

Knock, knock, knockin' on HR's door

So you think you are being bullied - what happens next?

Knock, knock, knockin' on HR's door

(Apologies to Bob Dylan)

"Sister take this complaint off of me
I can't hack it anymore
My persecutor won't let me be
I feel like knockin' on HR's door

Chorus: Knock, knock, knocking on HR's door etc

Brother I can't go another round
My sense of worth is through the floor
My spirit's crushed into the ground
I feel like knockin' on HR's door

Chorus: Knock, knock, knocking on HR's door etc"

Being bullied is a misery no employee should ever suffer. Being accused of bullying behaviour is an allegation no employee will willingly accept. Being asked to deal with a bullying complaint is the equivalent of being asked to achieve peace in the Middle East with a live grenade in one hand and a 10 kilogram grievance manual in the other.

Imagine the following scenario:

You are Peter - the HR Manager of a large department. Paul is a senior manager. Mary is a team leader who answers directly to Paul. Mary comes to see you alleging that Paul is a bully. She says he micro manages her. That he won't allow her to do things she is good at and that he speaks to her in a disrespectful manner in front of others. She has had enough and wants you to sort it out. She does not want to put in a formal complaint however.

Option A: You check your grievance policy which states that complaints of such magnitude need to be writing.

You do nothing

Option B: You check your grievance policy which states that complaints of such magnitude need to be writing.

You seek advice and you are told that all bullying complaints - no matter how trivial - need to be independently investigated. You call in an independent investigator

Option C: Your grievance policy is ambivalent. You can choose to find out more or you can wait for a formal complaint.

You choose to do a low key inquiry

Possible consequences of Option A

1. Mary really is a bit of whinger and things just die down
2. You and Paul are golf buddies. Mary takes her complaint further accusing you of sticking up for your mate
3. Paul has been tough on his supervisors for years. He really is a bully and Mary is the first person to actually go as far as HR to complain about him. She gets disillusioned and immediately goes off on stress leave
4. Paul is not a bad manager but he can be a bit tetchy at times. He thinks his relationship with Mary is okay and he continues to act as he has always done.
5. Mary goes off on stress leave six months later and cites bullying on her workers compensation claim. You immediately move to sanction Paul who complains to Fair Work Australia of unfair treatment and the denial of natural justice. It transpires that Mary had informed HR previously and you did nothing about it – Paul's complaint is upheld. Mary is still off work

Possible consequences of Option B

1. Mary really is a bit of whinger. Your initial advice to investigate has come from your industrial adviser at the local chamber of commerce and Industry. They also tell you not to disclose who complained and the substance of the complaints. They also advise that the person against whom the allegations are being made be stood down on full pay to protect both them and their accuser.
Paul is angry. He goes straight to his lawyer who writes to you claiming that natural justice is being denied and Paul has a right to know who is complaining and what he is guilty of. The independent investigator is thoroughly professional she gets on with her investigation and very quickly determines that Paul has no case to answer for bullying.
You now have to pick up the pieces of what has deteriorated into a relationship where there is no trust in each other and no trust in you and your organisation to deal appropriately with these matters.
Mary still feels that some aspects of Paul's behaviour still need to be addressed

Variation on Mary being a whinger: You reveal to Paul the identity of the complainant as well as the substance of the complaints. Paul seeks legal advice and fires in a counter claim of bullying and harassment against both Mary and you.

2. You and Paul are golf buddies. Having an independent investigator does help to preserve your friendship. Mary also is appreciative of the fact that you will not be actively participating in any investigation. Paul has a niggling concern that it has gone outside the workplace too quickly.
3. Paul has been tough on his supervisors for years. He really is a bully. The independent investigator is thoroughly professional and interviews all parties including yourself and Paul. She concludes that Paul has a case to answer as does the organisation. In a nutshell Paul's behaviours do need to be addressed and he does need to be disciplined. The organisation

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also needs to take responsibility for tacitly supporting Paul's inappropriate behaviour over a long period of time and for not intervening earlier.

4. Paul is not a bad manager but he can be a bit tetchy at times. The investigator concludes that Paul is not guilty of bullying behaviour and recommends mediation
5. Mary goes off on stress leave anyway and cites bullying on her claim. Depending on what the investigator finds this could play out a number of ways. If Paul is deemed to have bullied or to have acted in ways that he needs to change then you probably will support Mary's claim. If it is proven that Paul has not bullied and Mary is in fact a bit of whinger you still have a difficult path ahead. Essentially you now have two victims (a) Mary who feels she has not been vindicated and (b) Paul who has been stood down and accused of being a bully and who feels that although he has been proven innocent some of the mud has stuck.

Possible consequences of Option C

1. Mary really is a bit of whinger. You conduct a low key inquiry. You decide that mediation is the best course of action
2. You and Paul are golf buddies. You tell Mary that you would like to conduct a low key inquiry and you inform her that you and Paul know each other very well. If you feel that you can still conduct the inquiry you ask Mary if she is okay with this. If Mary says it is acceptable to her then you can go ahead. If Mary says it is not acceptable then you must get someone else internally to conduct a low key inquiry. Someone qualified, acceptable and capable. Mary now feels that she is in control and she can make the best decision for herself. The low key inquiry proceeds accordingly.
You also can rule yourself out of conducting the low key inquiry without seeking Mary's permission if you feel the conflict of interest will inhibit your actions.
3. Paul has been tough on his supervisors for years. The evidence gathered supports a credible claim by Mary. You decide to proceed to an external investigation. You inform Paul that a complaint has been raised and that a preliminary low key inquiry has been undertaken and you are now calling a professional external investigator.
4. Paul is not a bad manager but he can be a bit tetchy at times. You conduct a low key inquiry and decide that mediation is the best course of action.
5. Mary goes off on stress leave any way and cites bullying on her claim. You conduct a low key inquiry and decide to either recommend mediation or proceed to a professional external investigation.

These responses are not exhaustive but they are indicative of the many paths a bullying complaint can go down - many of them with little or no reward to the complainant, the alleged offender and the organisation. As outlined above the dangers of either ignoring the complaint because it is not formal or leaping straight into a full blown external investigation are obvious – so why do we do it?

Whilst the grenade/grievance manual analogy is clearly an exaggeration - fear does appear to be at the heart of whichever of these two actions is precipitated. Fear that by initiating a complaint, a party is not willing to formally pursue themselves, will result in you being blamed for a breach of regulation. And fear that by not appearing to be completely independent of any investigation process, will result in you or your organisation being blamed for being subjective and/or biased. In

both of these instances it could be argued that we have become rule bound and risk averse to the point of standstill and stand-off. We do not appear to be genuinely interested in resolving the problem as much as we want to appear to be doing the right thing - the 'right thing' in this instance being ticking all the boxes that will ensure that you cannot be blamed in any way for doing the wrong thing. And as tautological as that sounds what it means is that should the parties never reach agreement then it cannot be formally adjudicated to be your fault.

The irony of this is that having precipitated an external investigation prematurely you may find yourself before Fair Work Australia being rightly accused of failing to proceed according to natural justice or failing to provide adequate duty of care. Or conversely that in delaying any action because of a lack of a formal complaint that Fair Work Australia finds that nonetheless you knew there were serious allegations being made and you must therefore be held accountable for any subsequent damage caused to your employees, including possibly an employee guilty of bullying behaviour, by your non action. Who amongst us would not feel afraid and would rightly not want to be held accountable?

The case for a low key inquiry, where there is a clear lack of objective evidence of any serious breach of a code of conduct – is compelling. There is so much to be gained if HR practitioners go about this in the right manner.

Firstly by acknowledging what the complainant tells you regardless of whether the complaint is formal or even valid – is a sign that you take what they have to say seriously. You may not validate the complaint by acknowledging what is said but you will almost certainly validate the complainant's feelings – and if bullying is occurring this simple action is both reaffirming and reassuring.

Secondly by conducting a low key inquiry you are giving yourself a chance to distinguish between behaviours that may appear to be bullying - and are not - and behaviours that are bullying. This is of profound importance. Just because I call you a bully does not make you one - even if you behave towards me in ways that are socially unacceptable – raising your voice, sometimes ignoring me and correcting my mistakes. These things of themselves do not make you a bully. What makes you a bully is doing these things in a systematic way over a period of time – at least six months according to some definitions – so that it is clear that I am being unfairly targeted.

Now you cannot expect to be exonerated just because your inappropriate behaviour does not fit the definition of a bully. If you decide that there is not a bullying case to answer and that you will now proceed down a disciplinary, supportive and restorative path - you can come back to the complainant and outline your strategy. I would suggest that this now broadens your options considerably. For example should the complainant reject your offer and wish to proceed to a more formal complaint and a full on investigation then in this instance it is probably reasonable that the complainant can no longer expect that their identity and the substance of their complaints will be withheld from the alleged perpetrator.

Conversely should your low key inquiry uncover a significant degree of support for the complainant's allegations and you choose to invoke a full on external investigation then keeping the complainant's identity and the substance of their allegations confidential will afford them protection and can be much more readily justified. At least you will be exercising some judgement and not resorting to

blind rule driven behaviour out of fear of doing the wrong thing. Rules mindlessly applied can be just as intimidating, offensive and humiliating as the most ruthlessly planned bullying behaviour.

A bully is both a label and a definition. We simply cannot ignore this. Labels that are applied that do not fit the definition are a serious cause of distress and dysfunction when it comes to addressing such complaints. The complainant may genuinely believe that they are being bullied – they may feel powerless and offended. Under these circumstances it is vital to determine if the alleged behaviour has been occurring regularly over time, is targeted and is exploiting a power imbalance. At least two of these boxes have to be ticked. Professional external investigators are the only option wherever serious doubt exists. Unless there is clear evidence of a serious breach of conduct this should always be a last resort. Always

As mentioned previously behaviour that does not fit the definition which is nonetheless inappropriate can be addressed in a number of constructive ways once you have formally dispensed with the label. A properly conducted low key inquiry will always give you the best chance of doing this where the evidence for the complaint lacks clarity and objectivity or simply needs to be authenticated – so let's start there.

So Mary comes to you complaining about Paul. You listen and acknowledge her concerns. The inquiry starts now. Some of the questions that need to be asked of Mary include the following:

Have you ever raised these concerns with Paul?

Does Paul know you are here?

How would you feel about me approaching Paul and asking him how he sees your relationship and whether he has any concerns of you?

Why these three questions? First of all it is possible that Mary has not said anything to Paul. She may actually be voicing these concerns for the first time and you are the one to whom she has chosen to vent. She might like the idea that you speak to Paul and it is important that you inform her you will not be passing on her concerns you will simply be indicating that you (Mary) have some concerns and you (HR) would like to hear his side of the story in regard to how he sees the relationship.

Mary's answers to these questions will give you some very clear guidance on how to proceed.

If she is terrified of Paul knowing, appears nervous and upset and just wants it stopped without her becoming involved then there has to be some facing up to reality. An allegation of bullying no matter how inadvertent, like a last second bet placed on a spinning roulette wheel – cannot be easily withdrawn. Your duty to both Mary and Paul is to inform her that you will need to find out more and that you cannot just leave the matter be.

If Mary is genuinely distressed then one option is to refer her to your Employee Assistance Program and ask for a confidential report on her emotional health and her fitness for work. This can be readily achieved. This is not something you ask Mary to do just because she is genuinely distressed – this is something you need to do because if you do nothing to support her and she continues in her role and becomes more distressed – you will be judged to have had foreknowledge of what may be distressing her. What you discover from such an intervention may well determine if you proceed to independent investigation. For example if Mary sees the counsellor and becomes emotionally

settled and provides some detail about what is happening at work the counsellor can assist her in determining what she really needs to do about her situation.

If she remains genuinely fearful of any interaction with Paul then you may have no choice other than to proceed to independent investigation. This does not make Paul more likely to be guilty. One of the distinct advantages of a well designed grievance process is that it does in fact offer Paul the chance to have his name cleared.

If she feels that Paul does need to know what has been happening. She may agree that you can at least approach Paul and do as you initially suggest i.e. ask him how he views the relationship. Things can then open up from here. Paul may even admit to behaviours such as raising his voice and performance managing Mary a bit hard because he feels she is not doing her job. You may find that there are instances of Mary only wanting to do the things she likes and Paul being a bit blunt in his communication and so on - none of which are hanging offences and all of which require some constructive and possibly disciplinary intervention.

Before we look at some of the tools that can be made available at this point we need to also consider other ways in which a bullying complaint may be presented.

Mary presents with a written formal complaint asking for a full on independent investigation. Mary presents through a representative – legal and/or union with a written formal complaint. I would still recommend that you:

- Ask Mary to speak to her complaint – with a support person if she feels she needs it
- Listen and acknowledge all aspects of her complaint
- Ask the three previous questions if they are still relevant

Just because a complaint is in writing does not make it valid or substantial. Mary's complaint could be specious and speculative and therefore it needs to be responded to with thought and judgment. Grievance processes that indicate that all formal written complaints must be automatically independently and formally investigated are essentially mechanical processes. They are simply not appropriate for the paradoxical and complex thinking that comes with your average human being – let alone an employee in distress over what they perceive to be inappropriate treatment in the workplace.

You may still decide to go with an independent and formal investigation - after you have responded with thought and judgment – or you may wish to consider some of the following tools that are also available.

Mediation

Used in its broadest sense of bringing parties together through the agency of an acceptable mediator to facilitate voluntary agreement of unresolved issues.

Standard Mediation

A straightforward process whereby parties agree to conduct a mediated process in the presence of an acceptable mediator and the outcome is dependent upon their voluntary agreement.

Shuttle Mediation

A form of mediation whereby the parties meet separately with the mediator for all or the majority of the mediation process

Supervisor-Led Mediation

A form of shuttle mediation where the supervisor is accepted as a suitable mediator by the parties in conflict and where the supervisor is supported throughout the process by an experienced professional mediator. A Supervisor-led mediation course is taught by Newport and Wildman through the Tasmanian Training Consortium

Co-Mediation

Mediation with more than one mediator (usually two). Often recommended for supervisor-led mediation where the supervisor co-mediate and learns from a professional or more experienced mediator

Mediated Performance Assessment and Feedback

A tool designed for situations where a relationship between a team member and a supervisor has broken down and performance issues are a key part of the conflict. The tool teaches supervisors how to be both objective and supportive. In return team members are required to respond to objective feedback and act on appropriate support. Supervisors are assessed on their levels of objectivity and support. Team members are assessed on their capacity to respond to appropriate support. This is a time limited and mediator assisted intervention.

Multi Party Mediation

A more complex mediation usually involving three or more distinct stakeholder groups.

Distance Mediation

A form of shuttle mediation using telephone and the internet. Usually conducted for remote areas. Very useful and cost effective process for getting parties to work through positions and interests prior to bringing them together for a face to face session with a mediator.

Conciliation

A facilitated process similar to mediation which usually contains some form of binding outcome to the parties before agreeing to proceed and which usually contains some additional elements of arbitration.

Facilitated Team Building

A workshop that incorporates collaborative communication and conflict resolution strategies into an interactive, issues-based, practical workshop for identified work teams.

Coaching and Mentoring – including conflict coaching

Providing an independent and confidential sounding board and promoting practical conflict resolutions skills and clear and clear communication for employees working through conflict. Usually face to face. Can also be a form of Supervisor and Management Support, (SAMS) a telephone based support service provided under our EAP Services operation.

Counselling

A confidential, one on one support service provided by a qualified employee assistance counselling

professional – where listening, exploring and resolving are the key strategies used in encouraging clients to gain insight into personal issues and to take responsibility for their future actions.

Debriefing

A one on one or group process with a qualified employee assistance counselling professional to assist employees who have experienced strong emotion - and who appear to be negatively affected - as a result of conflict in the workplace.

Vocational Assessment

A process for assisting employees who may need to transfer or leave their current position and choose another line of work.

Conflict Management Intervention – CMI

The process of determining the best approach to each dispute or conflict. Usually a two part process of assessing each situation then recommending a certain approach or a range of options.

Mediation Pathway

A concept designed to show the many different ways in which we can arrive at mediation without seeing mediation as the default option when requests are made to assist in resolving workplace conflict.

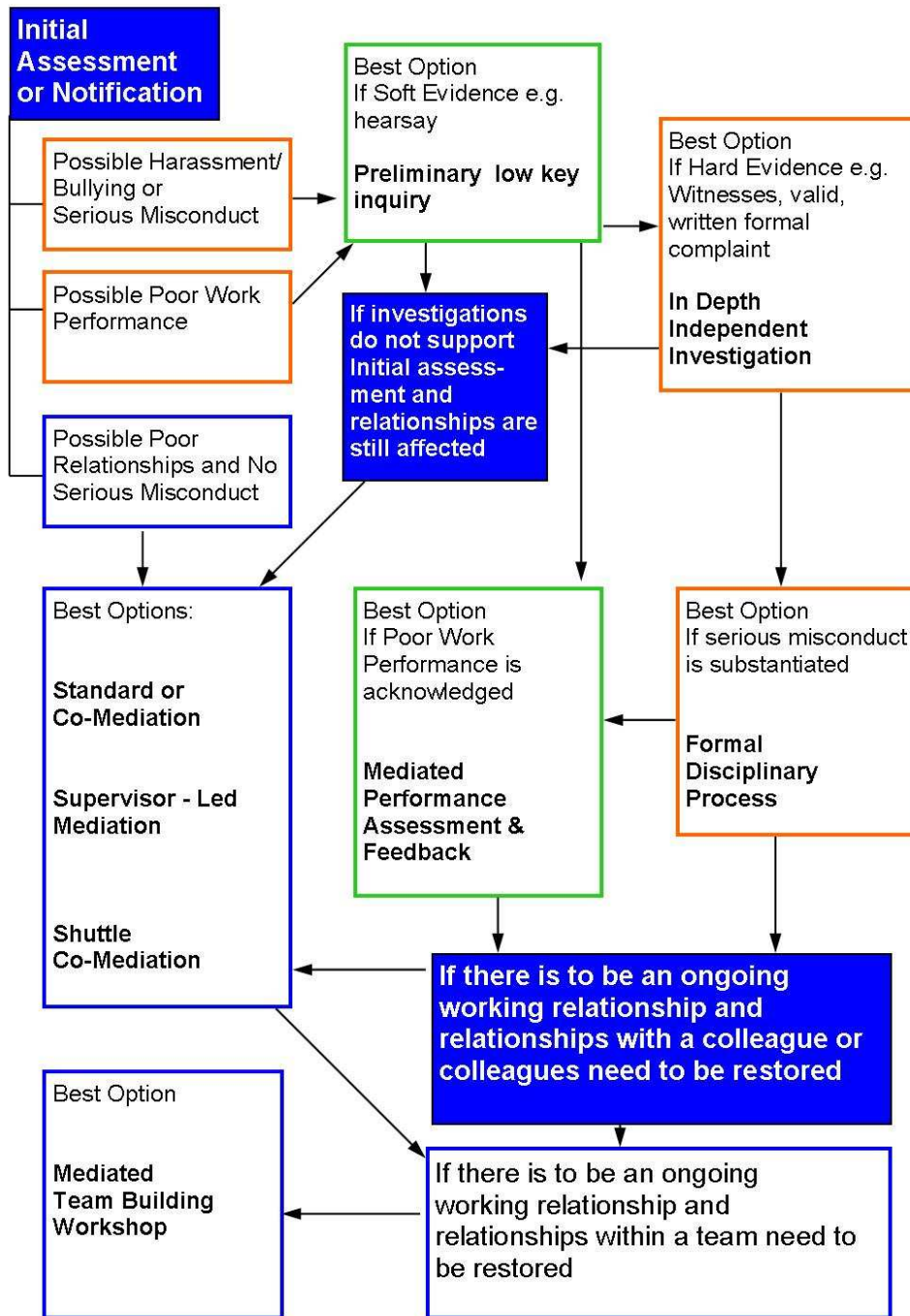
A diagram of the mediation pathway is shown overleaf. This is an ideal construct. What this means is that in a perfect world you could follow the linear pathways and everything will be hunky dory. Human relationships are far too capricious for this to ever be true. ***The purpose of the mediation pathway is to demonstrate what is possible – in particular that in cases of bullying allegations and poor work performance you can conduct a low key inquiry, you can investigate and you can discipline – and you can still come back to a mediated process and a constructive outcome.*** How significant is this? Why do we sometimes do nothing simply because an employee won't make a serious verbal complaint formal by putting it in writing? Why do we step back and hand the problem immediately over to an independent investigator? In both instances I would argue that this is avoidant behaviour and what we are trying to avoid is becoming involved in a linear and adversarial process which invariably has an unhappy outcome. Indeed this is probably one reason why we often go straight to mediation because we don't want to go down the difficult path in case we can't get back. There are two important principles in play here:

1. Always support people to be responsible
2. Embrace all the difficult options first

Always Support People to Be Responsible

This sounds quite simple – but it is really hard to do. When we avoid we are often supporting people to be irresponsible. Often we consider ourselves to be acting reasonably and giving people time to sort themselves out when in fact we are encouraging people, who in some cases may frequently exhibit inflexible behaviour, and who would rather procrastinate - ***to continue doing so***. In my early days as a workplace alcohol and drug counsellor I received a referral for an employee with 12 FINAL warnings. When the industry in which this employee worked took a downturn he was the first person dismissed – at a time when he was least able to be re-employed and when the goodwill with his colleagues was completely exhausted. It would have been far more responsible to dismiss him

Work Place Conflict Resolution - Mediation Pathway



the first time a final warning was breached, when he was much younger and more resilient and most importantly when he was able to take on board the lesson and use the time to learn from it. We appear to place ourselves in a double bind in situations like these. Firstly having formed an opinion that someone has erred we seek to justify our reasons for doing so. Secondly having justified that someone has erred we link our justification with a suitable punishment so that our assessment must automatically deliver negative consequences. Supporting people to be responsible turns this on its head. It says that we have hired you in good faith, you have passed your probationary period and if it now transpires that you are not performing to an acceptable standard then we, the employer will take the greater responsibility in the first instance. What this means is that we will identify where you are under-performing and we will help you to address this. If we are giving you the right support then you will need to demonstrate appropriate improvement. Annual performance appraisals do not deliver this. A mediated performance assessment and feedback process will. Why? The former is a routine process for everybody that all too frequently in many workplaces becomes perfunctory. The latter is specifically designed together with the poor performer and their supervisor and a professional mediator – it takes place over three months, it is pro-active and it delivers hard data on how supportive and objective the supervisor has been and how willing to accept support and redress under-performance the poor performing employee has been. In situations where the behaviour of those accused of bullying does not fit the definition but their behaviour is nonetheless inappropriate this is a practical and invaluable tool.

Embrace All Difficult Options First

Continuing on the theme of employees who have been found not to be bullies but have nonetheless acted inappropriately, a disciplinary process may still need to pre-empt any attempt at mediation. Why? Because mediation stands a much better chance of succeeding in a workplace situation where neither party is attempting to prove themselves innocent or the other party guilty. When still a relative novice to workplace mediation I was asked to mediate between two maintenance employees who were involved in daily tit for tat hostilities such as flicking stones up on each other's car when it was their turn to mow the grass. Things came to a head when one raised a butter knife to the other's throat whilst consuming scones during morning tea. Over the term of their working relationship one was as guilty as the other of misconduct and this seemed a fair approach to take into this particular mediation. It was not to be. The whole mediation was taken up with the other claiming to be the victim of the butter knife against his throat. And he was right. What should have happened was the butter knife wielder should have been taken aside by his supervisor and told that he had committed an assault, it was going on his record and any repeat behaviour would be severely dealt with. Then both parties could have proceeded to mediation with the butter knife crime addressed and the mediator expecting both parties to now take responsibility for their future behaviour. Understanding that you can make a difficult decision and still cycle back to mediation is critical in encouraging this behaviour. If a supervisor just thinks that punishment is the only conclusion or punishment must be avoided at all costs then these kinds of complaints will never be satisfactorily resolved and relationships will continue to suffer – and not just the parties directly involved – collateral damage involving all those who have to work with the disputing pair is both considerable and inevitable.

The importance of distinguishing between behaviours that fit the definition of a bully and inappropriate behaviours that do not cannot be understated. This is why the following comment has

been left until now to avoid confusion. An employee can still be rightly adjudged to have acted in ways that fit the definition of a bully – and this may or may not result in dismissal. Any form of bullying is unpleasant but not all bullying behaviour is of the same magnitude. A supervisor who is distant, often curt and sometimes rude over a significant period to some but not all employees fits the definition but you probably would not dismiss them. A supervisor who deliberately gives some employees menial tasks, denigrates them in front of others and discriminates against the same employees in matters of merit and professional development over a significant period may well be asked to seek other employment. For the employee found guilty of bullying whom you will not dismiss the same processes apply under the mediation pathway as those assessed of inappropriate behaviours that are nonetheless outside the definition. The critical factor is the ongoing relationship – it has to be addressed and the pathway demonstrates how this can be done.

At the heart of this paper is an appeal to assess each and every potential bullying situation that comes before you on its merits. To ensure you always listen, acknowledge and discreetly inquire in the first instance in the absence of hard objective evidence. At the heart of this paper is an appeal to personal judgement and courage. To be clear about what is appropriate behaviour and to be firm and pro-active when these standards are breached. At the heart of this paper is an appeal to restraint and compassion. To practice forgiveness in a way that ensures employees are supported to be responsible. At the heart of this paper is an appeal to justice and personal accountability. To be accepting of the duty to ensure a workplace is safe when an employee who has been suitably disciplined and pro-actively supported fails to learn the lesson. At the heart of this paper is the call to embrace all the support persons and tools that are available. To acknowledge to yourself that you are not alone – with that live grenade in one hand and a 10 kilogram grievance manual in the other.

Tony Newport

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Further Reading

Group One:

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| Ellison. Jenny, | The Impact of Personality Structure on Workplace Mediation Outcomes |
| Hough. Alan et.al, | Workplace Assessments Developing Theory and Practice |
| Jenkins. Moira, | Taking a Systemic Approach to Mediating Bullying Complaints: An Evidence Based Model |
| Sautelle. John, | Emotional Systems in Conflict – What Neuroscience Has to Offer |

All of the above are papers presented at the LEADR 11th International Conference in Brisbane in September 2011 www.leadr.com.au

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Group Two

Bryson. David,

Mediating In the Shark Infested Waters of Organisations

McEwan. Kathryn,

Restoring Conflict in Workplace Teams: Beyond Mediation

Both of the above are papers presented at the LEADR 10th International Conference in Melbourne September 2009 www.leadr.com.au

Babiak. Paul & Hare. Robert. D, **Snakes In Suits**, Harper Collins Australia 2007

For more information on Hare's studies on psychopathy go to: www.hare.org