

Key issues and conclusions

The risk in using workplace mediation to deal with workplace bullying does not necessarily arise from personalisation alone, but rather from the privatisation of organisationally and socially damaging behaviour. Privatisation not only provides the opportunity to avoid accountability, but also denies organisations the opportunity to send a message to their employees about acceptable conduct in the workplace.

It is important, however, when discussing the question of the appropriateness of mediation for workplace bullying cases, to recognise that organisations have duties of care in relation to their employees and that failing to adequately uphold these can expose them to legal liability. This has implications for the way workplace mediation is positioned with other procedures and though mediators may recommend mediation for bullying cases, employers should have robust processes in place to determine whether mediation is the most appropriate approach.

In the context of accountability, organisations should pay particular attention to any contributions organisational culture may have played in leading to a bullying complaint. Where mediation is deemed appropriate, the notion of 'tailored privatisation' does offer some scope for preserving self-determination in workplace mediation whilst addressing criticisms over accountability in relation to workplace bullying. Utilising mediation in this way however, requires employers to take a greater role in the mediation process than is often desired.



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Further materials, links and references

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The appropriateness of using workplace mediation to deal with workplace bullying

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Summary

This briefing explores the question of the extent to which workplace mediation is an appropriate way of dealing with workplace bullying.

The use of workplace mediation to deal with bullying is a contentious issue and debates are often highly polarised. Despite strong opposing arguments and evidence that workplaces are using mediation in bullying cases, there is a notable lack of research exploring these counter arguments.

An important argument in favour of its use relates to the opportunity for self-determination and for an alleged target to potentially regain control and power. One key argument against the use of mediation in this context relates to its individual and confidential nature and the scope it may provide for employers to avoid accountability by personalising organisational problems.

Drawing on interviews with external workplace mediators and focusing on British workplaces, this briefing considers how confidentiality in mediation can be negotiated to help mitigate objections around personalisation and privatisation whilst preserving the scope for self-determination. It warns, however, that use of confidentiality in this way should be approached cautiously and should not be used to add further pressure to an already complex and stressful situation.

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Introduction and background

The question of the most appropriate way to deal with bullying is a longstanding one, and although there is no specific anti-bullying legislation in the UK, failing to deal with bullying in an appropriate way potentially exposes employers to liability for breach of duties of care. In contrast to more traditional and formal approaches, workplace mediation has been proposed as an alternative approach (Acas, 2015; BIS, 2011)- this is, however, a contentious proposition.

Facilitative mediation is the dominant form of mediation used in the UK (Latreille, 2011); it is a relatively informal, though structured process, which is voluntary and confidential. The process is facilitated by an impartial

mediator(s) and the outcome is determined by the parties in conflict. Proponents tout its benefits for self-determination and regaining control (e.g. Jenkins, 2011); whilst opponents question the ability of a mediator to adequately manage power imbalances and warn of the risk for mediation to be used to personalise organisational problems and thus allow employers to evade accountability (e.g. Keashly & Nowell, 2011).

Taking the risk of personalisation as its focus, this briefing draws on interviews with twenty external mediators to explore the extent to which workplace mediation may be seen as appropriate in this context.

The research

The proposition that workplace mediation is an appropriate way of dealing with workplace bullying was endorsed by the mediators interviewed, who all provided examples of where mediation had been successful in cases initially labelled as bullying. Indeed, it is important to note that there was a general consensus that the nature of the conflict should not really be seen as a barrier to the use of mediation: what matters was that the parties were voluntarily willing to try mediation. Nevertheless, there was an acknowledgement that, given their legal responsibilities, employers may take a more cautious approach.

This distinction is interesting since it indicates that there is a need to recognise that employers and mediators have different responsibilities in relation to bullying, and therefore the answer to the question of the extent to which workplace mediation is an appropriate way of dealing with workplace bullying should vary accordingly. This observation speaks directly to the accountability criticism.

Avoiding accountability through personalisation

Whilst the mediators communicated a strong support for the power of mediation to help individuals in a situation labelled as bullying, there were reservations about its ability to tackle bullying which exists on a systemic basis across an organisation.

These reservations were expressed in terms consistent with those expressed by Keashly and Nowell (2011). They focused on the potential for mediation to allow employers to treat management or other organisational failings as individual, interpersonal problems, and thus allow them to avoid taking any responsibility for the dispute having arisen and progressed to the point a complaint of bullying was made. Failing to accept any responsibility also potentially prohibits the taking of effective steps to rectify the wider problem. This was expressed in frank terms by one participant:

"They'll say "oh Janet and John can't work together"...I'll tell you now there's something really crap about putting in a load of support... whilst still allowing your senior management to behave like shits, because what you're doing is you're saying you're going to create an organisation that's fundamentally naff but we're going to support you in putting up with it, and that's horrible. There's got to be integrity in an organisation."

A further consequence of the personalisation of disputes may be the removal of the opportunity for an organisation to send a clear message as to what is considered as unacceptable behaviour in their workplace. This therefore potentially contradicts best practice in relation to tackling workplace bullying.

Confidentiality and self determination

It is the confidential nature of workplace mediation that facilitates these consequences, since information shared within the mediation process should remain only between the parties – here the alleged bully and target and the mediator. In line with existing research, the participants saw the confidential nature of mediation as a vital factor to enable parties to realise the self-determination promised by facilitative mediation. It was also seen as an important feature helping to distinguish mediation from grievance processes. Much was made of the high levels of subjectivity involved in bullying cases and of the freedom afforded in mediation to reject labels and to explore the behaviour at the root of the dispute.

Confidentiality does, therefore, play an important role in mediation in bullying cases, but in so doing, it can operate to inhibit the flow of information between the parties involved and their employer and limit any wider organisational change. What this serves to do, therefore, is to not only personalise bullying complaints but also privatise them.

Confidentiality and tailored privatisation

Confidentiality is, however, not necessarily absolute and is subject to a number of exceptions, for example in relation to illegal activity. Accepting the non-absolute nature of confidentiality allows for the possibility of its use to mitigate the accountability criticism. In order to do this, what is needed is a greater focus on the relationship dynamics between the mediator and the organisation hiring them.

"I do feedback as part of the closing process, specific messages that the people have agreed that I feedback... As I'm going through the process, and I'm liaising with the organisation... feeding back to them about things they may want to consider doing differently".

The parties to the mediation can, therefore, be asked whether there is any information or suggestions they would like to share with their employer. Conversely, organisations may also be asked whether there is any feedback they would like to receive from the parties. Further, mediators themselves may also offer insight about organisational contributions to the dispute.

Through negotiations around the scope of confidentiality, a tailoring of the extent of privatisation can occur. This can help an organisation to at least become aware of any role it has played in the situation, and in this way they may be made aware of any accountability – even if there is no mechanism in mediation for actually holding them to account.

However, this process of tailoring and opportunity for sharing was seen by the mediators as being secondary to the need to develop the environment of trust and openness which facilitates an exploration of the behaviour. The consequence of this is that the power to decide to share information beyond the mediation process lies firmly with the parties involved. There were mixed reports on how willing the mediators had found parties to be to share information with their employers.

Further to this, there were also mixed reports as to how willing organisations were to use mediation in this way.

"The problem, I guess, is where you have organisations who aren't really conflict savvy. They just use mediation as a, "oh blimey we can't deal with this one, let's just send it off to the mediators and they can sort it out"... it's much more of a tick box thing".

The possibility for placing greater pressure on parties in an already complex and stressful situation by asking for feedback was raised, and mediator skill, integrity and confidence were identified as crucial mechanisms for challenging attempts by employers to use mediation in an inappropriate way.