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Alternative dispute resolution in the workplace

Inside

Introduction

Workplace disputes are disruptive and, in many cases, expensive for businesses, particularly if they result in litigation.

It will often be in the interests of both parties to a dispute to avoid litigation except as a last resort. This depends on the parties' understanding that there are alternative means of resolving disputes.

There are a range of methods of alternative dispute resolution (ADR) available. Making the appropriate choice at the most suitable point in a dispute gives employers the best chance of keeping cost and workplace disruption to a minimum.

This Inbrief summarises the types of ADR available in relation to workplace disputes.

What is ADR?

ADR is a collective term for a variety of voluntary processes, all of which aim to resolve a dispute by some means other than court or employment tribunal proceedings.

ADR can only go ahead if all parties to the dispute agree to take part and agree on which ADR mechanism to use.

When to use ADR

In order to understand when it may be appropriate to consider ADR, employers first need to be aware that a dispute is taking place.

In a case where a claim has been lodged against an employer by a worker or a former worker, it will be obvious that there is some form of dispute.

In other cases, the point at which a grievance is raised may be the first inkling an employer has that one of its employees is unhappy. However, many employees are concerned that raising a grievance will harm their prospects at work and will be reluctant to do so unless they can see no alternative. By this point a relatively minor concern may have grown into a major problem for the employee. The grievance process itself can, in some cases, appear to the employee as a case of the employer ticking procedural boxes in order to protect its position, rather than a genuine attempt to help the employee resolve a problem. Employers who have identified an issue should not wait until a grievance has been raised before recognising the issue as a potential dispute.

Where appropriate steps are taken to resolve an issue at an early stage it may be possible to avoid a full blown dispute altogether. Where a dispute is already in existence, even where litigation has already been commenced, it may still be possible for matters to be resolved through ADR. In other words it will rarely be too early, or too late, to consider the benefits of ADR as a means of dealing with a workplace dispute.

Types of ADR

ADR may involve a very informal process which amounts to no more than a discussion between parties with the aim of reaching a mutually acceptable outcome to a dispute. At the other end of the spectrum, ADR may involve a process which is almost as formal as court proceedings, but which has the benefit for the parties of taking part in private. The most appropriate form of ADR will depend on the dispute in question.

The cost to the parties of taking part in ADR can vary widely depending on the form of ADR that is chosen.

The nature and value of a dispute are therefore key factors to take into account when considering what type of ADR may be suitable.

There are three main categories of ADR commonly used in workplace disputes: mediation, conciliation and arbitration. A brief explanation of each category follows, along with a summary of the pros and cons in each case.

Mediation

Mediation has become relatively popular for workplace disputes. It is the most flexible form of ADR and can be used in a wide range of circumstances.

Mediation is, essentially, a discussion between parties to a dispute which is managed by a neutral third party, the mediator, with the aim of reaching a resolution which both parties are able to accept. The role of the mediator is to help the parties to identify the issues in dispute, find common ground and explore potential settlement options. Anything said by the parties during the mediation will be confidential and "without prejudice" (nothing said in the mediation is admissible as evidence in legal proceedings).

The mediator is usually selected by the parties - although there are accredited bodies, the most well known being CEDR, who may appoint a mediator if asked to do so. The likelihood of a mediation resulting in a settlement will, in large part, be down to the skill of the mediator.

There is no fixed procedure that mediation must follow. Typically, during the course of a mediation the parties will each have separate private meetings with the mediator and further meetings at which all parties are present with the mediator acting as chair. Depending on the complexity of the issues in dispute the parties may agree to provide the mediator with

documents and statements in advance, setting out their respective positions. The parties may be legally represented during the mediation, or they may agree to take part without legal representation present.

An attractive aspect of mediation, particularly in cases where at least one of the parties has reservations about the use of ADR, is that it is a non-binding process. The mediator will try to help the parties to agree a settlement and may make suggestions which can include monetary and non-monetary elements. But the parties are neither obliged to accept the mediator's suggestions nor committed to reaching a settlement by the end of the process.

The cost of mediation includes the mediator's fee and the hire of rooms (if necessary), in addition to any fees for legal representation. The mediator's fee will often be paid by the employer. This means that even an individual who is reluctant to participate in settlement discussions may be convinced that they have nothing to lose by taking part. Either party can choose to end their participation in mediation at any time.

If mediation does end in a settlement, this will become binding once a written contract recording the terms of the settlement has been entered into by the parties.

Pros:

- Relatively quick and cost effective
- Can preserve the relationship between the parties
- Informal and flexible, with the parties maintaining control over the process and a wide range of settlement options possible

Cons:

- There is no guarantee of reaching a settlement
- Since there is no guarantee of a settlement, an unsuccessful mediation will result in wasted costs
- The choice of mediator can be a source of conflict between the parties

Judicial mediation

Judicial mediation is a scheme offered by employment tribunals in cases where proceedings have been commenced.

Cases which are suitable for mediation are selected by the tribunal and the parties are given the option of attending a mediation meeting at which an Employment Judge acts as the mediator. If the mediation does not result in a settlement, the Employment Judge involved in the mediation will have no further involvement in the case if it proceeds to a hearing.

One advantage of judicial mediation is that, since it is administered by the employment tribunal, it may be viewed as a genuinely neutral process by a claimant who is otherwise reluctant to engage with the respondent.

Conciliation

In the context of workplace disputes, conciliation is best known as the process undertaken by ACAS. Usually this happens shortly before or after tribunal proceedings have been commenced.

Parties to a dispute may also contact ACAS independently, to seek the help of a conciliator before tribunal proceedings are considered.

From 6 May 2014, it is now compulsory for claimants to notify most types of potential claim to ACAS before bringing those claims in the employment tribunal. There is then a fixed period during which ACAS can explore pre-claim conciliation. It is not compulsory for either the claimant or the respondent to participate in the conciliation process. However, if both parties do wish to conciliate, ACAS can assist with resolving the potential claim for up to one month, with a possible extension of a further 14 days.

Conciliation differs from mediation in that the conciliator will generally only speak to the parties on an individual basis. The conciliator acts as a conduit between the parties, conveying settlement proposals and outlining each party's view of the merits of its case.

Pros:

- Conciliation through ACAS is a free service
- ACAS conciliators have the power to draw up a binding written settlement agreement
- There is no obligation on the parties to reach a settlement through conciliation

Cons:

- The parties do not have the power to choose an ACAS conciliator or to manage the process generally
- By the time conciliation commences, a dispute is generally already under way

There is no guarantee of reaching a settlement.

Arbitration

Arbitration is the most formal of the three main types of ADR and is best suited to disputes involving significant financial implications between legally represented parties. In the context of disputes arising in the workplace it is most likely to be used once the working relationship between the parties has ended and a dispute remains over money owed by one party to another.

Arbitration is essentially a form of private court hearing. It may be either ad hoc, in which case the parties agree on the arbitration procedure that they will follow, or institutional, in which case the arbitration will take place according to the rules of an arbitral institution appointed by the parties.

The parties to a dispute agree to the appointment of an arbitrator who then plays the role that the judge would play in conventional court proceedings. Having agreed in advance to be bound by the decision of the arbitrator, the parties must then abide by the outcome of the arbitration.

The process is quasi-judicial, with evidence prepared and presented to the arbitrator during a formal arbitration hearing in a similar manner to that which would apply to court proceedings.

Once the arbitrator has considered the evidence he or she decides in favour of one of the parties and decides on the award and amount of compensation to be paid by one party to the other, if appropriate.

The parties are generally represented by lawyers and, for this reason, the cost of arbitration may be equal to, or exceed, the cost of litigation as the parties must also fund the cost of the arbitrator and the rooms in which the arbitration takes place.

For the parties the key advantages of arbitration over court proceedings are that they can agree their own timetable and procedure, and the hearing and outcome will remain private. An agreement to arbitrate will not prevent a claimant from bringing statutory employment claims in the employment tribunal, unless the arbitration agreement complies with the formalities of a settlement agreement.

Pros:

- Private
- formalities of a settlement agreement.
- Allows full consideration of the issues in dispute
- Provides the parties with the certainty of an outcome at the end of the process

Cons:

- Expensive
- Can be very slow
- Results in a loser and a winner

For further information on this subject please contact:

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