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Alternative Dispute Resolution at
Metals: A Case of Mistaken
Identities

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Abstract

Since the late 1980s, in response to an increase in workplace bargaining in Australia, companies have relied more on their internal grievance procedures to resolve disputes than seeking resolution of these matters in the industrial tribunals. However, resolving matters within the organisation is not always straightforward, particularly when disputes involve a number of parties and a range of complex issues. As a result, firms may turn to the services of non-tribunal professionals. There has been a small, but increasing trend by organisations to engage the assistance of consultants who specialise in alternative dispute resolution. This case study explores a dispute which arose in a metals manufacturing firm and was resolved through an alternative dispute resolution session conducted by an independent third party. The case is intended to illustrate some of the difficulties associated with private alternative dispute resolution and to encourage consideration of training and education of workplace actors in dispute resolution techniques, workplace justice, and the role and responsibilities of private consultants.

Keywords

Fact-finding, facilitation, dispute resolution, workplace justice, perceptions of fairness.

Introduction to Alternative Dispute Resolution

This case study is situated within the framework of alternative dispute resolution (ADR), which can be described as informal, assisted dispute resolution. Many ADR processes are highly participative, involving not only the direct disputants but also committees of employees and employer representatives. Other ADR varieties utilise privately engaged, expert third parties such as mediators or facilitators.

This case study illustrates a dispute in which an independent third party was engaged to resolve a number of matters between a group of employees and their supervisor. The 'mistaken identities' referred to in the title of this case study, reflect the fact that none of the parties to this dispute shared an understanding of the ADR process utilised. The employees believed that the ADR process used was facilitation or mediation (these terms are used interchangeably in this case study, reflecting the understanding of the interviewees). However, the supervisor, shop steward and management team (who were responsible for the selection of the third party) understood the process to be fact-finding. The actual role played by the third party appeared to be neither facilitation/mediation nor fact-finding. Before turning to the case study, it is important to review the established definitions of mediation, facilitation and fact-finding.

Mediation

Folberg and Taylor's (1984, p.7) authoritative US study on mediation defined it as:

the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.

In practice, at least two forms of mediation have been described. First, mediation can be conducted by the third party as a passive (non-evaluative) process where the mediator refrains from proffering suggestions, advice or opinion, but rather provides a stabilising influence and ensures each disputant has adequate opportunities to vent anger and express concerns. This less active form of mediation has also been referred to as facilitation (Kuenzel, 1996) or facilitative mediation (Alfini, 1997). The essence of facilitation lies in the minimal degree of intervention exercised by the third party. In other words, facilitation is really a form of supervised negotiation (Chaykin, 1994).

On the other hand, evaluative mediation gives the mediator a more active role to make suggestions or provide advice, but not to impose a decision. Both forms of mediation rely on the disputants reaching a voluntary, non coerced agreement and may withdraw from the process at any time (Victoria Law Foundation and Attorney General's Law Reform Advisory Council, 1994).

Fact-Finding

Fact finding is a process conducted by a third party where the facts contributing to a dispute are isolated and documented so that an organisation may make a determination on a course of action to resolve the dispute. In other words, unlike mediation, in fact-finding, the role of the disputants is limited to identifying the facts of the case, rather than on agreeing to a particular outcome. It is a process particularly suited to complex or multi-party disputes where the key facts and circumstances are not fully known or are misunderstood by the parties (Rome, 2001, Mesch and Dalton, 1992). It involves identifying the personnel who need to be interviewed, as well as auditing any documentation necessary to determine the facts of the case, which the fact-finder then presents to management (Astor & Chinkin, 1992).

Metals – the Organisation

Once a significant trading force in the field of metals manufacturing in Victoria, Metals employed over 1400 people across a range of specialist manufacturing, engineering, research and development areas. In the mid-1990s Metals sold its 'high tech' and research divisions to a large US competitor. This narrowed Metals' business to its core manufacturing function. The Human Resource Manager, John Edwards, explained that

the market was moving faster than we could R&D, and if we invested 5 percent on R&D on \$64 million it was next to nothing to keep up with what was happening in the market. So we sold it to the American company.

Following the sale, Metals underwent a large corporate restructuring exercise with considerable rationalisation of plants and downsizing of personnel, particularly of white collar professionals and technical staff. In the four years to 2001, a total of 276 white collar workers had been retrenched compared to only 10 shop floor workers. At the time of interview, the downsizing at Metals had still not reached a plateau and the focus of recent closures and redundancies had switched from production to distribution with all but two distribution centres closing down across New South Wales and Victoria.

Metals' north-western plant, where this study was conducted, employed 190 shopfloor and 100 white collar workers. While the white collar workers tended to be mostly white Anglo-Australian males, shop floor employees were all middle-aged males mainly from Greece, Malta and Croatia. These latter workers generally had over ten years service with the company, little formal education and poor to average literacy and numeracy skills. A smaller, more recently employed group emanated from South East Asia. All the shop floor workers belonged to the National Union of Workers (NUW). Management, employees and the NUW reported a strong positive working relationship.

The Dispute

The dispute arose from a proposal by management to change the machine operators' roster in response to a continuing downturn in profitability in that department. The small, industrially powerful group of machine operators working in this highly specialised department had previously secured some of the best working conditions in the plant. These included a seven-day roster with access to overtime benefits. Peter Owen, the Operations Manager explained that 'because it was a high tech area and it was profitable it was easier in the past to acquiesce than have a dispute when you could lose output'.

The new roster was designed to bring shift and pay structures in line with other departments within Metals. By so doing, it would cut hours (and thus pay) and rationalise team structures. There would be up to 10 redundancies. As the machine operators had developed permanent teams over the years, they became agitated when they realised that apart from job losses and pay cuts, the new roster would split team structures and force them to work with employees from other teams.

Joe Palermo, a machine operator for the past 15 years explained what lay behind the resistance to the roster changes: 'some people got used to work with others for years and they had some personal preferences too – like someone working better with other people'. The new roster also changed shift rotations which meant that individuals faced new start and finish times at work. This was seen as a problem for some workers. According to another operator, Phong Tan 'they changed people around ..some people got family problems'.

The prospect of fewer shifts would have impacted heavily on total remuneration and this fuelled anger, although no industrial action was taken. Joe was quick to point out that ‘the people argued losing the money they would have a problem with the mortgage. The money matter was the main thing. When you work less hours you get less money’. Amidst the discontent with their shift arrangements, a new matter emerged. Peter explained:

We started to uncover a lot of interpersonal disputes in the department, a lot of accusations with the supervisor down there. Now whether this was a smoke screen because of the other issues down there, we didn’t know.

A group of employees had complained that the shift supervisor, George Dobelsky, was favouring some employees. This was allegedly manifested in the way he restructured teams and allocated overtime. The shop steward, Leo Zammit, saw the restructuring as an exercise in favouritism:

the whole issue was that one of the supervisor’s pals did not want to work with the individual that was being moved out [of a team]..and it was common knowledge ..the problem it did create was that it put that individual employee in with another influential individual ...who he’d had a history of racial abuse from.

The exposure of an employee to his abuser as a result of the team changes was played down by George, who reframed the incident as a bad reaction to a standard workplace change:

the whole thing was a very simple thing. I was not trying to do major changes. I was not changing working conditions. It was a very simple thing to do, but in this case a few of those guys were not happy about the changes and started looking for any reason or excuse and in this case, discrimination was mentioned.

Having had little luck with the supervisor in dealing with the matter, Leo raised the issue of employee discontent with Peter and John. Shortly afterwards, a facilitator was chosen to sort through the many issues raised by the workgroup.

Traditional Dispute Resolution at Metals

Metals, like many Australian companies experienced increasing industrial harmony through the 1990s. There had been no strikes at the plant for over seven years and a co-operative spirit had developed. John attributed this to policies encouraging consultation and communication but also to the departure of the former industrial relations manager, explaining that ‘sometimes he assisted in inflating the dispute and then went through a process of resolving it, which he got certain recognition for’. Consequently, in those times Metals had endured many lengthy battles in the Australian Industrial Relations Commission (AIRC). This put further strain on relations with the union. John stressed that ‘we used to have a reasonably militant union here and poor union-management relations’.

More recently, management-union relations had developed into a positive and productive dialogue. This was certainly the impression given by Leo, who commented that:

in my four years as a delegate, we've been able to handle disputes purely between myself and the company by negotiation sorting through the issues, facts and making a position on the issues together – through consultation.

John concurred, adding that 'we ..have a very good shop steward who also understands the pressures upon this business to continue to operate'. Similarly, Peter commended the shop steward, stressing that:

if he takes something seriously then I do too. On the rare occasion we disagree, it is a genuine disagreement over something like the approach rather than the facts. We will probably agree on the facts and I'll say I don't agree with what you want to do about it and vice versa.

The ideal of industrial harmony was echoed by the two machine operators interviewed. Joe insisted that:

I don't want to go in a strike because I lose money. I don't want to be insecure for my job. I like to work for years because I have mortgage to pay, my dreams and whatever. I prefer a smooth relations between workers and company. I prefer the life now in .. company much better than years ago. So... we don't want to go in a strike just to prove a point. Would be much better if we do it the nice way.

Despite their confidence in, and support of the union steward, both the HR and the operations managers stressed the importance of having matters dealt with directly between management and employees. Key to this, has been the use of the company's grievance procedure. John stressed that:

We use a grievance procedure, which is always of course the first line supervisor of the shop floor followed by the department manager, normally in consultation with myself ..we probably have had three discussions with the union organiser since last February of last year.

The success of direct management-employee resolution of issues was confirmed by Peter who pointed out that there had been a shift away from union dispute handling towards management handling of disputes: 'people used to go see the union if there was a problem but now they tend to go to management or a supervisor or to me'.

Metals has not had a dispute referred to the AIRC for nearly seven years at its North-western plant. However, they had brought in an external facilitator/mediator on three occasions in the past two years.

The Rationale for Using a Facilitator

John explained that there were three reasons for hiring an external facilitator to help resolve the roster dispute. First, the dispute involved all members of the original three-shift roster, amounting to 36 employees. John felt that a skilled independent consultant would be able to handle such a large group. Secondly, there were multiple issues of concern, ranging from the effects of the shift changes in both monetary and social forms to allegations of favouritism and mismanagement against the supervisor. The complexity of these issues, according to Leo, was of paramount consideration in the hiring of an external third party:

because of the large number of people the issue was affecting, the size of the task to address these issues and the need to show the whole workgroup that something other than ..the union and the company are listening to the issues and coming up with what might be deemed a closed door solution.

Thirdly, John decided that an ADR practitioner, rather than a representative from the union or management, would be better placed to obtain the facts from the workplace: ‘we were not at the stage when we thought the people would be honest with us – with management - and we don’t want a union view of the whole issue’.

Selection of the Facilitator

The facilitator was chosen principally because of his previous union connections, which John felt indicated his likely acceptability to the union. Additionally, John had utilised the same facilitator in the past for a similar dispute - but at a different company. The dispute had been handled expediently and John was keen to use the facilitator again. Leo supported John’s choice of facilitator. He reported that it was important for unions to become involved in the selection of a third party ‘to make sure the facilitator was independent and that they did have some understanding of workplace issues, and with experience in mediation in IR disputes’. He was certain that the facilitator possessed these traits:

I think we have a facilitator who is very aware of what is happening in the commission and in the industry. He has the ability then to say ‘hang on guys, this is happening - I see it all the time. This is not an outrageous request by the company.

The decision to hire the facilitator did not involve consulting the employees, who had no direct input to the choice of third party. They were unsure who chose the facilitator, or how the person was chosen. Importantly though, they trusted their management and were satisfied that the union had made a wise choice on their behalf, adding: ‘I think as long as they help that’s the main thing’ said Phong.

The Facilitation Process

A pre-facilitation meeting was conducted informally in the first instance. The facilitator was invited for a tour of the plant and to meet the shop steward and employees. This initial meeting was reasonably brief, taking around 1.5 hours, but it established his presence, credentials and intentions with the workforce. He also held a joint meeting with the management team, John and Peter. Following this, he spoke with George. In his meeting with the management team, it was agreed that the matter would be handled by holding a fact-finding meeting, which would allow for the gathering of issues and views from the shop floor. The facilitator proposed to document these issues and provide the information to management for their action.

It was difficult to arrange a meeting which could accommodate all workers of the three shifts and yet maintain production. Finally, an agreement was reached with the shop steward to hold the meeting at the end of the afternoon shift commencing at 6.30 pm and just prior to the start of the evening shift. This meant that two shifts of workers, the morning and afternoon shifts, were off duty and able to attend if they wished. Only the night shift could not attend. A total of 18 workers attended the meeting, along with the shop steward. Workers coming to the meeting directly from their shift were paid overtime and others paid at single rate. In the interest of obtaining the 'shop floor' view, no management representatives were present.

The meeting was conducted at Metals' training room. The facilitator had arranged the tables into a 'U' shape and while the employees sat around the 'U', he stood in the middle. His only pieces of equipment were a writing pad and pen, which he used to note employee responses to his questions. Leo tried to put the procedure into words:

The way he handled the session is not something that you could write a manual on. It's something that comes from years of experience and understanding of the types of issues you get in the workplace and an ability to talk the same language. What he initially did was introduce himself, discuss his union background, his working background, and what he currently does, which is mediate. Then he explained the reason why he was there and asked how they would rather he deal with the session; would they rather come in one at a time or all in the room and they opted for this.

Not all the employees who attended spoke out. Joe for instance remained silent for the entire meeting:

I didn't say nothing. I am a little bit shy person and especially when I let some people with more experience talk about this. I only have 8 years but some people have over 20 years. So I suppose they know better. In my personal view, you can't make happy everybody at the same time and I agree with a compromise.

Joe indicated that he relied on the participation of the shop steward to draw out the contentious issues, stating that ‘we trust him to represent our interest’. However, this did not mean he was happy with his non-participation:

if I have something to say, I prefer it to be different. Like one thing, everybody receive paper what will be this meeting about, what is the problem and everybody to prepare, just two minutes to have a talk what contribution can I make? Most of us, we are not scientists or something. We are people working we need little bit of help to make a practical contribution.

The Outcome of Facilitation

Formally, the outcome of the facilitation meeting was a series of ‘dot points’ taken down by John during a phone conversation between himself and the facilitator in the presence of Peter some days after the meeting (see table 1, below). The other major outcome of the process was the acceptance of voluntary departure packages by the 8 employees who had made complaints against the supervisor.

Table 1: Summary of the ‘dot points’: issues raised in facilitation with recommended action

Issues Raised	Recommended Action
Lack of supervision in department: (i) favouritism (ii) racial tensions (iii) conflict management	Supervisor to attend conflict management training.
Lack of fairness in overtime distribution	Develop an overtime roster based on need for specified skills.
Lack of fairness in team structures	Teams to be structured on the basis of skills mix. A skills-cluster analysis to be undertaken and checked against existing team structures.
Implement new roster	Employees to be provided with 8 weeks notice to arrange their affairs.

The list of ‘dot points’ represented the issues raised in the fact-finding meeting with recommendations for their action. When asked his reaction to the ‘dot points’, John said ‘I can say there was nothing there in his opinions that surprised us. There were a lot of things that we thought and identified ourselves but wanted confirmation from an independent source’.

Some time following the phone conference, the facilitator met with the HR manager, the operations manager and the shop steward as a group to finalise the outcome. Leo was somewhat miffed by his belated inclusion, explaining that

by the time all that happened some of this had already come to a head and things had already been sorted out. But some of the moves didn't happen. The ones we were most passionate about didn't happen.

The final outcome of the dispute rested upon the 'dot points' and their treatment by the management team. Not all parties viewed the outcome in the same way, and so for this reason, we will consider separately the positions of management and the employees in terms of their satisfaction with the way in which the matter was dealt.

The outcome for management

John expressed satisfaction with the process and outcome, exclaiming that 'for this business, it has been very successful'. He felt confident that the company would continue to use facilitation or mediation in the future where disputes were complex or involved many parties. The management team also believed that the shop floor were equally satisfied with the outcome. John explained that he and Peter had undertaken brief, informal conversations with the shop floor during routine visits, and was able to confirm that the participants were also pleased with the process and 'they were all very positive towards it'.

One management representative who was not entirely happy with the process was the supervisor, George. Several of the 'dot points' referred to his inability to manage conflict. John explained that when shown the 'dot points', George 'was quite upset, however he soon took it on board and in the end when he went to move on his own volition, the workers took a petition to keep him there'.

The 'dot points' were finally written into a letter and sent to each employee in the department. The letter outlined the shift issues as well as the supervisor issues and provided a course of action for each to be undertaken by the company.

Management and the Perception of Fairness

Impartiality

Impartiality is a trait consistently associated with mediators and is defined as involving 'freedom from favouritism and bias in either word or action' (Cooks & Hale, 1994: 64). In exercising this standard, a mediator must refrain from acting as an advocate or assuming an adversarial role. Impartiality is sometimes referred to as being equidistant from the parties, reflecting the standard that the mediator does not act for or against any one party (Astor & Chinkin, 1992).

Management expressed a commitment and belief that a facilitator ought to be impartial. This was stressed as their primary concern in dealing with the matter fairly and may be considered the most important moral and business principle for the management team. For instance, John explained: 'you have to have some trust that that person who is the mediator is independent and unbiased - because of what you are seeking to have them

do'. John felt that there was a balance struck between employing a facilitator with a known union background and the fact that he was paid by management. Further, he suggested that the fact the 'dot points' emerging from the meeting were devoid of subjective content was provided as evidence of this impartiality:

Impartiality yes. The company is employing [the facilitator], they are paying the bills, yes they are meant to be impartial. We got two A4 pages in dot-points from a substantial four-hour session. In these dot points there's not a lot hearsay or opinion underneath where this has come from or who it's come from or what the problem - it just states the facts. It's just a statement it is not selecting an individual, just gets straight to the point and is concise.

Peter agreed that the facilitator was able to obtain an 'unbiased view of the facts' and, despite his role as the focal point in this dispute, George expressed trust and confidence in the facilitator. When asked how he knew if the facilitator was impartial, he exclaimed: 'My dear. In my case, this one was definitely [impartial], but if I had to get someone who we didn't all know - it is great to check who the person is representing'.

Procedural and distributive fairness

Rawls' (1971) principles of justice encompass fairness, equal liberty, equality of opportunity and the difference or needs principle which holds that only social and economic differences which are to the benefit of the least advantaged are permissible. These principles applied to the workplace ensure that corporate goals do not override individual liberties or human needs (Esquith, 1997). Rawl's principles have been incorporated into research into justice in the workplace and three main types of justice have been described: procedural, distributive and interactional justice. Procedural fairness is related to the fairness of the entire process of dispute resolution from the engagement of the facilitator through to the conduct of the facilitated meeting and the formulation of the outcomes. Distributive justice focuses on the fairness of the ends or outcomes (Tremblay, Sire and Balkin, 2000, Tyler, 1988, Tyler, 1984). Interactional justice has been described as the manner in which the disputants are treated by the third party, for instance being treated with respect and dignity (Bies & Moag, 1988).

The management team were highly satisfied with their treatment by the facilitator and felt they had been afforded procedural fairness. For instance, George confirmed that he had been treated fairly: 'I was able to express my opinions and say what I had to say and so were [the employees]'.

The management team were also very positive about the fairness of the outcome of facilitation. When asked if he thought the outcome was fair, John stated:

I would like to think so. We wrote to them all the issues that were raised which we thought were of major instance were addressed within this company and I think they think this is a better place to work in. So I would say yes.

George agreed that the outcome was fair, basing his assessment on the fact that the outcome reaffirmed the original roster changes:

yes, not only because it was an outcome meant we were free to proceed to with those changes. This says he didn't change much our situation but basically took into consideration all the facts and I think it was a fair outcome.

The Outcome for the Employees and Union

Joe and Phong maintained that the facilitation meeting had not resolved anything, but rather had given management an opportunity to implement changes unilaterally. For instance, when asked if the facilitation fixed the problem, Phong answered indignantly 'the way the company do it, they just do it. So, we just work new hours for the company. So, what means fix or not fix? Nothing'. Joe added that:

I think we get a compromise. We lose some things like we work less hours, but we get some kind of deal with the new roster. I remember the company increased our notice, they give some extra few months for us to fix our personal problem and start new roster. I remember they taken in consideration some personal problems like someone he felt to do it this way or another way, to work another shift.

Leo felt he had not been afforded procedural justice as he was not party to the telephone conversation with the facilitator which gave rise to the 'dot points'. He complained that John and Peter 'had the report before I did; it already had their ideas about how they wanted things to turn out. It was a matter of them walking in and telling me this is what we have to do'. He also indicated that many of the recommendations were redundant because 'at the end of the day the majority of them had lost their jobs before the impact of it was recognised'.

Impartiality

Leo, Joe and Phong were satisfied that the facilitator was impartial. Leo voiced a concern that impartiality may be affected depending on who pays the facilitator. However, when asked if he had such concerns in this case, he answered 'no, because we used him before'. For their part the employees were happy with the fact that the union had been involved with the selection of the facilitator. Impartiality was less of a concern than the fact that their shop steward was present at the meeting: 'My personal feeling is that I prefer [Leo] to be there'.

Procedural fairness

The employees and their shop steward were happy with the choice of facilitator and explained that they felt that the facilitated meeting was also fair. For instance Joe commented that in 'my opinion was fair because everybody can have their say and can discuss in meeting or in private, after the meeting, and was like an open process, an

ongoing process'. Phong explained that 'why it was fair was a chance for people get to listen to one another'. These sentiments were echoed by Leo:

In terms of every individual to express their views and for those who received a response on their views - they would have considered it fair - but the outcome wasn't.

Interestingly, despite his anger at being excluded from the development of the 'dot points', Leo maintained he had been afforded procedural justice. This raises two issues. First, both the employees and their shop-steward equated procedural justice with being consulted. It was because they were consulted that they were prepared to accept a less than favourable outcome. Secondly, the fact that the 'dot points' which outlined the outcome, were formulated between the facilitator, the HR manager and the Operations manager (but not the shop steward) appears to be at odds with the participative principles of procedural justice.

The employees felt that procedural justice was not afforded to their supervisor, because he had been asked not to attend the meeting: 'In my opinion, talking about this contradiction. I think he should have been invited to attend the meeting so he can have his say' said Joe. It was clear that the employees and their management had different expectations of the process. The management team, and particularly the supervisor, had stressed that the facilitation meeting was to be more akin to a fact-finding exercise and that the supervisor's presence would inhibit employee responses. The facilitator had therefore told the supervisor not to attend. George explained:

that my presence there will in a sense stop some of them expressing their feelings so I didn't have a problem with not being there. In some cases I think it is a better thing to be able to say what you want.

The employees, however, believed they were engaged in a process leading to resolution, more akin to facilitation or mediation. They had expected to debate the contentious issues with the supervisor present. This fundamental misunderstanding of the process by the employees underpins this case.

Distributive Fairness

Despite the general agreement that the process of facilitation was fair, it was clear that the employees and their shop steward did not consider the final outcome of the dispute to be fair. When asked to explain, Leo suggested that management had implemented a pre-arranged solution using the facilitator as a conduit between themselves and the employees:

The employer in this instance, took a fair approach to solve the problem. I believe the facts they had at hand would have proved to them personally that their decision, their actions afterwards attempt to show that [the way] they had solved the problems were incorrect. However, for the reasons we spoke about before,

pointing to their coordinator, they chose follow those decisions and inadvertently did not give the employees the justice they deserved out of it.

Clearly, Leo endorsed the facilitation process as a fair method for gaining the facts necessary to make a wise management decision. The fact that this failed to occur he put down to management's support of the supervisor's decision on new team arrangements regardless of the harassment and other concerns raised by employees. Leo was particularly troubled by the strong support given to George by John and Peter:

He's got a policy that whatever his supervisors want they get. If they wanted to do this to complete their task he would support them - even when they're wrong. That was the point I wanted to make the about the reality. That was ridiculous. And what that did to the blokes was it made them feel second rate employees.

The employees explained that whilst the new roster delivered lower wages than the previous roster, they had accepted it as fair. However, they explained that the outcome was not fair to everyone. In particular it did not address the issues raised by the small group of employees who had criticised the supervisor. Joe explained that:

Maybe for those people who raised those problems was not fair. I suppose they have right to say what problem they have and they talk about it.

One outcome of the meeting had important ramifications for the employee who was to transfer to a new team where he would have to work with his former harasser. Whilst he initially refused to transfer, after the preparation of the skills cluster analysis, he was informed that his skills were required for the new team. Finally, and reluctantly, he agreed to the transfer, but worked only one shift before complaining again that he had been racially slurred. He took stress leave and has not been back to work since that date. Leo explained that the unfairness of the outcome for this employee has led to further problems for the company as he has launched formal proceedings in the Equal Employment Opportunity Commission:

In the incident of one person who has suffered the most out of it he has sought other processes to gain justice for himself. He is pursuing some of those at the moment so he can have his avenues to follow. So with regards to solving all problems by this means [facilitation] I don't think you can use any of those means. It is a tool to achieve a result. If the result isn't achieved, then they should have other avenues to pursue.

Discussion

This case study presents the facilitation process used by Metals as somewhat of a 'curate's egg'. It is important therefore to review both the positive and negative implications emerging from the dialogues of the protagonists. In the first instance, the willingness of the parties to resolve their grievances without resort to industrial action or recourse to the AIRC demonstrates their belief and commitment to good employee

relations. Management's strong co-operative relationship with the union and in particular with the highly respected shop steward has meant the lines of communication were open and in regular use at Metals.

The choice of the facilitator was considered an important element in maintaining impartiality and fairness by all parties. There is evidence that a shared trust in this person was vital to the willingness of both sides to proceed with the facilitation meeting. This was not the first time ADR had been used in Metals and so at least for management and the shop steward, there was a level of knowledge and expectation of the procedure. All parties interviewed in this dispute claimed the process used by the facilitator was fair, and further, that they would be happy to use the process for other complex disputes which may arise in the future.

Where this model of cohesive effort seems to break down, emerges through the divergence in the stories of the workplace actors:

- (i) Perceptions of facilitation process
- (ii) role of facilitator
- (iii) the outcome
- (iv) training
- (v) fairness; and
- (vi) power and the discourse of management

Some of these matters are procedural in nature and may be adjusted by the company in the future to avoid friction between the parties. Other issues go to substantive problems with the process and conduct of facilitation in this case. These will now be considered:

(i) *Perceptions of Facilitation Process*

The management team and the shop steward had a different expectation of the process than the employees. The employees defined facilitation as a problem solving process and had expected a process of supervised negotiation. For this reason they were surprised that the supervisor was not in attendance to answer their claims. They were also distressed at being ill-equipped to deal with the session. For instance, describing what might have encouraged more employee participation in the meeting, Joe suggested that the facilitator should have had:

more involvement with us - spending more time with us and explaining to us what is the good side or the best side. Beautiful, theoretical to have a meeting and say everything is solved - idealistic, but that is not happening in practical life.

In contrast to the employees view of the facilitation process, the shop steward and the management team described the process as a fact-finding mission. For instance, Leo explained the process would determine the contributing facts:

so that issues were become more clearer to the company. If they were clear prior to the mediation, I didn't think they were acting upon them. I thought once they understood the issues, that they would understand what would result if they didn't address those issues.

Similarly, George explained:

I suppose my expectations were to a certain extent met in that he wasn't really doing a mediation, he was there to get an unbiased view of the issues. If we continued to get him to help solve the problem which we didn't, things may have been different, he may have facilitated a different result.

The differing perception of what would occur in the facilitation meeting could well have been a failure on the part of management and even the shop steward to fully explain to the employees and prepare them for fact-finding. However, another issue which emerged, was the actual role played by the facilitator. While he, himself had described the process as fact-finding, he actually did something quite different:

(ii) *The role played by the facilitator*

A key issue emerging from this case study is the difference between the perceived and actual role played by the facilitator. In fact, the facilitator appeared to be engaged in an active process of dispute resolution, but as an advocate for management rather than an unbiased neutral. He presented management's view of the situation, listened to the employees' views and then argued for management's position.

Although not present at the meeting, John explained that the facilitator played an important role on management's behalf in moderating, or reducing, the demands of the workers regarding redundancy for those who would be laid off as a result of the shift changes:

Yes moderating, definitely. I know that one of the things they put to him he told them that is not standard, it is way over the top. For example, I think they were asking for 8 weeks pay for each year of service in redundancy. While they knew it was over the top and we were telling them it was, he was able to go in and say 'this is totally unreasonable, your claim is bullshit' in layman's terms, you know what the area is out there and this is a fair and reasonable agreement. You know what the TCR provisions are. This is way above the standard. You are getting a fair deal. I know he's done that.

Peter confirmed this strong pro-management stance taken by the facilitator: 'he told me the workers are prima donnas; they think ... that they should have anything they want'. Such descriptions of facilitator behaviour do not reflect values of neutrality or equidistance, but rather, appear to be those of an advocate, voicing the views of the hirer.

(iii) *The Outcome*

Despite their feelings of being treated fairly, the employees and shop steward reported that the outcome was unfair to those who had raised concerns over the roster changes and favouritism by the supervisor. Specifically, the subsequent show of employee support for the supervisor was finally explained as being unrelated to any rejuvenated supervisory skills. The employees reported that the 8 workers who had complained about the supervisor's favouritism accepted voluntary departure packages as a result of the meeting. Joe explained that the facilitation had little to do with resolving the issue of favouritism:

Actually the problem like this - to like someone, or not like someone - was not solved in that period of time, and most of these people left when they had a chance for retrench. After the retrench there was no complaints any more.

It is questionable whether the dispute was resolved by the ADR meeting. First, the fact that management and the employees reported that no further complaints had arisen in the department is directly attributable to the retrenchment of the complainants. Secondly, the denial of distributive justice to one employee who found himself on a shift with an individual who had in the past racially vilified him has led to the employee pursuing formal legal action against the company. Thirdly, the employees felt that the roster changes were thrust upon them by management and that the facilitation did nothing to 'solve' any of the problems they raised. To this end they felt they did not contribute to the decision as would be the expectation of facilitation. Their inability to contribute was not lost on them, and they specifically raised the issue of an absence of training as a key to their non-participation.

(iv) *Training*

Training emerged as an issue raised by the employees. They felt strongly that had the employees been given training in negotiation and conflict management they would have been more able to deal with matters raised in the facilitation meeting. For instance, speaking about the lack of specific training, Joe explained: 'no training. We try to learn in a practical way in the moment but to me it is not enough'. Training did not emerge as an issue for the other parties, although it formed part of the resolution of the dispute for the supervisor, now compelled to undertake conflict management training.

(v) *Fairness*

Despite the fact that the facilitator behaved as a management advocate, his behaviour was not detected as unfair by any of the parties – even the employees and their shop steward. In this exchange between the interviewer and the employee focus group, it is clear that their experience of not getting an optimal outcome had not dampened their belief in ADR:

Interviewer: my next question is about employees, like yourselves. Do you think mediation can benefit employees?

Joe and Phong: yes.

Interviewer: the way you were telling me about your mediation, people were not given an agenda, you had no training and you weren't prepared and they didn't maximise your contribution, so if that is what mediation offers all around Australia, is that still a benefit to them?

Joe and Phong: yes

Interviewer: even though you have criticised the model he used?

Joe: the one who said that criticism is the mother of progress was Lenin.

We consider four possible explanations for the unquestioning acceptance of the third party by the employees. First, the facilitator was trusted by the employees. He had been selected by the union, and he had both union and Labor party affiliations. Thus, his presence at the meeting was legitimated by the acceptance of all parties. Secondly, it may be that the facilitator's behaviour was not foreign to the employees. Such behaviour actually resembles that of a typical company industrial relations or human resources manager – a position paid by management to listen to the views of the employees, to moderate those views where possible with management's views, and to take any outstanding and unsettled issues back to the management team for resolution and discussion. The employees did not pick up on the point that such behaviour does not correspond with either fact-finding or mediation.

Thirdly, their acceptance of the behaviour of the third party may be linked to their sense of being afforded procedural justice. Procedural justice is a powerful indicator of how parties perceive fairness and how they judge the fairness of their company (Tyler, 1988; Tyler, 1984). Every interviewee explained that fairness amounted to being invited to give one's views or raise matters of concern, even when that opportunity was not taken up by the individuals. Because all interviewees felt adequately consulted, they firmly believed that they had been afforded fairness by the facilitator.

The fourth reason behind the employees acceptance of the behaviour of the third party lies in their role within the power structure of the firm. This is addressed below.

(vi) *Power and the discourse of management*

In a workplace setting, there is usually an ongoing, and hierarchical relationship between the disputants. The resultant imbalance of power between employees and employers is reflected in the authoritative power of employers. Berger and Luckmann (1966:101) observed that 'he who has the bigger stick has the better chance of imposing his definitions'. Discourse in the workplace can be said to be management-driven, and is

reflected in the organisation's goals, policy and decision making (Silverman, 1979). Importantly, these are shared goals, legitimated through the trust and commitment by the workforce in their management. In other words, because the employees trusted their management and the union, they accepted the facilitator and the ADR process as legitimate. It follows that despite being disadvantageous to the employees, the outcome was also accepted with little questioning.

The ADR process used at Metals does not represent a good start to the future of private workplace ADR in Australia. In an environment devoid of accredited training, practitioner registration or a code of practice, ADR risks becoming an unpredictable cocktail of techniques used at the discretion of the third party. In the context of trust and good employee relations at Metals, the outcome of this dispute upheld management's original decision without raising employee concerns over the neutrality of the third party or the influence of management in the selection, payment or briefing of the third party. The risk for the longer term, in the use of so called third party 'neutrals', is whether Metals' employees will eventually start to question the credibility of decision making and trust in this workplace.

QUESTIONS:

1. Do you think that employees and the management team would have benefited from a common understanding of the process used by the facilitator in this case? How could this have been ensured?
2. How prepared were the employees to discuss their concerns with the supervisor had he actually been present at the facilitated session?
3. What type of training might assist the employees in preparing to engage in future dispute resolution processes? Who should provide such training?
4. Both employees and the shop steward described the process as fair but the outcome as unfair. From the case study, how did they define fairness? What were the criteria by which the outcome was judged as unfair?
5. What steps might the shop steward take next time management wants to hire a facilitator to resolve a dispute?
6. What does this case study tell us about perceptions of justice held by the various parties in the workplace?
7. Given that the construction of meaning in organisations is a management-driven discourse, how realistic is it to expect neutrality in hired third party facilitators?

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