



A safe workplace: Investigate or mediate?



DARWIN₂₀₂₀ Symposium

Together we make a difference

Background



Background: Investigation



- 20-years Australian Federal Police
- 3-years Chief Officer NT Emergency Services
- Criminal, internal & workplace investigations
- Admitted as a Legal Practitioner
- Foundation member Australasian Association of Workplace Investigators
- Advanced Workplace Investigations training in Australia & USA

Background: Mediation

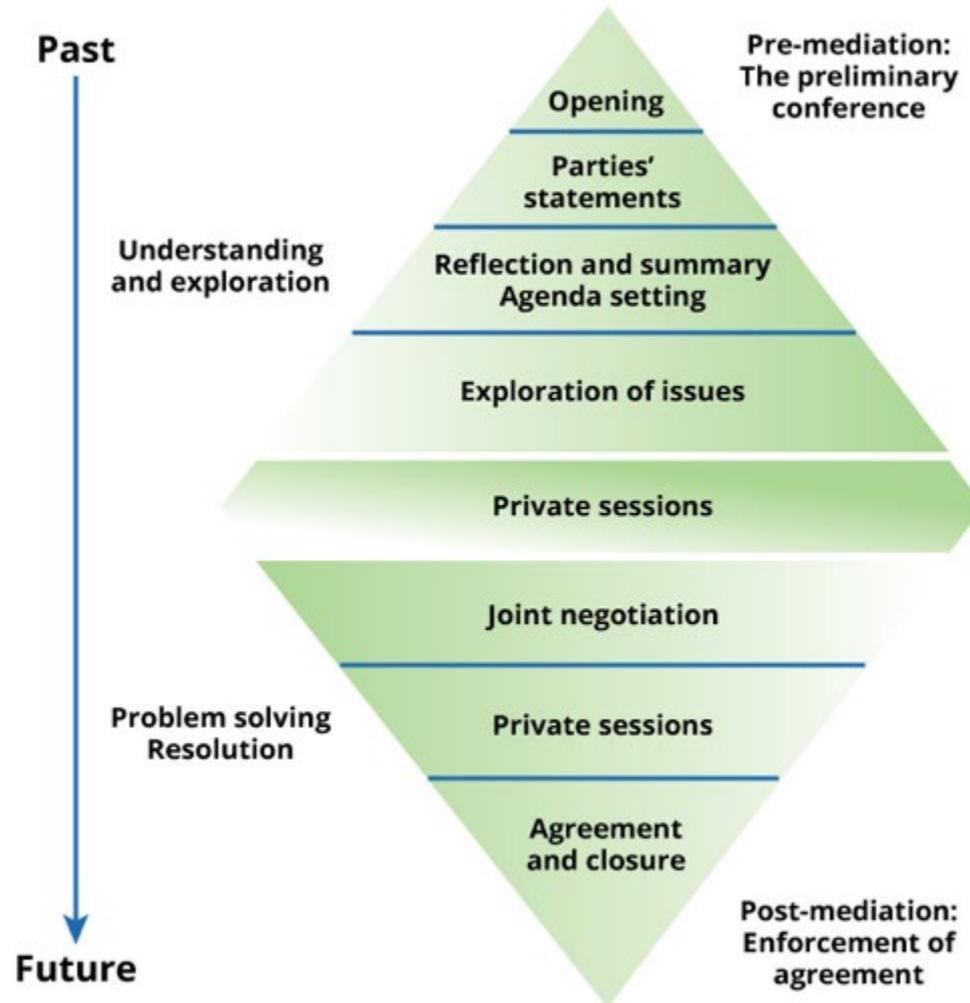


- Nationally accredited under the National Mediator Accreditation Standards (NMAS)
- Graduate Bond University Dispute Resolution Centre
- Member Australian Mediation Association (AMA)
- Panel member and course coach Community Justice Centre (Dept of Attorney-General & Justice)
- Lecturer Charles Darwin University

Mediation



Mediation: The Model



Mediation: The Benefits

- Provides an opportunity for parties to address issues in a safe environment and may prevent escalation
- Explores past issues, the foundations of conflict and provides the best chance of repairing relationships
- Empowering for the parties
- Confidential and responsive

Mediation: When may it not be the best option?

- Serious allegations requiring a more formal response
- Multiple sources of conflict where a *workplace review* may provide a better option
- Participants are not of the appropriate mindset

Investigation



Investigation: When may it not be the best option?

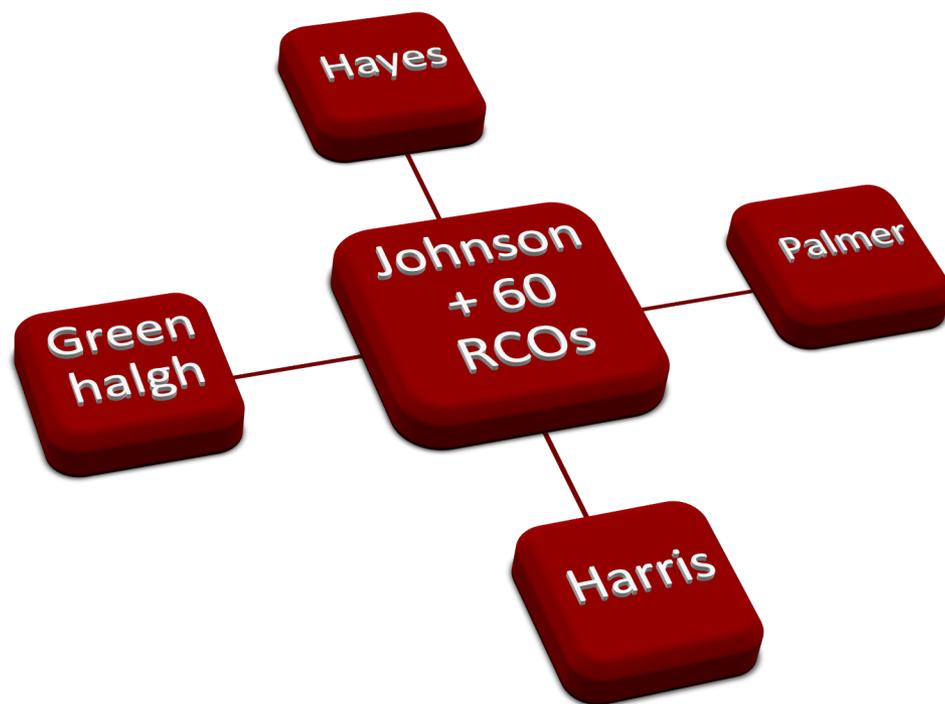
- When the complaints have questionable substance (for example: rumors, ambit claims, statements of emotion)
- When it is not the simplest path to resolution
- Where conflict exists and is escalating within a team but has not progressed to bullying behavior

Investigation: Top ten areas for mistakes?



- Preparation
- Interviewing
- Identifying witnesses
- Skipping steps
- Credibility decisions
- Documentation
- Legal Professional Privilege
- Opportunities lost
- The investigator
- The clock

Case law: Hayes v. State of Queensland



Hayes & Ors v State of Queensland [2016] QCA 191

200 Complaints

The Facts

- Managers subject to 200 bullying complaints
- Media attention with public support by union
- Managers subject to union picketing
- Protracted investigation
- Removal from positions without explanation
- Lack of discussion around investigative process
- Managers not assigned their own support person

The Facts

- Pamela Steele-Wareham appointed as the liaison point for complainants and respondents
- “There’s got to be something in it because there’s so many complaints” (Direct quote from accepted evidence)
- Local newspaper article 20 January 2009 reporting demands from Complainant’s union that the accused bullied be “stood down”
- Confidentiality direction not to talk to anyone except Senior Management or support person about the investigation

The Finding

- The managers had been unreasonably isolated
- Duty of care existed in 3 out of the 4 cases
- An employer may owe a duty of care to an employee to take reasonable steps to prevent psychiatric injury when conducting workplace investigations

The reasonable employer in the position of the respondent ... could reasonably be expected to have known that prolonged workplace stress could detrimentally effect (sic) ... employees performing work like the appellants' and that, if unsupported in the workplace, that stress could develop into mental illness.

Key Points for Employers

- Assess the big picture and decide whether or not EASA of itself, constitutes *adequate support*
- Consider the impact and practical scope of confidentiality – must be reasonable in the circumstances
- Ensure that the investigative process is clearly explained to all parties involved, and proceed as soon as possible

To Mediate or Investigate?



v.



To Mediate or Investigate?: Considerations

- Is there a duty to investigate under a policy or through a legislated obligation?
- Using mediation as a disciplinary process or performance management plan is extremely dangerous (Harvard Review)
- Voluntariness is a key pre-requisite for, and foundation of mediation as a dispute resolution strategy
- "Lack of power and assertiveness will totally undermine the process and the outcome will be distorted" (R Field: *Mediation and the Art of Power (Im) Balancing*, QUT Law Review)

To Mediate or Investigate?: Considerations

- "Mediation is not universally appropriate to all disputes and it is arguable not appropriate to workplace bullying...due to the imbalance of power and the fact that power and its misuse is central to workplace bullying"
- In many cases, the Complaint will want to know "did this happen or not"
- Consider the social/organization impact of dealing with Code of Conduct matters through mediation and the impact on general deterrence



Questions?

Practical Tips





Questions?



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