INTRODUCING MEDIATION WITHIN AN ORGANISATION

> "I fight for my corner, sometimes to my detriment, by the way; like the court case I had with Don King many years ago. He and I could have sat down and sorted that out. But, you know what, I didn't want to sit down because I was so aggrieved at what happened."
>
> *Interviewer: "And it cost you several million?"*
>
> "Yeah I took it to the limit, the whole limit. I fought it all the way and then we had to compromise. So I had to wipe my mouth, to do the deal, 'cos I had to live to fight another day."
>
> (Frank Warren, boxing promoter, on *Desert Island Discs*, BBC Radio 4, 24 January 2010)

Frank Warren's experience, described above, will be familiar to many people who have experience of litigation. In the adversarial systems of Britain and Ireland, court cases can be long drawn-out, bitter, expensive and publicly humiliating. In most cases, a compromise is reached after several months, if not years, of pleadings and exchange of documents, but before the matter is actually heard in court. It is not surprising that a party might say afterwards: "He and I could have sat down and sorted that out."

Mediation gives parties to a dispute the opportunity to sit down and sort it out. In mediation, an independent third party sits down with the parties to explore opportunities for resolution. This can occur at any stage of the proceedings. The discussions are entirely confidential and "without prejudice" to any further development of the dispute. Unlike a court or arbitration, the outcome is not limited to an award of damages, or injunctive relief, and the parties may come up with creative alternatives of their own. Most importantly, the outcome is agreed between the parties, and not imposed on either of them by the mediator.

For any organisation (whether a company, a government department, a charity or a club), there are advantages to mediation. It provides an opportunity to resolve a dispute quickly and privately. It helps to remove the risk and uncertainty associated with litigation, and should normally reduce legal fees. In international disputes, it can help to have a mediator who understands the different languages and cultures of the parties to the dispute. For example, Batmark, the intellectual property division of British American Tobacco, which operates worldwide, introduced a policy of seeking to resolve mediation in its international disputes, and has benefited from reducing the uncertainty of litigation in many countries.

Mediation has more applications than the resolution of legal disputes. "Deal mediation" is becoming increasingly common, where parties to deadlocked negotiations can retain the services of a mediator to help come to an agreement. Mediation can also be used by organisations seeking to reallocate responsibilities to

different departments. It gives the employees an opportunity to air their concerns about changes in the structure of the organisation, and have these concerns addressed.

People who attempt to introduce mediation into an organisation can often encounter difficulties. But management should consider taking the following steps to introduce mediation into their organisation.

1. Taking control of the organisation's own disputes

Disagreements are part and parcel of working with other people. Normally, these are of a healthy nature, and assist the organisation in finding the best way of achieving its goals. But when disagreements turn sour, they can turn into more unhealthy disputes. Unless the organisation has a policy of dealing with such disputes, they can take on a life of their own, to the detriment of the organisation.

There are four types of dispute that an organisation might typically face. The first is a dispute between employees, such as a bullying or harassment claim. The second is a dispute between an employee and the organisation itself, such as a claim relating to pay or promotion. The third is a claim between the organisation and a third party, such as a customer or supplier, with whom the organisation has an ongoing relationship. The fourth is a "one-off" dispute between the organisation and a third party, such as a personal injuries claim by a visitor to the organisation's premises.

In the first three types of dispute, serious damage is likely to be cause to the company by failing to reach an early resolution. Internal and external relationships are key to the efficient running of an organisation, and a dispute may not only affect the relationship relevant to the dispute, but also the reputation of the organisation with other employees, customers and suppliers. Even the fourth type of dispute can be damaging, if it develops into a long drawn-out case where the outcome is uncertain.

Once disputes start to involve outside lawyers, they can develop a life of their own. Personnel within the organisation may prefer to delegate the control of the dispute to the lawyers. While the dispute wends its way through the courts, the personnel within the organisation may change, making it increasingly difficult for the lawyers to get instructions concerning key facts. Where there is a breakdown in communication, and nobody takes charge of the dispute, it is hard for anybody to make the decision to seek a resolution.

One answer to this problem is for senior management to take a direct interest in any brewing dispute. Once they become aware of it, they need to give control of it to a senior manager or director. This person should have sufficient authority to investigate the material facts, and sufficient authority to settle the dispute. This person should also be the main contact with any outside legal team – giving instructions and taking advice, but without letting the outside legal team take over the dispute altogether.

2. Training personnel in the principles of early resolution through mediation

Organisations seeking to introduce mediation often face resistance. Negotiating teams can be fearful of resiling from the positions that they have adopted. Many businesspeople have cultivated a tough reputation that they are afraid to lose. For these people, the term "mediation" can have all the appeal of compulsory morning yoga sessions, or group therapy.

The best way to open people's minds to mediation is to see it working in action. If this is not possible, the best alternative is to introduce mediation training. For most people who have undergone mediation training, the use of role play can be a valuable introduction to an unfamiliar technique. In many mediations, or role plays, the parties experience a moment of break-through. They find that there is a coincidence of interest that makes an agreement more rather than less likely. When employees have experienced this, they are more likely to appreciate the benefits of mediation to their organisation.

Employees should also be introduced to different types of mediation. For example, in some US schools, "peer mediation" has been a valuable way of reducing conflicts among students. This requires the disputing students to attend a mediation chaired by another student. The trigger for such a mediation can either be the students themselves, or a teacher might require that such a mediation take place as an alternative to disciplinary measures.

For employees within an organisation, a meeting with a peer mediator could be a precondition or an alternative to making a formal complaint against another employee. Most claims of bullying or harassment have roots in small misunderstandings. If the aggrieved employee has an opportunity to air these misunderstandings in a confidential setting, the parties should be able to reach an accommodation that may even be of benefit to the organisation.

By receiving training in mediation and "interest-based" negotiation, personnel may be assisted in taking control of their own disputes. They may also realise the value in seeking early resolution by mediation of external disputes.

3. Publishing a policy of mediation

One of the obstacles in reaching the negotiating table is fear of seeming weak. Even where an organisation realises the value of mediation, there is a fear that an offer to mediate may already seem like a compromise too far. This weakness may be turned into a strength for the organisation, by stating that mediation is part of the organisation's policy.

For example, where a dispute has arisen with a third party, and the organisation wishes to mediate, a letter can be sent to the following effect:

> "XYZ Ltd has a policy of seeking early resolution of disputes through mediation. We would therefore request that your client agree to a preliminary meeting with a mediator to be agreed between us or, in the alternative, that you agree to the nomination of a mediator by the Chairman / President of the ABC Society. If your

client does not agree to attend such a preliminary meeting, we shall bring this letter to the attention of the court in any application for costs."

In England, such a policy was bolstered by the decision in *Dunnett v Railtrack* [2002] EWCA Civ 302, in which the losing party to a case was not ordered to pay costs because the winning party had refused to engage in mediation. In many countries, rules of court have been introduced to facilitate the use of mediation. In addition, EU directive 2008/52/EC has been passed, which will require member states to provide facility for mediation.

In the future, therefore, a policy of mediation may be seen as a strength rather than a weakness.

4. Incorporating mediation into the procedures of the organisation

Going back to the types of dispute discussed at (1) above, it is open to organisations to introduce procedures to seek early resolution by means of mediation.

Mediation is a voluntary process, so people should not be compelled to attend if they do not believe it will be of benefit to them. However, an employee's handbook might include a requirement that an employee have a preliminary meeting with a mediator prior to any formal investigation taking place in a bullying or harassment claim, or prior to bringing a claim in relation to pay or promotion.

Mediation can also be included in contracts with external parties, such as customers or suppliers. Just as it is common to include an arbitration clause in contracts as an alternative to litigation, a preliminary meeting with a mediator might be incorporated as a precondition to either arbitration or litigation.

Once mediation has been introduced for some types of dispute, and found to work, it can be expanded to other types of dispute. For example, the Electricity Supply Board in Ireland has long had a mediation procedure for bullying and harassment claims, which is generally felt to be beneficial. In recent times, it has introduced mediation for personal injury claims brought by its employees. This has enabled the organisation to deal with most of these disputes internally, without the delay and expense of letting them go to court.

5. Passing on the benefits of mediation to employees

Organisations that regularly engage in litigation will incur substantial legal costs, as well as suffering the costs of strained relationships with employees, customers and suppliers. Where mediation is introduced successfully, costs should fall and relationships should improve.

The process of mediation can also help an organisation realise certain weaknesses in its procedures, by hearing from the disputing parties how the dispute arose. This should help the personnel in the organisation learn how to improve the procedures.

If an organisation can reduce costs and improve its relationships and procedures, the employees of the organisation should automatically benefit. But the culture of mediation is likely to be strengthened if the financial rewards of mediation are passed on to the employees.

Introducing a bonus for mediation is a double-edged sword. It would not benefit the organisation if the employees are given an incentive to settle an external dispute where it is not in the interests of the organisation. Furthermore, an organisation that gave direct bonuses to employees who settled disputes might even find that there was an increase in the number of disputes.

A bonus culture must therefore be handled cautiously, with a view to the potential pitfalls. However, just as mediation has benefits that are not just financial, an imaginative organisation should be able to find creative ways of rewarding its employees for resolving disputes in a manner that is of benefit to the organisation.

6. Retaining external advisors who understand the benefits of mediation

One of the benefits of mediation to an organisation is that there should be a saving in legal expenses. These expenses do not only go to lawyers, but to the accountants, engineers, medical professionals and other experts who are retained to assist parties in litigation. For obvious reasons, many professionals are sceptical of the value of mediation – not least to themselves.

Leaving aside the financial disadvantages to professionals of early resolution, they are likely to be used to the traditional way of conducting litigation. As with hard-nosed businessmen, some professionals will not be receptive to mediation, and will not be keen to participate in it. Where legal teams are used to dealing with organisations that are not in control of their disputes, it may be difficult to adapt to the more hands-on approach of an organisation that seeks a different approach.

A particular problem for lawyers, where an organisation seeks early resolution, is that they may be considered negligent in advising a settlement without the litigation process having been completed. For example, in many cases, it is necessary to obtain discovery of documents from the other party before a case in negligence or breach of contract can be established (or disproved), or for a proper assessment of damages. An organisation might make the commercial decision that it is better to agree a resolution with the opposing party rather than let the case run its course. The legal team may seek to dissuade the organisation from reaching the agreement on the basis that the relevant facts are not all available.

If an organisation is to have a policy of seeking early resolution by means of mediation, it needs to have external advisors who will support it in this policy. There is a role for lawyers and other professionals in some mediations, but it is different from their role in the litigation process. Their primary role is not in the presentation of the facts and legal arguments to the mediator, as this is done mainly by the parties themselves. Their role is more in advising their own clients as to the agreement to mediate and the agreement (if any) arising from the mediation. For many solicitors and barristers, this requires a different attitude to the dispute.

Unlike employees, outside professionals are unlikely to reap the benefits of any change in culture of the organisation. So it is more important that they have an incentive to adopt the policy of the organisation in seeking early resolution by means of mediation. Fee structures should not be arranged such that the professionals have an incentive to keep the dispute alive as far as the final hearing. The traditional "brief fee" for barristers should not be substantially higher than any "settlement fee" that might be paid on an earlier resolution.

On the other hand, if law firms and counsel are not receptive to a policy of mediation, it is always open to the organisation to move their business elsewhere.

Conclusion

Not all disputes can be resolved amicably. But many of the disputes that are decided by arbitrators and judges might have been resolved if the parties had sat down and listened to each other at an earlier stage. It is not an exaggeration to say that many legal actions are brought simply because one person failed to apologise to another.

Mediation provides an opportunity for the parties to sit down and listen to each other and, if necessary, to give the all-important apology. Any organisation that is sufficiently flexible should also be able to learn from any mediation agreements to avoid the pitfalls that created the dispute in the first place.

In his book *Leadership*, Rudolph Giuliani expressed the view that an organisation should "organise around a purpose". He said that all activity within the organisation should be funnelled towards the outcomes required by the organisation. When organisations get large and unwieldy, they are liable to have entire departments that are dedicated to matters irrelevant to the organisation's core purpose.

Mediation is one tool that can help an organisation to focus on its core purpose. If an organisation can get all its management, employees, customers, suppliers and professional advisors to focus on its core purpose, without getting distracted by disputes, it is more likely to be successful at what it does.

Mark Tottenham
Barrister-at-Law and Certified Mediator (Mediators' Institute of Ireland)
The Law Library, The Four Courts, Dublin 7