

Circular Title: Use of Mediation as an Alternative Dispute Resolution mechanism in the resolution of workplace, contract and other disputes.

File Reference: DPE-228-001-2017

I am directed by the Minister for Public Expenditure and Reform to say that the following will apply in relation to the use of mediation in the resolution of workplace, contract and other disputes involving Government Departments/Offices and public bodies.

Circular Number: 17/2017

Purpose: To oblige managers to consider the use of mediation in the resolution of workplace, contract and other disputes involving Government Departments/Offices and public bodies using the guidance set out in this circular.

Circular Application: To All Departments and Offices, and all public bodies coming under their aegis. Each Department and Office is required to implement this Circular and to bring it to the attention of all bodies and authorities operating under their aegis, and to ensure that appropriate steps are taken to implement it.

Relevant Law/Guidance: Workplace Relations Act 2015
Mediation Act 2017
Public Financial Procedures
Code of Practice for the Governance of State Bodies

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1. Purpose

- 1.1. The purpose of this circular is, subject to the exceptions set out at section 4, to oblige managers to consider the use of mediation in the resolution of workplace, contract and other disputes involving Government Departments/Offices and public bodies. This circular sets out the factors to be considered when deciding which disputes are appropriate for resolution using mediation, and provides guidance to ensure that the use of mediation is encompassed under public financial management procedures.
- 1.2. While many disputes are capable of being resolved by direct engagement, where it proves not possible to arrive at a solution in this way mediation must be considered as an alternative approach to dispute resolution before having recourse to a third party (court/arbitration/adjudication).
- 1.3. This circular is directed to all public officials but is particularly relevant to managers with responsibility for handling the resolution of disputes and for addressing the financial implications thereof. When considering mediation as a means to resolve a dispute managers should ensure that the guidance and procedures set out in Parts 4 and 5 below are followed.

Background

- 1.4. Government policy is to promote mediation. The stated objective of the recently enacted Mediation Act is to promote mediation as a viable, effective and efficient alternative to court proceedings, thereby reducing legal costs, speeding up the resolution of disputes and relieving the stress and acrimony which often accompanies court proceedings. Under the Act, a new obligation is imposed upon practising solicitors and barristers to advise parties to disputes to consider utilising mediation as a means of resolving the dispute and provides that a court may also invite the parties to consider mediation.
- 1.5. The benefits afforded by mediation in the resolution of disputes have been increasingly recognised. IGees and the Comptroller and Auditor General have recommended the benefits that mediation can offer by way of resolving disputes in an efficient and cost-effective manner¹. The State Claims Agency highlights the opportunity mediation affords to resolve cases in a calmer, less adversarial environment. The *Dispute Resolution Guidance Note* issued by the Office of Government Procurement also highlights the flexible process that mediation affords and the advantage of parties retaining greater control.
- 1.6. Widespread provision for the use of mediation already exists in the civil and public service, particularly in relation to workplace disputes. Some civil service examples include the Civil Service Dignity at Work Policy (DPER Circular 10/2015) which promotes early and local resolution of complaints and the use of mediation to resolve issues wherever possible, and the Civil Service Grievance Procedure (Finance Circular 11/2001) which provides for mediation where a civil servant is not satisfied with the decision of management on a complaint. The revised *Code of Practice for the Governance of State Bodies* (August 2016) also encourages the use of mediation for resolving legal disputes between State Bodies

¹ See <http://stateclaims.ie/wp-content/uploads/2014/05/SCA-May-2014.pdf>; Irish Government Economic and Evaluation Service 'Public Expenditure on Legal Services – Avoid, Minimise, Recover', Expenditure Report, 2013 See <http://igees.gov.ie/wp-content/uploads/2014/02/Public-Expenditure-on-Legal-Services.pdf>; DPER Circulars 07/2011 and 09/2016

before expensive legal costs are incurred. Further well-developed approaches to the use of mediation in the public service, other than in a workplace context, already exist or are in development in the health and education sectors.²

- 1.7. Notwithstanding the provision that currently exists for the use of mediation as an efficient and cost-effective Alternative Dispute Resolution mechanism, this recourse does not appear to have been used by civil and public service managers as much as might have been expected. In line with the objectives and provisions of the Mediation Act, this circular places an obligation on managers in the civil and public service to first consider the suitability of mediation as a means to resolve a dispute prior to referral to a third party (court/arbitration/adjudication) using the guidance set out in this circular. It should be noted that mediation is without prejudice; where an agreement is not reached or a party withdraws from the process, other dispute resolution processes can subsequently be pursued.

² For example, the Minister for Education, published in December 2016 a draft Bill to introduce a new Parent and Student Charter which will provide for, inter alia, a ‘... fair and accessible mechanism for resolving complaints, including through mediation’.

2. Mediation

Definition

- 2.1. Mediation means a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.³

Principles

- 2.2. The principles of mediation consist of:

- **Confidentiality:** The Mediator will not disclose any information about the parties, the content of or the outcome of the mediation to anyone not involved in the mediation, unless they have the express consent of all the parties to do so.⁴
- **Impartiality and neutrality:** The Mediator will act in an impartial manner, treat all parties fairly and remain neutral as to the content and outcome of the process.
- **Self-Determination:** It is for the parties to determine the outcome of the mediation.
- **Voluntary Participation:** Mediation is voluntary. Any party to the Mediation may withdraw from the mediation at any time. A mediator may also withdraw from a mediation but must provide general reasons for doing so.
- **Respect:** The parties will treat each other and the process with respect.

Benefits

- 2.3. The mediation process offers a number of benefits, including:

- The parties are in control of the decisions as opposed to a solution being imposed;
- A positive approach is promoted to resolving disputes or difficulties and this is of particular importance where working relationships need to be maintained;
- Mediation is confidential, thereby avoiding reputational damage;
- It is relatively quick;
- Lower or no legal fees are accrued and the costs associated with an appeals process are avoided; and
- It is without prejudice - where an agreement is not reached or a party withdraws from the process, other dispute resolution processes can subsequently be pursued.

³ Definition taken from the Mediation Act 2017

⁴ Section 10(1) of the Mediation Act 2017 deals with confidentiality: *Subject to subsection (2) and section 17, all communications (including oral statements) and all records and notes relating to the mediation shall be confidential and shall not be disclosed in any proceedings before a court or otherwise.*

Conduct of mediation

- 2.4. It is not considered necessary for the purposes of this circular to set out a detailed procedure for the conduct of mediation, given that guidance of this nature is already available from a number of sources, including, for example:
- Civil Service Dignity at Work policy
 - Civil & Public Service Mediation Service Guidelines
 - Workplace Relations Act 2015
 - Mediation Act 2017
 - The Mediators' Institute of Ireland Code of Ethics and Practice available at www.themii.ie/code-of-ethics-and-practice.
- 2.5. Where another dispute resolution process has been entered into during which the parties then form the view that mediation represents a more appropriate prospect for resolution, mediation may be availed of. To facilitate this, the initial dispute resolution process must be suspended to allow for the mediation to take place.
- 2.6. The Mediation Act provides that a mediation settlement shall have effect as a contract between the parties to the settlement save where the settlement is stated to have no legal force until incorporated into a formal legal agreement or contract signed by the parties.

3. Existing mediation services

Civil & Public Service Mediation Service

3.1. The Civil & Public Service Mediation Service (CPSMS) offers a free mediation service to current employees of civil and public service organisations. The panel of Mediators operating the service are serving civil and public servants, professionally trained, accredited to and bound by the Code of Ethics and Practice of the Mediators' Institute of Ireland and acting as a shared resource within Departments, Offices, Local Authorities and Agencies.

3.2. The purpose of CPSMS is:

- To provide an early intervention and resolution option to conflict situations within the workplace.
- To provide a mediation service across Civil and Public Service Organisations including Departments, Offices and Agencies.
- To provide a panel of mediators who are qualified, competent, trusted and responsive to the needs of organisations and employees.
- To provide a panel of mediators who will provide both a consistent standard and ethical approach to mediation.
- To raise awareness of the benefits of mediation within organisations through training and other initiatives.
- To provide a value for money mediation service.
- To assist the Department of Public Expenditure and Reform in terms of reviews undertaken of relevant HR policies and practices where mediation may be appropriate.

Workplace Relations Commission (WRC)

3.3. As part of its work resolving collective and individual disputes in the workplace, the Workplace Relations Commission (WRC) handles employment rights and unequal treatment/discrimination claims in the civil and public service. Under Section 39 of the Workplace Relations Act, 2015, claims of this nature can be referred for mediation with a view to resolving issues without recourse to formal adjudication proceedings. Parties to such claims are encouraged to engage in mediation either by telephone or face-to-face, to allow for the earliest possible resolution of their disputes. Mediated settlements reached under the auspices of the WRC are confidential to the parties. Once a mediated settlement is agreed and signed by the parties it is enforceable in accordance with contract law. Mediation services provided by the WRC are free to the users and provided by a team of professional conciliation and mediation officers.

Independent accredited Mediators

3.4. Mediation may be referred to internal or external professionally qualified mediators where appropriate.

4. Use and scope of mediation

- 4.1. This section provides guidance to managers for use when making a decision on whether mediation is appropriate for dealing with a workplace, contract or other dispute.
- 4.2. This circular does not replace existing provisions found in policies/contracts/agreements relating to mediation or other dispute resolution processes but rather can be used to:
 - Ensure that the use of mediation is encompassed under public financial management procedures; and
 - Provide additional guidance on the systems and processes that currently exist for managing mediation in official business contexts.

Exclusions

- 4.3. Mediation as considered in this circular does not include the process of mediation under industrial relations conciliation and arbitration schemes, which have their own specific sets of procedures.
- 4.4. Disputes involving the following circumstances should be excluded from consideration for mediation:
 - Where an official policy approach to an issue is concerned – this is unlikely to be capable of compromise in a particular case;
 - Where a particular case does not qualify under an existing legislative or regulatory provision;
 - Where there is a danger of conceding a precedent that could give rise to greater costs in other cases or would indicate weakness in the State’s position in other cases;
 - Where there are pressing industrial relations concerns;
 - Where mediation is prohibited under current policies – for example, under the Civil Service Grievance Procedure, mediation cannot be used where existing disciplinary action is being undertaken in accordance with the provisions of the disciplinary code; selection for promotion; selection for assignment to a post carrying an allowance or to a post abroad etc.; and
 - Where it concerns any matters, proceedings, disputes or applications excluded from the scope of the Mediation Act 2017.
- 4.5. Where there is any concern that there may be a wider industrial relations aspect that could affect the terms and conditions of a group of staff in the organisation or beyond, prior discussions should first take place with the Remuneration, Industrial Relations & Pensions Division in the Department of Public Expenditure and Reform.

Role of State Claims Agency

- 4.6. Disputes involving claims against the State in relation to alleged negligence or other torts must first be referred to the State Claims Agency, whose advice should be sought in relation to all such matters.

Determining whether mediation is suitable

4.7. Consideration must be given to whether disputes, which are not excluded by the reasons outlined above, are suitable for referral to mediation and a written note kept of the rationale underpinning this decision using, inter alia, the factors listed below:

Factors favouring the decision to use mediation

- Both parties wish to end the dispute within a short period of time.
- There is a long-term relationship in place which both parties wish to continue into the future.
- Both parties have a desire to settle the matter themselves and on their own terms. They consider that 'ownership' of the eventual resolution is important.
- There is a concern that a legal judgment might not fully resolve the underlying problem.
- The dispute concerns several claims or areas of conflict.
- The issue involves a lot of technical or otherwise complex content and so requires specialist knowledge.
- The parties consider confidentiality to be important.
- Mediation has worked successfully in similar situations in the past.
- It is without prejudice – if mediation fails or a party withdraws, other dispute resolution processes may be pursued.

Factors arguing against the use of mediation

- The case could set a precedent and have implications for other cases.
- A principle of law is involved and needs to be resolved.
- One party is concerned that there is a publicly stated resolution of the matter.
- One party is precluded by reason of the application of regulation, law or public policy from modifying its position on the question at issue.
- Previous frustration/delay of process by one of the parties.

4.8 Where, after consideration of the above and any other relevant factors, a decision is reached that a dispute is suitable for referral to mediation, the referral procedure relevant to the mediation services listed at part 3 to this circular should be consulted. To engage the Civil and Public Service Mediation Service or an external mediator in relation to workplace disputes contact should be made with the HR unit of your organisation who can advise on the matter and refer onward. The referral form to avail of the WRC services can be found at:

http://www.workplacelrelations.ie/en/Contact_Us/Mediation_Referral_Form/

4.9 The Mediation Act 2017 provides for the possible future establishment of a Mediation Council which will have the responsibility of establishing and maintaining a register of mediators who have subscribed to a code of practice published or approved under section 9 of the Act. Pending the establishment of the register, information regarding practicing mediators may be obtained from the Mediators' Institute of Ireland, FriaryLaw ADR Group, the Law Society, the Chartered Institute of Arbitrators and other commercial mediation operations.

5 Procedures relating to mediation

5.1 In advance of a mediation, the parties and the mediator must, as provided for in section 7 of the Mediation Act, enter into an agreement to mediate setting out details of:

- (a) the manner in which the mediation is to be conducted;
- (b) the manner in which the fees and costs of the mediation will be paid;
- (c) the place and time at which the mediation is to be conducted;
- (d) the fact that the mediation is to be conducted in a confidential manner;
- (e) the right of each of the parties to seek legal advice;
- (f) the manner in which the mediation may be terminated;
- (g) such other terms (if any) as may be agreed between the parties and the mediator.

5.2 In advance of the mediation process it is very important that Departments, Offices and public bodies determine the appropriate level of delegated authority for negotiation and decision making in the settling of disputes and ensure that this is communicated to the relevant officials engaged in mediation. The effectiveness of a mediation process may be dependent on the capacity of the parties present to reach agreement.

Mediation settlements involving financial settlements / the awarding of other benefits

5.3 Where, during the course of a mediation, a financial settlement or other benefit(s) with financial implications is sought to form part of the mediation settlement, a written statement of reasons for the financial settlement should be prepared before finalising a mediation settlement.

5.4 The written statement should detail the reasons for agreeing or refusing a financial settlement on foot of the mediation. It should include the following:

- Any relevant legal advice obtained;
- Any precedents that support the approach now being adopted or would justify following the alternative strategy;
- A cost-benefit analysis table (A template of which is found at Appendix 1) as a means to compare potential costs which would be incurred between the two alternative approaches proposed; and
- Appropriate risk analysis comparing the proposed mediation settlement against the potential risks associated with progressing to 3rd party (courts/arbitration/ adjudication), including, for example:
 - o Reputational risk / negative publicity
 - o The cost of the financial settlement that might eventually be decided on by the court or in a pre-trial agreement. The risk that the costs of the other party might also have to be paid.

- The amount of time that might be needed for the case to proceed through the courts systems, with potential for appeal to higher courts.
- Potential knock-on effects for similar cases in the same organisation or in other public service bodies.
- Greater uncertainty concerning the final resolution and its cost.
- Irreparable damage to the relationship between parties.

5.5 Approval of the written statement should initially be obtained from the appropriate level of management within the Department/Office, subject to and in accordance with internal approval mechanisms.

5.6 Following internal approval, sanction must be sought from the Vote control sections of the Department of Public Expenditure and Reform, in the case of Departments and Offices, and from the parent Department in the first instance, in the case of public service bodies. The written statement should be used as the basis of the business case.

5.7 In the case of Departments and Offices, where any such payment is considered as a 'special payment' under Section C7 (paragraphs 7-11) of the *Public Financial Procedures*⁵, the procedures laid down in relation to obtaining prior sanction and noting the payment in the Appropriation Account should be followed. Public bodies should follow the reporting requirements laid down in the *Code of Practice for the Governance of State Bodies – Business and Financial Reporting Requirements*.

5.8 A copy of the written statement, together with the record of approval, should be retained for any future review whether as part of an audit or otherwise.

Offer of severance terms following process of mediation

5.9 The Department of Public Expenditure and Reform considers it appropriate to preserve the capacity, as part of best human resource management practice, to allow for the possibility, where other approaches have proved unsuccessful, to agree discretionary severance terms that are not based on the terms of a contract or a prescribed scheme but following negotiations between employers and employees on a case-by-case basis. Mediation is a process that may be followed, particularly where a dispute has arisen or may potentially arise between the two sides, to enable the severance arrangements to be agreed in this way. Public service employers must have regard to guidelines laid down by the Department of Public Expenditure and Reform on this matter.

Further information

5.10 Any queries by Departments/Offices should be directed to the Remuneration, Industrial Relations & Pensions Division of the Department of Public Expenditure and Reform. Other public bodies should consult in the first instance with their parent Department/Office.

⁵ See: <http://govacc.per.gov.ie/wp-content/uploads/2012/05/SECTION-C.pdf>

Appendix 1: Cost-benefit analysis: Future costs of resolving a dispute

The cost of mediation⁶ and legal proceedings will vary greatly depending upon the complexity of the case. Whilst it is difficult to accurately quantify the differences in cost between each approach, the table below is intended to act as a guide to the main cost headings that will arise and should be used to assist decision making.

Legal advisers should be asked to give an assessment of the possible cost of barrister and other legal and court fees in any possible litigation.

Mediation	Cost	Legal process	Cost
Initial legal advice obtained through CSSO, State Claims Agency, etc.		Initial legal advice obtained through CSSO, State Claims Agency, etc.	
Mediator – fee for preparatory work plus fee per hour X no. of hours		Solicitors' fees	
Mediator – administration, expenses		Solicitors' administration costs	
Mediator – preparation of report		Barrister's fees – senior council brief fee	
Time of staff members (no of hours involved in preparation of papers required from mediation meetings, internal consultations, time spent in mediation sessions)		Barrister's fees – senior council hourly fee (rate per hour x no. of hours)	
Time of staff members in other departments e.g. HR, Accounts, etc.		Barrister's fees – junior council (rate per hour x no. of hours)	
Time of staff members in other Government Departments (e.g. DPER, Chief State Solicitor's Office, Attorney General's Office, State Claims Agency, etc.)		Courts fees – filing of summons, petitions, affidavits, motions, appearances, notices, discovery expenses, etc.	
Fees for any expert assistance		Court 3 rd party charges, e.g. expert witnesses' fees	
Cost of settlement agreement		Costs associated with delays of proceedings	
		Time of staff members in work section (no of hours involved in preparation of court case papers, consultations with legal advisers, court time)	
		Time of staff members in other departments e.g. HR, Accounts, etc.	
		Time of staff members in other Government Departments (e.g. DPER, Chief State Solicitor's Office, Attorney General's Office, State Claims Agency, etc.)	
		Cost of settlement agreement	
		Other party's costs (in event of loss of case)	
		Cost of appeals (avoided in mediated settlements)	

⁶ As stated previously mediation services provided by the WRC and the Civil and Public Service Mediation Service are free to the users.

