EARLY INTERVENTION MEDIATION IN COMMERCIAL AND WORKPLACE DISPUTES

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OUR AGENDA FOR TODAY

I. Summary of Published Research
   ➢ current thoughts in leadership
   ➢ what does best practice look like?

II. Summary of surveys to extract raw data

III. Case Study discussion

IV. Active group discussion highlighting early intervention strategies.
SUMMARY OF PUBLISHED RESEARCH

Research is limited and often not directly related to early intervention mediation or dispute resolution. There are international commercial organisations that specialise in early intervention dispute resolution processes.
Do you use mediation as a form of resolving disputes?

- Yes
- No
- Sometimes

- Commercial
- Workplace

Do you participate in voluntary mediation prior to contacting lawyers or issuing proceedings?

- Yes
- No
- Sometimes

- Commercial
- Workplace
- Other
SUMMARY OF SURVEYS – PRESENTING RAW DATA

What success have you had with early intervention mediation?

- Considerable financial savings
- Saving of manhours
- Confidentiality
- Preservation of working relationships
- Preservation of reputation
- Creative outcomes
- Other (please specify)

Bar chart showing percentages of success in different areas for commercial and workplace cases.
WHAT DISPUTES COME UP IN YOUR ORGANISATION WHICH ARE MORE AMENABLE TO MEDIATION?

• Confidentiality is required
• Parties committed to avoiding significant investment of further time and money
• Commercial disagreements where the parties have indicated some intention to negotiate or resolve the matter
• Wish to work out the issue and continue a commercial relationship
• Disputes involving a project that is ongoing and not near completion
• Disputes with more sophisticated customers who are not emotional

“I think all types of disputes coming up in our organisation would be better dealt with by mediation rather than legal proceedings.”
“WHAT WOULD PREVENT YOU FROM VOLUNTARILY MEDIATING A DISPUTE AT A VERY EARLY STAGE?”

- Beliefs (often unfounded) of senior management
- Willingness of the other side
- Need to follow a prescribed process
- Aggressive tactics of the other side
- Fear of prejudicing future proceedings
- Fear of wasted costs
- The internal bureaucracy involved in engaging an external mediator
- Where a law has been broken, or where mediation would be too confronting for the aggrieved party
- Lack of information about the dispute
- A serious criminal matter
WHAT WE KNOW CATEGORICALLY IS........

Disputes lead to the following negativities:

• Stress – increased insurance claim costs

• Lost time and impact on employee discretionary effort.

• Increased cost in production

• Impact on the individual parties’ health and well being

• Loss/impact on corporate image, workplace culture

*See Handout for Reference
WHAT WE KNOW CATEGORICALLY IS....

“...Despite the considerable costs associated with compensable conditions, outcomes for work-related health problems are consistently worse than for similar but non-work-related conditions...”

Employers are commonly unprepared for complex and adversarial activity in the workplace.

Policies and procedures may be established but are not always followed or known by the staff members that need to implement them. Sound policies and practices are documented but are not implemented effectively given timeliness to dispute, actions taken to manage disputes/relationships, management or impact on others.

When employees feel supported by their employers, the outcomes are significantly better.
WHAT WE KNOW CATEGORICALLY…..

Dispute Resolution is a series of activities that moves forward at different times and in different places —

Mediations do not just occur behind closed doors in conference rooms and in formalised settings.

There is diversity in dispute resolution e.g. “…In the United States there is a focus on community mediation and teaching young children in schools to mediate their own disputes…”

“…In Los Angeles gang leaders are brought together to mediate turf issues in a local park…”*

*See handout for reference
WHAT WE KNOW CATEGORICALLY IS........

**Warning signals** (Flags) relating to psychosocial factors need to be considered when preparing for effective mediation. The flags to consider are as follows:

- **Yellow flags** – these are about the person – their thoughts, feelings and behaviours

- **Blue flags** – these are about the workplace or the environment relating to work, environment and health concerns

- **Black flags** – these are about the context – the people involved, systems policies and the law.

*See Handout for Reference*
WHAT WE KNOW CATEGORICALLY.....

Collaborative arrangements and relationships between each party of a dispute leads to effective and durable outcomes. Process driven adversarial and administrative processes complicate issue resolution in both workplace and commercial disputes.
<table>
<thead>
<tr>
<th>Commercial Disputes</th>
<th>Workplace Disputes</th>
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<tbody>
<tr>
<td>These commonly involve parties that have no other affiliation or relationship than the dispute at hand.</td>
<td>Employer has control over policies and practices</td>
</tr>
<tr>
<td>There is limited knowledge over the other party’s core values and beliefs</td>
<td>Employer has control over implementation of policies and practices</td>
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<tr>
<td>The environment is uncontrolled with parties not clear on their respective agendas</td>
<td>Controlled environment making risk identification and risk management feasible</td>
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<tr>
<td>Law may define reasonable practice but there is no legal requirement for co-operation, collaboration and consultation even when legislative penalties exist</td>
<td>Employment Practices demand active co-operation, collaboration and consultation</td>
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<tr>
<td>The role of legal representatives when acting as mediation advocates rather than taking an adversarial stance</td>
<td>Law supports active issue resolution (OHS Act, Anti Discrimination Act etc... )</td>
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WHAT DO WE NEED TO AIM FOR...

➢ **Prevention** – this is far better than management of avoidable issues

➢ **Education** – to those that are in decision making levels of an organisation re: benefits of mediation and general HR/IR principles, policies and practices.

➢ **Commitment to Risk Identification** – knowing the risk and then strategizing to limit or mitigate same is essential

➢ **Encourage Early Intervention** – early action to address presenting issues avoids additional issue creep.

➢ **Build Relationships** with relevant parties – ensuring all are aware that mediation is a transparent and unbiased process.
CASE STUDY 1

• Summary of Presenting Issue

Employer performance manages an employee on poor behaviour relating to customer interaction.

During the performance discussion the employer raises her voice and introduces other performance related issues that have not previously been addressed with the employee.

The employee becomes distressed, cries and storms out of the room

A claim of bullying is received by the HR Department

The employee also submits a claim for Workcover Compensation.

• Participants – who and where from

Employer – Brianna

Employee – Sally

• Presenting Barriers relating to each party

Brianna – has received a number of customer related complaints

she does not know how to interact with Sally now that a Bullying and Workcover claim has been submitted

She has not interacted with Sally since the performance meeting.

Sally – has just been through a long term relationship separation

has financial limitations

has recently turned to the use of alcohol to manage her emotional state after work each day.
A is a manufacturer of yachts and undertakes the custom build of a 30 m luxury yacht for B. The detailed drawings reflect the customisation required by B and the contract contains a DR clause which requires parties to first attempt to mediate any dispute they are unable to resolves by themselves, and if that fails, then to appoint an arbitrator. The jurisdiction for mediation has been nominated as Victoria. There is considerable delay due to A’s difficulty in acquiring necessary custom materials, inclement weather and constant changes made by B. The delivery date is extended by 18 months and there is a penalty clause for delay in the contract. In fact, if the delay is more than 12 months, the purchaser may have the option to terminate the contract. A claims that it is the constant changes made by B and inclement weather that caused the delay. B claims that A provided assurances that custom materials were easily available and if not for the delays caused by A, inclement weather would not have added to the delivery delay. B claims its changes were minor and easily agreed to by A.

A: does have another purchaser for the yacht but is not willing to pay any penalties to B as it would have completed the yacht as per the contract if not for delays caused by B’s changes.

B: has recently suffered significant financial losses due to the performance of several of his business interests and a yacht is not going to help matters at this stage.
CASE STUDY 3

Summary of Presenting Issue

A, B and C were co-owners and co-founders of a business providing a technology platform in the education sector. All had been involved since inception and had worked in the business while on maternity leave. All three owners were juggling long hours in the business with family demands. A had returned to full time work and was fitting in the business around her job and family. B was CEO and working full time in the business. C looked after more operational issues part-time. No-one had been drawing a regular income from the business. The business had just reached cash flow positive and profit. A dispute arose about how contributions should be recognised and changes to salaries and ownership percentages. At a recent meeting, there had been raised voices, tension and tears.

Participants – who and where from

A – experienced consultant with business knowledge
B – experience in government, particular industry knowledge relevant to the business

Presenting Barriers relating to each party

A – feels the idea for the business was hers. Has returned to work to generate personal income but constantly disrupts that work to contribute to the business. Lots of extra hours.

B – has significant relationships which have brought in major contracts. Has done lots of late night international calls to get back end technology up and running and deals with technical problems.

C – stressed by the tension between A and B. Doesn’t want to get caught in the middle and struggling to understand some of the commercial elements. Wants to be treated fairly and to see B recognised for her hard work.
CASE STUDY QUESTIONS

1. When should you intervene?

2. What ways would you intervene?

3. What variables do you think would assist resolution?

4. Based on what we have discussed, how would you manage the barriers to resolution?