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The Mediation Act, 2017 – A game changer for employment lawyers?

Until now mediation could be seen as the 'Cinderella' of the dispute resolution process - the beautiful sister consigned to the scullery who at last gets to the ball. The Mediation Act, which has been under consideration since 2012, but was only been signed into law on October 2, 2017 by President Higgins, may change this story, writes Jacqui Kelly of A&L Goodbody.

While the Mediation Act, 2017 expressly excludes from its ambit disputes being investigated or mediated by the Workplace Relations Commission (WRC), it puts mediation at the centre of almost every other dispute resolution process.

The purpose of the legislation is to actively promote the consideration of mediation as an alternative to court proceedings. It obliges lawyers to advise their clients to consider mediation as an alternative to litigation.

Under the Act a solicitor must advise their client to consider mediation before issuing proceedings. A solicitor must also provide information in respect of mediation services, including names and addresses of mediators and advise of the benefits and advantages of mediation. The solicitor must also explain the confidential nature of the process and the binding nature of any resulting settlement agreement. To re-inforce the point, when commencing proceedings a solicitor will be required to make a statutory declaration confirming that s/he has complied with these obligations.

This means that, before commencing non WRC claims such as stress/bullying claims, employment lawyers not only need to be aware of the provisions of the Mediation Act but also have details to hand such as the names and addresses of mediation services and a working understanding of the process.

When advising clients of the advantages of mediation, solicitors will need to explain that if the mediation results in a settlement being agreed then the process will be much faster and cheaper than litigation. Accordingly, where mediation appears likely to have a reasonable prospect of success in resolving particular disputes then it is likely to become increasingly popular as a means of resolving such issues and avoiding the costs, risks and delays of litigation. This must be especially true for stress/bullying claims where the legal costs often equal or exceed any damages awarded.

> 'Where there is a reasonable prospect of a successful outcome ... mediation will become popular'

'REASONABLE FEES'

The Act says that the mediator's fees must be reasonable and proportionate to the importance and complexity of the issues and the amount of work carried out. It also imposes a statutory obligation on the mediator and the parties to make every reasonable effort to conclude the mediation efficiently, which is likely to minimise costs. In practice, the mediation of an employment dispute rarely takes more than a day.

The new legislation includes the following important clauses:

- Section 6 makes clear that the fact proceedings have issued shall not prevent the parties engaging in mediation at any time prior to the resolution of the dispute.
- Section 16 allows the court or the parties to suggest mediation and/or provide the parties with information about the benefits of mediation. This is likely to prove a very persuasive tool to encourage mediation.
- Section 19 allows the parties, any time after an appearance has been entered, to adjourn the proceedings to allow for mediation where a pre-existing mediation agreement is in place. It is likely that employers who are adverse to litigation and/or publicity will look to include a mediation clause in future employment contracts so as to avail of section 19 if the matter ends up in dispute.
- The statutory support for mediation is reinforced by section 21 which allows the court to have regard to the unreasonable failure of a party to refuse to consider or attend mediation when awarding costs.

TRAINING & ACCOUNTABILITY

The Act also provides for the training and accountability of mediators and envisages a statutory Code of Practice.