

Model Mediation Clauses and Mediation in Employment Policies



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This publication is intended as a guide and cannot cover every specific situation. Readers should take legal advice before applying the information covered in this publication to specific issues. CEDR accepts no liability for any issue arising out of a dispute over the usage of these clauses.

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Employment and Workplace Mediation - Adding Value to your Business

1 The Centre for Effective Dispute Resolution's (CEDR's) recommended approach in developing mediation in organisations is by full incorporation into the workplace and the employment environment through clear and relevant **Mediation Policies** as well as internal training in dispute resolution and conflict management skills. In this way mediation can make a sustainable impact and contribution and be an integral part of an organisation's culture.

2 CEDR is a not-for-profit body that offers mediation schemes, procedures and policies to promote best practice in employee relations and the employment environment. CEDR has established a history of mediating employment and workplace disputes in all sectors and at all levels of complexity over the last two decades. Employers, employees, Trades Unions, employee representatives and other stakeholders refer to CEDR for up to date guidance, experience, training and thought leadership on modern conflict management systems. CEDR Contract Clauses are widely recognised in business and legal contracts.

Why organisations should consider including mediation clauses in employment contracts and policies

3 By establishing independent mediation arrangements such as mediation schemes, employers can manage conflict proactively and consequently reduce the prospect of litigation and the negative impact that accompanies adversarial proceedings or relationships, whilst frequently saving substantial costs.

4 Mediation has many significant benefits other than costs savings. The process enables confidential dialogue in a safe environment, it is quick to set up and it can help to preserve and even rebuild relationships.

5 Mediation was given particular attention in the Gibbons Review of employment dispute resolution in 2007 and the Employment Act 2008. Following these ACAS (the Advisory, Conciliation and Arbitration Service) introduced mediation in the foreword of its statutory Code of Practice on disciplinary and grievance procedures, reviewed in 2015: *“Employers and employees should always seek to resolve disciplinary and grievance issues in the workplace. Where this is not possible employers and employees should consider using an independent third party to help resolve the problem. The third party need not come from outside the organisation but could be an internal mediator, so long as they are not involved in the disciplinary or grievance issue. In some cases, an external mediator might be appropriate.”*

6 The UK Government's response to its 2011 consultation 'Resolving Workplace Disputes', states "We are even more convinced about the role that mediation can play, as one of the forms of early dispute resolution. There is much work to be done in the coming months and years to change attitudes to mediation and embed it as an accepted part of the dispute resolution process". As mediation in employment and workplace disputes increases, organisations may wish to include clauses, incorporating references to mediation in their key policies and employment documentation including employment contracts.

Benefits of mediation and references to it

7 Simply put mediation will always increase the chance of settling any dispute. This is especially the case for those disputes which are still at an early stage before the parties have become polarised, however, mediation can be effective at any stage of the process. Effective mediation will generally save costs and resources, reduce hurt and stress, and solve problems through dialogue rather than litigation. The particular benefits of inserting mediation clause(s) in contracts of employment and cross referencing into other employment policies include:

- a. Prompting the parties to consider a voluntary and confidential process that may not otherwise necessarily occur to them.
- b. Saving employees from a great deal of stress and anguish as grievance procedures can often exacerbate problems and make issues that are difficult more complicated.
- c. Resolving matters between individuals as speedily as possible given that mediations are easy and quick to set up.
- d. Introducing a specific process which gives the parties a clear framework for exploring different forms for finding resolution and settlement in a safe and objective way.
- e. Involving a neutral third party through the mediation process, trained to work with parties to facilitate communication geared towards understanding each other's issues and working towards an agreed and lasting settlement.
- f. Changing the focus of the individuals away from past events and towards potential solutions and their needs for the future.
- g. Keeping and/or moving the negotiations out of the public arena (or shop floor/office) through the confidentiality of the mediation process and thus allowing the parties to explore options and outcomes with a sense of freedom.
- h. Providing substantial savings in legal and management costs, freeing up the organisation for more productive endeavours by achieving an early resolution to the dispute - 70% of mediations (that fall under the auspices of the Civil Mediation Council, including workplace mediations) settling on the day, and another 15% shortly thereafter.
- i. Achieving a lasting solution - the settlement agreement is built and owned by the parties, reinforcing its impact and placing it on a long-term perspective.
- j. Mediation clauses 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.

The Scope of Mediation

Employment or Workplace mediation?

8 Workplace mediation is referred to as a conflict resolution procedure where the conflict principally concerns general work relationships and work arrangements rather than concerns about legal rights. It is often commissioned by the Human Resources department to resolve conflicts between employees. The process will focus on the existing relationship, seek to avoid the escalation of the conflict to re-create sensible dialogue between the parties, and help them find lasting resolution by agreement and, if possible, repair the relationship.

Employment mediation refers to a dispute resolution process where the dispute is conducted principally within the framework of questions of legal rights. Legal representatives are often engaged, and the mediation process offers a safe and positive alternative to an employment tribunal or the courts. It mainly focuses on securing a deal acceptable by both parties, saving time, money and reputation and thus avoiding the potentially negative consequences and distractions of legal proceedings.

The terms are not exclusive.

External and internal mediators

9 By definition, a mediator is a person acting as a third neutral party to resolve a conflict or a dispute between two or more persons or groups. In the employment and workplace environment, two types of mediators can intervene to help resolve disputes: internal and external. It is important they should possess a recognised training and accreditation.

External mediators are professionals from outside the company who are experts in facilitating and mediating disputes and/or conflict, using the mediation process to find a lasting settlement. They often have a wide experience in mediating different types of disputes.

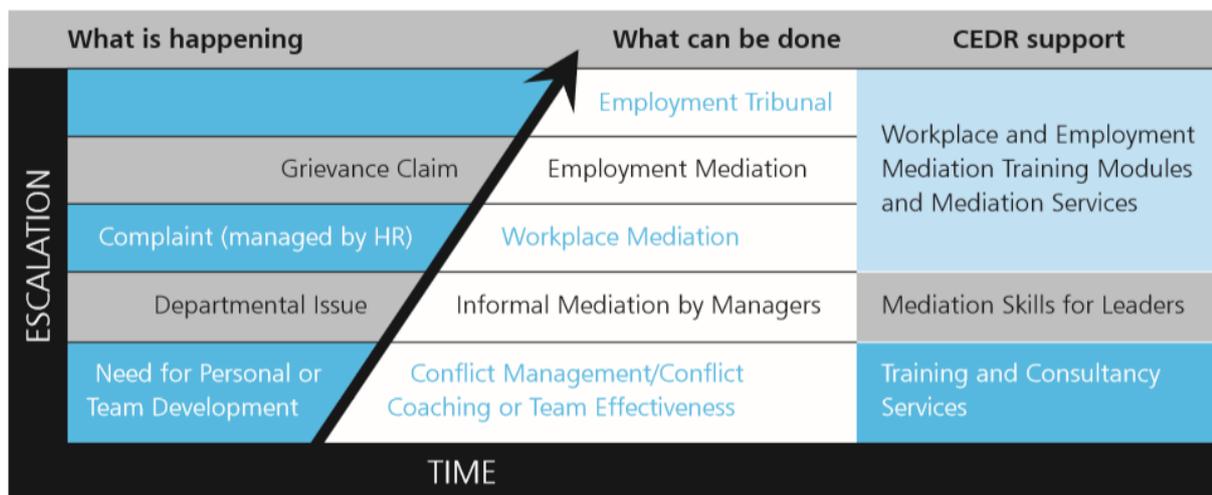
Internal mediators can either be an internal professional dedicated to handling conflicts and difficulties within the organisation (which can be the case for large groups dealing with tense relationships on a daily basis) or they can be a nominated person within the organisation, such as a member of the Human Resources team, who can be called when a difference arises between two staff members.

Internal or external mediators both have their own different advantages, and can be used equally in employment and/or workplace cases although external mediators are more often used for employment cases:

USING AN INTERNAL MEDIATOR	USING AN EXTERNAL MEDIATOR
<ul style="list-style-type: none"> Easy and quick to set up 	<ul style="list-style-type: none"> Stronger neutrality
<ul style="list-style-type: none"> Informal approach 	<ul style="list-style-type: none"> Formal approach
<ul style="list-style-type: none"> Knowledge of organisational culture 	<ul style="list-style-type: none"> Wider experience of organisational conflict
<ul style="list-style-type: none"> Ease of access for staff 	<ul style="list-style-type: none"> Brings a fresh eye to the situation
<ul style="list-style-type: none"> High emphasis on joint meetings 	<ul style="list-style-type: none"> Better interaction with legal representatives
<ul style="list-style-type: none"> Set up to create a lasting peaceful environment 	

Mediator services regarding employment and workplace mediations 10 The practice of mediation has a wider scope than simply 'resolving disputes'. The skills taught to the mediator can be shaped to tackle issues at any stage. Simply put, we can designate three levels of action on conflict: analysing a situation that breeds conflicts, preventing the appearance and/or recurrence of issues through bespoke recommendations, consulting and training, and resolving any conflict or dispute.

ESCALATION OF CONFLICT:



1 There are certain situations within the operation of disciplinary and grievance procedures that particularly lend themselves to mediation, or where the mediators' skill sets can be most relevant, such as disputes on contracts and severance arrangements or disputes following dismissal (possibly within the appeal process). Mediation can then provide the possibility for settlement prior to an employment tribunal.

2 At an individual level, the spectrum of outputs from mediation may well range from handling a board director's termination arrangements, to reconciliation in a peer-to-peer relationship that has fallen apart. In other instances, the use of a mediator may bring a valid contribution at any stage of a grievance procedure. Use of mediation strategically also encourages organisations to work more effectively within themselves, and try to resolve differences as they emerge, where both damage and costs are limited.

3 Mediation can also be an excellent process for collective resolution (e.g. involving industrial action, changing work practices, restructuring, major redundancy plans, etc.). Most of all, it offers the opportunity for genuine joint and collaborative working, and 'win-win' solutions. As it develops within the organisation, mediation may have the power and potential to profoundly change the conduct of both industrial and employee relations.

4 Preventing and reducing emerging conflicts can save time, anguish and improve business effectiveness. Certainly, mediation, timely conflict resolution interventions, and the use of mediation skills can resolve differences at any organisational level, whether they are collective, multiparty or individual.

How to Introduce Mediation

5 For any Mediation policy statement to be effective the internal author will need to understand its impact on other employment policies and procedures. It is important that any individual drafting either a mediation policy or mediation clauses has a sound understanding of the different ways in which mediation can be used most effectively in employment and workplace matters throughout organisations.

6 From CEDR's experience the most appropriate ways of introducing and establishing the use of mediation is through a separate Mediation policy with accompanying guidelines for use within the organisation. Mediation is still relatively new in some organisations and is not a process that the majority of people will be involved in more than once. Answers to frequently asked questions and details on the process, including information about the way in which mediations are conducted, within that particular organisation, can often be very helpful and reassuring to both managers and employees of all levels of seniority.

7 CEDR can work with an organisation and its stakeholders to produce effective Mediation policies, processes and guidelines which are aligned to the organisation's employment environment. It can also advise organisations on drafting mediation agreements and settlements. This can be done very quickly and easily, and for a discussion and guidance on this matter please contact CEDR on +44 (0)207 536 6000 or email adr@cedr.com.

8 CEDR recommends that in organisations where there is a Mediation policy this should be cross-referenced to other relevant employment policies and documents. Examples of employment and workplace clauses are shown overleaf. These are for cross-referencing in employment contracts and grievance, capability and disciplinary procedures and refer to mediation as a way of resolving a dispute between employee(s) at all levels, or between employee(s) and the employer, using external an external or internal mediator according to the situation.

Model Clauses

The sample model clauses below are given to suit particular circumstances and can be used to assist in drafting employment documentation.

Core mediation clause for an employment contract

CORE WORDING

for a dispute or disagreement in connection with employment contract

19 “If any dispute, complaint or disagreement arises in connection with this employment contract, the parties will consider resolving it by mediation in accordance with the Company’s Mediation Policy (and if appropriate refer to the CEDR model mediation procedure) before engaging in any adversarial procedure. Unless otherwise agreed between the parties, the mediation service provider, CEDR, will nominate the mediator. Mediation is a confidential process and 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.”

CORE WORDING

for a conflict or disagreement during employment

20 “If any conflict, disagreement or complaint arises between employees during employment, and the parties have not been able to solve it through existing non-adversarial procedures, the parties shall consider resolving it by mediation in accordance with the Company’s Mediation Policy (and if appropriate refer to the CEDR model mediation procedure). In order to trigger mediation the matter should first be referred to XXXX (as stated in the Company’s Mediation Policy). Unless otherwise agreed between the parties, the mediation service provider, CEDR, will nominate the mediator. Mediation is a confidential process and will be entered into voluntarily and in good faith, and neither party, by entering into such a process will waive their respective statutory or other legal rights.”

Model Clauses

Core mediation clause for fairness at work policies (particularly grievance policies and procedures)

CORE WORDING

for grievance, diversity, anti-bullying/ harassment and whistle blowing policies

21 “An employee and his or her manager should endeavour to resolve the grievance (matter of difference) between themselves 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 the matter to XXXX (as stated in the Company’s Mediation Policy). An employee participating in mediation to resolve an issue will not be debarred from either commencing or taking such procedures further through the Company’s grievance procedure if the matter is not resolved by mediation.”

CORE WORDING

for disciplinary and capability procedures

22 “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 the mediation service provider, CEDR, as detailed in the Company’s agreed Mediation Policy.”

“If mediation is agreed the disciplinary/capability procedure may be halted temporarily at the discretion of the Company. In the event that the mediation does not begin, or does not resolve the dispute, within a reasonable time period, the disciplinary/capability procedure and appeal process shall normally be reinstated.”

Accompanying Guidelines for Mediation Policies or Clauses

The Guidelines should be drafted around the organisation's culture and existing procedures. There are some key elements that should be present in such a document, in order to clarify the purpose, the process and the applicability of mediation. The following points should be considered when drafting the Guidelines for Mediation Policies.

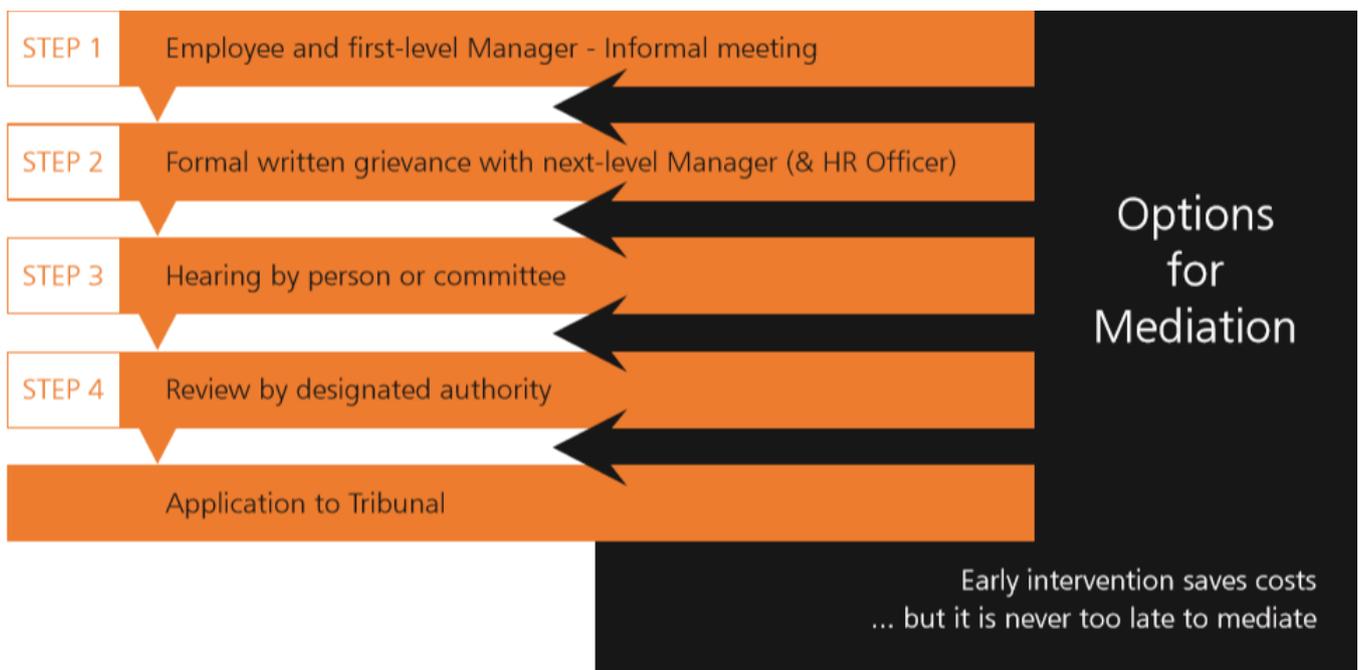
Mediation accessible at all stages of a dispute or difference

23 It is important for an employer to think in advance about the circumstances in which it may enter into mediation. CEDR's recommendation is that Mediation is available as an option throughout all the stages of a dispute, but it is best to try and solve matters as early as possible and certainly before any adversarial or litigious process develops. In some instances an Employment Tribunal may be asked to stay the case or postpone a hearing date to allow parties the opportunity to mediate. The diagram below shows how an organisation may allow the opportunity for mediation at different stages of a Grievance procedure.

MEDIATION AND EMPLOYMENT POLICIES

Grievance Policy

Mediation Policy & Guidelines



Accompanying Guidelines for Mediation Policies or Clauses

Introducing Mediation

24 Guidelines accompanying a Mediation policy should explain the mediation process clearly and describe how this is authorised and set up within the organisation. References to CEDR and/or the CEDR model mediation procedure may be appropriate if the organisation has a Mediation Policy or scheme and intends to use CEDR's services.

25 Organisations have a large variety of approaches for employees to raise concern on workrelated issues. 'Fairness at work' and Equality policies will be an expanding list, for example, sex discrimination, age discrimination, harassment and bullying and many of these key issues will have their own separate policies and procedures. Where Mediation policies exist they should be cross-referenced appropriately so that employees recognise their alignment.

Expectations regarding mediation

26 Any guidelines should make it clear that Mediation is an informal yet serious process and that both parties will need to put effort into case preparation and presentation and that often sensitive and highly emotional matters are raised. In their guidelines, organisations need to explain that whilst on the one hand it is important that sufficient time and support is allocated to mediation, there do need to be some controls and boundaries on its use.

Custodian or gatekeeper

27 Organisations may also wish to identify a 'custodian' of a Mediation scheme or service, which is, naming a role within the organisation and/or an external body, such as CEDR, responsible for setting up the mediation process and clarifying their authority to do so. This may be particularly important where an external Mediation provider such as CEDR is involved and the employer is paying all the costs to ensure that the service is used sensibly and not abused. Similar issues also arise where internal mediators are used.

Reference to Trades Unions and other stakeholders

28 For a Mediation Policy to be effective in the employment environment (as with any employment policy), it should reflect the interests of the individual employee and of any collective or representative groups, for example, Trades Unions, professional organisations etc.

29 It is often good practice for employers to inform and consult with their employees, on the introduction and development of any Mediation Policy or mediation scheme. Organisations who have introduced mediation with the active engagement of their employees, Works Councils, recognised Trades Unions and other employee consultative groups find that this has many positive benefits. CEDR is also very well equipped to help organisations raise mediation awareness and to communicate how mediation works.

Accompanying Guidelines for Mediation Policies or Clauses

Using external/internal mediators

30 The benefit of using an independent provider such as CEDR is that mediators have a more varied experience in handling difficult disputes across different organisations. Furthermore as they are external to the organisation CEDR mediators are completely uninvolved and objective in any dispute situation. Many organisations, therefore, will only use external people to mediate when matters cannot be resolved through normal management channels.

31 However, some organisations prefer to try and resolve matters 'in house' through the use of internally trained mediators in the first instance and if so this should be explained in their Mediation Policy and Procedure. Guidelines to a Mediation Policy might also give examples of the types of disputes, which would be most suitable for internal mediation, but should also clarify the circumstances and the type of instances where an external mediator might be appointed.

Costs of mediations

32 Any payment for mediation needs to be clarified in any Guidelines, and employers need to take care that there are mechanisms to monitor costs. Employers are also advised to make a clear distinction between mediation costs and 'costs to the employee of their own adviser's costs' so that there are no misunderstandings. There are no set rules on this matter the important issue is that the situation is clear to the parties at the outset so confusion does not arise later on.

33 **Suggested paragraph regarding costs for use in Mediation Policies/Guidelines:** "At any stage of the process, the designated senior manager [the HR Director] may intervene and suggest mediation 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, in an attempt to reach a settlement prior to any tribunal or legal proceedings. The employer will not be responsible for any costs to the employee of their own adviser's costs, nor for any party's costs and expenses for preparing and attending the mediation unless otherwise agreed."

Particular issues within a disciplinary and capability procedure and policy

34 From CEDR's experience many employers will have reservations about the appropriateness of mediating in disciplinary and capability situations, particularly if they believe their processes have been fairly applied. There will be situations, for example, cases of gross misconduct, which are non-negotiable where a mediation process aimed at co-operative resolution may be considered inappropriate.

35 However, mediation is a very flexible process and is always going to be cheaper than tribunal or litigation. Some form of independent intervention by an experienced mediator may therefore be suitable in relation to the circumstances of the case. The wording suggested, above in paragraph 22, leaves matters 'open' by allowing either party the opportunity to suggest mediation. It will never do any harm to remind parties to consider mediation prior to any legal action.

If you have any questions that are not covered here please refer them to your lawyer, or to CEDR or Trust Mediation who will be happy to help. To discuss a mediation in confidence, contact the CEDR team on:

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