

	<p style="text-align: center;">MORGAN MC MANUS SOLICITORS</p> <p style="text-align: center;"><i>With offices in Northern Ireland and the Republic of Ireland and also practising in England/Wales.</i></p> <p style="text-align: center;">ISSUE 12</p>	<p style="text-align: center;">April 2005</p>
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Monthly Employment Law Bulletin

WELCOME to the twelfth issue of our Monthly Employment Law Bulletin - keeping you advised of developments in Employment Law both North and South of the Border. Every employer will be aware of the necessity to be informed of ever increasing duties because of legislative developments which are being enacted by reason of EU Directives. The difficulties for the employer with businesses in both jurisdictions are doubled! This is where we can assist.

BRIAN MORGAN, SOLICITOR, REPORTS ON

MEDIATION – A WORKPLACE DISPUTE RESOLUTION

Mediation, sometimes known as “Alternative Dispute Resolution”, is becoming a well recognised means of resolving all kinds of disputes. While it has commonly been associated with the resolution of commercial disputes and family law disputes, it has in the recent past been recognised as a means of resolving workplace disputes. The reason for this is that it has been recognised that not all workplace disputes can be settled by the “win/lose” outcome, which Employment Tribunals provide. Under *Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations* from the 3rd April, 2005, where an employment dispute arises, employers and employees will be required to follow minimum procedures to attempt to resolve the dispute in the workplace. If they do not follow these minimum procedures, a Tribunal may reject an application or alter an award of compensation. These regulations have been enforced in England for the past 6 months. In effect, these regulations introduce statutory procedures for handling discipline, dismissals and grievances in the workplace. It is however important to bear in mind that, while these regulations come under the title of “Dispute Resolution”, they should not be confused with the process of “Alternative Dispute Resolution”/Mediation. So far, the opinion in England is that these regulations have done nothing more than enshrine the most basic of procedures in statute law; that is, the obligation to undergo a three-step process; namely to (1) set out the complaint in writing, (2) meet to discuss the problem and (3) hold an Appeal Meeting if required. Effectively, the new Dispute Regulations do not ensure that the parties have used *every means* to resolve the dispute but that they have merely gone through the above three-step process before going to the Tribunal.

As the type of issues arising in the workplace become more complex and are often not solved by the “win/lose” outcome provided by an employment tribunal or an internal grievance procedure, the use of other forms of dispute resolution, and Mediation in particular, is growing rapidly.

Below is an overview of how the Mediation process works, and also an outline of some of the other situations where Mediation may be useful.

1. The Definition

By definition Mediation “is a means of resolving disputes by taking the matter to a third party experienced in such cases and allowing the parties to hear the independent view of the Mediator in order to move toward settlement.” (Source: www.legal-term.com/mediation-definition.htm)

2. What is Mediation?

Mediation is part of a system of Alternative Dispute Resolution and is considered to be a key tool for the resolution of disputes between parties. It is a voluntary, non-binding, non-adversarial and without prejudice dispute resolution process that allows the parties involved in the process to find a mutually acceptable outcome. This is unlike an adversarial litigation process in front of an independent third party who has the power to adjudicate on the matters before him/ her and impose an outcome. Whilst a Mediator is an independent third party the role of a Mediator is one of facilitation rather than imposition of an outcome. Therefore Mediation allows parties to avoid the litigation of a dispute in front of a third party.

3. The Mediator

The Mediator is an independent facilitator and as such will endeavour to facilitate the parties in finding a mutually acceptable outcome to resolve their differences whilst upholding and protecting the integrity of the Mediation process. The Mediator does not at any time throughout the Mediation process negotiate on behalf of one or either of the parties, and nor will the Mediator impose a settlement or outcome on the parties.

The independence and neutrality of the Mediator is, of course, crucial. Both sides must invest trust in him and the ability of a Mediator to build rapport with both parties is vital. During the process, the Mediator will receive and retain information that is wholly confidential to one party. He must be trusted to protect that information, unless and until he has permission to reveal it. Proper training, accreditation and evaluation of a Mediator is therefore vital, because the opportunity for settlement that Mediation provides can be lost [and a bad situation made worse] if the Mediator is insufficiently skilled.

4. A Voluntary Process

Mediation is an entirely voluntary process and at any time during the process any of the parties can withdraw from it and invoke appropriate formal procedures such as an organisational grievance procedure or refer the matter to an appropriate external third party forum. Likewise, if after having participated in the Mediation process a party is dissatisfied with the outcome they can invoke formal organisational procedures or refer the matter to an appropriate external third party forum.

5. Dispute Types Suitable for Mediation

Most types of workplace disputes can be mediated including bullying, harassment, sexual harassment, breakdown in working relations, contracts, job descriptions,

workplace change etc. For instance, in the Republic of Ireland since 2002 the Equality Authority's Code of Practice on Sexual Harassment and Harassment at Work has suggested that as part of the informal procedure for resolving such disputes, Mediation should be offered between the parties.

6. Key Factors

The employer is willing to consider referring the matter to Mediation and the parties involved in the dispute are of a like mind. Because the parties to the Mediation process are allowed to find their own solutions to the dispute without pursuing the matter through litigation there is a greater chance that 'normal' working relationship can be restored. Therefore, Mediation in the workplace is particularly good at re-establishing respectful, professional working relations. The sooner the Mediation process is adopted, the more successful and constructive the outcome is likely to be.

7. The Mediation Process

A typical Mediation process has six steps as follows:

Step 1

The Mediator holds a preliminary consultation with the point of contact for the employer and as a result of this meeting the mediator should:

- have details of the parties to the dispute to be mediated
- understand the nature and context of the complaint(s)
- establish whether or not the parties will be accompanied by an advisor
- establish if any formal procedures have been invoked or is the matter subject to pending legal proceedings
- appreciate the level of understanding the parties in dispute have about the process of Mediation

Step 2

The Mediator meets the parties individually to explain what the Mediation process is and to set down the ground rules. The agreement of the parties to mediate the matter will be formally sought.

Step 3

The Mediator meets the parties jointly to allow opening statements on the matters in dispute to be made by each party.

Step 4

Following on from the opening statements there is the process of fact finding and issue definition. This process can happen when the parties are together or each party can meet the Mediator in a separate room whereby this process of fact-finding and issue definition can be facilitated.

Step 5

Finding the solution(s). Through the process of joint discussion the mediator facilitates the parties to find win/ win solutions that are mutually acceptable.

Step 6

The solution(s) are captured on a formal agreement that is reviewed by each party to ensure that they are satisfied that the content reflects the understandings reached as a result of the Mediation process. The parties should then be invited to put their respective names to the agreement.

8. Incorporating the Process into the Employers Handbook

For Mediation to take place, the parties must agree to it. That could be ensured by building an agreed option for Mediation into internal grievance processes, or by individual agreement at any time. Having a Mediation stage built in has the added advantages of providing the option in all cases, and demonstrating a mindset of resolution, not of conflict, in the workplace.

9. Benefits of Mediation

Unlike other internal or external processes, Mediation works because the parties themselves provide the answers. No-one judges, decides or resolves the dispute, other than the parties. It is, after all, their dispute, and therefore a 'solution' will only work if they agree to it. The key to this is the focus that the Mediator puts on the future, not the past. Unlike other processes, which are designed to find out what has happened, Mediation focuses on what will happen, and, for example, how the parties will work together in the future, or how incidents of discrimination can be avoided.

Apparently, 80% of cases are resolved in one day, and most of the remainder settle shortly thereafter. Seemingly intractable internal grievances, complex claims for discrimination, and collective disputes are all areas where Mediation works, in addition to the more 'straightforward' claims, such as unfair dismissal. Equally, if you are trying to agree on changes in workforce structure, policies and procedures or are engaged in pay negotiations, Mediation is a way of resolving the dispute without publicity, and certainly without escalating the problem. It involves a more co-operative mindset than traditional negotiation.

10. How and when to Mediate

Do not be afraid to propose Mediation. It is not a sign of weakness - rather, it shows a willingness to resolve, not perpetuate, disputes. There are many Mediation service providers, and almost all Mediators will accept direct instructions. Many courts have Mediation schemes, and will advise on where to find Mediators. There is no 'set' form of Mediation, and the Mediator will guide the parties through the process. Not all disputes are right for Mediation. If a party is seeking to establish a precedent, then Mediation would not be right. Otherwise, almost all internal and post-termination disputes can be resolved through Mediation if the parties agree. If you believe that you have a case that is suitable for mediation, then ask either your lawyer, or a Mediation provider to discuss this with you. They should be able to explore whether or not the dispute is really appropriate for Mediation.

Partner in Morgan McManus obtains Certificate in Mediation Training

Having completed seminar attendance and assignments at the Queens University of Belfast last year Brian Morgan, partner in Morgan McManus Solicitors was awarded

a Certificate in “ADR and Mediation Training” on the 27th October 2004. The benefits of ADR (alternative dispute resolution) and Mediation training have been well recognised by the Courts. Continually, the Courts are encouraging parties to avail of Mediation in order to resolve disputes at minimum cost and expeditiously. Morgan McManus Solicitors have always been conscious of encouraging clients, whether they are in family, business or employment disputes, to resolve those disputes with least possible hurt to family or damage to business and the availability of this service to clients of Morgan McManus Solicitors will be of definite advantage.

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This Bulletin is intended as a general guide only. Care and attention has been taken to ensure the accuracy of the information in this Bulletin however, we advise that specific professional advice should be taken. Employment legislation is subject to change.