



## **Mediation – Wake up and smell its success.**

**Quentin Bargate**, Senior Partner of the City of London law firm **Bargate Murray** and a solicitor for nearly 29 years muses on the reasons why mediation is not more widely adopted.

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Mediation is in the news again. My Employment partner, Philip Henson, writing in HR Magazine about the current BA / Unite dispute, says:

*"I firmly believe the Unite vs BA plc soap opera can still be resolved by the parties if they use the conciliation service of Acas, or instruct an independent mediator"*

In the context of complex industrial disputes, I wholeheartedly agree with Philip. Similarly, the thumbscrews are being applied to use mediation more widely and generally to help settle other complex disputes. In his report on the future of Civil Litigation published in January 2010, Sir Rupert Jackson, a highly experienced member of the Court of Appeal, drives home the message when he opines that:

*"Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes....ADR is, however, under-used..."*<sup>1</sup>

Sir Rupert devotes an entire chapter of his report to mediation. His view is that mediation should be much more widely used, but that many parties are not aware of its full benefits. In particular, he notes that not all judges and solicitors are aware of the benefits of mediation.<sup>2</sup>

One has to wonder what rock those legal professionals not aware of the benefits of mediation have been hiding under these last 15 or so years. One also has to wonder what cathartic effect on this unfortunate lack of understanding the use of mediation in a high profile dispute such as the BA / Unite dispute might have in raising awareness of the benefits of using mediation for all kinds of complex dispute. Even cases sometimes considered poor candidates for mediation – such as personal injury claims - are in fact suited to it.

However, all is not bad news. In their submissions to Jackson, CEDR (the Centre for Effective Dispute Resolution) reported some 4,000 mediations took place per year. The Civil Mediation Council reported 6,473 mediations in 2009, an increase of 181% over a 2007 baseline. Clearly mediation does have traction amongst many professionals, which is why

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<sup>1</sup> See Executive Summary, para 6.3, Review of Civil Litigation Costs: Final Report, Sir Rupert Jackson.

<sup>2</sup> See further chapter 36, para 3.1, *ibid*.

it is that much hard to understand why a few still fight a rearguard action against it, or at least are less than enthusiastic about it.

Not every case can, of course, be resolved by mediation or another form of ADR process, as Lord Jackson accepts. Some matters require the force of state authority to intervene and protect the rights of litigants, such as where freezing order relief is required, or where you want a point of law decided. However, where the courts are involved for the purposes of obtaining interim relief, it is still possible to revert later to mediation in order to resolve the substantive issues.

Of course, it is pointless agreeing, on the one hand, to mediate if, on the other hand, the parties do not understand the process and its advantages. I have written previously about [Tips for a Successful Mediation](#).<sup>3</sup> If those tips are taken on board and applied, then the prospects of a successful mediation are greatly enhanced.

When writing an article like this and considering the benefits of mediation, there is no substitute for personal experience. Mine is very positive. We have found mediation works in a variety of cases, from complex commercial matters involving large sums of money including allegations of fraudulent conduct, though smaller property claims and partnership disputes. That is the message we need to get across to the minority who don't yet buy in to the process. The courts are proactive in requiring parties to say at the case management conference stage whether mediation has been considered. However, I share the view of Sir Rupert Jackson that mediation must remain consensual and should not be imposed on litigants by the courts.

And to return to the dispute between BA and Unite, it is time we dragged industrial relations dispute resolution out of the 19<sup>th</sup> century. Such disputes are no less amenable to mediation or other forms of ADR than are complex private commercial disputes, as Philip Henson has so ably said in his recent article.

In short, it is high time to wake up and smell the success mediation can bring to dispute resolution.

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<sup>3</sup> Follow [hyperlink](#) to PDF article "Tips for a Successful Mediation" by Quentin Bargate, or alternatively [contact us](#) for more information.