

mediation

Mediate don't litigate

WITH MORE EMPLOYMENT REGULATIONS BEING RIGOROUSLY ENFORCED, MEDIATING TO AVOID COSTLY TRIBUNALS MAKES GOOD BUSINESS SENSE, SAYS **DAVE HOWELL**

With the latest figures from Acas indicating that employees are seeking to resolve disputes by mutually agreeing terms with their bosses, as an employer it is clearly an advantage to encourage your employees to seek independent help and advice if they feel their employment terms have been compromised.

In a recent GfK NOP poll, over 50 per cent of respondents stated they were aware of mediation services, but had not used them to resolve employee disputes. More worryingly, managers think that mediation should only be used as a last resort, when the opposite is true. For mediation to be effective, it should be used as early as possible in a dispute and before you become entrenched and have less inclination to compromise.

RESOURCES

"Small and medium-sized enterprises do not always have sufficient financial or human resource to dedicate to resolving disputes," says Michael Lind, managing director of ADR Group, a mediation specialist. "Invariably they do not have a dedicated person or department allocated to handle conflict, and the management of any dispute is often left to the last minute by someone without suitable skills or training, regardless of their enthusiasm or desire to resolve the problem.

"Furthermore, the person tasked with resolving the dispute may be too closely connected with the facts, history and emotion of the dispute to be able to apply clear, strong and impartial decision making. I see many business disputes that could have been

resolved earlier had a third party been engaged to assist. The short-term view by many SMEs is that I will save costs by trying to resolve this dispute myself. Unfortunately, this seldom proves to be the case."

Kirsten Sholl, senior management consultant at Right Management, a talent and career management consulting firm, says: "According to a report called Workplace Mediation: How Employers do it, of the employers surveyed that use mediation, more than 80 per cent report that it helps improve relationships between employees, 71 per cent of respondents believe mediation reduces stress associated with the use of formal disciplinary or grievance procedures and half say that mediation helps avoid the costs of defending employment tribunal claims.

"Indeed, mediation is impartial, sits outside any formal process and, as a result, can be an extremely effective preventative intervention to workplace conflict."

The employee legislation and regulatory environment that has evolved encompasses every aspect of employment law, from health and safety to discrimination. Employers can often feel overwhelmed by the employment law they must comply with. However, smaller enterprises in particular are realising that if they work to integrate these regulations into their businesses, the productivity of their workforces improves with a reduction in complaints, grievances and formal legal action from their employees.

For instance, the new Time to Train regulations gives all employees the legal right to advance their training and skills. In the past, employees often

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felt powerless to develop their skills at work. Skills Minister, Kevin Brennan, says: "We need to empower people to speak about training opportunities and the benefits they can bring to a business' success. Many companies and organisations are very good at training their staff, but we need to make sure that all businesses are advising employees on what is on offer."

Ron Woods, assistant director of individual conciliation at Acas, advises: "Keep it simple. It doesn't have to be hard work to get the basics right. Acas provides a wide range of advice and guidance on how to set up policies and procedures in the workplace. The Acas website is a good starting point and offers free e-learning packages on a range of employment issues, such as handling absence and discipline and grievance."

Mediation is now more popular than ever. Your business should have a formal complaint and grievance process employees can use, but when this system breaks down agreeing to mediation is often a practical means of resolving the dispute you are involved in. Many smaller businesses are using independent mediation as a way of quickly resolving their issues.

All parties must agree to use a mediator, as mediation itself is always voluntary. Your business will have to pay for mediation services, but these



costs often outweigh any potential award of damages that might be imposed if the dispute were to come before an official employment tribunal. In England and Wales, mediators are available from the Civil Mediation Council. If your business is in Scotland, registered mediators should be members of the Scottish Mediation Register, which is run by the Scottish Mediation Network. Businesses in Northern Ireland have their own mediation service.

"The Acas Code of Practice on Disciplinary and Grievance Procedures took effect from April 6, 2009," says Carly Mather, a solicitor at Davies Arnold Cooper. "This replaced the statutory disciplinary and grievance procedures that employers and employees were previously obliged to follow.

"Strictly speaking, there is no legal obligation for employers and employees to follow the Acas Code of Practice. However, a tribunal can increase or decrease any award made, by up to 25 per cent, if it believes there has been an unreasonable failure to follow the code by either party. All employers, particularly SMEs, should continue to tread carefully when handling disputes. There is still an overarching need to deal with matters, fairly consistently and without undue delay."

Holly Dobson, partner in the employment and dispute resolution department at law firm

Wake Smith & Tofields, says: "Is there a union or other employee representative body? If so, how good is this and how good is the working/ negotiating relationship between the employer and this body? My personal experience is that good industrial relations, either direct between the employer and the employee or between the employer and a representative body, can achieve a great deal to avoid a highly damaging dispute. This is often best achieved by the use of an external adviser to consider an overall strategy and approach in tandem with the employer."

DISPUTE RESOLUTION

Mediation is a practical way to diffuse workplace disputes and bring them to a mutually agreeable conclusion. The use of a compromise agreement is becoming increasingly popular in small enterprises in particular, as they prevent an employee from using an employment tribunal to resolve their issues. However, your business should be aware that overuse of these agreements can be counterproductive, as employees could make complaints just to receive the financial reward that compromise agreements offer.

"Clear dispute resolution policies and procedures will, without a doubt, help

organisations both prevent and raise awareness of their position when managing conflict in the workplace," says Kirsten Sholl. "Just as important is to ensure that managers are educated and equipped to deal with conflict before it escalates.

"Providing managers with the skills to detect and tackle these issues will lead to a healthier and more positive working environment. Indeed, more often than not airing different opinions and approaches can have a positive impact on overall performance if channelled appropriately."

Carly Mather says: "It is not sufficient simply to implement policies in order to prevent disputes arising in the workplace. It is essential to also take measures to train managers and employees on the implementation and use of the policies. The policies need to become part of the fabric of the business."

Disputes of any kind can be highly damaging for your business. Mediation is certainly an option that all owner/managers should consider. However, your business should have a clear grievance process, and where mediation is used, a concise understanding of how the process will be implemented, how legally binding any agreement will be and how employee relations will move forward after a resolution has been reached. **MM**