



The role of mediation in resolving workplace relationship conflict



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ABSTRACT

Stress triggered by workplace-based interpersonal conflict can result in damaged relationships, loss of productivity, diminished job satisfaction and increasingly, workers' compensation claims for psychological injury. This paper examined the literature on the role and effectiveness of mediation, as the most common method of Alternative Dispute Resolution, in resolving workplace relationship conflict. Available evidence suggests that mediation is most effective when supported by organisational commitment to ADR strategies, policies and processes, and conducted by independent, experienced and qualified mediators. The United States Postal Service program REDRESS™ is described as an illustration of the successful use of mediation to resolve conflict in the workplace.

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1. Introduction

A psychologically healthy and safe workplace has been defined as one in which organisational support exists for the physical, social, personal and developmental needs of employees (Kelloway & Day, 2005). Despite the existence of Occupational Health and Safety legislation designed to protect workers, and the abundance of guidance available to employers and employees on how to combat it, the modern workplace is increasingly characterised by stress. Stress is defined here as the emotional or mental condition experienced by someone in response to a perceived threat (stressor) in their environment. In this instance, the stressor is interpersonal conflict and the environment is the workplace. A number of theories exist for why workers experience stress in the workplace but most recognize that it is to do with either the work environment or job factors rather than individual personalities (Dollard & Knott, 2004). In Australia, workers experiencing ill health as a result of stress to which their workplace or employment has significantly contributed are entitled to submit a claim for workers' compensation. Although the cost to organisations and workers' compensation schemes, prevalence of stress claims, and relevant legislation varies between states, nationally the number of claims continues to rise (Dollard & Knott, 2004). These claims are also expensive due to the often lengthy periods of absence and complicated medical care characteristic of this type of injury (Cotton, 2008; Guthrie, Ciccarelli, & Babic, 2010). Such is the increasing number of psychological injury claims in Australia, a range of legislative amendments has been implemented in all jurisdictions (Cotton, 2008; Guthrie et al., 2010). Yet, as Cotton (2008, p.8) notes, the situation has not been able to be legislated away. Moreover, compensable stress-related claims

continue to grow, along with their associated expenses (Guthrie et al., 2010). Research also suggests that available statistics under-estimate the extent of workplace stress, as many people neither report it nor file a compensation claim (Caulfield, Chang, Dollard, & Elshaug, 2004, p.149). This finding although concerning is not unexpected since, as Dollard and Knott (2004, p.355) observe, "workers typically regret making a claim, find the process very stressful, and experience it as a form of social suicide." What is more, involvement in the compensation process can be an additional stressor for already injured workers (Lippel, 2007; Roberts-Yates, 2003).

The focus of workers' compensation systems in many jurisdictions is on injury (rather than claim) management with an emphasis on a return to work (King & Guthrie, 2007). This is in keeping with a recent systematic review that found that in a variety of populations, times and settings, there are health benefits for injured workers in returning to work (Rueda et al., 2012). However, as Roberts-Yates (2003) notes, recovery from any injury can be strongly influenced by treating medical experts, the nature and severity of the injury, the emotional and psychological fragility of the injured worker and the culture of the workplace. MacEachen, Clarke, Franche, and Irvin's (2006) systematic review of qualitative literature on return to work found that goodwill (where the employee feels attached to their workplace), trust and overarching conditions are central to successful return to work arrangements. In addition, there are often social and communication barriers to return to work and intermediary players (such as managers) have the potential to play a key role in facilitating this process. For those suffering a psychological injury, even if they return to the same workplace, this process can be complex and prolonged.

In the past, most return to work policies and programs took a "top down" approach with employers having the responsibility to establish a return to work program as opposed to involving the injured worker in formulating a program in conjunction with the approval and support of the employer (King & Guthrie, 2007, p.40). But this requires a good

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relationship to exist between employer and employee, a key factor in a successful return to work for workers' compensation claimants.

The term workplace relationship generally refers to all interpersonal relationships which individuals form whilst performing their jobs and can range from supervisor/subordinate to romantic (Sias, 2009). Workplace interpersonal conflict is frequently identified as a source of stress which, in some circumstances, may lead to a workers' compensation claim for psychological injury. Conflict in the workplace can result in damaged relationships, loss of productivity and job satisfaction (Kidder, 2007) for the individual. This also has consequences for employers and society in general. Researchers of organisational behaviour and industrial relations have long recognised the importance of a procedure for resolving employment disputes. Many studies draw on theories such as procedural justice and social accounts theory that suggest opportunities for people to have their concerns heard and taken seriously, and perceptions of fairness, will be associated with positive outcomes (Bingham & Novac, 2001). However, Elshaug, Knott, and Mellington (2004) emphasise that any solution needs to be examined in different ways: individually, in terms of a person's psychological and physical well-being; organisationally with regard to issues associated with loss of productivity and absenteeism; and at a societal level in relation to costs associated with mental health and family well-being.

This article is based on a "Snapshot Evidence Review" undertaken by the Institute for Safety, Compensation and Recovery Research (ISCRR) on behalf of WorkSafe Victoria. It examined a selection of the literature on the role and effectiveness of mediation in resolving cases of workplace relationship conflict¹ expanded to more emphasise ADR processes in general in the context of the principles of therapeutic jurisprudence.

2. Method

An initial systematic search of health and social science databases was conducted to identify relevant peer-reviewed literature published in English between 1990 and 2012. Searches used combinations of the terms: mediation; workplace mediation; psychological injury; stress; workplace stress; workplace relationships; and return to work. Databases consulted were Expanded Academic, PsychInfo, PubMed, Medline, CINAHL, ABI/Inform Complete, Current Contents, Proquest, SCIRUS and Google Scholar. Abstracts of potential papers were read and full text versions obtained of relevant references. Further references were identified from reference lists of these papers as well as a search of grey literature from relevant government bodies and other institutions. This article is a revised version of the ISCRR report. In addition to the original search, an additional limited search was undertaken using the terms alternative dispute resolution and therapeutic jurisprudence and the inclusion of the year 2013.

2.1. Relationship conflict in the workplace

The emotional dimension of work relationships is important. Workplace or professional behaviour is often very different from customary, societal, forms of emotional behaviour. Workplace relationship conflict can vary from minor disagreements between co-workers to aggression and organisational violence; it may be overt or covert, intentional or unintentional, but all conflict will be characterised by negative emotions (Kidder, 2007). For example, Struthers, Dupuis, and Eaton (2005, p.305) argue that co-worker relationships, increasingly recognised as one of the most meaningful interpersonal relationships that people will have at work, require a particular kind of "emotional labour". But due to the public nature of the workplace, emotions such as distress

may have to be disguised, attraction suppressed, or annoyance left unspoken (Fineman, 2000, p.2). As Lutgen-Sandvik (2006, p.426) notes, "...communication at work...is always social and public." Waldron (2000) argues that the experience of emotion at work is influenced by the unique contextual features of work relationships and is an integral part of relational conflict. Moreover, the role of emotion and feelings of alienation in protracted workplace conflict impairs communication by producing intense emotions, especially shame and anger (Retzinger & Scheff, 2000).

Poor interpersonal relationships in the workplace are frequently identified as a source (as opposed to a predictor) of stress. There are some indicators such as taking frequent leave or absenteeism that point to workers suffering from workplace stress. When taken together, high levels of distress and low job satisfaction have been identified as precursors to stress claims (Dollard & Knott, 2004, p.350). Conflict, as an emotional experience, has psychological and physical consequences; psychological injury claims are therefore likely to also have corporeal outcomes (Dollard & Knott, 2004; Elshaug et al., 2004). Dollard and Knott (2004, p.353) point out that workplace psychological injury, including interpersonal conflict, "...tends to have a poor prognosis in terms of claim duration [and] return to work outcomes." They, like Roberts-Yates and MacEachen et al., argue that organisational culture, and support for injured workers, as well as beliefs and attitudes about psychological injury, impact negatively on these outcomes.

Although causes and conditions of sickness absence are not well documented or understood this can be an indicator of a more serious problem such as bullying or harassment. Although some workers find that sickness absence and disconnecting from the work environment can provide short term relief, they often find that the problem remains. In these instances organisations need to address interpersonal issues if workers are to be able to successfully return to work. For example, studies on bullying in the workplace have found that changes in working conditions that remove or interrupt bullying are important indicators of returning to work (O'Donnell, MacIntosh, & Wuest, 2010). In O'Donnell et al.'s (2010, p.448) study of women affected by workplace bullying, they found that "adjusting was influenced by working conditions and organisational support." But the viability of this depended upon not just the willingness of the workplace to change, but its ability to change. For example, many small businesses may be too small and unable to reorganise their workplace whereas others may simply be unwilling to do so.

When it comes to workplace disputes, interpersonal conflict is most often considered to be an occupational health and safety (OH&S) rather than industrial relations issue. OH&S models often treat stress as an individual reaction to external conditions (Kelloway, Teed, & Kelley, 2008) so that strategies and interventions relating to work stress occur at three possible levels: primary, secondary and tertiary. Most interventions occur at either the secondary level (individual/organisational interface) with a focus on altering the way that individuals respond to stressors at work and improving their coping mechanisms; or the tertiary (individually-focussed) level that aims to minimise the effects of stress-related problems once they have occurred (Elshaug et al., 2004; Lamontagne, Keegel, Louie, Ostry, & Landsbergis, 2007). Workplace dispute resolution procedures are likely to be tertiary level interventions.

Workplace psychological injury/conflict is both individual and collective as it occurs within the context of an organisation. There also tends to be a higher degree of reporting delay with psychological injuries than with other workplace injuries (Elshaug et al., 2004, p.529), often exacerbated by the stress of the claim process itself (Winefield, Saebel, & Winefield, 2010). But why some people go on to submit a workers' compensation claim for psychological injury whilst others do not, is not able to be accurately predicted (Haines, Williams, & Carson, 2004; Haines, Williams, & Carson, 2006; Winefield et al., 2010). Only one study found suggested that psychological injury claims could be predicted; the indicator being worker perceptions of workplace unfairness (Winefield et al., 2010).

¹ Snapshot evidence reviews have a short turnaround time and so are unable to provide definitive answers or exhaustive analyses based on all existing evidence. Due to short time frames, searches are also likely to be limited to a small number of databases and search terms.

Schultz (2008) notes that return to work is both a process and an outcome. In psychological injury litigation there is a gap between the broadening and transdisciplinary conceptual models of health, function and disability. “The new focus is on the individual with disability in environmental and temporal context and on the synthesis of the medical and the psychosocial. Traditionally, the field of psychological injury and the law has not been well defined and has been influenced by the biomedical paradigm which challenges the adversarial outcome model.” One way in which harm associated with the adversarial nature of the litigation process can be mitigated is through alternative dispute resolution (ADR) processes.

3. ADR

ADR evolved in the USA as an option for resolving disputes outside a courtroom and in response to weaknesses in the adversarial legal system (Struthers et al., 2005). ADR methods are now practiced worldwide in various ways. Lipsky and Avgar (2004, p.176) suggest that ADR was a paradigmatic shift in employment dispute resolution; a product of a “historic transformation of the American workplace” that began in the 1970s. ADR methods include (but are not limited to) processes such as: open door policies; Ombuds; peer review; employment arbitration; negotiation; and mediation (Bingham, 2004; Mahony & Klaas, 2008; Vickers, 2006). Schneider (1999, p.1086) argues that “ADR differs fundamentally from the adversarial system in that it seeks a mutually satisfactory process and resolution to a dispute” and that because it is faster, more flexible, and less costly than litigation, ADR serves clients and their lawyers; the justice system (through a reduced case load); and provides dispute resolution opportunities to the broader community. A skilled lawyer can become a source of both technical and social support (Lippel, 2007) if a collaborative rather than adversarial approach to conflict is taken.

The increasing use of ADR is only one recent reform in the field of judicial dispute resolution. Another is therapeutic jurisprudence (TJ) that encourages lawyers to assess the potential emotional impact of litigation on a client. This approach views the law as a healing agent and acknowledges that the justice system has an effect on individuals and communities that extends beyond rights and obligations to encompass overall well-being (Campbell, 2010; King & Guthrie, 2007; Wexler, 2011). Wexler (2011) for example, argues that the law has the potential to be more than a formalistic process; that it can also be an agent of reconciliation and resolution. Originally developed in the field of mental health law (Struthers et al., 2005), TJ is most often associated with criminal law and other “problem-centred” courts but is also applied in civil law practice, in particular to workers' compensation and other personal injury claims (King & Guthrie, 2007). It has been argued too, that TJ has a preventive and remedial quality in its emphasis on issues of fairness and the value it places on processes that promote resolution of what can be highly emotive contexts (King, 2008; King & Guthrie, 2007; Wexler, 2011). “It points to the importance people place on having some control over what happens to them, in being able to choose what they do. It points to the value of self-determination in promoting health” (King & Guthrie, 2007, p.39). However, if TJ is preventive, it can only be so in the sense that the aim is to prevent further harm; it cannot prevent what has already happened.

Other, similar approaches within the justice system are restorative justice (RJ) and preventive law (PL) (King, 2008). RJ (although limited to the context of victim/offender) like TJ, also aims to heal relationships rather than balance hurt with hurt (Kidder, 2007). The RJ process, as a mediated encounter between victim and offender, allows the emotions of each party to be expressed and appeased by discussing the events, their effects and what the offender might do to make amends (King, 2008). Yet it is not without its critics. Michael King (2008, p.1110) notes that some primary criticisms are that it puts pressure on victims to participate; there is a risk that victim and/or offender will be harmed by it; it is particularly problematic where there is a power imbalance

between victim and offender (such as in cases of sexual assault and domestic violence); and it undermines deterrence. Furthermore, it has been suggested that in such an emotionally charged situation where people are especially vulnerable, there must be proper processes in place (such as ways to prepare for the encounter and proper facilitation by the mediator) to alleviate the risk of further harm to the parties.² Proper guidelines “...are therefore vital for the protection of the parties and the process” (King, 2008, p.1111). Schneider (1999, p.1087) notes that “the concept behind PL is both the clear establishment of legal rights and duties as well as the avoidance of litigation.” This approach focuses on the role of the lawyer as advisor/counsellor and planner. However, not all lawyers will necessarily be comfortable with this kind of role.

One challenge for ADR is to determine which method is the most appropriate for the case at hand. Schneider (1999) has suggested a four-step approach by which lawyers can choose the most appropriate ADR method for their client: identify emotional concerns; determine legal procedures that would be therapeutic; implement PL for therapeutic outcomes; and establish a legal check-up system. Depending on the needs of the client, she considers that there are three main approaches most likely to serve a therapeutic interest: negotiation, arbitration and mediation. Negotiation allows the client to be the most detached from legal proceedings as negotiations occur mainly between lawyers, whereas in arbitration the client is more involved. However, both these approaches operate under the assumption that the parties are adversaries. Mediation, on the other hand, allows the parties the opportunity to talk directly to each other facilitated by an independent mediator.

3.1. ADR in other contexts

Teague, Roche, and Hann (2012) note that there has been relatively little work done on the organisational uptake of ADR in countries other than the USA. They ask whether it is a peculiarly North American phenomenon or whether it constitutes a genuinely innovative approach to conflict management. The extent to which ADR and meditation in particular, has been taken up across the globe in the same way and with the same kinds of results, is therefore open to question (Teague et al., 2012). Teague et al. distinguish between ADR as individual-based conflict, as is largely the case in the USA, and the collective context which is more prevalent in nations with a history of group workplace/interest-based bargaining such as Ireland, the UK, and Australia. In Ireland, for example, the Labour Relations Commission deals with disputes arising from a range of statutory employment rights as well as other employment issues for groups, whether unionised or not. Further, most firms in Ireland follow relatively orthodox practices to resolve workplace conflict and the incidence of ADR for managing conflict involving individuals is extremely modest. This may be a reflection of the institutional framework for conflict resolution in that country although Teague et al. (2012) found in their survey of Irish organisations that US-owned multinationals were more likely to have adopted individual ADR practices than their Irish counterparts and other multinationals.

3.2. ADR in Australia

Although ADR has been increasingly used in Australian workplaces since the late 1980s it is applied almost exclusively to interest disputes such as personality conflicts, disciplinary matters and to facilitate enterprise negotiations (Forsyth, 2012). When compared to the USA, private ADR does not have a significant place in workplace dispute resolution in

² In this article the term parties refers to the participants in a dispute. This may be limited to two individuals or encompass groups of people. They represent the different sides in a dispute such as an individual and their manager, two co-workers, or a group of workers and the organisation for which they work. This does not include a mediator unless otherwise stated.

Australia (Colsky, 2001; Forsyth, 2012). This is largely because of the role and effectiveness of the government organisation, Fair Work Australia (FWA). FWA undertakes conciliation, arbitration and mediation processes for workplace disputes. The types of disputes it mainly deals with include those falling under the terms of an award or collective/enterprise agreement; bargaining disputes; and disputes arising under general protections provisions of the *Fair Work Act 2009* (issues such as unfair dismissal; workplace rights; or adverse actions such as discrimination and bullying³). Dispute resolution services are able to be accessed by individuals and groups including employers, employees and unions.

There are some larger organisations that offer ADR programs to their staff such as the Australian Defence Force that offers interactive problem solving; conflict coaching; mediation; and group facilitation and the Victorian State Services Authority which provides ADR processes as part of its staff grievance procedures. Although only descriptions rather than formal evaluations are available, Forsyth (2012, p.484) notes these examples are "...consistent with anecdotal reports of an increasing propensity of employers to utilise workplace mediation, particularly for 'employee on employee' conflict."

In the private ADR sector there is some evidence that practitioners are having success in combining facilitative and transformative mediation models in resolving workplace-based conflict (Manning, 2006). Manning suggests that these two models allow for behavioural changes in workplace interactions desired by employees and employers. In contrast, settlement-based mediation is less suited to workplace conflict as it does not address the underlying tensions between the parties. If not resolved, "...tensions and differences are likely to flare up again in future contexts such as meetings, lunch rooms, corridor interactions, functions, etc." (Manning, 2006, p.87). In Manning's study, a series of 20 cases were referred to independent mediation; 17 of these resulted in an agreement formulated at the time of mediation. At one month follow-up, 12 of these agreements were still operational.

Mediator practice in Australia is guided by the National Alternative Dispute Resolution Advisory Council, an independent body that advises the Australian Attorney-General on ADR and promotes the use of ADR for civil (rather than criminal) cases. For individual practitioners, a National Mediator Accreditation System of Mediator Standards is administered by the Mediator Standards Board. This allows professional organisations to become a Recognised Mediator Accreditation Body and to award accreditation to their members who meet these standards, although this is not mandatory.

3.3. Mediation

Mediation is the most frequently employed ADR method because of the mediation process itself – when people feel that a process is fair, they are likely to be significantly more satisfied with the outcome (Bingham, 2004). A satisfactory outcome for participants is that the experience is as collaborative and least traumatic as possible. In mediation this happens in the same way in either a legal context or in other conflict situations (King & Guthrie, 2007) such as peer mediation (McWilliam, 2010) and workplace conflict resolution (Bingham & Novac, 2001). The general process involves three features:

Participation – participants are actively involved in the decision-making process. By participating, it may be found that simple misunderstandings are at the heart of a dispute.

Representation/reparation – parties are allowed to express their perspective and how they feel about what has occurred. One of the most

powerful forms of reparation is an apology (research on apologies at work has found them to be effective).

Validation/reintegration – parties work to solve a dispute in a cooperative and respectful way. For example, in restorative justice, balance is achieved through forgiveness as the parties are reintegrated back into the original "community" (Kidder, 2007).

Kidder (2007) argues a case for the concept of restorative justice and use of mediation in organisations, especially for managers of teams in which conflict is a barrier to effective performance. Restorative justice-type meetings, she suggests, can be used as a tool for the team to address issues such as poorly performing members and build interpersonal skills. However, Kidder (2007, p.15) does caution that this process is not appropriate for all situations, can be time consuming, and has to be carefully handled so that it may be prudent for an organisation to engage an independent mediator to facilitate. On the whole, mediation is understood to rely largely on facilitating negotiation among the parties to a dispute to bring about a successful outcome (Harkavy, 1999; Lewicki, Weiss, & Lewin, 1992). Or, as Della Noce, Bush, and Folger (2010, p.95) put it, mediation is "...a social process in which a third party helps people in conflict understand their situation and decide for themselves what, if anything, to do about it."

In general there are three kinds of mediation⁴ (Bingham, 2004; Nabatchi, Bingham, & Good, 2007):

Evaluative – in which the mediator offers an expert opinion to assess the legal and substantive merits of a claim in order to give the parties information about the strengths and weaknesses of their case.

Facilitative – where the mediator structures the process for the parties and engages in problem-solving techniques to move the parties toward settlement.

Transformative – this is less directive than the other approaches. The mediator provides opportunities for parties to clarify their own interests, goals and choices to reach a better understanding or acknowledgement of the other's perspective and to resolve their own conflict.

Mediation is becoming a progressively more significant aspect of organisational integrated conflict management systems. Considered to be effective in disputes involving strong emotions, it is increasingly popular as a means to resolve discrimination and harassment complaints. Mediation may also help resolve the relational and emotional aspects of intractable conflict found in psychological injury claims (Retzinger & Scheff, 2000). McWilliam (2010, p.294) suggests that "if left unresolved, the residual, underlying relational issues may be externalised in more destructive forms of conflict." Mediation has also been found to produce better organisational outcomes than either no intervention or one involving judgement, such as arbitration, as it is often less expensive and more satisfactory to the parties involved (Bingham, 2004). Harkavy (1999, p.156) for example, argues that "mediation provides a comfortable forum for all parties and thus is more likely to facilitate a workable resolution to a dispute than a more adversarial process involving rights adjudicated in a formal setting under a fixed set of rules." It has also been found that employees involved in an interpersonal dispute often simply want cessation and reconciliation rather than retribution (Harlos, 2004). Certainly the possibility of an apology is possible in mediation rather than litigation, where it may be considered an admission against interest or evidence of liability (Bingham, 2004). White (2006) argues that the promotion of forgiveness through the use of court-ordered apology can maximise the therapeutic effect and minimise the anti-therapeutic effect of judicial procedures. There are also examples in legislation in a number of countries that allow for this without

³ Bullying complaints and ways in which to prevent bullying are now receiving particular attention in Australia. On 20 November 2013 the Fair Work Commission released a Draft Anti-Bullying Case Management Model in preparation for the introduction of a jurisdiction in 2014 <http://www.fwc.gov.au/documents/media/releases/20-Nov-2013.htm>.

⁴ These models are also known by other names. For example Bush and Folger refer to "...the problem-solving framework; the harmony framework; and the transformative framework" (Della Noce et al., 2010, p.96). For a debate on the theoretical aspects of mediation see for example, Alberstein (2010).

being deemed constituting an admission of liability for death or injury. Critics of the court-ordered (as opposed to voluntarily given) apology have remarked that this has the potential to manipulate victims, although research has shown that it is the degree to which the apology is perceived as genuine and sincere that is key to its acceptance (Allan, Allan, Kaminer, & Stein, 2006). Furthermore, there is little to say what differentiates apologetic behaviour from other restorative behaviour, and to what extent an apology can address emotional and psychological wounds is open to debate; some judges have been known to use apologies as a shaming mechanism (Allan et al., 2006).

Power, a significant issue in any mediation, has been defined as "... the objective control of resources in a situation" (Greer & Bendersky, 2013 p.242) and impacts on negotiation and conflict management processes as well as outcomes. Van Gramberg (2003) observes that, in the employment relationship, it is reasonable that employees will be concerned that decisions made by those in power may be exploitative or motivated by reasons other than the issue at hand. Employees deal with this dilemma by measuring decisions against their own principles of fairness; decisions which pass their fairness test are more likely to be accepted and acted upon. Van Gramberg says that ADR practitioners need to be aware of the entrenched inequality of power that operates in the workplace and which is likely to be underplayed and even considered normal. She goes on to state that "power disparity in ADR acts to limit the opportunity of weaker parties to have their issues considered to an equal extent in decision making, leading to injustice. The role of the practitioner balancing the interests of both parties is therefore paramount in pursuing workplace justice" (Van Gramberg, 2003).

There are also other ways of mitigating the effects of power imbalance rather than relying on the mediator alone. A recent study investigating the effects of hierarchical differences on mediation satisfaction by comparing face-to-face mediations with mediations using a prior online intake, found that subordinates were just as satisfied as supervisors but only when they had used the online intake (Bollen & Euwema, 2013). Further, since the power of the mediator has been shown to influence behaviour in a mediation (Della Noce et al., 2010; Greer & Bendersky, 2013), those monitoring the performance of mediators need to ensure that they have not just technical skills, but also well-developed interpersonal skills in order to judge how best to approach each dispute for the benefit of all parties. They also need to adhere to an ethical code that requires them to be aware of their own behaviour and biases.

Power, as a product of relationships between people, is present in all mediation, but the way in which it manifests is culturally defined. The following section explores how mediation as defined in a Western cultural context does not always work effectively cross-culturally.

3.4. Mediation in cross-cultural context

Mediation as a way to resolve interpersonal disputes and as an alternative to court proceedings also occurs in other parts of the world. However, the manner in which it is practiced and outcomes are subject to cross-cultural variation. In The Gambia, for example, Davidheiser (2006) suggests that issues of power imbalance and inequality that occur in mediation as understood in a Western model do not always translate well in others. In his study of mediation between married couples in The Gambia he notes that although the general view is that women are subservient to men, women are just as likely as men to seek out mediation as a forum in which to air spousal grievances. Davidheiser (2006) argues that this is because Gambians place a high value on relationship harmony and mediation is a means by which change can be effected without terminating those bonds. He found that mediators considered harmonious relations as central to resolving disputes and rather than being neutral facilitators, were often "...explicit in their reference to rights and morals and did not attempt to sideline them in the interest of neutrality" (Davidheiser, 2006). Furthermore, mediators were considered by locals to be a fairer and more personal solution than the judiciary, especially for less privileged disputants.

In a further example, Syukur and Bagshaw (2013) observe that a Western model of court-annexed mediation introduced into the Indonesian courts in 2003, was less than successful. A significant reason for this was, they argue, that the court-trained mediators were trained in an adversarial approach and failed to understand existing indigenous methods of dispute resolution that emphasise harmony. The many different island and ethnic groups that make up the Indonesian nation have their own methods and rationale for resolving disputes. The authors suggest that a style of mediation incorporating both indigenous and Western approaches would be more useful in the Indonesian context. They also emphasise the need for mediators to be culturally fluent and self-reflexive.

Although few evaluations of workplace-based ADR programs were found in the literature and then only from North America, there is one program that dominates. Not just the largest and most successful example of a workplace-based dispute resolution system, it also demonstrates the importance of organisational commitment to cultural change in the workplace.

3.5. REDRESS™ – a case study from the USA

In 1994, the United States Postal Service (USPS), the largest civilian employer in the world at the time, had a serious problem with a workplace conflict culture, in particular individual, informal employment discrimination complaints (Bingham, 2012; Bush, 2001). In response, USPS management initiated "Resolve Employment Disputes, Reach Equitable Solutions Swiftly" REDRESS™, a voluntary conflict management program providing employees who filed discrimination complaints with free, outside neutral mediators. A pilot program based on a facilitative form of mediation was implemented for which early results were promising (Intrater & Gann, 2001). This led to a period of experimentation with various models during which time mediation was implemented in more than 27 cities throughout the USA. The success of the trial led to its expansion to include formal complaints. For USPS this meant the involvement of lawyers; not just Postal Service attorneys, but also complainants' attorneys and advocates (Intrater & Gann, 2001) as well as a shift in focus from reactive to proactive lawyering (Hallberlin, 2001, p.381). The aim was to encourage the use of ADR as well as to ensure USPS staff received sufficient training in such an approach. At the same time a research program was initiated in conjunction with Indiana University which acted as sole outside evaluator of the mediators from 1994 to 2006 (Bingham, 2012).

In 1998 Bush & Folger's transformative mediation model was instigated nationwide (Bingham, 2012; Bush, 2001). This model was considered to hold more promise for improving conflict management in the workplace as a program designed and managed by the employer (Bingham, 2012). Although settlement-based mediation was useful in "closing cases", it could "...still leave parties stuck in destructive, alienated interaction as they returned to the workplace" (Bush, 2001, p.370). In contrast, the goal of the transformative model, to give disputants an opportunity for their concerns to be heard and for informed decision-making, made settlement a by-product of the process. Intrater and Gann, themselves USPS attorneys, reported that there appeared "...to be strong general agreement among postal attorneys that, in the context of employment disputes, winning is often less relevant than achieving resolution of the parties' underlying problems and improving workplace relationships" (2001, p.473). There was also evidence that the number of new formal complaints had reduced.

Due to the large scale of the program, evaluators Nabatchi, Bingham, and Moon (2010) took a multi-step approach. As researchers they were unable to observe mediations in progress, so a variety of methods were used including: archival case filing data to examine formal complaint filing rates before and after; self-reporting by mediators on their understanding of transformative mediation practice; interviews with employees; and national exit survey data (Bingham, 2012). The evaluators noted that although there is a large body of literature assessing

basic mediator competencies and quality of practice, it is generally framed within the context of evaluative or facilitative models. This meant that the performance of mediators was not able to be evaluated by validated tests as transformative mediation occurs in private. However, USPS trained its own EEO ADR specialists whose role is to monitor mediator performance. They observe at least one session with new mediators to assess their understanding and practice of the transformative model (Nabatchi et al., 2010).

Examining the REDRESS™ program in 2001, Bingham and Novac (2001, p.324) concluded that “...outside neutral mediation can have a significant positive effect on an organisation by resolving employment disputes at an earlier step in the administrative process.” At the time, the authors noted that limitations of their findings concerned the relative newness of the program and that their study did not examine what happens in the mediation session itself, only the systemic evidence of what implementing the program did to formal EEO complaint filing in the organisation as a whole. Furthermore, they considered that it was “impossible in this analysis to tease out the independent effects of [the] three salient design choices, that is, the transformative model, early intervention, and the high participation rate as a goal” (Bingham & Novac, 2001, p.327).

In 2006 Nabatchi et al. (2007) further “field tested” the REDRESS™ program to examine organisational justice in a workplace mediation setting. The authors noted that in general, studies of organisational justice models explain perceptions of fairness in a two-way relationship where one decision maker holds authority and control over some kind of subordinate. In mediation, on the other hand, there is at least a three-way interaction of interest and ideally a reduced power imbalance among participants. The aim of the study was to capture all possible interactions and outcomes of transformative mediation in the context of the workplace. A model that comprised six factors was proposed to assess the program's effectiveness:

- *Distributive justice*: an emphasis on fairness in the distribution and allocation of outcomes whereby satisfaction is a function of outcome;
- *Procedural justice - process component*: participants' perceptions of the fairness of the process itself;
- *Procedural justice - mediator component*: objective assessment of the mediator's performance as a professional;
- *Informational justice*: a focus on the enactment and explanation of decision-making procedures;
- *Disputant-disputant interpersonal justice*: interaction between disputants and acts as a measure of how the employer/employee relationship has been repaired; and
- *Disputant-mediator interpersonal justice*: assessing the disputants' interactions with the mediator.

The authors concluded that their model was a useful tool to assess the effectiveness of mediation. They also suggested that when structuring a workplace mediation process and training mediators, employers should emphasise opportunities for respectful exchange that contribute to perceptions of interpersonal justice between all parties, including the mediator. In her study on mediation, diversity and justice in the workplace, Catherine Shivers Powell (2009) found Nabatchi et al.'s model to be an effective analytical tool to investigate the degree to which mediators were able to show an appreciation and understanding of diversity in their practice. However, due to the emotional nature of workplace disputes, simply having a model is insufficient. It is the interaction and intervention of the mediator as well as those which occur between the parties that create opportunities for change (Manning, 2006, p.88).

In reviewing the results of a 12-year longitudinal study of the REDRESS™ program, Bingham (2012, p.362) suggests that the transformative style “...does a better job of fostering perceptions of disputant-disputant interpersonal justice, and thus possibly, settlement than does the evaluative style.” More importantly, she argues, it is the institutional

context that shapes how parties respond to mediator style, their satisfaction, and perceptions of justice. In effect, “...a major lesson of the USPS research on mediation style is that the mediation action arena is shaped by its institutional home” (Bingham, 2012, p.362).

4. Implications

Clearly there is evidence that when mediation works it works well (Bingham, 2012) but this is not a guaranteed (nor is it always the most appropriate) method for resolving every dispute. Criticisms are mainly to do with practice. For example, Schneider (1999) suggests that lawyers who have been trained in adversarial processes may be resistant to the use of ADR by the courts. Given the increasing acceptance and use of mediation in the last decade, this may be of less concern than it once was (see for example, King and Guthrie (2007)) and training in ADR principles and practices for lawyers is now widely available – although some studies have found there is still some resistance to promoting their use.⁵ Other criticisms have to do with the three principles of the mediation process: participation; representation; and validation.

4.1. Participation

A requirement of most ADR processes is that participation is voluntary, so it is always possible that one or both parties may refuse to engage. Furthermore, by the time mediation occurs, parties to a workplace conflict may have become involved in a situation marked by intense emotional experiences and developed assumptions about others' beliefs and behaviour (Harlos, 2004). In such situations it is possible that an offer of mediation may be rejected by one or both parties. It is also not a mediator's role to force or persuade people into a settlement. Sometimes, despite their best efforts, it may not be possible for mediators to help people to overcome their differences and resolve the problem. As Maxwell (1992, p.357) notes, “the parties must negotiate not just a settlement but a settlement they can live with.” In these cases a dispute may be escalated to a more formal method of ADR or even proceed to litigation.

4.2. Representation

Another reason for non-participation may be when more powerful parties have stronger rights of refusal. Or a worker may feel they are being forced to take part in mediation, especially if loss of eligibility to compensation is a consequence of not participating. Claimants may regard mediators as authority figures and see them as being more favourably inclined toward an employer (Harlos, 2004). For example, Van Gramberg (2006) suggests that it is possible that an outside consultant considered to be favourably inclined toward the side of management may be engaged by an organisation to mediate an internal dispute and be used to give the impression of management distance from the decision making process. She argues that entrenched inequalities of power are often underplayed in the normative literature on ADR and independent practitioners need to be aware of how this can play out in the context of workplace justice. Workers, compared to management, are likely to be limited in their access to information and “...immersed in organisationally constructed social realities and values... [so] are often unable to see past these constructs.” Van Gramberg (2006) has identified what she considers are three “dilemmas” that

⁵ See for example, a survey conducted by the New Zealand Ministry of Justice on ADR practitioners' and lawyers' perspectives of the benefits and disadvantages of ADR. <http://www.justice.govt.nz/publications/global-publications/a/alternative-dispute-resolution-general-civil-cases/4-advantages-and-disadvantages-of-adr>.

create a “gap” between the rhetoric of ADR and the reality of practitioner behaviour that can significantly affect outcomes. These are:

1. The absence of precedence in determining outcomes in private ADR;
2. Power imbalances where a practitioner may (un)intentionally act in favour of the person paying for the process; and
3. Bias in which a passive practitioner allows a more powerful party to dominate proceedings.

4.3. Validation

In a study of 449 cases handled by four major ADR service providers in the USA that proceeded to mediation, 78% were settled whether or not the parties had voluntarily participated (Brett, Barsness, & Goldberg, 1996). However, reports of satisfaction with outcomes may not give the full picture and should be read with caution. In this particular study the type of mediation employed was not stated nor whether access to compensation for claimants was contingent upon participation.

Mediators are usually evaluated by professional reputation, opinions of the parties, and settlement rates. The historical definition of success is the outcome; whether agreement is reached. But this does not necessarily equate to satisfaction with the outcome. The ways in which satisfaction with outcomes is measured is through exit surveys or post-proceedings interviews with participants. Van Gramberg's (2006) interviews with workers who had taken part in a workplace mediation revealed that although they might have been satisfied with the fairness of the process, they were less satisfied with the outcome. This has implications for procedural and distributive justice which Nabatchi et al.'s (2007) model attempts to remedy by splitting the procedural justice component into mediator and process components. Nevertheless a power imbalance is likely to apply to any system of dispute management (and indeed almost all human relationships) and so is not peculiar to ADR.

5. Conclusion

ADR, and in its most common form mediation, is a viable alternative to formal dispute resolution provided by tribunals or the courts. As a less adversarial and more personal process, ADR is chosen for a number of reasons. It is less expensive; can assist in repairing relationships; allow greater control by disputants over the resolution process; and as a result parties are likely to be more satisfied with outcomes into which they have had input (Forsyth, 2012). Due to subjective and emotional aspects, workplace interpersonal conflict is likely to be classed as an OH&S issue and mediation is the most common response in these cases. Notwithstanding that the majority of published research on mediation has been undertaken in the North American context, there is evidence for mediation as an effective tool with which to resolve workplace-based conflict. This is especially the case when supported by organisational commitment through ADR strategies, policies and processes. However, the return to work process for workers suffering a psychological injury is complex and often protracted. Moreover, power imbalances in mediation are likely and in this the role of the ADR practitioner is crucial. To be successful, mediation requires a person to be suitably qualified and skilled to negotiate the often tricky emotional situations involved in situations of interpersonal conflict and to judge which model to use in each case. Mediators must be reflexive and use ethical practice when understanding and dealing with potential inequalities between disputants. The USPS REDRESS™ program is a particularly useful example of how an organisation can successfully reduce instances of workplace conflict with an effective dispute resolution process. Since there is currently little evidence in the Australian context of the effectiveness, further research in this regard from practitioner, employer and employee perspectives would be useful as well as the use of mediation in cross-cultural contexts.

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