Keeping away from employment tribunals and Court room battles

How to save money, maintain business relationships and avoid negative publicity by embracing the power of mediation to resolve business and employee disputes

By Justin Patten

This paper provides a complete road map for managers who need to lower the cost of settling disagreements and disputes with employees, customers and suppliers.

After reading this report you will be able to:

- Understand fully the different options open to you in resolving disputes – and their costs
- Follow a 6-point plan for effective despite resolution which could save thousands on every dispute you ever face
- Understand how you can avoid Employment Tribunal and Civil Litigation cases and their associated resource implications

This paper will help you and fellow management make decisions with more confidence so that time and effort can be put into managing the business instead of managing problems.

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Disputes – The Costs to Business

Your job would be so much easier if you didn't have to deal with people!

I say this only slightly tongue in cheek because we all know that most business and employer to employee disputes start with misunderstanding, personality clashes or downright pig headedness by one of other party. But the reality of business life is that we all have to deal with people – the problem is if we get it wrong it can cost our companies hundreds or even thousands of pounds.

According to a survey conducted by law firm Nabarro disputes with employees, colleagues, customers and suppliers cost the UK economy £33 billion a year, yet fully two thirds of employers fail to educate staff on how to avoid and manage them, with more than half even leaving senior managers to sink or swim.

If disputes escalate they end in the Court room with costs reaching ridiculous heights in:

- Solicitor and Counsel fees
- Settlement costs
- Manager time
- Employee time
- Negative publicity
- Lowered company morale

If you've ever been involved in an employee dispute, been unfortunate to take a case to employment tribunal or had a customer or supplier dispute escalate to the point where it reaches Court you'll know how draining this can be. In terms of management time, moral and personal and emotional input.

Let's hope you won't have to deal with these kind of issues on a day to day basis but it pays to be made aware of all the options available so that next time you can try to avoid the Court room and horrendous costs associated with Court cases.

What Causes Disputes at Work?

The most common types of dispute are with customers (more than a third), followed by employees (more than a fifth) and suppliers (15 per cent).

Worryingly, almost half are allegedly caused by ineffective risk management procedures.

The recent *HR Benchmarker* mini survey asked participants to list the three most common causes of disciplinary and grievance cases and the three most common types of employment tribunal application brought against their organisation. The results are illuminating – demonstrating why it's so difficult to break the mould in resolving disputes.

Discipline
A massive 80% of participants in the survey cited poor attendance and absence as the most common cause of disciplinary proceedings being brought against employees. Following some way behind was poor performance (47%), then general misconduct (37%), poor timekeeping (26%), fraud and theft (17%), and aggressive behaviour/insubordination (13%). Other less frequently cited causes included breach of regulations (for example, health and safety), misuse of equipment (for example, e-mail and the internet), failure to follow procedures, and substance misuse.

Grievance
The most common subject matter of grievances was harassment and bullying, with 45% of participants having this at the top of their list. Bullying and harassment were a big problem in many workplaces and employers must continue to try to tackle them.

ACAS has drafted revisions to its advice leaflets on bullying and harassment to reflect the proposed changes to the law set out in the Employment Equality (Sex Discrimination) Regulations 2005. These regulations, which provide a definition of sexual harassment to bring it in line with other discrimination legislation, come into force on 1 October 2005, which is when the revised guidance becomes effective.

Other common causes of grievances were line manager relations (36%), pay-related reasons (27%), hours of work (including rotas and shifts) (18%), and terms and conditions (14%). Less frequently cited causes included job evaluation and relationships with colleagues. Employers, of course, must ensure that they now follow the statutory grievance procedure when dealing with employee grievances and must take them seriously and deal with them promptly.

Tribunals
The most recent Employment Tribunal and EAT statistics for the period between 1 April 2006 and 31 March 2007 show a 15% increase in the total number of claims compared to the same period the previous year. A total of 132,577 claims were bought with significant increases in equal pay claims up from 17,268 to 44,013 and a continued rise in the number of unfair dismissal claims, up from 41,832 to 44,491.

Amongst the claims were 972 for age discrimination, significant since the age discrimination provisions only came into force on 1 October 2006 and therefore represent the first 6 months worth of claims alone.

In tribunal cases during this period the average award for unfair dismissal was £7,974 and the average award for costs just over £2,000. But this is just the tip of the iceberg when it comes to evaluating the true cost of resourcing and managing such a dispute.

The bad news is that compared to the previous year the number of claims rose by 15% - up from 115,039 to 132,577. Equal pay claims accounted for a

substantial proportion of this increase with unfair dismissal claims also on the up.

The System isn't Working

The survey of 100 in-house lawyers and managers by law firm Nabarro has found nearly a third of companies do not learn from previous disputes or fail to update their policies in the light of dispute outcomes.

And we know why this is – don't we?

We are all busy people. We face pressures to cut costs or manage to very tight budgets – which often means reduced spend for training and development. We also know that senior managers are not always receptive to new ideas, especially when they challenge the status quo. A traditionally run, hierarchical organisation may prefer the macho route of litigation for handling disagreements and may not have their eyes open to alternative routes which can be much more cost effective and much more successful.

A study by the *Chartered Institute of Personnel and Development* at the start of this year warned that the introduction of statutory dispute resolution procedures three years ago had failed to reduce the burden on the employment tribunal system and in fact had made it less likely that disputes were resolved informally.

In the Nabarro survey only six out of 10 senior managers were concerned about the impact a dispute could potentially have on employee morale, despite a fifth of disputes being directly with employees.

As every human resource professional knows the cost of low morale on company profitability must never be underestimated. Low staff morale is endemic in some industry sectors and is noticeable by the high staff turnover, low customer service levels, poor repeat sales rates and ultimately low profitability and high business failure rates.

Its survey found that conflict at work cost the average employer around 350 days of management time every year, even before the direct cost of employment tribunals was taken into account.

Horses for Courses

So, what's the answer?

Management – is the simple answer, managing disputes effectively from the outset can save an enormous amount of time and cost. But once a dispute has reached an impasse then the critical thing is to understand all the options available before electing which dispute resolution route to take.

So what are the options and how does each compare?

Litigation

In litigation parties can gain closure from taking the case through to Court and get a result.

A wronged Claimant can have vindication from a 3rd party and financial settlement. And in the case of a successful employment tribunal claim can produce remedies above and beyond financial compensation.

Recommendations can have a very real and important effect on a workplace and can lead to real change.

Disadvantages

- uncertainty – litigation is unpredictable
- delay - it may be 6 months to a year (or even more) before an employment tribunal hears the claim, in the meantime you're in limbo. For commercial disputes similar delays are not uncommon and can cause strains in other areas of the company as you try to cope with the consequences of the supplier or customer row
- stress - litigation puts a real pressure on all those involved and even a victory at the end cannot compensate for the impact a case may have on your business and often your personal life
- time – the lawyers, managers and in the case of employee disputes the HR director will need to spend a lot of time reading and commenting on documents and reviewing statements
- publicity – a tribunal case about alleged discrimination can have very negative effects whether the ruling goes the way of the company or not.
- limited remedy – in the case of employment tribunals they have limited powers and in some circumstances they can make declarations and (in unfair dismissal cases) order reinstatement
- Lack of control – once you are in a litigation scenario it's difficult to pull back and rethink, considering all the consequences of the action.

If you have deep pockets, no concern for the potential publicity and impact on company morale or you simply want to be proved right in a court of law then maybe litigation is the route for you. But be warned – whilst you may believe you are in the right, or may face pressure from management to gain a victory – there are no guarantees.

*Two thirds of SMEs believe the cost of an employment tribunal could result in their bankruptcy – **Management Today**, August 2007*

The costs of litigation will vary significantly depending on the precise details of the case, the lawyers selected, any other specialist advisers or counsel used and so on. Lawyers fees for most Court cases *start* at around £3,000 and can run to tens of thousands. In America a legal journal survey found that most lawyers won't take a case worth less than $20,000.

Arbitration
In arbitration an independent third party considers both sides in a dispute, and makes a decision to resolve it. The arbitrator is impartial; this means he or she does not take sides. In most cases the arbitrator's decision is legally binding on both sides, so it is not possible to go to court if you are unhappy with the decision.

Most types of arbitration have the following in common:

- Both parties must agree to use the process
- It is private
- The decision is made by a third party, not the people involved
- The arbitrator often decides on the basis of written information
- If there is a hearing, it is likely to be less formal than court
- The process is final and legally binding
- There are limited grounds for challenging the decision

Acas offers an Arbitration Scheme - the estimated time from the receipt of a qualifying agreement to use the Arbitration Scheme is usually around four to six weeks to set up a hearing, and a further two weeks for the award to be sent to the parties. So if you can wait and you don't mind someone else making a decision on the case arbitration may be appropriate.

Arbitration costs significantly less that going to court. There is an administration fee, to appoint the arbitrator and then the costs of the arbitration itself. The arbitrator decides who should pay the arbitration fees.

In ad hoc arbitrations, there are no prescribed rules for calculating fees. Generally, parties will agree a prescribed hourly or daily rate which, in the London arbitration market, can range anywhere between £200 and £600 per hour for each arbitrator. For a dispute which turns out to be lengthy, this can prove costly.

Conciliation
Used as a tool primarily in employment disputes conciliation is similar to mediation but is normally used when there is a particular legal dispute, rather than more general problems.

A conciliator will normally be there to encourage the two sides to come to an agreement between themselves.

Conciliation through Acas is free of charge and is automatically offered to an employee who makes an Employment Tribunal claim

If the claim might go to Employment Tribunal, the employee can also ask for conciliation before you put in a claim. Both employee and your employer have to agree to conciliation before it can happen.

The decision of an Employment Tribunal is not affected by any decision to try conciliation. So if you decide not to go through conciliation, or if you try it but it doesn't work, this does not make any difference.

The success of conciliation can be erratic due to the nature of the conciliator. Some are good, some are less so and they can be constrained by existing workloads.

A conciliator will:

- talks through the issues with each side
- explains the legal issues involved

The conciliator is impartial and independent (so they are not on anyone's side, and have nothing to gain), and your discussions are confidential. They'll try to help you make your thoughts clear, and look at ideas you may have for sorting out the problem.

The benefits are that:

- you'll get a better understanding of the issues
- you might sort the problem out without a tribunal hearing
- you could reach a solution on your own terms
- a settlement can include things that won't be covered in a tribunal judgement (like getting a good reference)

Settlements reached through Acas and LRA conciliation are legally binding. You'll sign an agreement called a COT 3, and once you've agreed it - even verbally - there's no going back on it. If the employee or employer break the agreement, the other party could sue.

Another form of legally binding settlement is a 'compromise agreement'. These agreements are used where Acas and LRA are not involved. There are strict requirements on a compromise agreement - putting it down in writing and signing it isn't enough. For this to be effective it must be in writing, relate to your claim and you must have taken specialist advice from someone who has appropriate insurance, usually a lawyer.

Conciliation is a free service – but of course is only available to employees in the case of an employment dispute situation, so it’s of little benefit to companies themselves.

Round table meetings

These are often used by personal injury lawyers and represent another way to settle cases. They are useful when there is reasonable rapport between the lawyers involved on either side. For many companies however they are not considered appropriate because their interests are not directly represented in the meetings.

The costs involved here will revolve around what you are paying your lawyers. If you have in-house counsel and the dispute is with another organisation it can sometimes prove cost effective – but of course stalemate can often be reached, well before an agreement!

Mediation

In mediation a neutral third party, the mediator, assists the parties to achieve an agreement.

The Courts today like all parties to explore the mediation route prior to litigation.

Mediation can be used on any type of dispute, not necessarily one already involving lawyers. The parties involved in the dispute appoint the mediator and therefore keep control of the proceedings until a resolution is found or it is recognised that a mediated settlement cannot be reached.

The mediator is different to a lawyer. They will not take sides or pass judgement instead they work with the parties to come to an agreeable solution that all can live with.

James Freund in The Neutral Negotiator: *"In litigation you lose control. With mediation you keep control of the process particularly on costs."*

Your case is suitable for mediation if:

- You would like to resolve a dispute quickly
- You would prefer to settle, to leave the way open to a continued commercial relationship with the person or organisation with which you are in dispute
- You would prefer to avoid a sensitive case going through the courts

Any person involved in a dispute can propose directly, either to their lawyer or to the other side that they would like to pursue mediation.

Alternatively, one of the lawyers involved in the dispute may suggest referring the case to mediation as a means of seeking early resolution.

If necessary the mediator will approach the other party to seek their agreement to mediation.

All parties retain access to legal advice and representation from their lawyers, if they wish, throughout the mediation process, and litigation still remains a final option if desired.

Once mediation has been agreed upon and a mediator chosen a formal document will be signed, setting out who will attend mediation, who the mediator is, the agreed fee and the time and place of the mediation.

The mediator's role is to act as a catalyst to enable the parties to resolve the difficulty for themselves. To do this the mediator will:

- Establish exactly what the dispute is about.
- Clarify the positions of the parties and translate them into terms that are clearly understood by the parties
- Establish what is important and what is not to each of the parties, give priorities to these various requirements
- Establish areas of overlap and help each side to a position of compromise
- Extend discussions into matters or proposals not previously considered
- Make suggestions to each party concerning alternative solutions
- Exert pressure for a solution to be reached and seek a face saving formula where appropriate

On the day of mediation, the mediator will call the parties together and allow them a brief summary of the dispute from their individual perspective.

The mediator will see each of the parties individually to clarify points and help them work towards an agreement.

The mediator reveals nothing to the other side without express permission. Instead they act as a go-between and imaginative problem solver.

If an agreement is reached, the mediator prepares a document setting out the agreement which is signed by all parties.

A mediation does not have to involve any lawyers. However if you are already involved in a dispute it is normal practice for your lawyers to be present for the mediation. In many cases your solicitor will recommend mediation as a potential way of resolving your dispute quickly and without the cost of a court case.

It is best not to use mediation if you want an injunction or a legal precedent.

You can mediate at any time whether before or during court or arbitration proceedings, which may be "put on ice" while the mediation is being arranged and conducted. It is possible to draft mediation clauses into employment contract to reflect this.

According to figures released by the government disputes using mediation settle in at **least 80% of cases**.

The cost of mediation will again be largely dependent on the mediator you select and whether you choose to have your legal team involved in the mediation. The beauty of mediation is that it can be organised quickly and often dealt with in a day or two. Most commercial disputes settled through mediation cost between £2,000 and £3,500. But the added advantage is that mediation limits the time spent on the dispute, can leave the parties still on speaking terms, avoids the delays and costs associated with Court cases and, being confidential, avoids any negative PR centering on the dispute.

Why is Mediation the Poor Relation?

The simple answer – it's relatively new and often misunderstood.

Most managers, HR professionals and business owners avoid disputes – so they have no reason to want to know about dispute resolution methods.

And unfortunately some lawyers really don't understand mediation, seeing it either as a threat to their potential to litigate or classing it in the same school as arbitration or conciliation.

In-house lawyers often don't have experience of mediation either. In a survey published last year only six out of the 21 FTSE-100 companies surveyed said their in-house lawyers had attended mediations as lead advocates without external lawyers, and even then on 'larger, more complex disputes' they would usually attend with external lawyers.

There is also concern about the without prejudice nature of mediation and the fear that a client may say something at a mediation which will damage one's case. This is why it is important to prepare properly for mediation and select an experienced mediator who brings creative problem solving skills, coupled with a thorough knowledge of the law and a determination to find solutions.

At the mediation generally the mediator will meet with all the parties, explain the procedure and then meet with the parties on an individual basis shuttling between the parties seeking to try to reach agreement between the parties.

Mediation is not a panacea

It cannot on its own overcome deeply-rooted intransigence or irreconcilable differences between businesses or other organisations in the global community. The alternatives to mediation, however – arbitration, litigation, economic sanctions – are much blunter and costlier in approach and outcome.

In a mediation situation the mediator will be seeking to help all parties reach agreement using the crucial skills of negotiation. These skills will be used, not only by the mediator to help reach an agreement, but can be used by the disputing parties themselves and their lawyers. Indeed lawyers who master the art of negotiation can not only help their clients reach a settlement, they can often help them get a better deal.

Trying a Solution that Works

We are advocates for mediation for one simple reason – we know it works. 80% of cases that enter mediation settle.

It's a modern solution to resolving disputes. Government are pushing for mediation to be considered before cases are taken to court

Gone are the days when employers can act unreasonably towards employees and get away with it; gone are the days when suppliers can deliver shoddy goods and expect still to get paid and gone are the days when we can get away with delivering poor value for money to customers. If you're in business you're going to have disputes – be they with employees, suppliers or customers. What you don't want is to get into the business of constantly battling out those disputes in the court room.

But if you are planning to try mediation there are a few simple steps you need to take first.

The Human Law 6-Point Plan for Successful Mediation

Plan & prepare in the right way
The most successful negotiators are not those that are gifted but those that have in fact given careful consideration to the issue at hand. This can manifest in researching your position and the other sides, your aspirations and those of the other side. If you start thinking what are your best-case scenario, your worst case and giving thought to the concessions that you will make, this sets the basis of having a successful negotiation.

Listen more than you talk
All of us like to express ourselves but often when the other side (or in the case of a mediation, the other side and the mediator) is talking they reveal some information about their desires for the negotiation. Often this can be part of an area of overlap and can be all the difference between the deal being reached or not and enabling you to successfully negotiate more effective terms.

Keep emotions in check
In my experience many people get far too emotional when they negotiate. Emotion is not necessarily a bad thing as it shows motivation. However if you lose control the chances are that you make some form of error which may come back to haunt you in the negotiation process. If you have researched your position carefully, anticipated some of the issues which may come up, then this puts you in a better position to negotiate.

Balance aggression against co-operation
Often individuals can think that the best way to negotiate is by being aggressive. As a mediator I don't agree and believe that the best result can come from a softly, softly approach. According to research conducted in the United States up to 87% of negotiators performed more effectively when they were co-operative whereas those that considered themselves aggressive negotiators 85% of them were found to be ineffective. As a consequence it can be assumed that the aggressive negotiator will only see his or her tactic work in 1 in 6 cases. For a lawyer or mediator this is probably an unacceptable fail rate, so learning another way is well worth while. Food for thought for negotiators who believe that to get the best deal you need to project strength.

(Generally) make the first offer

When people are negotiating many people like to see the other side make the 1st offer but is this the best way? According to Leigh L. Thompson, author of The Mind and Heart of the Negotiator it is not as she writes: "Whichever party - buyer or seller - makes the first offer, that person obtains a better final outcome. Why? First offer acts as an anchor point. First offers collate at least 0.85 with final outcomes, which suggests how important they are." In my experience there are circumstances when you should not make the 1st offer such as if you are dealing with a party who may be desperate to get a deal but generally you should make the 1st offer albeit not too low so that it is accepted straight away.

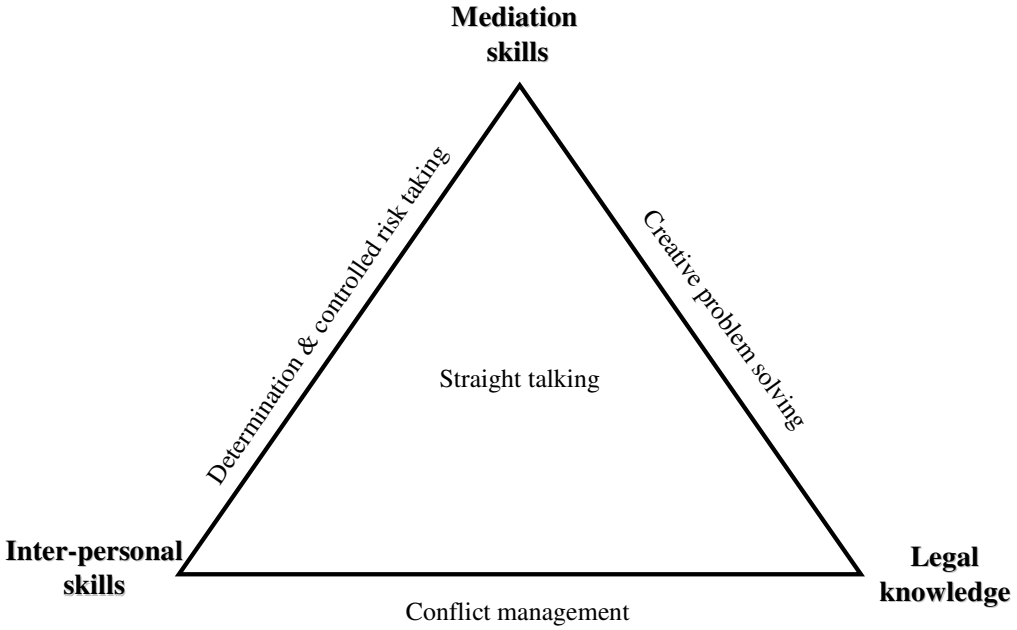
Select the right mediator

A mediator must bring a different skill set and perspective to the problem or they won't add value.

Look for a mediator who can balance complex the legal aspects of a case with the intangible emotional, reputational and managerial challenges.

When training lawyers, managers and other professionals in mediation skills we always use the Human Law Mediation Success Model:

Human Law Model for Mediation Success



By combining legal and mediation skills with unconventional management and interpersonal skills Human Law Mediation mediators resolve conflict more quickly and with commercial sensitivity.

Always select a mediator who shows dogged determination, a thorough grasp of the legal issues but one who doesn't switch off to the business and emotional issues too. Look for one who takes pride in the result, as opposed to relishing the challenge of the dispute itself (that's an interesting point to consider when you appoint lawyers too!).

A good mediator will get to the truth of a case quickly and make sure there's a balance between reality, desire and expectation.

If you are going through a mediation for the first time this model and the 6-steps could prove invaluable in making sure you don't trip up in coming to a mediated settlement.

Useful Resources:
The Academy of Experts offers a useful 'expert witness finding service. Their free service contains a searchable directory of accredited experts from a wide variety of disciplines including:

- Construction Experts
- Forensic Accountants
- Forensic Scientists
- Engineers
- Medico Legal Experts
- Personal Injury Specialists
- Surveyors

ACAS – dedicated to resolving employment disputes have lots of free information on disputes, grievance and conflict and some SME free tools and downloads.

Human Law Checklist
Here are some questions you might ask your mediator:

- What mediation training have you done?
- How many mediations have you been involved in?
- How do you charge?
- Is mediation right for my case?
- Why should I choose you?
- Can you provide references?

What's the Next Step?

Option 1 – If you have a live dispute
Human Law Mediation has developed a 30-minute "dispute assessment" which we conduct over the telephone with you and any relevant members of your team. What we accomplish in this no-nonsense session is:

- How to assess your case
- How to prevent disputes in the future
- The most cost effective approach to resolving your dispute

The 'dispute assessment' is conducted by Human Law Mediation principal, Justin Patten, who as well as being a fully trained and qualified mediator is also an experienced solicitor. With over 11 years legal and mediation experience he has been involved in resolving disputes involving Tesco's, Penguin books, Habitat and

International Charities over the years, as well as many smaller disagreements for SME clients. His experience of conflict resolution spans the world of copyright infringement, employee disputes, divorce negotiations, senior management conflict as well as all manner of commercial disputes involving customers and suppliers.

At the end of the 30-minute "dispute assessment" you will know whether mediation is the right solution.

To secure a time for a consultation with Justin email Justin@human-law.co.uk stating the nature of your dispute, providing as much detail as possible so that we can maximise our time during the telephone consultation.

Option 2 – If you want to manage disputes more effectively in the future
Human Law Mediation have developed a half-day Making Mediation Work training session which equips managers with the knowledge and skills they need to get the most from mediation. Run in-house the training can be tailored to tackle specific company issues and using case study examples allows delegates to leave with practical tips they can put into practice immediately.

For a no obligation discussion about your training needs email Justin@human-law.co.uk. All training is delivered by Human Law Mediation principal, Justin Patten, who as well as being an accredited mediator with the Academy of Experts also regularly trains lawyers on behalf of MBL seminars.

Option 3 – If you want a mediator – NOW
Call Justin Patten on 0844 800 3249 or email Justin@human-law.co.uk – we guarantee an appointment to discuss your case within 48 hours.

Justin Patten is a fully trained and qualified mediator. He is an accredited by the Academy of Experts.

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