

## **Pathways to Mediation – Putting the Resolute Back into Resolution**

By Tony Newport

### *Precis*

From a mediation practitioner's perspective it seems that fear is at the heart of current conflict resolution practices in Australian workplaces – particularly the Public Sector. Employees guilty of serious misconduct in the form of harassment, bullying, negative social behaviour and poor work performance often tend to be judged initially on their personality and their relationships rather than the focus staying on their behaviour. There appears to be a genuine reluctance to name up what we really suspect in case we are wrong. We see the difficult person, we experience the difficult relationships and we factor this analysis into our projected solution. The decision to then proceed down a path of mediation and conciliation becomes almost inevitable.

Too often we as mediators willingly comply without canvassing appropriate alternatives. Too often workplace supervisors and managers attempt their own form of reconciliation before throwing their hands up in despair and contacting an independent mediator.

This paper examines the reactive and avoiding behaviours that ensue when we don't name up and investigate reasonable suspicions from the outset. This paper argues for formal and practical organisational support for a low-key investigative process as a necessary first step whenever there is a whiff of suspicion that bullying, harassment and poor performance are contributing factors to a conflict. This paper also demonstrates pathways that encompass investigation, discipline and performance management interventions that can still lead to individual and team mediation. Essentially you can have your mediation cake and eat it too – if those engaged in serious misconduct are made accountable before and not during or after a mediatory process has been undertaken.

Case studies and a diagrammatic process are included

## **Pathways to Mediation – Putting the Resolute Back into Resolution**

Difficult people create real pressure on reasonable people.

In the workplace this provokes two classic responses:

1. Avoidance and Accommodation and
2. Reaction and Frustration

A \*difficult person is someone who has some or all of the following traits:

Quick to get on the defensive  
Quick to get on the offensive  
Generally unwilling to accept responsibility  
Good at blaming others  
Frequently plays the victim  
Rarely shows empathy for opposing points of view  
Knows how to enlist powerful support

**Plays for time and frequently procrastinates**

A reasonable person is someone who has some or all of the following traits:

Quick to identify common ground  
Rarely attacks  
Always prepared to share their load of responsibility  
Willing to look at solutions  
Slow to blame  
Good at accommodating  
Willing to empathise and listen  
Uses powerful support as a last resort

**Gives people time to sort themselves out**

When you match a difficult person who is good at playing for time against a reasonable person who gives people time to sort themselves out you frequently end up with some or all of the following:

Angry and frustrated co-workers  
A dysfunctional team  
A general lack of respect for the chain of command  
Staff off on work stress  
Staff taking sides  
Continued poor work performance  
Declining morale  
Intensifying conflict incidents  
Bullying and harassment

This kind of stand off is invariably toxic. No one wins. Sometimes everybody loses.

\*(Excellent mediation papers on this topic include Working With High Conflict Clients, by Bill Eddy and The impact of personality structure on mediation process and outcomes, by Jenny Ellison et al, both presented at 9<sup>th</sup> National Mediation Conference held in Perth W.A. in 2008)

Sometimes supervisors and managers portray both difficult and reasonable traits. When reasonable fails to work they get angry and defensive. Sometimes it is exactly the reverse and it is the supervisor or manager who is the difficult person and the team member who starts off being reasonable and then gets angry and defensive.

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*One thing is for certain and it is this: Difficult people do not always bring out the best in us – sometimes they bring out the worst in us.*

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When a conflict has gone on too long in a workplace inevitably there are faults that can be identified on both sides. If this conflict goes on to be arbitrated then a conflict that started out with one side being reasonable and the other being difficult may now be adjudged to be a conflict for which they are both equally responsible. Unfair? Maybe. This is the price we all pay for avoidance and accommodation. We have in effect reinforced difficult behaviour because we have let them get away with it. Yes that is correct – we have let them get away with it. How? Because we did not stand firm when we needed to and because we let our reasonableness suppress our discomfort in having to have a difficult conversation with a difficult person. **We have been too nice.**

Eventually patience wears thin in the most reasonable person or organisation. Nice people can then turn very nasty. We justify our sudden uncompromising stance on the length of our reasonableness. “We bent over backwards,” we say. “There just comes a time when you have had enough” And it is true. But what else is true is that we rarely if ever accept how complicit our own actions have been in letting things deteriorate to the point where someone may have to lose their job. You would think that organisations would have this nailed down by now. That beyond a certain point when reasonableness is not working it is time to get firm before everyone is playing for stakes much higher than they originally anticipated. Following are a number of case studies that illustrate these two critical issues of Avoidance and Accommodation and Reaction and Frustration.

#### Case Study One:

Corinne was a teacher of some thirty years standing who had just started at a new school. She had developed her own style over this long period in which she saw herself as creative and friendly. Sam had taught at the same school for twenty years. She was a highly organised and straight talking team leader. Corinne found Sam intimidating. She sought to win Sam over by giving her gifts and cultivating a friendship. Sam was not unfriendly towards Corinne but she liked things to be organised and she was plain speaking when rules were not adhered to and budgets for resources were exceeded. Corinne continued to act friendly towards Sam whilst complaining behind her back. Sam began to feel undermined by Corinne and things steadily got worse over their first year and continued into the second year. Corinne began plying the principal with gifts and inviting him to social gatherings. Included in these gatherings was a relative – a retired but still influential member of the School Board.

Corinne's influential relative began contacting the principal as well as speaking to other board members about Sam. By this time Sam had begun to raise her own concerns about Corinne with the principal. The principal eventually decided to call in a mediator.

The mediator after speaking with all key stakeholders including Corinne, Sam and other team members drew the following conclusions 1. This is primarily a work performance issue i.e. Corinne needed to accept her professional role as defined by the principal and understood by the team leader. 2. If this could be agreed upon then the next step was to mediate the relational aspects of the conflict – in particular their diverse approaches to their work: Corinne – creative and friendship driven. Sam organised and rule driven. On the page these descriptions lack the nuance that underlined each other's behaviour. Corinne did not agree with what was being asked of her by Sam despite the principal endorsing Sam's approach. She felt that Sam was bossy and that she should be trusted to deliver her teaching brief without the constraints that Sam was placing upon her. Sam had earned a reputation as a good manager of resources and during her twenty years at the school had built up a solid reputation. She was never going to be swayed by Corinne's overtures of friendship as a means of Corinne getting her own way.

There were other aspects to Corinne's behaviour that are worth noting. She was sometimes absent at crucial times. She suffered from ill health. She used the common room at times to complain about her colleagues, notably Sam, whilst other teachers and sometimes students were in earshot. She repeatedly professed to be friendly and wanting to resolve the conflict whilst performing the following undermining activities:

- Encouraging her influential relative to politic on her behalf
- Plying the principal with gifts and social invitations
- Plying the vice principal with gifts and social invitations
- Going to the vice principal when the principal was off site and after the principal had returned her gifts
- Putting damaging claims of bullying and harassment in writing and then insisting that she did not want to make a formal complaint
- Contacting Sam and the Principal late at night after she had been drinking

Sam was becoming more agitated and distressed. Both Sam and the principal feared Corinne's political influence. They felt powerless to resolve the conflict in a way that would make Corinne accountable. Sam's agitation probably contributed to her taking a tougher and more controlling stance with Corinne and in so doing gave Corinne's allegation of bullying and harassment some justification.

At this point the mediator encouraged the principal and the HR advisor to conduct a formal investigation even though Corinne was still claiming that she wanted to mediate. The School was reluctant to instigate such a process and pressed ahead at the request of Corinne and Sam with the mediation strategy. Some six months later when the relationship between Corinne and Sam broke down completely Sam lodged a formal complaint against Corinne

and Corinne promptly lodged one back against Sam. The matter is still ongoing.

#### Case Study Number Two

Billie worked as a ward clerk in a public hospital. She was part of an administration team that serviced a medical ward. She was very protective of her personal space to the point of labelling pens and declaring the whole of the shared front office desk 'hers'. She chastised nurses for invading her space and took exception to being excluded from medical related conversations and meetings that had no bearing on her administrative duties. Nursing staff put up with this behaviour and found ways of working around Billie. Things came to a head when a maintenance person came in at the request of senior nursing staff to put in a shelf. Billie became abusive and staff stood their ground saying that she had become too difficult to work with. Billie then went off on work stress. Upon her return to work she was placed in another department. She then put in a complaint of harassment against the nurse supervisor. A mediator was then called in. Billie was offended at the way in which things had progressed. She felt the complaint about her behaviour was unfair and that she had lost control of her workspace. She was very keen to return to her old work station.

The mediator negotiated the following key points on Billie's behalf.

1. That Billie would have the opportunity to propose her ideal workspace
2. That if she were given this opportunity, even without guarantees, she would then mediate with the nurse supervisor on the prospect of restoring their professional relationship.

The nurse supervisor agreed even though she was not Billie's direct supervisor. Billie's direct supervisor also agreed and sat in on the first session.

Almost 12 months had elapsed since Billie had last worked on the medical ward. During this time a room next to Billie's work station had been appropriated by senior medical staff. This severely limited the changes that could be made to Billie's ideal workplace. Billie accepted this but held out on being able to work at a desk she claimed had been ordered exclusively for her use. The nurse supervisor responded by requesting that Billie would be asked to accept a desk suitable to what was required. Both agreed for the Director of Nursing to arbitrate this issue.

Billie accepted that after such time away she would need to be re-oriented to her workplace. She held out however on who would conduct the orientation. The nurse supervisor wanted the incumbent. Billie wanted someone else. Both agreed to refer this one to the D.O.N. as well.

Billie also agreed to accept the nurse manager as her direct supervisor. The mediation session then concluded with further agreement on several minor points.

Two days later Billie indicated that she would not be honouring the mediation agreement. She then went to HR to renew her claim of harassment.

Eventually after further consultation with management, HR and the medical ward she was given the following ultimatum: You can return to your job under the conditions of your mediated agreement or you can stay where you are. At which point Billie indicated that she did not want to return to her previous position and the harassment allegations were dropped.

These case studies have a number of elements in common:

1. Reasonable persons when confronted with difficult behaviour attempted to avoid and accommodate in the first place
2. When the reasonable people began to object - the difficult person immediately went on the defensive and began complaining of unfair treatment
3. When work performance issues were raised the difficult person then made their allegations concrete e.g. Corinne put them in writing and even though she withdrew them it was a serious escalation of attacking the other party. Billie made a formal allegation of harassment.
4. Reasonable persons eventually began to demonstrate reaction and frustration.

Fundamental to both of these cases is the following critical sin of omission:

There was no pro-active investigation. The difficult parties were permitted to control and manipulate the process from the outset.

This raises some very important questions:

Why Investigate?

Shouldn't we mediate before we investigate?

If I initiate investigation wont I be escalating the problem?

Lets look at these in turn.

### **1. Why investigate?**

Conflicts never occur in a vacuum. Other staff are always affected. More often than not customers, clients, patients and students are also affected. These people are valuable sources of information for a supervisor or an HR practitioner in gaining some background before deciding on a course of action. Unless there are serious and well-grounded accusations of bullying, harassment or negligence there is no reason why this cannot be a straightforward and low-key information seeking exercise. Provided the protagonists are informed, the investigation is discreet and confidences are kept, this process can give a very clear guide to what should happen next. Let's look at some of the potential outcomes.

1. The investigation uncovers some serious concerns in regard to bullying
2. The investigation uncovers some serious concerns in regard to work performance
3. The investigation uncovers some undisciplined tit for tat behaviour that is starting to involve other staff.

In cases where preliminary investigation uncovers concerns in regard to serious bullying this should always be investigated much more thoroughly and preferably by a qualified independent professional

In cases where preliminary investigation uncovers serious work performance issues these need to be identified as such and a suitable disciplinary process undertaken.

In cases where undisciplined tit for tat behaviour is occurring and it is not serious misconduct then mediation could be a sensible place to start.

## **2. Shouldn't we mediate before we investigate?**

Where bullying and poor work performance are the critical issues mediation let's the offending party off the hook. It sends the message that the other party is somehow contributing to their bullying behaviour or poor work performance. It gives them the opportunity to complain that they are not being treated fairly when in the first instance they need to take full and complete responsibility for their own behaviour.

Where the evidence clearly suggests that discipline has in fact been breached supervisors and managers should never surrender their responsibility for maintaining discipline.

Under these circumstances a disciplinary process should always take place prior to any subsequent mediation process. The bully needs to be censured and given appropriate warnings if necessary. The poor performer needs to acknowledge and undertake to lift their work performance.

Failure to appropriately discipline an offender prior to a mediation almost always leads to the other party in the mediation seeking some form of \*retribution and justice. Most mediations do not survive this kind of pressure and the process founders. Where bullies or poor performers are motivated by remorse, mediation can still succeed. If poor behaviour is not sanctioned however, then most bullies and poor performers will feel they are getting away with it and will continue to justify their own position.

\* (Professor John Wade from Bond University provides great insight into the projection of guilt in mediation with his wonderful teaching handout on the apology - with no less than twelve different ways of apologising. The dilemma for workplaces is that if a bully or poor performer will suffer no consequences for their behaviour then an apology of any kind is unlikely to be forthcoming. They simply do not have to agree.)

### **3. If I initiate investigation wont I be escalating the problem?**

Yes you could escalate the problem. The protagonists may become jittery and defensive and start bringing third parties such as counsellors, unions and lawyers to protect themselves.

For the most part this is bluff.

Here is the nub of the dilemma: fear of doing the wrong thing and making things worse. It is this very fear that feeds into our rationalisations of reasonableness and subsequent avoidance and accommodation. It is an irrational fear that can set a conflict on the same path as the examples provided. It is time we faced up to this fear and considered the much better alternatives.

A preliminary investigation should be nothing more than a discreet fact finding mission. If it uncovers serious allegations of misconduct then proceeding to the next step of independent and in depth professional investigation is the only fair option for all parties. A person unfairly accused will want to be exonerated. A victim unfairly overlooked will want the behaviour identified and stopped and the perpetrator appropriately dealt with. To rely on mediation to do these things is at best misplaced and at worst a continuation of an untenable situation. To rely on the victim or the alleged perpetrator to initiate a request for investigation is to surrender control of the disciplinary/grievance process. Management effectively becomes reactive rather than pro-active.

This is not easy. Often victims may verbally complain and refuse to lodge a formal complaint. What then?

There is only one answer and it is this:

Any hint of harassment or bullying must be investigated. Any hint of poor work performance disguised as personal enmity must be fleshed out. A discreet preliminary investigation is for the most part a minimal risk and supervisors and HR practitioners ought to be able to activate such a process as an appropriate first course of action.

Let's look at our case studies.

In Corinne's case she exhibited clear indications of both poor work performance and harassment type behaviour early on in the conflict. By the time she was making written allegations of harassment and bullying and then withdrawing them this should have been independently investigated. Instead the process dragged on another six months and both finished up making formal complaints against each other. (Which ironically then had to be investigated!)

In Billie's case her inappropriate territorial behaviour was tolerated for far too long. Confrontations of any kind were avoided to keep the peace. Eventually the pressure built until staff could no longer put up with her behaviour. Billie then lodged an harassment claim. Billie needed to be told that she was acting inappropriately and a firm stance taken. Right throughout the mediation

process Billie still felt she was entitled to act as she had before she was removed from her situation the first time. She remained unaccountable.

Policy Makers at all levels but particularly in the public sector need to re-examine this step in their grievance procedures. It has been my experience that HR practitioners in particular feel constrained to act pro-actively under the circumstances described and that they must rely on the alleged victim to officially complain. It is time to remove any such inhibitions. Knowledge of potential harassment and bullying situations needs to be acted upon. A preliminary discreet investigation is not without risks. A victim may feel exposed to further bullying if the bully is aware they are being investigated. **The risk remains however that the person making allegations will continue to be bullied with impunity if nothing is done.** On balance a preliminary investigation, discreetly managed that safeguards confidentiality is a risk worth taking when the initial complaint hints at serious misconduct. To do nothing and wait or to attempt to mediate such a situation is simply unacceptable.

For many supervisors they will also need to see a pathway from investigation to discipline to mediation and a return to normal working relationships. The diagram overleaf depicts this process.

Here it is in detail

1. Initial assessment or notification. At this point we are looking at three different types of issue:
  - (i) Possible harassment or bullying
  - (ii) Possible poor work performance
  - (iii) Possible poor work relationships and no serious misconduct.

Many workplace conflicts will have a combination of all three. What we are looking for here is not just what is primary. Any indication of possible harassment, bullying or poor work performance will still need to be addressed before mediation can take place.

2. If there is a hint of harassment/bullying or poor work performance then a preliminary low-key investigation needs to be undertaken.
3. If there is hard evidence for either harassment/bullying or poor work performance then an in depth independent investigation needs to be undertaken. In cases where these behaviours are acknowledged it may be possible to go straight to formal discipline.
4. Where the issue is fundamentally a situation where poor working relationships are the problem then by all means proceed directly to mediation.
5. Where employees will still be engaged in the same working relationships that existed prior to investigation and a formal disciplinary process it is now essential that you proceed to mediation.

What is important here is to understand that a mediation pathway can embrace investigation and discipline and still result in mediation. What is more important is to understand that mediation as a first option is entirely inappropriate to resolve harassment, bullying and work performance issues.

Without a clear goal and the potential for a satisfactory resolution - avoidance and accommodation will continue to be the dominant response to workplace conflicts.

Without a change or review of current policy, particularly in the public sector, most HR practitioners, managers and supervisors will feel compelled to remain re-active and wait for victims to formally initiate complaints.

We have to do better.

Tony Newport  
24/2/09

#### References

Eddy. Bill, Working With High Conflict Clients 9<sup>th</sup> National Mediation Conference, Perth W.A. 2008

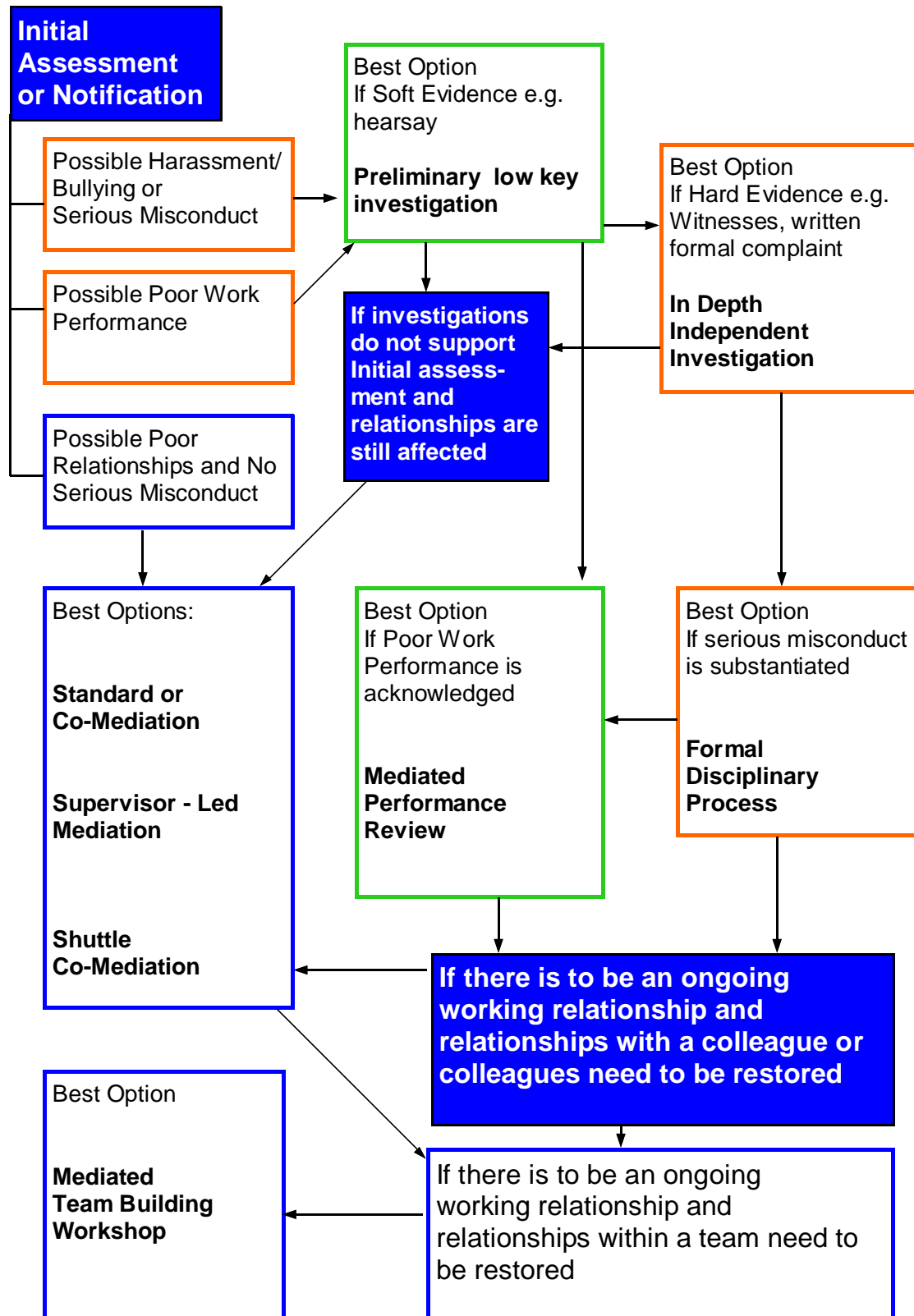
Ellison. Jenny et al, The impact of personality structure on mediation process and outcomes 9<sup>th</sup> National Mediation Conference, Perth W.A. 2008

Wade. John and Boule. Laurence, Advanced Mediation Workshop conducted at Leo Cussen Institute in conjunction with Bond University, Melbourne 2006

Eddy's and Ellison's papers can be found at:  
[www.mediationconference.com.au](http://www.mediationconference.com.au)

Wade's 12 different ways of apologising are attached

## Work Place Conflict Resolution - Mediation Pathway



## Wade's 12 Apologies

"I won't settle until I have an apology"

Competent negotiators know that there are many gradations of apologies in content, form and response

### Content

- |                              |   |
|------------------------------|---|
| 1. Refusal and explanation   | "In my position I can't give an apology, but I want you to understand..."   |
| 2. Time to consider          | "I need some time to think about what you are asking"   |
| 3. More information          | "Why? What will you do with any statements I make?"   |
| 4. Conditional apology       | "I will apologise for...if you also apologise about..."   |
| 5. Sorrow for an event       | "...I'm sorry that this has happened; I wish it hadn't"   |
| 6. Sorrow for hurt           | "I'm sorry that this has caused (you) so much distress"   |
| 7. No admissions of fault    | "I don't say I was wrong, but if I have caused you offence I apologise"   |
| 8. Apology plus explanation  | "I apologise; but my intentions were good; I was under a lot of pressure; I acted on the best information I had at the time: the event occurred in these circumstances" |
| 9. I would do differently    | "If I had another chance, I would do it differently; I would consult you first; I would use different language."  |
| 10. Apology for fault        | "I'm sorry...it was my fault...there is no excuse for that kind of behaviour."  |
| 11. Future remedial action   | "I apologise and we will endeavour to ensure it does not happen again; we have changed our systems already."  |
| 12. Apology plus forgiveness | "I am dreadfully sorry; please forgive me"  |

### Form

Orally; in writing; privately; in front of witnesses; by a group.

### Response (practise with care)

Thank you; shake hands: "I too am sorry this has happened". ...by-gones are by-gones – I'm looking forward to working with you again"; I accept your apology and I apologise also for...", "Yes, you are forgiven."

A Bond University Dispute Resolution Centre Handout

## **Obtaining Commitment**

We have allocated a role that we call the Workplace Mediation Supervisor (WMS). This person may be a direct line manager, a HR person or both. This person commissions the mediation. Their primary responsibilities are as follows:

1. They brief the stakeholders before they attend their pre-mediation interviews. Part of the brief involves instructing participants that they need to meet the mediator and find out what mediation offers before they can accept or reject the process. Another part of their brief involves informing the participants that if mediation is not possible they (the WMS) will have to look at other ways of resolution – and that this could mean investigation.
2. Upon the completion of any mediation process the agreement is handed back to them so that they can preside over the signing and counter-signing. They are instructed not to keep the agreement – that it is an agreement between the participants and it is not an industrial relations document.

As part of informing participants of what may need to happen if mediation is not possible the WMS also needs to be briefed by the mediator.

This is not as straightforward as it sounds. When people call up for help with a conflict they don't want a lecture. They want help.

### **Overleaf is a questionnaire designed to guide a WMS through the alternative pathways to mediation.**

This seems to me to be very much an educative process and whilst it may be possible to introduce this during the pre-mediation phase of the mediation there is a strong possibility that you may not - and it may be something that necessarily follows once a mediation has been conducted. You have established a relationship. Hopefully you have established a level of confidence and professionalism and now you have a chance to follow up.

## WMS Conflict Resolution Options

1. Has an allegation been made that could be classed as bullying and harassment?

(a) Yes (b) No (c) Not sure

2. If you have answered yes or not sure then you need to ask some follow up questions - see attachment one.

If you answered no then proceed to point 3.

3. Has an allegation been made that would indicate some level of poor work performance?

(a) Yes (b) No (c) Not sure

4. If you answered yes or not sure then you need to ask some follow up questions - see attachment two.

If you answered no then proceed to point 5.

5. Are you satisfied that all parties are open to mediation?

(a) Yes (b) No (c) Not sure

6. If you answered yes then you simply need to ask them to make a separate pre-mediation appointment with the mediator and inform them that:

- The mediator will explain the process
- It will be completely confidential
- They will not meet and mediate together until all parties, including the mediator, are committed to the process.

You may wish to add that:

- They may take a support person with them.
- All rights held prior to the mediation will remain intact but cannot be acted upon whilst the mediation is in progress e.g. a right to pursue a formal complaint

7. If you answered no or not sure to point 5 then you need to inform them of two things:

(a) That parties may choose to opt out of mediation - but only after being interviewed by the mediator.

(b) What you are prepared to do if mediation does not go ahead. (A list of suggested options is available to you in attachment three.)

8. If in any doubt seek some face-to-face time with the mediator.

## Attachment One - Preliminary Low Key Investigation

An allegation suggesting some form of bullying or harassment has been made - or you suspect that bullying and harassment issues may be underlying.

Questions for all stakeholders (the person making the allegation, the alleged offender, any potential witnesses)

1(a) Do you or did you feel intimidated, embarrassed or offended by any actions the other party has made?

1(b) Do you think you may have intimidated, embarrassed or offended the person making the complaint?

1(c) Did you witness any behaviour by either party which you consider could constitute actions that were intimidating, embarrassing or offensive?

If the answers to the above are no then go no further and proceed to point three on page one of this document

2(a) What exactly did or does the other party do. Can you describe in as much detail as possible exactly what was said or what happened?

2(b) What exactly did you do or how exactly do you relate to this person? Can you describe in as much detail exactly what happened?

2(c) What exactly did you witness. Can you recall exactly what was said and what occurred?

3 Do you think the level of intimidation you experienced, acknowledged or observed was mild, moderate or severe?

4. What do you, the WMS think, after hearing answers to these questions?

### Guidelines for taking the next step:

If the general consensus is that it is mild then some disciplinary action needs to be taken. You may need HR advice but generally speaking the behaviour should be noted on the employee's file and they should be cautioned. It may even be appropriate to recommend they make a discreet verbal apology. You should then proceed to point 3 on page one.

If the general consensus is that it is moderate then you should speak with HR straight away and get direct advice from them. There must be an appropriate disciplinary response before any further action is taken. An apology probably needs to be insisted upon. You can then proceed to point 3 on page one.

If the general consensus is that it is severe you should hand this over to HR and insist upon a full and complete independent investigation. Upon the completion of the investigation and the implementation of any recommendations **you must return to the mediation process if the parties will still be working together.**

Consensus may be hard to achieve. Your judgement on these matters is paramount. You are required to be as objective as you possibly can.

## **Attachment Two - Indications of Poor Work Performance**

There is some evidence or suggestion that a team member is not performing their duties as could reasonably be expected of them.

Questions for all stakeholders (the person making the allegation, the alleged offender, any potential witnesses)

1(a) Is there anything that you are being asked to do that you are (a) refusing to do or (b) not doing as well as could be expected?

1(b) Is there anything you are asking your team member to do and they are (a) refusing or (b) not doing it as well as expected?

1(3) Is there anything that your team member should be doing and is not doing?

If no then proceed to point 3 on page one of this document.

2 You as the WMS now need to make a judgement call. Not all parties may agree on the extent or whether there is in fact a work performance issue. Someone has to decide.

3. Other things to take into account that you need to ask yourself?

Is the supervisor supportive?

Has the supervisor lost patience and are they possibly driving the team member a little hard?

This may feed into issues raised in attachment one.

If the supervisor has become frustrated and is willing to acknowledge they have behaved inappropriately for a supervisor then a discreet apology can precede the next step.

Any suggestions the supervisor may have moderately or severely harassed or bullied a team member - NO MATTER HOW JUSTIFIED THEY FEEL - must be investigated.

The Bottom Line:

If you are satisfied there is a work performance issue and it is seriously affecting the supervisor/team member relationship - you need to consider a Mediated Performance Review process. Please see attachment three - WMS further options.

Please consider spending some time discussing this process with the mediator.

## Attachment Three - WMS Further Options

Whenever a conflict arises and a key protagonist does not wish to take appropriate responsibility - such as mediation or lodging a formal complaint - then you need to take control.

This means you must inform them that you will investigate the matter, or have it investigated by an independent party, and you will then act on their recommendations.

You cannot under any circumstance justify doing nothing once you are aware staff members are in conflict. This constitutes a breach of duty of care.

### 1. Pro-Active Investigation

Conflicts never occur in a vacuum. Other staff are always affected. More often than not customers, clients, patients and students are also affected. Not only are these people valuable sources of information for a supervisor or an HR practitioner in gaining some background before deciding on a course of action - they too have a right to have their duty of care upheld and the consequences of such conflicts diminished. **That is your job.**

If I initiate investigation wont I be escalating the problem?

Yes you could escalate the problem. The protagonists may become jittery and defensive and start bringing third parties such as counsellors, unions and lawyers to protect themselves.

For the most part this is bluff.

Here is the nub of the dilemma: fear of doing the wrong thing and making things worse. It is this very fear that can lead to persons in authority become overly reasonable and thus unwittingly encouraging avoiding and accommodating behaviour. ***Under these circumstances the Chain of Command often collapses into the Chain of Indecision.*** It is time we faced up to this fear and considered the alternatives.

A preliminary investigation should be nothing more than a discreet fact finding mission. If it uncovers serious allegations of misconduct then proceeding to the next step of independent and in depth professional investigation is the only fair option for all parties. A person unfairly accused will want to be exonerated. A victim unfairly overlooked will want the behaviour identified and stopped and the perpetrator appropriately dealt with. To rely on mediation to do these things is at best misplaced and at worst a continuation of an untenable situation. To rely on the victim or the alleged perpetrator to initiate a request for investigation is to surrender control of the disciplinary/grievance process. Management effectively becomes reactive rather than pro-active.

This is not easy. Often victims may verbally complain and refuse to lodge a formal complaint. What then?

There is only one answer and it is this:

Any hint of harassment or bullying must be investigated. Any hint of poor work performance disguised as personal enmity must be fleshed out. A discreet preliminary investigation is for the most part a minimal risk and supervisors and HR practitioners ought to be able to activate such a process as an appropriate first course of action.

## **2. This is essentially a work performance issue**

This is often a conflict where an employee has succeeded in avoiding responsibility over a significant period and supervision has been weak and accommodating. Usually there is some serious relationship damage that needs to be addressed first. This is also a smokescreen in many instances because the conflict right now is being defined in terms of personality rather than supervisory responsibility and employee accountability. It is very tempting to jump in and do a straightforward mediation. This instinct is fine up to a point. By all means clear the decks in terms how they relate to each other. What then needs to happen however is for both parties to re-learn their roles.

1. The supervisor needs to support the employee to be responsible
2. The employee needs to accept support and demonstrate responsibility

Once both parties accept the above a **Mediated Performance Review** can now take place. This process has a number of defining characteristics:

1. It is time limited – from 6 weeks to 3 months
2. It is collaborative – both supervisor and employee have equal input
3. It is behaviour focused – bureaucratic position-descriptive language is avoided and active behavioural type descriptions are encouraged
4. It is positive and pro-active – the descriptions are objective not negative; the participants meet fortnightly and discussion is encouraged on where things need to be rather than on what went wrong.
5. It is evidence focused – the participants keep copies of each other's undertakings, ratings and offers of support.
6. Both parties are accountable – it is not only the employee's behaviour that is being measured. The supervisor is being measured on their capacity to be objective and to provide appropriate support.
7. Get commitment from your supervisor/ manager. Ensure the chain of command is informed and operating as it should.

This tool/process has the capacity to teach. A straightforward mediation may resolve many issues but the mediator remains a critical factor. In this process the mediator withdraws as soon as the behaviours to be measured have been identified and the participants are prepared to work through things together. The mediator never withdraws completely but essentially the relationship is proceeding as it should without the mediator present when performance is being discussed.

### **3. This is a disciplinary issue first and foremost**

All disciplinary issues must be investigated first. The fundamental issue in any workplace is whether colleagues will continue to have an ongoing working relationship. This is not the only significant issue but it *is* fundamental because if people are going to continue to work together then it is worth spending considerable time at the front end of the mediation getting things right, getting stakeholders committed to the process and eventually getting them committed to an agreement that will continue to work outside the small window of collaborative opportunity generated within a mediation process. If a disciplinary process needs to be entered into and if, following the conclusion of such a process and the implementation of any recommendations, they will still need to work together, you must then mediate.

Please see attached diagram outlining a pathway to mediation through investigation, performance review and discipline to a mediated resolution.

(Same as the diagram on page 11)