems at work will be anxious to ensure that no-one else has to experience the same thing in future. An enlightened employer will also wish to learn lessons from an individual case. In such cases it may be appropriate, by mutual agreement, to identify aspects of the mediation agreement which need not remain confidential, in order that – without reference to the individual case – management and the union can work together on any agreed actions which have a collective rather than only an individual impact.

As mediation develops in unionised workplaces in the UK, mediation itself will become a somewhat different animal. Mediation in a unionised environment has the potential to be more effective, both in advancing the interests of individual members and in ensuring that the resolution of individual disputes helps to promote good employment practice across the organisation. Trade union reps in the UK therefore have an exciting challenge of helping to shape the way in which mediation works and making workplace mediation more effective and more appropriate than it could possibly be in the absence of union involvement. This improvement in mediation will not happen overnight. Unions, employers and mediators themselves have much to learn. It is likely that a discussion paper like this one will need substantial revision in the light of trades union experience of mediation over the next few years.

## 9. Entering mediation- the safeguards you should expect.

As a union member entering mediation there are a number of safeguards which you can reasonably expect. Here is a checklist for you to consider.

- **Are you well enough to go to a mediation meeting?** If you are suffering ill health, or if you have a disability which may place you at some risk, do consult your GP or specialist medical adviser before going to a mediation meeting. The advice may cover whether you are capable of handling the process of mediation at all, such as giving your informed consent to enter

mediation and reaching voluntary agreement. Or your medical adviser may advise that there should be some limits, for example on the duration of mediation or that there should be regular breaks, with food and refreshments. Where you are receiving assistance from your employer's Occupational Health service, you and/or your employer may seek their advice before you embark on mediation.

- **Times and location of mediation meetings.** Mediation meetings should be scheduled at reasonable times, consistent with your normal working pattern and not involving excessive hours. Even if you are in the best of health, be aware that mediation can be very demanding and tiring for participants and you are entitled to expect set times, with scheduled lunch and refreshment breaks, rather than an open-ended commitment. Mediation should take place in a neutral location. If it is on your employer's premises it should be away from your or your line manager's normal territory. In order to maintain confidentiality, it should not be in a location where you can be observed attending by colleagues. There should generally be three rooms available, a conference room where both parties meet together with the mediator, and two side rooms, one for each party to have confidential discussions.

- **Is the mediator independent and trained?** You should be informed of the identity of the proposed mediator, in advance, together with some basic information on the mediator's training and experience. If the mediator is a person from within your own organisation, are you satisfied of his/her independence? Someone from another department or location may be completely impartial but you are entitled to consider whether this is in fact the case and to raise questions and, if you feel it necessary, to ask for another mediator. You may have a preference for a mediator with particular experience, for example with experience of equality and diversity issues. The choice of mediator is not a matter for management alone but for you and management to agree.

- **Are your rights safeguarded, in the event that mediation does not result in a mutually acceptable outcome?** Mediators often report that about 4 out of 5 mediations end in a resolution which works for everyone. But there is no guarantee of success. Where you are opting for mediation in preference to exercising your rights to use some other procedure – such as lodging a formal grievance or a complaint of bullying - check that you will be able to opt back in to the formal procedure in the event that mediation is unsuccessful. You should not have to permanently give up your right to lodge a formal grievance or complaint until the point at which you have resolved your concerns and as part of a mediation agreement. If mediation is unsuccessful you may wish to revert to the more formal procedure.

- **If you have a legal claim, or a potential legal claim, will you remain within time limits once you have entered mediation and as it progresses?** Legal claims – such as claims about unfair dismissal and discrimination- have time limits within which the employee is expected to have lodged a grievance and to have submitted a claim to an Employment Tribunal. If you are in any doubt, you may need advice through your own union to check that by entering

mediation, you will not allow a time limit to expire and thereby lose your right to pursue a relevant legal claim. There may be a way to formally protect your position and still enter mediation. For example, it may be that a grievance can be lodged and, by agreement with your employer, put on hold while mediation is attempted. A Tribunal claim may, where time limits are pressing, be lodged and then, by agreement, be put on hold pending the outcome of mediation. **Where you believe that the issues on which you are about to enter mediation could form the basis of a legal claim, you should always take advice about how to protect your legal position, in case mediation fails and you wish to revert to asserting your legal rights.**

- **Are you entitled to be accompanied in mediation?**

As a trade union member, unless the mediation is at an early stage or about an issue on which you are very comfortable to speak for yourself, you may prefer to be accompanied by a trade union representative in mediation. Bear in mind that mediation is a negotiation under very special ground rules, so that your union representative would not be acting as your spokesperson in the way which might occur in a formal grievance hearing. Mediation is a process in which you and the other party will be encouraged by the mediator to speak to each other directly, wherever possible and, as the mediation progresses, to work out the basis of an agreement together. Nevertheless, your union rep can be very helpful as a person who can look out for your well-being and whom you can consult as the mediation progresses. As in any process at work, your union rep can also help safeguard against any management abuse of the process of mediation, bad faith on the part of management and, if the worst comes to the worst, can help you to extricate yourself if the mediation turns sour. Your own union will advise you about who is the most appropriate person to accompany you when you enter mediation on an issue arising at work.

Sometimes another person in your life – typically a partner- will be much affected by what you agree and may have definite views. It can be helpful, if you wish, for that person to accompany you in your private room during mediation or to be available at the end of the phone. Sometimes a person who cares a lot about you can become angry and upset on your behalf and this may not help the chances of success in mediation. On the other hand, if you agree something without consulting those closest to you and have to explain it when you go home in the evening, that may put you in a position of personal difficulty. You will need to make your own decision, perhaps in consultation with the person or people closest to you, about how to handle this, so that you can maximise your chances of reaching a successful agreement in mediation while ensuring that any agreement will work out well for you at home as well as at work.

- **The mediation agreement is voluntary, is your own agreement and is confidential.** Only agree at the end of the day what you are genuinely willing to agree. You may move a long way as you see that there is also a willingness to move by the other party and in a mutual effort to reach a workable agreement. But anything you agree should be on a voluntary basis. You and the other party, the mediator and all present will agree to the confidentiality of the mediation agreement. You can expect that to be adhered to and should

observe it yourself. You and the other party will each then implement the action points you have agreed as part of the mediation agreement. It may be helpful, unless there is complete trust at the end of the mediation process, to agree how any difficulties of implementation or any fresh issue which may arise between the parties will be addressed in future.

## 10. Sources of information

There is a wealth of literature about mediation but not currently much which is written specifically to advise employees and union members about mediation on workplace issues.

It is worth checking the latest information on mediation on the ACAS website on www.acas.gov.uk. ACAS include a general guide to mediation, with video clips to give an idea of what mediation can look and feel like. They also have a helpful mediation FAQ (frequently asked questions) section.

In Scotland, there is excellent guidance on good practice in mediation and information on mediation providers, through the Scottish Mediation Network. See their website on http://www.scottishmediation.org.uk/

## 11. Acknowledgements.

I would like to thank my own union for study leave in which I was able to improve my understanding of mediation and the many union members, full time officials and solicitors who have discussed their own experience of mediation with me. Thanks also to the members of the Steering Group of the Improving Dispute Resolution project in higher education (supported by the Higher Education Funding Council for England) with whom I have worked on a sector specific project which is ongoing. I am grateful for lively and illuminating discussions with a number of mediators in the UK and would especially thank Lin Inlow, Doug Yarn and their colleagues at the Consortium on Negotiation and Conflict Resolution at the University of Georgia. Ewan Malcolm of the Scottish Mediation Network has provided immense encouragement and he and John Moffat offered thoughtful comments on the final draft. I am grateful to the SMN for putting this discussion paper into the public domain. *All views expressed are my own.*

## 12. Request for comments.

***I would welcome comments as the views I have expressed remain, in some respects, tentative and some of the issues are likely to be and remain controversial until there is much wider experience of the use of mediation by union members in the UK. This discussion document is not the last word on mediation for trades unionists in the UK, nor even my last word on the subject. I hope that it will start off a lively discussion.***

***Comments can be sent to***

***david78rpm-unionmediationviews@yahoo.co.uk***

***Please note that I am not able to, nor is it appropriate for me, to offer advice to individuals considering mediation. If you need individual advice, please contact your own union or see sources of information above.***

David Bleiman

October 2008