



***Chartered Institute of Arbitrators  
(Irish Branch)***

***Submission to Minister Richard Bruton***

The Chartered Institute of Arbitrators (CI Arb) is the largest body involved in alternative dispute resolution in Ireland with some 750 members (and globally with some 12,000) We write to make the case for an option which has not always got the prominence it deserves; although referred to in the Minister's speech in UCD on July 1<sup>st</sup> and by Mr. Mulvey of the LRC and others.

That is the option of early dispute resolution through mediation in respect of employment rights claims. Paradoxically, while the Irish state pioneered innovative dispute resolution mechanisms in the employment area (The Labour Court, the Rights Commissioner service etc.) it has now fallen behind developments in relation to mediation, which is to be the subject of legislation next year on foot of the recommendations of the Law Reform Commission.

The Law Reform Commission included a draft Mediation & Conciliation Bill in its report which fortunately includes employment related disputes. (The Arbitration Act 2010 unfortunately and inexplicably excluded them).

There are a number of issues to be considered.

- First, we recommend a review of the exclusion of employment disputes from the Arbitration Act 2010; something this Institute lobbied against. There is no reason why employment disputes should not be arbitrable under the Act; subject to the normal rules governing arbitration agreements.
- Related to this, in the context of first instance adjudication we recommend the creation of a panel of suitably qualified arbitrators who would enjoy the same status as the Rights Commissioner service. There is precedent for this in the N. Ireland LRA and in ACAS, although in both cases the option seems to be underused. Appropriate arrangements would then be required to invest the arbitrator with the necessary authority.
- Second, from the point of view of very early dispute resolution the incorporation of mediation provisions in standard Grievance and Discipline procedures needs to be more strongly encouraged. This is provided for by SI 146/2000 (a document you might also revisit in your review, given its unsuitability for the small business sector) but rarely seen in practice. There is a possible role for the NERA inspectorate in encouraging this.

(There is a related need for training in mediation and dispute resolution for HR professionals; too many of whom have become 'slaves' to procedural documents).

- Third, and most significant from the point of view of your reform agenda is the availability of early intervention mediation once workplace relations have become fractured and before referral to the dispute resolution institutions arises.

One possibility is the creation of a panel of private, accredited mediators which would be made available to parties on terms to be decided by your Department.

Issues that arise here are;

1. **Qualification for the panel.** Some definition of ‘accredited’ mediator, or other qualification would be necessary. We would submit that this should be not less than the current standard required for Accredited Mediator status with CI Arb which is a global standard.
2. **Nomination/selection of mediators.** In general, we would propose an ‘appointment’ system (such as is the case with the Rights Commissioner service) where the parties have no role in selecting the mediator. Asking the parties to agree on the mediator adds further opportunity for disagreement and should be avoided. Details of this require further refinement. In any event mediators are bound to recuse themselves from any matter in which they might be compromised. CI Arb would be happy to appoint from its panel of accredited mediators.
3. **Costs:** We see no reason why your Department should not determine the daily fee to be paid as a condition of membership on the panel, thereby fixing the cost of the mediation. (CI Arb operates a number of consumer arbitration schemes on this basis). Costs of representation would be a matter for the parties.
4. **Payment:** Normally this is shared by the parties. In employment disputes it is more likely to be borne by the employer. However in the context of early and cheaper resolution of disputes this may not be an obstacle especially given the foregoing. In any event participation in the process is voluntary.
5. **Penalty for non-participation:** It is now strongly emerging law that parties who refuse to engage in participation in mediation may be penalised as to costs, even if successful in subsequent litigation. We suggest that some appropriate disincentive to non-participation might be considered as part of your proposals.
6. **Rights under Article 6 of the European Convention of Human Rights.** The mediation agreement can contain a clause clarifying that referral of the dispute to the Mediation does not affect Article 6 rights and if the dispute does not settle through the mediation, the parties’ right to a hearing remains unaffected. There is a strong view that in itself, a requirement on parties to mediate does not breach Article 6 rights. (per Lord Dyson, judge of the Supreme Court in ‘Arbitration’, the Journal of CI Arb, August 2011).

We hope you will agree that these ideas have merit. In particular they could;

- a. Contribute to a significant reduction in the numbers of disputes presenting at the state Dispute Resolution services, even as reformed.
- b. Bring about much earlier resolution of those that do; and do so on a relatively amicable basis.

- c. Significantly reduce legal costs to the parties.