

**WHO'S THE BOSS?
MANAGING ETHICAL DILEMMAS
IN WORKPLACE MEDIATION AND
DEVELOPING A CONTEXTUALIZED
REFLECTIVE PRACTICE**

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I. INTRODUCTION

Mediation has become a standard response to workplace conflict. Many private and public organizations have integrated conflict resolution mechanisms within their organizational processes. Some have developed permanent departments to prevent and manage disputes within the organization, sometimes relying on the assistance of external mediators hired from the private sector.

Viewed as a flexible, efficient and creative way to solve workplace issues, mediation reduces the burden on the administrative and judicial system, prevents conflict escalation within organizations, while simultaneously mitigating damage to the relationship between managers and their employees. Through mediation, managers and employees are more likely to resolve issues, improving motivation and productivity. Workplace mediation is different from other forms of mediation, both in its benefits and ethical concerns. The stakes in workplace mediation are particularly high, given that an employee's or manager's livelihood, reputation and health may be threatened. In addition, the workplace setting is often ripe with power imbalances that may leave parties particularly vulnerable. When done ethically, mediation can help manage such imbalances and facilitate a positive working environment.

Professional standards have been slow to respond to the developing practice of workplace mediation. This paper will analyze traditional ethical principles of mediation, such as *neutrality*, *autonomy*, *impartiality* and *capacity*, and propose two new principles for the particular field of workplace disputes: *fairness* and *wellness*. Ethical policies and practices from some of the most experienced organizational conflict management programs will be discussed to determine how these have supplemented national codes of conduct, where they lack precision. Finally, the enforceability of codes of conduct will be analyzed, along with general recommendations for legislative and policy change. This paper will conclude with legal and policy recommendations to encourage more effective ethical deliberation in the field of workplace mediation.

II. BACKGROUND

When conflict first occurs within the workplace setting, those involved may seek the advice of a “conflict management practitioner” to help them resolve the issue individually (known as conflict coaching) or with all parties present (known as a facilitated discussion or mediation). Both public bodies and private organizations hire internal conflict management practitioners or external mediators, typically paid by the employer (known as the “sponsor”), to prevent and manage internal disputes between teams and individuals.¹ If the issue escalates beyond the organization, employees in both unionized and non-unionized settings may seek mediation services offered by governmental labour boards or departments.² In some countries, administrative tribunals are seen as a last resort, whereby complainants must first attend mediation prior to applying to a more formal process.³

A. Benefits of Workplace Mediation

Workplace mediation is increasingly sought as one of the most creative and effective means of addressing workplace conflict and wellness issues.⁴ Compared to court proceedings, workplace mediation provides the opportunity to reach creative and flexible outcomes.⁵ For example:

an apology, a commitment to change behavior, an agreement to distribute work more fairly and provide greater levels of responsibility, an agreement to review policies and procedures [and] a commitment to periodically review the agreement reached.⁶

1. See Treasury Board of Canada Secretariat Office, Office of the Chief Human Resources Officer, Getting to Know Informal Conflict Management Systems Better (no date); See also Outsourcing, The ADR Institute of Canada available at <<http://www.adrcanada.ca/services/outsourcing.cfm>> (no date), KPMG hired private mediators to resolve disputes related to an internal pension fund dispute.
2. See also Normes du travail, *Médiation un service gratuit pour vous aider à régler un conflit dans les meilleurs délais* (no date); Ontario Ministry of Labour, Mediation, (2009).
3. Cheryl Dolder, “The Contribution of Mediation to Workplace Justice” (2004) 33:4 Indus. L.J. 328, citing G. Anderson, *Labour’s Labour Law: Labour Law Reform in New Zealand Under a Labour Government* (Institute of Employment Rights, 2001); G. Davenport, *National Labour Law Profile: New Zealand* (International Observatory of Labour Law, 2001).
4. Ray Fells, “Settlement Process or Tactical Opportunity? Mediation in Industrial Relations” (1999) 41 J.I.R. 608. As far back as 1999, there was a trend towards the promotion of mediation within the field of industrial relations.
5. Advisory, Conciliation and Arbitration Service, *Mediation: A Guide for Trade Union Representatives*, available online: <[http://www.acas.org.uk/media/pdf/m/7/Acas_TUC_Mediation_Guide_AUGUST_2010_\(Final\).pdf](http://www.acas.org.uk/media/pdf/m/7/Acas_TUC_Mediation_Guide_AUGUST_2010_(Final).pdf)>.
6. *Ibid.*

Mediation may provide a means for an employee or manager to reenter the workplace after leave or suspension,⁷ even in such serious cases as workplace harassment. Although reintegration may not take place, the option to reach a negotiated agreement is a tempting alternative to managers who face challenges in the retention of personnel.

Mediation has the potential to reduce the escalation of conflict, preventing costly litigation and damage to relationships. Some managers prefer mediation to formal disciplinary or grievance procedures in cases where they would rather avoid imposing sanctions.⁸ In addition, "the use of mediation can avoid unnecessary tribunal claims and reduce the level of formal grievances because early interventions mean that disputes are addressed before they escalate".⁹ Preventing conflict escalation may also reduce potential counterclaims. In a case where an employee files a grievance against another employee, the respondent may choose to file a counterclaim based on their feeling of being treated unfairly.¹⁰ Mediation seeks to help employees and managers "avoid a more formal and often more confrontational route, such as grievance and discipline procedures, and rather than attribute blame looks to rebuild damaged relationships for the future".¹¹

B. Mediators are the Guardians of Process

Mediators must act as the guardians of the dispute resolution process, ensuring that ethical standards are followed in the achievement of parties', and simultaneously, organizational goals. Frequently, tension exists between the goals of each individual, so the mediator must decide whose interests they must serve, and how so. To manage power differentials, the mediator must be transparent in addressing concerns, or risk quietly reinforcing power imbalances. However, compared to adjudicators, mediators need not follow procedural rules with regards to the process or substantive rules in terms of an outcome.¹² Many workplace mediators do not ascribe to one theoretical model of mediation, rather choosing techniques based on past experience or training.¹³ Mediators

7. *Ibid.*

8. *Ibid.* at 8.

9. *Ibid.* at 5.

10. *Ibid.*

11. Tony Bennett, "The Role of Mediation: A Critical Analysis of the Changing Nature of Dispute Resolution in the Workplace" (2012) 41:4 *Indus. L.J.* 479, citing Advisory, *supra* note 5.

12. Julie Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002) 40:1 *Osgoode Hall L.J.* 51.

13. Mediators may use a variety of tools depending on the subject matter of the case and the dynamics between parties.