Kluwer Mediation Blog

Entering the mainstream: uncomfortable, but hard to avoid.

Charlie Irvine (University of Strathclyde) · Saturday, October 13th, 2012

This week in Glasgow, Strathclyde University hosted the first seminar in a series entitled 'Reframing Resolution – Managing Individual Workplace Conflict'. The six seminars will take place across the UK over the next 12 months and the opener was ambitiously called 'Understanding Individual Employment Disputes.' The day contained elements that were encouraging and others that were rather disturbing. The same economic and social forces that affect the UK are no doubt playing out across the Western world, and possibly elsewhere, so it is worth dwelling on what we learned.

Let's start with encouragement. It was heartening for the mediators present to find that academics in the field of Industrial Relations have finally found us a subject worth studying. Sometimes mediation can feel like a lonely furrow, but we seem to be entering the mainstream. ACAS, the UK's statutory employment relations body, has played an honourable part in funding quality research in the area (see http://www.acas.org.uk/index.aspx?articleid=2056) The UK's specialist industrial courts, known as Employment Tribunals, have also played a part by inaugurating a scheme of 'judicial mediation'. While not yet common, the influence of this approach is significant, helping convince employment lawyers that mediation can benefit their clients.

A number of scholars have also looked at the phenomenon of 'in-house' mediation schemes. The findings are encouraging, with one recent study concluding that such schemes can deliver positive culture change, helping to move a workplace from combative/adversarial to cooperative (see http://www.acas.org.uk/media/pdf/k/8/Transforming_Conflict_Management_in_the_Public_Sector_-_Mediation_Trade_Unions_and_Partnerships_in_a.pdf). For an excellent review of ACAS funded research see

http://www.acas.org.uk/media/pdf/h/m/1311_Thematic_review_of_workplace_mediation-accessible-version-Apr-2012.pdf.

However, there always seems to be a downside here in the UK. And here's why. First, we are living through a punishing recession. That recession creates huge insecurity which renders work a precious commodity and reduces mobility: all a recipe for sharp employment practice. One speaker cited a number of contemporary approaches – performance management, absence management and 'LEAN' – as the front line of an ongoing (and longstanding) struggle to squeeze more work from fewer people. Whatever you think of the wisdom of this approach, it tends to lead to disputes over pay, conditions, discrimination and unfair dismissal.

Second, the UK Government, ensnared by debt, is responding to the recession by seeking savings wherever they can be found. Public justice is not immune. Until now Employment Tribunals have been free for claimants but the Ministry of Justice is proposing a charge of up to £1,200 (1,500 Euros) for raising a claim. In attempting to sell this rise the Government has linked it directly to mediation: *"It is in everyone's interest to avoid drawn-out disputes which emotionally damage workers and financially damage businesses. That's why we are encouraging quicker, simpler and cheaper alternatives like mediation."* (see http://www.guardian.co.uk/money/2012/jul/13/employment-tribunal-fees-branded-disgrace).

Suddenly we mediators find ourselves cast as the villains of the piece (not for the first time in the UK: family mediation has been associated with drastic cuts to Legal Aid). This is uncomfortable territory. We are used to seeing ourselves as the good guys, the kinder, simpler, cheaper alternative to the delay, worry and expense of the courts. Yet now a formidable alliance of trade unions, the legal profession and socio-legal scholars are turning on us. The leader of the Trade Union Congress, Brendan Barber, claimed that vulnerable workers will be 'priced out of justice'. The assumption underlying this is that justice cannot be obtained in mediation, only in courts.

This is not new territory for mediation. In her forceful 1990 book, 'Getting Justice and Getting Even' (London: University of Chicago Press), Sally Engle Merry spoke of 'cases' being recast as 'problems' when they moved from the court to the mediation room, implying a kind of patronising minimisation of their importance. I sense something similar being anticipated in the UK.

So what is to be done? Quite a bit, actually. One distinction can immediately be drawn between 1980's USA and here and now. Then the majority of mediators were volunteers. Apart from in-house mediators there are few of these now in the UK. Most of the people likely to provide employment mediation will be reasonably well-remunerated professionals with a background in law, HR or management. That in itself may raise the perceived status of the actitivy in the eyes of the public.

And mediators are not passive. We can examine our practice for its weak spots and adapt it. Last month in this blog I suggested that our mantra of confidentiality could be working against us, making mediation look like privatised justice. We can certainly raise in our clients the expectation that mediation will throw up systemic information, for example that a conflict between colleagues was exacerbated by poor working practices. It may require courage to take a critical message back to those who pay our bills, but if we pause to consider it this is exactly what the justice system does. Employment Tribunals are quite prepared to be critical of poor practice.

We may have to pay more attention to power. Employment disputes can involve the lowest status

people in organisations: what duty do we have to ensure that their voices are honoured in our process?

We may also have to say the little word ‘no’ from time to time. As in family law, there are some situations where allegations of bullying and abuse, whether they are ‘true’ or not, make it almost impossible for a fair negotiation to take place.

And we may need to get used to losing the sheen of novelty. It’s attractive to be on the outside: wild prophets critiquing the established order. But if our profession has something serious to offer society we will eventually take our place in the mainstream. In all the rhetoric of globalisation, cutbacks and recession it is easy to forget the simple vision that poorly handled conflict benefits no-one.

And that brings me back to the conference. Our industrial relations colleagues seemed genuinely taken with the potential of a mediatory approach in the contemporary workplace. We shouldn’t forget that their research gives them first hand experience of the alternatives: people spending months and years in anguish over employment disputes, despairing of both process and result. So it seems to me that workplace and employment mediation will be one of the key growth areas over the next few years, because it simply makes sense.

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