GEMME
Groupement Européen des Magistrats pour la Médiation

Mediation Forum

Gaffney Room – Law Library Distillery Building, Dublin 7.
19 April 2023

'Mediating Employment Disputes in Ireland'

Mark Connaughton SC

Introduction

1. Mediating employment disputes is, in many respects, no different from mediating disputes in other areas of civil law. The general law applies as do the Rules of Court. The primary enactment is the Mediation Act 2017. In addition, the somewhat inconsistent provisions of Section 15 of the Civil Liability and Courts Act, 2004 continue to apply in respect of personal injury actions -permitting a court to direct mediation. The Rules of the Superior Courts, the Circuit Court and the District Court respectively, all support these legislative provisions. [1]

2. When considering ADR generally, one must bear in mind that the right of access to the Courts is one of fundamental value in our legal order[2] and enshrined in our Constitution.[3] The Mediation Act, 2017 encourages mediation but stops short of imposing mediation upon the parties. It contains two specific provisions. First, a statutory requirement that parties contemplating litigation should be apprised by their legal

[1] The relevant provisions of the Rules of the Superior Courts are found in Order 56A and while those rules are referred to within this paper, similar rules apply in the Circuit and District Courts respectively. See Statutory Instruments 9, 11 and 13 of 2018. See also Order 1A, Rule 12 (Mediation in Personal Injury Proceedings).
[2] See the Judgment of Collins J in the Court of Appeal in *O'Reilly v. Neville* [2020] IECA 215, para. 36
[3] Among the unspecified rights found to subsist under Article 40.3 of the Constitution are the right to litigate and the right to have access to the Courts. Article 40.3.1° provides that the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. Article 40.3.2° then provides that 'The State shall in particular by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.'

representatives both of the availability and benefits of mediating their dispute. This advice must be given in advance of the initiation of legal proceedings and must be supported by a statutory declaration to that effect (usually by the solicitor).[4] Second, the provision enabling the Courts to invite parties to subsisting proceedings to mediate, either on the application of any of the parties (including an application on consent) or at the initiative of the Court, with consequential effects of staying the litigation pending the completion of the mediation process, if the invitation results in mediation. The chief consequence of a failure to mediate lies in the prospect that when the Court makes final Orders a party who has failed to mediate (even a successful party) may suffer an adverse Order in respect of costs.[5]

3. By way of exception to the general provisions of the Mediation Act, s.15 of the Civil Liability and Courts Act, 2004 empowers the Court to direct mediation in personal injury actions. While one is not able to refer to specific statistics with respect to the frequency of its invocation, it is generally accepted that it is undesirable to order parties to mediate and anecdotal 'evidence' suggests that it is rarely invoked. Indeed, in *Ryan v. Walls Construction Limited*[6] (Court of Appeal), Kelly J. (as he then was), overturned a direction that had been made by the High Court Judge compelling the parties to mediate their dispute. The Court made a number of points that are of considerable relevance generally when considering whether or not to recommend mediation. Some of the points addressed were case specific, namely, significant delays in the progression of the litigation and the fact that there were fundamental differences between the parties in respect of one particular part of the Plaintiff's claim. However, the Court appeared to be most influenced in

[4] Sections 14 and 15 of the Act refer together with Order 56A Rule 8 of the Rules of the Superior Courts (RSC).
[5] Section 169)1)(g) of the Legal Services Regulation Act, 2015 and Order 99 of the RSC refer.
[6] [2015] IECA 214.

its decision by the fact that there had been no real attempt by the parties to engage in any form of negotiation to try to resolve the dispute or indeed, to create a climate in which mediation might assist. The Court also considered that it was entitled to take into account "*the poorer chance of success in a mediation which is not undertaken on a voluntary basis*"[7] when overturning the decision to direct mediation.

4. The position in *Atlantic Shellfish Limited and Another v. Cork County Council and Others* is also instructive.[8] The sole question in issue was whether the Court should invite the parties to mediate their dispute. A very late application was made to adjourn the proceedings in the High Court to facilitate mediation but Gilligan J. (then a Judge of the High Court) rejected the application on the basis that the Plaintiff knew the offer would be rejected and the real purpose of the application was to seek to "*copper fasten its position with regard to a future application for costs.*"[9]

5. The appeal to the Court of Appeal was rejected and Irvine J., giving the Judgment of the Court of Appeal, identified the following non-exclusive factors of relevance:-

    a) The manner in which the parties had conducted the litigation up to the date of the application;
    b) The existence of any relevant interlocutory Orders;

[7] Ibid. para 59
[8] [2015] IECA 283. As applied by Costello J. in *Grant and Another v. The Minister for Communications, Marine and Natural Resources and Others* [2016] IEHC 328. See also the judgment of Butler J. in *I.E.G.P. Management Company v. Cosgrave and Others* [2022] IEHC 175, where the Judge declined to invite a particular party to mediate the dispute notwithstanding apparent agreement between all of the other parties because the particular Defendant(a firm of Architects) had successfully contended that the Motion inviting the parties to mediate was premature in circumstances where the case against that Firm had not yet been pleaded with particularity and further, the pleadings had not yet closed. The Judge also noted that in giving Replies to a request for Particulars, the position adopted by the Plaintiff was "*unnecessarily uninformative and defensive" (para 133.)*
[9] [2015] IEHC 570, para 24.

c) The nature and potential expense of the proposed ADR[10];

d) The likely effect of the making of the Order sought on the progress of the litigation should the invitation be accepted and the ADR prove unsuccessful;

e) The potential saving in time and costs that might result from the acceptance of an invitation;

f) The extent to which ADR can or might potentially narrow the issues between the parties;

g) Any proposals made by the Applicant concerning the issues that might be dealt with in the course of the ADR; and

h) Any proposal as to how the costs of such a process might be borne.

6. Of practical interest is the fact that notwithstanding the decision that was made in both the High Court and the Court of Appeal – not to invite the parties to mediate - the parties ultimately settled their dispute through mediation!

7. Indeed, the case underlines the point that there is virtually no case that will not benefit from mediation. Not infrequently, an apparently unsuccessful mediation may lead to a true narrowing of the issues or assist the parties in a further process of negotiation. That is a point worth exploring further within the following brief observations particular to the mediation of employment disputes.

Mediating employment disputes

8. First, there is a particular statutory framework in place for employment disputes. In respect of various statutory employment rights the

[10] The relevant Order facilitates applications not only related to mediations but other ADR processes, including mediation but not arbitration

provisions of the Workplace Relations Act 2015 apply. Claims are dealt with in the first instance by the Workplace Relation Commission "WRC"). A limited form of mediation is offered by the WRC to the parties in most such disputes, in lieu of progressing their dispute immediately for determination by an Adjudication Officer. In 2021, the latest year for which figures are available, the Annual Report of the Workplace Relations Commission confirmed that pre-adjudication mediation was successful in approximately 52% of cases submitted to mediation. Separately, the WRC also provides a mediation service in what are described as workplace disputes – interpersonal disputes are cited in its Report by way of example. It would appear that this service is not widely utilised.[11]

9. At collective level the Irish system is essentially grounded in the notion of voluntarism, save where the issues involved concern the exercise of legal rights. Both the Workplace Relations Commission and the Labour Court provide a service of intervention, invariably at the request of the parties but exceptionally, of the Labour Court's own volition, The first stage is through a conciliation service assisted by an official of the Workplace Relations Commission. If that proves unsuccessful, the matter may proceed to a full hearing before the Labour Court which then generally issues only a non-binding recommendation to the parties. This is a very long established State sponsored service and most frequently utilised in 'organised' employments where at least some of the employees are members of and represented by a trade union for collective bargaining purposes. On occasions collective employment disputes are submitted to formal 'private' mediation but, in this writer's

[11] The Report discloses that a total of 56 workplace mediation requests were received during 2021 and by the time of publication of the Annual Report the following July, 42 of those disputes were closed.

experience, that is confined largely to legal rights issues rather than what are referred to as disputes of interest.[12]

10. It is worth remembering that in employment disputes there is a significant disparity in bargaining power between employer and employee. Hence, when mediation is availed of it is important that it is not simply deployed as a tool whereby the party with the stronger bargaining position must prevail. In the words of Lord Reid in *R (on the application of Unison) v. The Lord Chancellor:*[13]

> *"… it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if backed by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail."*

11. Mediators in employment disputes are not judges, nor are they arbitrators but it is important to maintain a balance between the parties to ensure that both sides to the dispute are satisfied as to the independence of the process.

12. There may be occasions when one party to the dispute may wish to drive towards a resolution whereas the other party has considerable doubts as to the desirability of the outcome being pressed. A timely adjournment of the mediation to permit further consideration and, if necessary, further separate engagements with the parties before reconvening,

[12] To the extent that disputes might be defined as *'rights based'* and therefore referable to laws or contractual agreements they may be distinguished from disputes involving conflicting economic interests.
[13] [2017] UK SC 51.

might be the best course. This is rarely a problem when both sides are legally represented in a mediation (or otherwise assisted)but it is a prospect that a mediator must be alive to.

A mediator's perspective on employment mediations

13. There are a wide range of circumstances in which parties may enter mediation. On occasions, mediation is contemplated before proceedings are instituted and the parties (advised by their representatives) may have a very particular view, both as to the choice of mediator and the objectives of the mediation. In many instances, there is a recognition that the most likely outcome of the mediation is a severance of the employment relationship and it is then a question of attempting to agree the relevant terms that will apply. Here, the mediator's role is largely confined to assisting the parties in the negotiation of exit terms. Indeed, one sometimes wonders what additional benefit the mediator brings to the process in that circumstance, particularly when experienced practitioners are involved. However, one cannot overestimate the value of a process in which parties are afforded the opportunity of airing their grievances to a neutral.

14. At the other end of the scale there may be complex issues, such as where the employee is also a shareholder and may even be a founder of the business. Resolution of the dispute may not just potentially involve termination of the employment relationship but giving up their shareholding in the business and perhaps also suffering a restriction on any competition with the business post termination. Inevitably, one experiences few instances where the objective of both parties is to sustain the relationship.

15. In every instance, an early assessment of the issues involved is essential, guided by a perusal of agreed papers and confidential engagements with the representatives of the parties to the dispute and perhaps preliminary engagement with the parties. Encouraging the parties privately to provide a realistic assessment of the possible outcomes of the mediation can be a very useful way of identifying at an early stage the most problematic issues. The Mediator can then do valuable work before the formal mediation meeting and respectfully test the respective positions of the parties within confidential engagements. Nevertheless, it must be remembered at all times that mediation is merely a facilitation of a negotiation between parties and it is crucially important that the mediator should maintain the integrity of the process by continuously clarifying what information may or may not be communicated to the other party /parties to the dispute.

16. A practice has developed, particularly in commercial disputes, of exchanging position papers but in this writer's opinion, such papers are generally of very limited value. Often such papers slavishly repeat the content of formal pleadings (if the dispute has already been the subject of litigation) or repeat the stated positions of the parties, already expressed in open correspondence. As much information, if not more, can be gleaned from a perusal of essential papers by the mediator. Sometimes, position papers take the form of highly argumentative submissions, as if one was making a submission to a decision-maker. Such papers, if exchanged, can inhibit the progress of the mediation. That said, it is important for the mediator to understand at the earliest possible stage what areas of potential compromise may exist and what fundamental differences may exist between the parties. It might be apparent quite early in a dispute that mediation will not provide a complete solution but may succeed only in narrowing the issues. That

is not failure and if it is properly translated into an agreement, however qualified, the mediation will have achieved something significant.

17. There is always a risk that a party will seek to secure some litigation advantage from engaging in mediation but then withdrawing and proceeding to trial. Parties might frame further offers in settlement of the proceedings, not by express reference to anything that was discussed in confidence in the mediation, but taking those matters into account. From a mediator's perspective early engagement in separate discussions with the parties to a prospective mediation should significantly reduce the risk of any unfair advantage being taken. The implementation of proper procedures within the mediation with respect to the sharing of information should be of particular assistance in this regard. However, it must always be remembered that the primary objective is to assist the parties to secure agreement and it does not follow that steps taken by a party, following termination of a mediation process, constitutes a negative outcome. For example, it is always open to a party to litigation to make proposals at any time for the settlement of the dispute, quite apart from making formal lodgment or tenders (in appropriate instances) and the Courts in Ireland now enjoy a very wide discretion with respect to the award of costs at the end of the proceedings.[14]

18. It is open to the parties to expressly agree how the question of costs might be dealt with in the event that, following an unsuccessful mediation, a late application is made to lodge or tender. In this regard, the decision of Binchy J. in *White Young Green Environmental (Ireland) Limited v. Gethings*[15] is worthy of consideration. There, a mediation had taken place after the trial of the proceedings had commenced (following invitation by the trial Judge). The mediation was unsuccessful and the

[14] Sections 168 and 169 of the Legal Services Regulation Act, 2015 refer.
[15] [2015] IEHC 498.

Plaintiff brought a late application to make a lodgement/tender in respect of the Defendant's counterclaim. Ultimately, Binchy J. refused the application citing two reasons. First, that the information shared in the mediation had conferred a significant advantage on the Plaintiff and secondly, while undoubtedly there was a sound public policy to permit lodgements or offers of tender either later than permitted by the Rules or after settlement discussions (or both) where there was no prejudice or unfairness to the Claimant, there was also a public policy in encouraging parties to mediate and that is precisely what had occurred at the original trial. Interestingly, Binchy J. stated that the parties could, by agreement, avoid such a consequence by considering in advance of a mediation "the possibility of a lodgment or offer of tender of payment in the event that the mediation is unsuccessful and agree whether or not such a course could be taken in that event" but no such agreement was made in the instant case.[16]

The conduct of the mediation

19. Quite apart from the important work done in anticipation of a mediation, including agreement on the papers that may be shared during the mediation, certain practical issues need to be agreed prior to or at the very outset of the mediation. The question of authority to bind a party often arises, particularly where some emanation of the State is involved in the mediation process and referral back may be necessary. A standard provision in most mediation agreements requires the parties attending the mediation to have express authority to bind the party they represent in the mediation process. If this requires adaptation in a given

[16]See also the decision of Meenan J. in *Emerald Isle Insurance and Investments Limited and Others v. Dorgan and Others* [2018] IEHC 214. The Court was satisfied that the party objecting to the late lodgment had full knowledge of the possibility that in the event of the mediation failing a lodgment might be made and therefore it was not open to that party to claim that the lodgement was unfair or any improper advantage obtained following the failure of the mediation.

circumstance, that should be discussed with all parties well in advance. Further, it is important that the entire range of issues likely to be canvassed are tabled and it is the mediator's responsibility to ensure that a complete list of the issues is solicited from each party to the mediation at the earlier possible point. It goes without saying that the introduction of issues late in the proceedings can often have a very damaging effect on the prospect for the success of the mediation, particularly if the issue or issues are significant.

20. Finally, it is essential that at the earliest point in time the shape of any final agreement is mapped out and to this end it is desirable that, at the very least, the subject matter of likely clauses are introduced. In employment cases, issues concerning confidential information, restrictive covenants, references/statements of employment can became very problematic if introduced late in the process.

21. The adage '*nothing is agreed until everything is agreed*' applies with great force in mediations. While it might appear to follow that a party is entitled to resile from a position on an individual issue under discussion, the mediator plays an important role as *guardian* of points tentatively agreed, noting any conditionality attached to that provisional agreement.

22. There are no fixed rules regarding the conduct of a mediation or its duration on a given day. One might contrast the position with Court hearings, where, no doubt due to the intensity of the process, proceedings are generally limited to four hours. An experienced mediator will assess the progress at a relatively early stage in the afternoon of a mediation and should be in a position to inform the parties if agreement is likely within a reasonable time frame. Here, the importance of having draft agreements prepared and updated as the

discussion progresses is most relevant. In this mediator's experience, one often finds that agreement in principle is reached relatively early but the gap between such agreement and the execution of a formal agreement can often be many hours, something which is frustrating and in most instances, clearly avoidable.

23. Happily, mediation is now a very well settled and integral feature of our system of dispute resolution. Improvements in process are always possible and engagement by such bodies as GEMME is most welcome. Indeed, it would be very beneficial to see more detailed output on its website as we all try to improve our mediation skills.