WHY CONSIDER MEDIATION IN EMPLOYMENT CONTRACTS AND POLICIES

The recommended approach in developing mediation within organisations is by its full incorporation into the employment environment through clear and relevant **Mediation Policies**. In this way mediation can make a sustainable impact and contribution and be an integral part of an organisation's culture.

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, also frequently saving substantial costs.

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 invariably it can help to both preserve and rebuild relationships.

Mediation was given particular attention in the Gibbons Review of 2007 and following this ACAS (the Advisory, Conciliation and Arbitration Service) recognised the benefits of mediation within organisations suggesting its use at the earliest point of a disagreement or dispute.

The ACAS Code of Practice (April 2009) on disciplinary and grievance procedures is accompanied by a new non-statutory guide, that provides information on handling such matters in the workplace and suggests the use of mediation to resolve matters of disagreement. 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

Simply put mediation will always increase the chance of settling any dispute as at early a stage as possible, before the parties become polarised and the matter causing concern festers disproportionately. 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:

- prompting the parties to consider a process which is voluntary and confidential that may not otherwise necessarily occur to them
- 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
- resolving matters between individuals as speedily as possible given that mediations are easy and quick to set up
- introducing a specific process which gives the parties a clear framework for exploring different forms of resolution and settlement in a safe and objective way
- 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
- changing the focus of the individuals away from past events and towards potential solutions and their needs for the future
- keeping and/or moving the negotiations out of the public arena through the confidentiality of the mediation process and thus allowing the parties to explore options and outcomes with a sense of freedom

- providing substantial savings in legal and management costs, freeing up the organisation for more productive endeavours by achieving an early resolution to the dispute
- achieving a binding solution – more than 90 per cent of mediations reach an agreed and binding solution, despite any earlier impasse
- 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.

INTRODUCING MEDIATION

Catalyst and it's specialist team 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.

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.

From our 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 or regularly. 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.

We would suggest that in organisations where there is a **Mediation policy** this should be cross-referenced to other relevant employment policies and documents. Example clauses are shown below. 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) and the employer.

SAMPLE MEDIATION CLAUSE FOR AN EMPLOYMENT CONTRACT

Wording – for a "dispute or disagreement during employment":

"*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. 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.*"

"*Parties in any disagreement or dispute should consider, resolving their differences through mediation, before contemplating any other more adversarial or legal action.*"

MEDIATION CLAUSE FOR FAIRNESS AT WORK POLICIES (PARTICULARLY GRIEVANCE POLICIES AND PROCEDURES)

Wording – for 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 themselves in the first instance under the normal terms of this policy. The Organisation 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 Organisation'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 Organisation's grievance procedure if the matter is not resolved by mediation."

Core wording for disciplinary and capability procedures
"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 HR, as detailed in the Company's agreed Mediation policy and scheme."

"If mediation is agreed the disciplinary/capability procedure may be halted temporarily at the discretion of the Organisation. In the event that the mediation is not appropriate or does not resolve the dispute, the disciplinary /capability procedure and appeal process shall normally be reinstated".

ACCOMPANYING GUIDELINES FOR MEDIATION POLICIES OR CLAUSES

Mediation is accessible at all stages of a dispute or difference

It is important for an employer to think in advance about the circumstances in which it may enter into mediation. Our 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. In Scotland many Tribunal judges are trained mediators and may suggest mediation at any stage of a case.

REFERENCE TO MEDIATION

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 the internal mediation Co-ordinator and/or the internal mediation procedure may be appropriate.

Organisations have a large variety of approaches for employees to raise concern on work-related 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 RE MEDIATION

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.

REFERENCE TO TRADES UNIONS AND OTHER STAKEHOLDERS

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.

It is 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.

USING EXTERNAL/INTERNAL MEDIATORS

Many organisations will only use external people to mediate when matters cannot be resolved through an internal team or normal management channels. The great benefit about using an independent provider is that mediators will always be much more experienced in handling difficult disputes. Furthermore as they are external to the organisation external mediators are completely uninvolved and objective in any dispute situation. Where external mediators are to be used they should be chosen either on a case by case basis from the Scottish Mediation Register (www.scottishmediationregister.org.uk/) or from a commercial panel under a fixed term contract.

COSTS OF MEDIATIONS

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 should also make a clear distinction between mediation costs and "costs to the employee of their own adviser's costs" (where an employee wishes to use their own legal advisor) so that there are no misunderstandings. There are no set rules on this, the important issue is that the situation is clear to the parties at the outset so confusion does not arise later on.

SUGGESTED PARAGRAPH RE COSTS FOR USE IN MEDIATION POLICIES/GUIDELINES:

"*At any stage of the process, the designated senior manager (the HR Director) may intervene and suggest internal mediation or an independent external 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.*"

PARTICULAR ISSUES WITHIN A DISCIPLINARY AND CAPABILITY PROCEDURE AND POLICY

From our 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 clearly inappropriate.

However, mediation is a very flexible process and is always going to be cheaper than 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, 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.