

# Model Employment ADR contract clauses

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## Model ADR Contract Clauses

### Why you should consider including an ADR clause in your employment contracts, policies and procedures.

As mediation in employment matters increases, organisations may wish to include clauses, and incorporate references to mediation (and other forms of conflict resolution) in their key policies, procedures and employment documentation. By entering into formal ADR/mediation agreements and establishing mediation services or schemes employers can manage conflict proactively and control risk factors in litigation.

CEDR Solve mediation schemes, procedures and policies, will promote best practice in employee relations and the employment environment. Employers, Trades Unions, groups of employee representatives and other stakeholders, may welcome such developments in modern dispute resolution and conflict management systems.

CEDR's preferred and recommended approach in developing mediation in organisations is by its consistent incorporation, throughout the employment environment, by means of mediation policies and agreements. In this way mediation can make a sustainable impact and contribution and be an integral part of an organisation's culture. It is however, recognised that as mediation is a developing field its introduction to organisations may be in incremental phases.

Even if mediation policies are not adopted fully in the first instance, including contract clauses and/or statements of intent within your employment procedures, will encourage parties to attempt to settle a dispute by some form of ADR. Simply put this should increase the chances of settling any such dispute before, the parties resort to litigation or arbitration.

The advantages of inserting ADR/Mediation clause/s include:

- Prompting the parties to consider a process that may not necessarily occur to them
- Introducing a specific process, giving the parties a clear framework for exploring settlement
- Involving a neutral third party through the mediation process trained to work with parties to facilitate communication that is geared towards an agreed *and lasting* settlement
- Changing the focus for the parties away from the events of the past towards potential solutions and the needs of the future
- Keeping and/or moving the negotiation out of the public arena through the mediation process
- Providing substantial savings in legal and management costs, freeing up the business for more productive endeavours by achieving an early resolution to the dispute
- Achieving a binding solution - over 70 per cent of mediations reach an agreed and binding solution despite earlier impasse.

- An ADR/ Mediation clause may well pre-empt the parties seeking recourse to an Employment Tribunal and provide for the process to take place on the parties' own pre-agreed terms.

### **How**

For any clause or policy statement to be effective the draftsman needs to understand which policies and procedures it will impact and how this may be best managed within their own employment environment. It is best that any individual drafting mediation clauses and policies has a sound understanding on ways, in which mediation can be used in employment matters and in organisations.

The following is - are a few of the issues a draftsman may wish to consider.

#### **1 Decision makers**

Do you want to identify the likely decision makers who may be engaged in the ADR process e.g. HR Director, CEO? It is not strictly necessary, you can simply refer to the parties, leaving the decision to the relevant time. In any mediation scenario the parties to the dispute are always encouraged to come with full authority to finalise and settle matters.

#### **2 Stakeholders/Potential Parties to the dispute**

For a mediation clause/ policy to be effective in the employment environment (as with any employment policy) it must reflect the interests, rights and obligations of the individual employee and of any collective or representative groups e.g. Trades Unions. It is, of course, advisable that employers inform and consult with their employees, on the introduction and development of any mediation policy within the organisation as early as possible.

#### **3 Pre-litigation**

Do you want to attempt the ADR process before any adversarial process begins? The opportunity for settlement may be greater before the lines of battle have been drawn by a hostile step of commencing proceedings/arbitration. An Employment Tribunal may be requested to delay a hearing date to allow parties to honour their agreement to mediate.

#### **4 Singular clause or embedded within a Mediation policy?**

Do you want to use a singular clause or statement of intent within the employment contract, or embed ADR principles and possibly a mediation scheme or service that ensures the consistent promotion of the use of ADR processes across all policies and procedures as your organisation? Here choices may include whether to move straight to mediation or for example to provide for direct negotiations followed by mediation if the negotiations fail. In deciding resource impact and implications of either need consideration.

**5 Time limits / time span**

What time frame do you want? You may wish to provide for a clear process and timetable illustrating stages of procedure where mediation might be most appropriately used. In the employment context, do you want to differentiate how mediation might be used in certain post-employment situations? You may also wish to clarify whether you want the mediation to take place before or during an adversarial or whether you want to leave your options open.

## Model clauses

### 1 Core mediation clause for an employment contract

#### Core wording - for a “dispute or disagreement during employment”

“If any dispute, complaint or disagreement arises in connection with this employment contract, the parties will first attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure.

Unless otherwise agreed between the parties, the mediator will be nominated by CEDR. Mediation will be entered into both voluntarily and in good faith and neither party, by entering into such a process will waive their respective statutory or contractual employment rights.”

#### Notes for the drafts person

In drafting such clauses it is important that a clear process for mediation and its trigger mechanisms are properly described. References to CEDR and/or the CEDR Model Mediation procedure may be appropriate if the organisation has a scheme or intends to use CEDR’s services.

Organisations may also wish to identify a ‘custodian’ of the process i.e. naming the individual responsible for setting up the mediation process and under what authority? E.g. In relation to a senior contract -Would this be the HR Director, Chairman of the Remuneration Committee or the Company Secretary?

Options on when the mediation should take place should be left open or clarified e.g. before or during an adversarial procedure (such as an Employment Tribunal)

As in Notes pages 4-6 references to timing, notification and legal or Tribunal proceedings may be equally appropriate.

## **2 Core mediation clause where there is a mediation policy or collective agreement in place**

### **Core wording - for a “dispute or disagreement during employment”**

‘In any claim or dispute arising out of, or related to this agreement or to any aspect of the employment relationship including statutory claims, the matter may be dealt with by mediation under the terms of the Company’s agreed ADR/Mediation policy/scheme.

This will include without limitation, all matters relating to the contract’s formation, and validity, binding effect, interpretation, performance, breach or termination.

The mediator will be nominated by CEDR in accordance with the (agreed) Mediation policy and scheme”.

and /or

“Under the terms of a Company agreed ADR policy, mediation is a voluntary process, which is only conducted with the agreement of the parties in dispute. Either, or, any party in a dispute is encouraged to suggest mediation as a way of resolving a difference or dispute. Parties in any disagreement or dispute are requested to fully consider, resolving their differences through mediation, before taking any legal action”.

### **Notes for the drafts person**

Organisations may draw up their own ADR / Mediation policies and refer to these in their employment contracts. In cases, where a CEDR Mediation employment scheme or service exists they may wish to include some reference to this. Where such a service is part of a Works Council agreement or where policy which has been agreed with any Trade Union or employee representative groups, this should also be stated.

Some organisations may use ‘internal mediators’ in the first instance. A scheme should be clear on when and in what instances an external mediator from CEDR might be appointed.

A Mediation Policy might give examples of the types of disputes, which would be most suitable for mediation. It might reserve its position on the voluntary nature of mediation, but emphasise the appropriateness of mediation prior to any form of external litigation.

Payment for mediation also needs to be clarified. If the employer suggests that it might pay all the costs of mediation, does this need to be monitored in some way? Is payment of costs necessary to encourage parties to mediate and resolve their differences or might these be perceived as putting a party under duress to mediate?

Employers are also advised to make a clear distinction between mediation costs and ‘costs to the employee of their own advisor’s costs’ so that there are no misunderstandings.

### 3 Core mediation clause within a disciplinary and capability procedure and policy

#### Core wording

“The most appropriate course of complaint regarding any action taken within this procedure will normally be through the Appeals Procedure”.

“This does not prevent either party or their adviser suggesting an attempt to resolve the difference by mediation. If this is acceptable, to both parties, an independent mediator will be nominated by CEDR, as detailed in the Company’s agreed Mediation policy and scheme”

If mediation is agreed the disciplinary process may be suspended at the **absolute discretion** of the Company. In the event that the mediation does not resolve the dispute the disciplinary and appeal process shall immediately be reinstated at the conclusion of the mediation.

#### Suggested Optional Clauses

“At any stage of the process, the designated senior manager or Director responsible for people and employment matters (the HR Director) may intervene and suggest mediation or an independent evaluation of the case by a CEDR mediator”.

“If the policy and appeals procedures have been exhausted, the employer may, in appropriate cases agree to meet the whole or greater part of the cost of the mediation but not the cost of legal representation, in an attempt to reach a settlement prior to any Tribunal or legal proceedings.”

#### Notes for the drafts person

If disciplinary and capability procedures are operating effectively and applied fairly and consistently, then it is anticipated that the majority of employers may not always consider it appropriate for disciplinary matters to be mediated. There will be situations in the implementation of these policies, which are definitely non- negotiable and instances where an independent’s intervention is not appropriate. In this context organisations may, however, wish to refer to mediation and to its voluntary nature, particularly if they have mediation policies.

It may also be appropriate to advise and remind parties to consider mediation prior to any legal action.

Companies and employees must take care to observe the statutory disciplinary procedures and to ensure that any mediation process is placed into this procedure in a way that does not compromise rights nor render either party vulnerable to penalties.

Other issues, as above, are costs and timing and whether a ‘status quo’ should be applied, whilst matters are ‘being resolved’. For example is there a Mediation agreement or policy that costs of mediation are split or met by the employer? Are there ‘internal mediators’ within the organisation’s scheme, who could be used?

If mediation is to be incorporated into disciplinary and capability procedures and processes or even be available alongside, it is also emphasised again that the custodians of such employment policies have a sound understanding of when mediation is most appropriately used. Without this the process may be devalued.

#### 4 Core mediation clause for fairness at work policies and procedures

##### **Core wording – applied consistently across grievance, diversity, anti-bullying / harassment and whistle blowing policies**

“An employee and his or her manager should endeavour to resolve the grievance (matter of difference) between them in the first instance under the normal terms of this policy”.

“The Company operates an (agreed) Mediation policy and procedure. Disputes and differences are best resolved at the earliest stage possible. If either the employee or manager considers that the matter might be best resolved through mediation they should refer it to (as stated in the policy).”

“An employee participating in a mediation to resolve an issue under this policy will not subsequently be debarred from either commencing or taking such procedures further, including the statutory grievance procedure if the matter is not resolved by mediation.”

##### **Notes for the drafts person**

Some of the issues above on Disciplinary and Capability policies will also apply to these Fairness at Work policies.

Companies /employers should also ensure that the statutory dismissal and disciplinary procedures are observed.

Different organisations will have large variety of channels and approaches for employees to raise concern on work related issues. Fairness at Work policies will be an expanding list e.g. sex discrimination, age discrimination and many of these key issues will have their own separate policies and procedures.

Mediation will work particularly well at different stages of such policies and procedures, as it encourages both parties to take joint ownership and responsibility for resolving such problems.

It is preferable, however, that the organisation also has properly developed Dispute Resolution / Mediation Policies and procedures, which put an emphasis on early dispute resolution

In summary, organisations should consider the ‘stages’ at which mediation should be offered in these procedures, the sort of resources and costs involved as well as the following:

- Should managers endeavour to resolve such disputes in the first instance?
- Should there be a gateway?
- Is there a policy custodian?
- Are there ‘internally’ trained mediators to deal with such issues?

- When should an 'external' CEDR Solve mediator be appointed?

Most policies will have their own Appeals processes. Many organisations will prefer mediation to run alongside these, rather than replace them.

It would almost always be appropriate to encourage the use of mediation, prior to any legal action.