

Title: Use of Mediation by SMEs in Great Britain

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Abstract

Repeal of Statutory Dispute Regulations in 2009, following the Gibbons report, placed alternative dispute resolution, especially workplace mediation, high on the policy agenda. Although Gibbons recommended a publically-funded system of early dispute resolution no specific provision was made. Prior research suggests that while SMEs have traditionally adopted an informal approach to conflict resolution they remained concerned about procedural formality as a pre requisite to defending their actions in the case of litigation. Moreover both internal and external mediation represent a significant financial cost to SMEs, with external mediation, arguably the most appropriate form for SMEs, being the most costly. The paper will use data from the Sixth Workplace Employment Relations Study (WERS6) to explore dispute resolution practices in SMEs and their relationship to rates of grievance, disciplinary sanction and employment tribunal application in SMEs

Introduction

Resolving individual workplace disputes is a key concern for policy makers and employers. A desire to improve workplace grievance and disciplinary procedures has resulted in a stream of legislation designed to strengthen the process of dispute resolution and to contain the growth of ETAs (Antcliff & Saundry, 2009). Recent statistics suggest that while the overall number of ETAs in 2011-12 fell by 15% on the previous year, single claims (those brought by an individual against an employer) remained high at 59,200, a fall of only 2% (Ministry of Justice, 2012).

Debates surrounding effective dispute resolution mechanisms centre on contrasting claims about the role of formality. Formality can be seen as means of promoting high standards in workplace grievance and disciplinary procedures, leading to improved outcomes and underpinning fairness. However, undue concern with formalised procedures, especially at the early stages of a dispute is argued to encourage parties to adopt adversarial positions and so escalate conflict.

UK policy has traditionally focussed on formal process, a notion underpinned by the introduction of statutory grievance and discipline procedures in 2004, under the Employment Act 2002 (Dispute Resolution Regulations). However it quickly became apparent that increased formalisation had failed to contain the problem and, faced with a continued increase in ET applications, the Government commissioned the Gibbons Review in 2007 to look into the UK's system of workplace dispute resolution.

Gibbons argued that concern with process was leading to increased formalisation of disputes at an early stage and so discouraging informal discussion and resolution (Gibbons, 2007). To mitigate the problem he recommended a publically-funded system of early dispute resolution, focusing on mediation as a way to facilitate a cost-effective, speedy and mutually acceptable outcome without recourse to formal procedure. Government announced the repeal of statutory grievance and discipline procedures, and workplace mediation has since become a major focus of dispute resolution policy. However, no provision has been made for the publically-funded system of early dispute resolution recommended by Gibbons and the revised ACAS code of conduct *advises* the use of mediation to resolve individual workplace disputes, but does not *require* it.

SMEs have traditionally adopted a less formal approach to dispute resolution (Edwards et al., 2003) reflecting the personal nature of working relationships, and yet they remain over represented among ETAs (Peters et al., 2010). Early, informal dispute resolution may, arguably, represent an improved situation for SMEs, freeing them from a legal requirement to adopt a level of formality at odds with their practices and culture. However a significant number of SMEs continue to view formality as a pre requisite to defending their actions in the case of litigation (Harris et al., 2008), or prefer standardised procedures and guidelines when faced with workplace issues where they lack knowledge and experience (Saundry et al., 2011).

Practical Concerns

These are organised around two broad issues: the type of mediation suitable for SMEs and perceptions the process. Essentially mediation is '*where an impartial third party, the mediator, helps two or more people in dispute to attempt to reach an agreement*' (Podro & Suff, 2013:8). The mediator may be a trained employee, or an individual supplied by an external organisation. In reality mediation often refers to less-structured, ad hoc discussions between the disputant and a manager or owner (Saundry et al., 2013; Saundry & Wibberley, 2012; Latreille et al., 2012). The close personal nature of employment relationships in SMEs means such ad hoc discussions are unlikely to fulfil requirements for impartiality and confidentiality, and external mediation generally offers the best solution, but is also the most costly option (Latreille et al., 2012).

Perceptions of mediation

SMEs rarely have specialist knowledge or expertise in handling grievance and disciplinary issues, alongside limited financial resources. They are left to deal with individual workplace disputes without HR expertise and, while they may be enthusiastic about the idea of mediation, the reality of the financial cost may be prohibitive (Harris et al., 2008). Thus, while conducting formal grievance and disciplinary hearings may be counter cultural, and can escalate rather than resolve disputes, negative attitudes towards mediation on the part of SMEs, especially perceived costs can make mediation equally alien (Latreille et al., 2012; Williams, 2011). Perceptions are often, therefore, contradictory, supporting informal approaches on the one hand, but also perceiving them to be a costly luxury suitable only for larger businesses.

It is unclear then, to what extent mediation represents a useful tool for improving dispute resolution in SMEs. WERS6 provides data that, for the first time, measure the extent to which mediation is used in British workplaces. Evaluating the success of mediation is less straightforward and, following the lead of existing research (Colvin, 2004; Antcliff & Saundry, 2009), annual rates of grievance, disciplinary sanction and ET application per hundred employees are taken as the primary dependent variables.

The paper is organised as follows: Section 2 sets out existing theory and research, Section 3 discusses limitations in quantitative measures of success, Section 4 describes the data, some preliminary results are presented in Section 5 and the paper ends with a discussion of the future research agenda and policy implications.

2. Literature Review and Theory

2.1 Types of Mediation

Research investigating the suitability of types mediation for SMEs, suggests that external mediation is generally perceived as most appropriate (Harris et al., 2008; Latreille et al., 2012; Seargeant, 2005). Harris et. al (2008) suggest that SMEs favour external mediation because it allows them to distance themselves from the process and so ensure impartiality and neutrality. This is important because perceived neutrality of the mediator is argued to be a key factor in effective mediation, leading *inter alia* to increased confidence and trust, improved concessions and a rise in settlement rates (Marachel, 2005; Silberman, 1989; Arnold & O'Connor, 2006).

However, external mediation may be prohibitively costly (Harris et al., 2008; Seargeant, 2005). Internal mediation, however, is likely to be problematic. Where managers take on the role of mediator their ability to deal effectively with the dispute can be limited, especially if they have an ongoing relationship with the disputants (Sherman, 1995). The impracticality of internal mediation, and cost involved in external mediation have led Latreille et. al., (2012) to call for more creative solutions on the part of Government to provide affordable mediation for SMEs. Local networks where SMEs share the cost of mediation training and act as external mediators for each other is one idea put forward.

2.1 The 'previous experience' effect.

Seargeant's evaluation of an ACAS pilot scheme offering employment advice and mediation services to businesses with fewer than 50 employees provides an insight into perceptions of mediation (Seargeant, 2005). Seargeant found enthusiasm for mediation among SMEs but those who had positive experiences of the process were more likely to express a willingness to pay in future. This 'previous experience' effect was investigated by Latreille et al using data from existing CIPD surveys. Latreille suggested that actual *experience* of the mediation is the principal driver of positive attitudes (Latreille et al., 2012), and can overcome perceptions of excessive cost. It is possible that a vicious circle may exist where SMEs are less likely than larger firms to believe that mediation is suitable for their workplace, so are less likely to acquire the positive 'previous experience' effects that can overcome perceptions about the cost and suitability of the process.

3. Measuring the Success of Mediation

Benefits of mediation can be conceptualised across two dimensions: provision of quick, cost-effective and successful dispute resolution; 'upstream' benefits relating to improved employment relations, more effective conflict management skills and a supportive organisational culture (CIPD, 2007; CIPD, 2008).

Quantitative studies have sought to measure the success of mediation across the first of these dimensions. Corby, (1999) compared data from the UK and New Zealand (where workplace mediation is widely used) and found that use of mediation in New Zealand was associated with lower rates of formal tribunal hearings, while Bingham et al.'s study of the US Postal system found a 17% decrease in formal complaints (Bingham et. al., 2000). However the institutional environment in these countries strongly encourages mediation, unlike the voluntarist approach in Britain. In the UK the CIPD survey found that organisations where mediation training took place were subject to lower rates of ETA than organisations where no such training was available (CIPD, 2007).

This paper takes rates of grievance, disciplinary sanction and ETA as dependent variables explores relationships between these and use of workplace mediation. Measuring success in terms of rates of disciplinary sanction or tribunal application is necessarily simplistic (Greig, 2005) and fails to

capture the second dimension of 'upstream' benefits, however these are beyond the scope of this paper..

A further limitation associated with rates of sanction or tribunal application as a measure of success relates to workplace power relations. The decision to proceed with mediation is generally taken by the mediator, hence it is largely restricted to cases where it has the greatest chance of success (Greig, 2005). Where an imbalance of power exists the weaker party may feel too intimidated to participate (Agusti-Panareda, 2004), or the stronger party may refuse to take part (Wiseman & Poitras, 2002)s. Decisions about mediation can be infused, therefore, with power relations rooted in organisational context, culture and practices. Thus mediation may be associated with low rates of grievance and disciplinary sanction because its use will be restricted to a self-selecting group predisposed to success.

4. Data and Methods

Data are drawn from WERS6, a nationally representative survey of workplaces in Great Britain employing five or more workers. The unit of analysis is the workplace, which is defined as 'the activities of a single employer at a single set of premises'(Deepchand et al., 2013). This means that where an employer operates at more than one set of premises, the data refer only to the single workplace that has been selected in the sampling process. For example, a workplace may be a single branch of a high street store, a local library or the branch office of a national organisation.

The senior manager dealing with employment relations or HR was interviewed at each workplace, and asked to provide a demographic profile of the workplace, prior to completion of the main questionnaire. Data collected in this way forms the Management Survey. Further questionnaires were distributed to a sample of employees and employee representatives. This analysis draws on the cmanagement survey. Interviews were conducted at 2,680 workplaces between February 2011 and June 2012.

Dependent Variables

Three dependent variables have been constructed, the rate per 100 employees of grievances raised, disciplinary sanction and Employment Tribunal applications in the previous 12 months.

Independent variables

Business size

This paper sets out to explore the use of mediation in SMEs, rather than small workplaces (the unit of analysis in WERS6). WERS 6 asked respondents if their workplace was a single establishment or part of a larger organisation, and if so how many people did that organisation employ. This allowed for variable to be constructed to measure 'business size', defined as the total number of people employed by that organisation. Thus a small branch of a large high street retailer, employing 50 people, would be classified as workplace belonging to a large business. SMEs are defined as those with 5- 49 employees, medium businesses as those with 50 – 249 employees and large businesses as those with 250 or more employees.

5. Preliminary Analysis

Table 1. Use of Workplace Mediation in the previous 12 months by Business Size.

Size of Business	% of workplaces using internal mediation in last 12 months	% of workplaces using external mediation in last 12 months	% of workplaces using both in last 12 months
5-49 emps	2	3	0
50-249 emps	6	7	1
250 or more emps	14	9	4

The use of mediation remains low, especially in workplaces belonging to SMEs. There is some evidence to suggest that where SMEs have used mediation, it is more likely to be external mediation.

Formal Provision for Mediation

WERS asked respondents if provision for mediation by an impartial third party was made in grievance and disciplinary procedures at their workplace.

Table 2 Formal provision for Mediation by Business Size

Size of Business	% Of workplaces with provision for mediation in grievance procedures	% Of workplaces with provision for mediation in disciplinary procedures	n=
5-49 emps	49	53	623
50-249 emps	58	56	394
250 or more emps	66	55	1661

Table 2 offers an insight into the perceived usefulness of mediation. Around half of workplaces include provision for mediation in grievance and disciplinary procedures, but for medium and large businesses there is an emphasis on its use in resolving workplace grievances, rather than disciplinary issues. It is unclear why SMEs appear to place greater emphasis on mediation in disciplinary procedures. One possibility may be that it reflects a more personal and informal approach to handling grievances. Nevertheless there is strong evidence to suggest that the voluntary approach to the use of mediation in the UK means that while many businesses make formal provision for its use, only a small minority of workplaces actually employ it. This is especially true among SMEs.

Rates of Grievance, Disciplinary Sanction, and ET Application by Use of Mediation

Table 3 summarises the mean rate of grievances raised, disciplinary sanctions and ETA per hundred employees in the previous 12 months by business size and Table 4 presents the same rates by use of mediation.

Table 3. Rates of grievance, disciplinary sanction and ET application per 100 employees by size of business.

Size of business	Mean rate of grievances raised (SD)	Mean rate of disciplinary sanction (SD)	Mean rate of ET tribunal application (SD)
5-49 emps	1.3 (4.1)	4.8 (9.9)	0.17 (1.3)
50-249 emps	1.4 (3.5)	4.5 (7.5)	0.23 (0.9)
250 or more emps	1.5 (3.5)	4.0 (7.7)	0.24 (0.9)

Table 4. Rates of grievance, disciplinary sanction and ET application by use of mediation

Use of 3rd party mediation to resolve grievance or disciplinary matters last 12 months		Mean	Std. Deviation
no, have not used mediation	Grievance rate	1.2141	3.40286
	ET application rate	.1519	.80391
	Sanction rate	4.2115	8.29371

yes, mediation with an internal third party	Grievance rate	2.3922	4.90741
	ETapplication rate	.3732	1.33152
	Sanction rate	5.3865	9.47707
yes, mediation with an external third party	Grievance rate	2.2751	4.61677
	ETapplication rate	.7474	2.14624
	Sanction rate	4.8505	6.95628
yes, mediation with an external third party and an internal	Grievance rate	1.6336	2.54186
	ETapplication rate	.4114	.69201
	Sanction rate	3.7331	8.63118

Table 4 suggests a positive association between use of mediation and rates of grievance, disciplinary sanction and ETA, especially where external mediation services have been used, and is in stark contrast to findings from New Zealand and Canada (Bingham et al., 2000; Corby, 1999) Further investigation of the data is needed, however, the initial picture seems to be one of mediation being used in workplaces where relatively high rates of conflict exist. It is possible that this reflects the costs of mediation, with businesses only choosing to invest in external mediation as a last resort.

6. Discussion

Gibbons shifted the focus of workplace conflict resolution in the UK from formal process to early, informal resolution through mediation. This raised concerns about the suitability of mediation for SMEs. There is clear evidence to suggest that use of mediation low, with SMEs least likely to have employed it. Costs of external mediation, and resources needed to establish internal mediation represent major barriers to SMEs. Research suggests that knowledge and experience of mediation can overcome preconceptions about the cost and efficiency of mediation in SMEs, but the legal framework provides little encouragement for businesses to try mediation in the first place.

Initial analysis of WERS6 data confirms that while provision for mediation within grievance and disciplinary procedures is widespread, its use, especially among SMEs is limited. organisations tend to focus on including mediation as an option for resolving grievances. Overall use of mediation shows a positive association with rates of sanction and tribunal application suggesting it may be seen as a last resort rather than an early intervention as Gibbons envisaged.

Policy Implications

SMEs are making scant use of mediation, except perhaps as a last resort despite levels of grievance and disciplinary sanction similar to their larger counterparts. If the vicious circle outlined by Latreille (2012) is to be broken, business support programmes need to focus on providing SMEs with

knowledge, and especially positive examples of the mediation process. Arguably the greatest value of mediation is that it can act as a catalyst providing 'upstream' benefits in the form of improved conflict management skills and workplace relationships (Banks & Saundry, 2013). If SMEs are to enjoy the wider benefits of mediation espoused by Gibbons, these support programmes will need to convince managers and owners of the wider business case for mediation, rather than, as initial analysis suggests, seeing it as a costly last resort.

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