



THE EQUALITY TRIBUNAL
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MEDIATION REVIEW 2003



Mediation Review 2003

The Equality Tribunal

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Chapter 1

Introduction



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This Mediation Review is published as part of the Annual Report of the Equality Tribunal for the year 2003. Any readers interested in an analysis of the Tribunal's discrimination caselaw should also consult the Tribunal's Legal Review 2003.

Mediation at the Equality Tribunal completed its third year of operation at the end of 2003. This innovative new service offers the parties in a discrimination case the opportunity, **if they wish**, to reach an agreed settlement. It is completely voluntary (either party may withdraw at any stage) and, generally, more speedy (on average 2¹/₂ times quicker) than an investigation before an Equality Officer.

The process is informal and does not involve written submissions. Mediation is private and agreements are not published (unlike Equality Officer Decisions). The parties are also given a "cooling-off" period before being asked to sign an agreement to ensure that both sides can give informed consent on signing.

In the event that agreement is not reached the complainant may seek to have the investigation resumed. If the case returns to investigation both sides are precluded from using information disclosed by the other side at mediation without consent. In addition the mediator will not pass on any information from mediation to an investigating Equality Officer.

One hundred and five cases completed mediation in 2003, representing a sixty four per cent increase on 2002 (and nearly a six fold increase on our first year of operation). During 2003 a mutually acceptable agreement was reached between the parties in sixty one per cent of cases that completed mediation. **The analysis of mediation agreements revealed that cash compensation payments were not a feature in nearly 44% of single claimant equal status cases, 11% of multiple claimant equal status cases and 27% of employment cases.** Apologies for the effects of the treatment complained of feature in just over half of equal status agreements and a sixth of employment cases.



Mediation Team

Mediation can achieve a “win-win” situation if the parties wish to reach a settlement and innovative and creative solutions are also possible. This allows the parties to reach a settlement which meets their particular needs.

Chapter 2

The Equality Tribunal

The Equality Tribunal was established on 18 October 1999 under its formal legal name; the Office of the Director of Equality Investigations. It is an independent quasi-judicial statutory body whose core function is to investigate and/or mediate complaints of unlawful discrimination under the Employment Equality Act 1998 and the Equal Status Act, 2000.

Under Irish equality legislation, discrimination is unlawful on 9 grounds [gender, marital status, family status, sexual orientation, religion, age, disability, race (including colour, nationality or national or ethnic origin) and membership of the Traveller community] in relation to employment, the disposal of goods and property, the provision of services and accommodation, and in certain aspects of education. The Equality Tribunal operates under the aegis of the Department of Justice, Equality and Law Reform.

As an impartial quasi-judicial body, the Equality Tribunal has the function of investigating or mediating complaints of unlawful discrimination that are formally referred to it. The Tribunal is headed-up by the Director, Ms. Melanie Pine. Nearly half of its 30 staff are Equality Officers, who investigate cases or Equality Officers / Mediators who may also mediate cases.

2.1 Investigation and Decision

The Equality Tribunal is committed to reaching decisions which are balanced, robust and well founded in law and which contribute to a high level of protection against discrimination, consistent with legislation and case law. A Tribunal investigation is carried out by an Equality Officer.

Where discrimination is found to have occurred, redress will be awarded. Redress awardable comprises, as appropriate, one or more of the following – compensation, an

order for equal pay, an order for arrears of remuneration, an order for equal treatment and/or a direction of a specific course of action.

Decisions are made available to the widest possible audience, including on the website (www.equalitytribunal.ie), to foster an awareness of what does and does not constitute discrimination and to contribute to the prevention of future discrimination.

The decisions of the Equality Tribunal's Equality Officers are binding and enforceable at law. Where they are appealed, appeals lie to the Labour Court for cases under the Employment Equality Act 1998, and to the Circuit Court for cases under the Equal Status Act 2000. The Tribunal has significant powers to underpin its functions. The Equality Tribunal acts in accordance with the principles of natural justice in all its work.

2.2 Mediation

The Employment Equality Act 1998 (Section 78, Appendix 1 attached) provides for the establishment of a mediation service, staffed by Equality Mediation Officers or mediators. A similar approach to mediation is also found in the Equal Status Act 2000 (Section 24). Equality Mediation Officers are recruited from the ranks of Equality Officers and are given specialised training for mediation.

Both Acts provide that "if at any time after a case has been referred to the Director ... it appears to the Director that the case is one which could be resolved by mediation, the Director shall refer the case for mediation to an equality mediation officer". Under the Employment Equality Act 1998 the Labour Court, on making a similar judgement, may refer a case to the Director for mediation by an Equality Mediation Officer if the Court decides not to mediate the case itself.

The Acts further provide that -

- ▶ Mediation cannot take place if either party objects;
- ▶ Mediation shall be conducted in private;
- ▶ If the case is resolved, the Mediator shall write up the terms of the settlement;
- ▶ The agreement shall be signed by the complainant and the respondent;
- ▶ The agreement, when signed, is legally binding and enforceable (subject to the limits on redress set out in the Acts);
- ▶ A copy of the agreement is retained by the Tribunal.

There is no provision that requires the publication of mediation agreements.

Mediation can be defined as an informal process in which the Mediator, who is a neutral and impartial third party with no power to impose a resolution, helps the parties in dispute to try to reach a mutually acceptable settlement, if they so wish. In investigation there has to be a winner and a loser, whereas at mediation, both parties could be considered 'winners' if agreement is reached.

In mid-December 2000, the Tribunal began offering mediation as an alternative mechanism for resolving disputes. The new innovative Mediation Service was formally launched by the then Minister for Justice, Equality and Law Reform, Mr. John O'Donoghue, T.D., on 28 March 2001.

Chapter 3

Equality Mediation

3.1 Mediation Service Structure

In 2003 the Mediation Service was staffed by a Head of Unit and 4 other Mediators (Equality Mediation Officers), who also work as Equality Officers. While the Head of Unit has devoted most of his time (with effect from October 2002) to management of the service and direct Mediation, the other mediators all carry substantial caseload as Equality Officers and must balance their work between the two areas. **It is important to note, however, that a Mediator will never act as an Equality Officer in a case s/he has mediated.**

3.2 Purpose

The Equality Tribunal's Statement of Strategy 2001-2003 set the overall goal for the Mediation Service -

to contribute to the realisation of equality by developing and operating an effective mediation service.

Two of the key objectives of this goal, training of Mediators and the development of procedures and guidelines, were achieved in the first two years of operation. For 2003 key objectives were set for the Mediation Service to ensure the continued achievement of this goal, including –

- ▶ Effective mediation of Employment Equality and Equal Status cases
- ▶ Effective overall management of the mediation caseload
- ▶ Continuing professional learning and training for Mediators
- ▶ The promotion of mediation as an alternative to the more complex investigation process.

These objectives will be considered in further detail in the Operations Report for 2003 (Chapter 4).

3.3 Training

The Tribunal's Mediators all completed a training course in Autumn 2000 which gave Part 1 accreditation with Mediators Institute Ireland (MII). This training course was also accredited by the U.S. based Academy of Family Mediators¹. In tandem with this, mediation guidelines and principles for the operation of the Mediation Service in the Office were developed. The Equality Tribunal is committed to continuing development and/or professional training for all staff. Building on the foundation course undertaken by the mediators in Autumn 2000 the Tribunal contracted a Trainer/Consultant for advanced mediation training in Autumn 2001. This training programme continued in place until August 2003.

3.4 Code of Ethics

The Service drew up mediation guidelines in 2000 which includes a statement of the principles that underscore its operations, essentially a code of ethics for equality mediation. These mediation principles are set out in full in Appendix 2.

The principles cover issues such as –

Consent, Voluntary Process, Accessibility, Impartiality, Advice, Power Balancing, Joint Sessions, Confidentiality, Participation, Disclosure, Issues for discussion, Third Parties & Representatives, Settlement and No Settlement

Some of the key features can be summarised as follows –

Consent / Voluntary Process / Power Balancing:

The principle of self-determination is recognised as a fundamental principle of mediation. Mediation is a voluntary process and either party may withdraw at any stage. The Mediator has a duty to ensure balanced negotiation and to prevent manipulative or intimidating negotiation techniques. If the parties wish to agree a settlement it must be on the basis of “informed consent” from each side.

Impartiality:

The Mediator must guarantee impartiality. If at any stage the Mediator feels unable to conduct the mediation in an impartial manner s/he must withdraw from the process. It is important that any real, perceived or potential conflicts of interest are disclosed by the Mediator at the earliest opportunity. The Mediator may only proceed if the parties agree to continue with the mediation.

¹ The Academy of Family Mediation merged with two other mediation organisations in 2001 to form The Association for Conflict Resolution (www.acresolution.org)

Confidentiality:

There are three aspects to the confidentiality issue –

1. From the Equality Tribunal's and the Mediator's perspective there is a guarantee that information disclosed at mediation will not be given to an Equality Officer if there is a subsequent investigation. This guarantee is underwritten by the legislation. In addition the terms of a settlement are not published, unlike the Decisions of Equality Officers. The Equality Tribunal reserves the right to use extracts from agreements in a manner that cannot identify the parties, in the interests of promoting interest in and knowledge of the mediation option.
2. Both the Employment Equality Act 1998² and the Equal Status Act 2000³ make it an offence for any person to disclose any information furnished in the course of an investigation or mediation without the consent of the person furnishing the information or of any other person to whom the information may relate. One exception to this rule is when disclosure is required on the order of the High Court or Circuit Court.
3. The practice has developed whereby a confidentiality clause is normally included in the terms of any settlement reached. This essentially complements the fact that the Tribunal does not have the statutory power to publish mediation agreements. However it is important to note that there is nothing in the legislation which underscores this aspect of an agreement and in the event that it is breached it may be necessary for the 'injured' party to seek redress under contract law.

Representation & Advice:

While a significant proportion of the parties appearing before the Equality Tribunal are not represented, advisors and other representatives are made welcome if they are involved. Many different categories of representative/advisor have been present at mediations including trade union and employer representatives, solicitors, barristers, voluntary representative groups and representatives from Citizens Information Centres.

3.5 Mediation Model and Motivation

Equality mediation is promoted as an alternative to the quasi-judicial Equality Officer investigation, with its written submissions and formal hearing. The mediation model selected is similar, in many respects, to the traditional family mediation model. It is different from the labour relations negotiation and conciliation model.

Conciliation

A conciliator is a neutral expert who seeks to resolve a dispute by getting the parties to identify the 'bottom line' in private and by using this information to push each side into

² EEA 1998 Section 97, Subsections 2&4

³ ESA 2000 Section 36, Subsections 2&4

a compromise position which is acceptable to both sides. The conciliator will frequently draw on his/her expertise to suggest solutions or ways out of an impasse and will not hesitate about offering opinions on the likely result if the dispute is taken to a hearing. In general the parties in dispute go to conciliation knowing that a settlement will be a compromise somewhere between the opening positions.

Equality Mediation

Equality Mediation is different. It is important to realise that in equality mediation it is inappropriate for a Mediator to assume that there will be a settlement based on a compromise between the two sides.

It is one thing for either party to realise in the course of mediation that a case may not be straight-forward, it is altogether quite different and unacceptable for a Mediator to suggest from the outset that the parties should compromise what they regard as their principles. It is important to note that while the Equality Mediator is expert in equality legislation s/he is not there to interpret the law or to decide on the facts. S/he is not there to be convinced of the validity or truthfulness of one side or the other. An Equality Mediator will be able to point to sources of information, but will not advise the parties as to how they should proceed. While an Equality Mediator will help the parties tease out solutions they have in mind, s/he will not recommend or suggest his/her own solutions.

Motivation

The Tribunal's experience over three years of operations has thrown up many different motives as to why parties in dispute use mediation. In some cases it is simply the wish to bring the dispute to a speedy end, whereas in others it is to avoid the formality and stress of a quasi-judicial Equality Officer investigation. While some parties come to mediation with possible compromise in mind, others wish to resolve the dispute by convincing the other side that they will lose if the dispute goes on into investigation. Many parties come to mediation with a view to testing the other side's case. The dialogue that results frequently helps to identify issues which the parties can agree on and which may form the basis for a settlement.

How does Equality Mediation work?

The Mediator comes to the mediation without any detailed knowledge of the case at issue; other than the names and contact details of the parties, their representatives, if any, the ground(s) under which discrimination is claimed and a basic description of the type of complaint, for example – discriminatory treatment, harassment etc. in employment, discriminatory treatment in the equal status area. If the disability ground is involved the Mediator will find out if the parties require any facilities to ensure reasonable accommodation. Language interpretation is also provided where necessary to ensure accessibility for the parties involved.

The non-reliance on written submissions is an important feature of equality mediation. In many cases the parties involved, especially persons who are un-represented, are more comfortable when they are asked to talk about the issues and how they feel about them as opposed to putting these issues in to a written submission.

It should be noted that the mediation option is available to the parties at any stage in the investigation process right up to the day of the hearing. It is not unknown for a hearing to be adjourned to give the parties an opportunity to resolve the case by mediation.

Further details on how the model is implemented can be found in Appendix 3

Statistical Approach – Explanatory Note:

The production of statistics under the Employment Equality Act and the Equal Status Act in a way that facilitates easy comparison between the two areas is made more complex by the number of linked or multiple claims. These are a well-known feature in the equal pay area where a group of claims against a single employer may be grouped together in a combined case for investigation and decision. This practice has arisen because class actions are not a feature in Irish law. Similar situations can arise under the Equal Status Act where a group of complainants might make individual claims of discrimination against a single service provider about the same incident. Such multiple claims are generally combined in a single investigation or mediation case.

To facilitate better comparison between the two areas for the purpose of this review, claims by individuals have been counted separately to multiple claims (where two or more complainants are linked together in the same case). This system provides a more accurate reflection of the workload – since, for example, one group of 4 complainants and 1 respondent in a single mediation requires less work from a mediator than 4 separate mediations with one complainant and one respondent. However it should be noted that grouped mediation is generally more complex than mediation between a single complainant and respondent.

Chapter 4

Report of Operations 2003

4.1 Mediation Service Objectives

The Mediation Service more than achieved its key objective by significantly increasing the total number of mediation cases processed (+64% in total, resolved +94%, not resolved +32%) while also seeing a rise in the proportion of cases resolved (up from 52% to 61%) as shown in Table 4-1. In approximately half the cases that were resolved an outline agreement was reached in the first session. In approximately ninety per cent of cases the mediation process is essentially completed at the first session – with either full/outline agreement being reached or before a case is deemed not resolvable. Where agreement is reached it may be necessary to meet for a second session simply to sign the agreed terms of settlement.

Table 4.1 Case Outcomes (Completed Mediations)

	2003		2002	
	Resolved	Not Resolved	Resolved	Not Resolved
Employment				
Single Claim	30	23	13	17
Multiple Claim	0	1	1	1
Sub-total EE	30	24	14	18
Equal Status				
Single Claim	25	8	13	8
Multiple Claim	9	9	6	5
Sub-total ES	34	17	19	13
Total	64	41	33	31
% Change	+94%	+32%		
% Resolved		61%		52%

The second key objective for the Mediation Service in 2003 was the overall effective management of the caseload. In general mediation agreements in 2003 were achieved, on average, within 8 months of the date of referral compared to employment investigations that, on average, take 20 months. These figures include all processing work within the Tribunal, not just the work of mediators and Equality Officers as appropriate.

A different view of the speed of the mediation process can be gauged from the fact that, on average, resolved cases took 2³/₄ months to finalise; from the date of the first mediation session until the date the agreement is signed. Table 4-2 shows that three quarters of mediations are completed in 3 months or less from the date of the first mediation session.

4.2 Continuing Training

Because of the Tribunal's core value of professionalism, continuing professional learning and training remains an important objective of the Service. To achieve this objective a Consultant Trainer in Mediation was contracted to provide advanced mediation training for the existing mediators. This contract continued until August 2003. Additional learning and training through attendance of mediators at appropriate conferences and workshops both in Ireland and abroad was also possible during the year. A contract was signed in late 2003 to provide for the training of new mediators in early 2004.

Table 4-2 Timeliness – Resolved Cases (from date of first session)

	Duration	No. of Cases	Per Cent
Average	2.75 months		
	Same Month	8	13 %
	1 month	15	23 %
	2 months	14	22 %
	3 months	11	17 %
	More than 3 months	16	25%
	Total	64	

4.3 Promoting Mediation

In fulfilment of the publicity and promotional objective for the Service (a) a report on the operations of the Mediation Service is published each year, as part of the Tribunal's Annual Report and (b) presentations on mediation were made to a variety of user groups and other interested parties.

Chapter 5

Mediation Referrals - Analysis

Referrals in 2003

While the output of the Mediation Service increased significantly in 2003, as described above, the level of referrals to mediation dipped somewhat in 2003 compared to 2002 – 109 cases referred in 2003 compared to 121 in 2002, a drop of ten per cent (See Table 5-1).

During 2003 the mediation referrals continued to be made on the basis that the parties in a case formally signalled their consent to the mediation process by signing a consent form. These procedures were changed at the start of 2004 and written consent is no longer requested. A case is now referred to mediation if the Director thinks the case is resolvable and if neither party objects to the referral.

Table 5.1 Mediation Case Referrals

		2003		2002	
		Cases	Claims	Cases	Claims
Employment	Single Claim	52	52	51	51
	Multiple Claim	1	2	4	11
Sub-total EE		53	54	55	62
Equal Status	Single Claim	30	30	44	44
	Multiple Claim	25	67	22	73
Sub-total ES		55	97	66	117
Total	Single Claim	82	82	95	95
Total	Multiple Claim	26	69	26	84
Grand Total		108	151	121	179
% Change		-10.74%	-15.64%		

In 2003 twenty two per cent of Employment cases and fifteen per cent of Equal Status cases were referred for mediation.

Table 5.2 Mediation Referrals – single claimant cases
(by discriminatory ground)

	Total		Employment Equality		Equal Status	
Gender	7	8.5%	6	11.5%	1	3.3%
Family Status	2	2.4%			2	6.7%
Marital Status	3	3.7%	2	3.8%	1	3.3%
Age	14	17.1%	11	21.2%	3	10.0%
Disability	18	22.0%	11	21.2%	7	23.3%
Sexual Orientation	0		0		0	
Religion	0		0		0	
Race	11	13.4%	10	19.2%	1	3.3%
Traveller community	9	11.0%			9	30.0%
None declared	1	1.2%	1	1.9%	0	
Multiple Grounds	17	20.7%	11	21.2%	6	20.0%
Total	82	100%	52	100%	30	100%

Table 5.3 Mediation Referrals – multiple claimant cases
(by discriminatory ground)

	Total		Employment Equality		Equal Status	
Gender	1	3.8%	1	100%	0	
Family Status	2	7.7%			2	
Age	3	11.5%			3	12.0%
Disability	2	7.7%			2	8.0%
Traveller community	12	46.2%			12	48.0%
Multiple Grounds	6	23.1%			6	24.0%
Total	26	100%	1	100%	25	100%

An examination of the multiple ground cases shows that in employment cases the gender ground appears to be the most represented ground, while Traveller community and race dominate the multiple ground cases in Equal Status. The religion ground does not feature among the multiple ground cases, while sexual orientation was listed alongside race in one of the Equal Status multiple ground multiple claimant cases.

Chapter 6

Mediation Outcomes - further analysis

Tables 6.1 to 6.6 give further details of completed mediations (both resolved and not-resolved) from the perspective of discriminatory ground.

Table 6.1 Resolved Mediations – single claimant cases (by ground)

	Total		Employment Equality		Equal Status	
Gender	7	12.7%	5	16.7%	2	8.0%
Family Status	4	7.3%	1	3.3%	3	12.0%
Marital Status	1	1.8%	1	3.3%	0	0.0%
Age	10	18.2%	7	23.3%	3	12.0%
Disability	9	16.4%	5	16.7%	4	16.0%
Sexual Orientation	0	0.0%	0	0.0%	0	0.0%
Religion	0	0.0%	0	0.0%	0	0.0%
Race	7	12.7%	4	13.3%	3	12.0%
Traveller community	7	12.7%	0	0.0%	7	28.0%
Multiple Ground	10	18.2%	7	23.3%	3	12.0%
Total	55	100%	30	100%	25	100%

Table 6.2 Resolved Mediations – multiple claimant cases (by ground)

	Total		Employment Equality		Equal Status	
Traveller community	5	55.6%			5	55.6%
Age	1	11.1%			1	11.1%
Family Status	2	22.2%			2	22.2%
Multiple grounds	1	11.1%			1	11.1%
Total	9	100%	Nil		9	100%

Table 6.3 Non-Resolved Mediations – single claimant cases
(by ground)

	Total		Employment Equality		Equal Status	
Gender	4	12.1%	4	16.7%		0.0%
Family Status	0	0.0%	0	0.0%		0.0%
Marital Status	0	0.0%	0	0.0%		0.0%
Age	8	24.2%	7	29.2%	1	11.1%
Disability	8	24.2%	7	29.2%	1	11.1%
Sexual Orientation	1	3.0%	1	4.2%		0.0%
Religion	0	0.0%	0	0.0%		0.0%
Race	1	3.0%	1	4.2%		0.0%
Traveller community	7	21.2%	0	0.0%	7	77.8%
None Given	1	3.0%	1	4.2%		0.0%
Multiple Grounds	3	9.1%	3	12.5%		0.0%
Total	33	100%	24	100%	9	100%

Table 6.4 Non-Resolved Mediations – multiple claimant cases
(by ground)

	Total		Employment Equality		Equal Status	
Traveller community	6	75.0%	6	100%	6	85.7%
Multiple grounds	1	12.5%	1	100%	1	14.3%
Race	1	12.5%	1	100%		
Total	8	100%	1	100%	7	100%

Table 6.5 Resolution Rate 2003 - single claimant cases (by ground)

	Total	Employment Equality	Equal Status
Gender	63.64%	55.56%	100%
Family Status	100%	100%	100%
Marital Status	100%	100%	100%
Age	55.56%	50%	75%
Disability	52.94%	41.67%	80%
Sexual Orientation			
Religion			
Race	87.50%	80%	100%
Traveller community	50%		50%
Multiple Grounds	76.92%	70%	100%
Average	62.50%	55.56%	73.53%

Table 6.6 Resolution Rate 2003 - multiple claimant cases
(by ground)

	Total	Employment Equality	Equal Status
Traveller community	45.45%		45.45%
Age	50.00%		50.00%
Average	52.94	N/A	56.25%

Chapter 7

Analysis of Agreements

7.1 Employment Equality Agreements

Sample extracts from selected Employment Equality Agreements are set out in Appendix 5 attached.

Some of the most significant features of the 30 Employment Equality Mediation Agreements were –

- ▶ Eight of the 30 agreements (27%) involved no payments by the employer to the complainant.
- ▶ Payments to the complainant were a feature of 22 employment mediation agreements (73%), amounting to more than €210,000 - ranging from a low of €100 to €99,000. Five payments were under €1,000, seven between one and five thousand, seven between six and ten thousand and three in excess of ten thousand euro. It is important to note that the individual circumstances of each case make it inappropriate to try to identify particular criteria linked to a payment or to calculate an average.
- ▶ Three of the 30 agreements involved discriminatory dismissal and were referred for mediation by the Labour Court. Two of these were also the subject of a parallel complaint to the Tribunal of discriminatory treatment.
- ▶ Examples of other benefits included payment of the complainant's legal expenses, payment net of tax and payment in a tax efficient manner.
- ▶ Admission of liability for discrimination was specifically denied by respondents in half the cases.
- ▶ The introduction of equality proofing, equality policies or human resource strategies was agreed in 4 cases.
- ▶ Apologies were recorded in 5 cases.

7.2 Equal Status Agreements

Sample extracts from selected Equal Status Agreements are set out in Appendix 6 attached.

Some of the most significant features of the 34 Equal Status Mediation Agreements were –

- ▶ No cash payments were made in 11 out of the 25 agreements involving a single claimant, and in 1 of the 9 multiple claimant cases. **Therefore in nearly 44% of Equal Status mediations involving one claimant, financial compensation was not at issue.**
- ▶ Vouchers for services (e.g. meals, accommodation) featured in 5 of the 34 agreements.
- ▶ €22,000 was paid in total in 14 Equal Status cases, ranging from €100 up to €2000.
- ▶ Liability and/or discrimination was denied by service providers in 9 of the 34 agreements.
- ▶ Apologies for the particular treatment and/or its effects featured in 19 of the 34 agreements.

Chapter 8 Conclusion

The impact of the Mediation Service continues to offer an opportunity to make significant inroads into the backlog of cases before the Tribunal. Mediation can achieve a “win-win” situation if the parties wish to reach a settlement. Innovative and creative solutions are also possible. This allows the parties to reach a settlement which meets their particular needs.

Appendices

Appendix 1

Section 78, Employment Equality Act 1998
(which makes provision for the mediation option)

Appendix 2

Principles of Mediation at the Equality Tribunal

Appendix 3

Equality Mediation Model – Structure of Mediation Session

Appendix 4

Outline Mediation Agreement – Standard Clauses

Appendix 5

Extracts from Employment Agreements

Appendix 6

Extracts from Equal Status Agreements

Appendix 1

Legal Basis for Mediation

(Section 78 Employment Equality Act 1998)

Section 78 Mediation

- 78.— (1) Subject to subsection (3), if at any time after a case has been referred to the Director under section 77(1) it appears to the Director that the case is one which could be resolved by mediation, the Director shall refer the case for mediation to an equality mediation officer.
- (2) Subject to subsection (3), if at any time after a case has been referred to the Labour Court under section 77(2) it appears to the Labour Court that the case is one which could be resolved by mediation, the Labour Court shall either—
- (a) attempt to resolve the case in that way itself, or
 - (b) refer the case to the Director for mediation by an equality mediation officer.
- (3) If the complainant or the respondent objects to a case being dealt with by way of mediation, the Director or, as the case may be, the Labour Court shall not exercise their powers under this section but shall deal with the case under section 79.
- (4) Mediation, whether by an equality mediation officer or by the Labour Court, shall be conducted in private.
- (5) Where a case referred under section 77 is resolved by mediation—
- (a) the equality mediation officer concerned or, as the case may be, the Labour Court shall prepare a written record of the terms of the settlement,
 - (b) the written record of the terms of the settlement shall be signed by the complainant and the respondent,
 - (c) the equality mediation officer concerned or, as the case may be, the Labour Court shall send a copy of the written record, as so signed, to the complainant and the respondent, and
 - (d) a copy of the written record shall be retained by the Director or the Labour Court, as the case may require.

- (6) If after—
 - (a) a case has been referred to an equality mediation officer under subsection (1) or (2)(b), or
 - (b) the Labour Court has attempted to resolve a case under subsection (2)(a), it appears to the equality mediation officer or, as the case may be, the Labour Court that the case cannot be resolved by mediation, that officer or that Court shall issue a notice to that effect to the complainant and the respondent.

- (7) Where—
 - (a) a notice has been issued under subsection (6) with respect to a case,
 - (b) within 28 days from the issue of that notice the complainant makes an application to the Director or, as the case may be, the Labour Court for the resumption of the hearing of the case, and
 - (c) if the notice was issued by an equality mediation officer, a copy of that notice accompanies the application under paragraph (b), the Director or the Labour Court, as the case may require, shall proceed or, as the case may be, continue to deal with the case under section 79.

Appendix 2

Principles of Mediation

Principles of Mediation at the Equality Tribunal:

The objective of the Tribunal's Mediation Service is to provide an alternative dispute resolution process to that of investigation in respect of claims for equal pay in employment and complaints of discrimination, harassment, sexual harassment and victimisation under the Employment Equality Act, 1998 and the Equal Status Act, 2000. The Mediation Service is staffed by Equality Mediation Officers (Mediators). The Mediation Service adheres to the following principles in the mediation process:-

Consent:

If the Director of the Tribunal considers that a case could be resolved by mediation she will refer it to a Mediator. **However, the case will not be referred for mediation if either party objects to the case being dealt with by mediation.** Both parties will be asked if they object to a mediation referral. The Mediation Service arranges a mutually convenient meeting between the parties and a Mediator as soon as practicable after the case has been referred. A number of such meetings may be necessary as part of the mediation process.

Impartiality:

The Mediation Service and its Mediators guarantee impartiality and do not take sides with either party.

Voluntary Process:

Mediation is a voluntary process. Mediation cannot proceed if either of the parties objects to a mediation referral. Likewise each side may withdraw consent at any stage of the process and mediation will be terminated immediately. The complainant may request the resumption of the investigation as laid down in each Act.

Accessibility:

The Mediation Service is committed to ensuring accessibility for all persons. Special arrangements as appropriate will be put in place for any person with special needs who wishes to use the service.

Participation:

It is essential that everyone necessary to reach a settlement participates in the mediation process.

Power Balancing:

The Mediator has a duty to ensure balanced negotiation and to prevent manipulative or intimidating negotiation techniques.

Third Parties:

Third parties (e.g. an advisor or representative) are welcome at mediation. The Mediator will facilitate all the parties involved in reaching agreement at the outset as to how the third parties contribute to the mediation process.

Advice:

The Mediator will give information only in those areas where s/he is qualified to do so by training and experience. Where the mediation may affect other rights and obligations, the Mediator will advise the parties to seek independent advice.

Issues for Discussion:

It is the responsibility of the parties to identify, if necessary with the help of the Mediator, the issues on which they wish to negotiate. The parties are responsible for the terms of settlement, if any, which they reach.

Confidentiality:

Mediation is conducted in private and the terms of any settlement are not published. Information furnished at mediation or investigation may not be published or otherwise disclosed.⁴ Any person who discloses information in contravention of the Acts⁵ is guilty of an offence.

The Service further guarantees that any information disclosed to the Mediator remains confidential to the Mediation Service and shall not be released to an investigating Equality Officer if the dispute is not resolved at mediation and the investigation is resumed.

Joint Sessions:

Parties are normally seen together. However, in some cases the Mediator may consider it helpful to discuss an issue alone with each or either of the parties. Should the Mediator decide to do this, the conditions and procedures for this will be clarified and agreed with the parties beforehand.

Disclosure:

The mediation process is based on full disclosure and it is important that all information relevant to the dispute is shared by the parties at mediation. However, if the Mediator agrees to have discussions with each or either of the parties separately from the other, that person may, with the Mediator's agreement, give him/her information which will be kept in confidence and not shared with the other party.

4 Except on the order of the High Court or Circuit Court or with the consent of the person furnishing the information and of any other person to whom the information may relate.

5 Section 97(2) of the Employment Equality Act, 1998 and Section 36(2) of the Equal Status Act, 2000

Settlement:

If agreement is reached between the parties the Mediator prepares a written record of the terms of the settlement. A draft copy of the proposed settlement is issued to each party before the final mediation session. When each party is satisfied with the final terms of the settlement, it is signed by both parties and a copy formally sent to each party. A copy is also retained by the Director of Equality Investigations. The settlement once signed is legally binding and may be enforced on application to the Circuit Court.

No Settlement:

If agreement is not reached and it appears to the Mediator that the case cannot be resolved by mediation a notice to that effect will be issued by the Mediator to both parties. Within 28 days from the issue of that notice the complainant may make an application to the Director for a resumption of the investigation of the complaint. This application must be accompanied by a copy of the Mediator's notice.

Appendix 3

Mediation Model - Structure of Mediation Session

Mediation Session – Introduction

Mediation sessions are generally scheduled to last about two hours. The Mediator usually starts the process, after introductions, by explaining the guidelines and principles underlying the mediation process and especially the voluntary nature of the process, the confidentiality issues etc.

Generally starting with the complainant each side is asked to tell the Mediator (and through her/him, the other side) their side of the story - what happened from their perspective to bring them before the Equality Tribunal and how they feel about the circumstances surrounding the incident(s) of alleged discrimination.

The respondent is then asked to tell their side of the story – what they think happened at the time of the incident(s), what their policies are and how are they implemented.

This dialogue is an important feature of the mediation as it gives the parties a chance to say what happened from their point of view while the other side listens. In many cases this might be the first time the parties have spoken to each other since the alleged incident(s) of discrimination. In some cases the parties may never have discussed the issues face to face.

Mediation Session – Identification of Issues

The Mediator will help the parties more clearly identify the gap between them and the key issues that need to be addressed. The Mediator, unlike an Equality Officer, makes no findings in fact or law and cannot take a position as to whether s/he believes all or part of one side's story or of the other. The Mediator does not give advice to either side but can point to sources of information (e.g. Equality Officer Decisions) and advice (legal advisers, trade unions, the Equality Authority, Citizens Information Centres and voluntary bodies), where appropriate.

The parties are asked how they might see the dispute being resolved and if they wish to negotiate on particular aspects of the framework the Mediator will assist them. In some cases it is useful to discuss the finer details of a possible settlement with each side separately and privately at a side-conference.

Mediation Session – Agreement

If agreement is reached between the parties the Mediator prepares a written record of the terms of the settlement. A draft copy of the proposed settlement is issued to each party, thus allowing both sides a “cooling off” period so that each can be sure that they wish to sign the agreement. When each party is satisfied with the final terms of the settlement, it is signed by both parties and a copy formally sent to each party. A copy of the agreement is retained by the Equality Tribunal. The settlement once signed is legally binding and may be enforced. Standard terms of agreement which have been developed over the last two years are set out in Appendix 4. The terms are similar for both employment equality and equal status agreements, although the Section numbering will change, as appropriate to the legislation.

Mediation Session - Non Resolution

If agreement is not reached and it appears to the Mediator that the case cannot be resolved by mediation a notice to that effect will be issued by the Mediator to both parties. If a complainant wishes to apply for a resumption of the investigation s/he **must** make an application to the Director of the Equality Tribunal for a resumption of the investigation of the case **within 28 days from the issue of the non-resolution notice**. The Act provides that the application **must be accompanied by a copy of the Mediator’s notice**. If an application for a resumption of the investigation is not properly made within the 28 day period the Tribunal ceases to have jurisdiction in the case.

Appendix 4

Standard Agreement Terms

Equal Status Act, 2000
Section 24(4)

Mediation Agreement between

Name, Complainant
And
Name, Respondent

Terms of Settlement

Agreement No: AGR2002-No. Case Ref. No: MED/2002/No.

1. Background

- A. The complainant referred a case to the Equality Tribunal in accordance with Section 21(1) of the Equal Status Act, 2000 alleging discrimination in relation to... The case was on the grounds of...
- B. Section 24 of the Act states that “if at any time after a case has been referred... it appears... that the case is one which could be resolved by mediation the Director shall refer the case for mediation to an Equality Mediation Officer”. A mediation referral cannot be made if either party objects.
- C. The parties involved in this case agreed to participate in the process of mediation. The case was referred by the Director to **...Name...** Equality Mediation Officer, for mediation under Section 24(1) of the Act. The parties met at a joint session with the Mediator on **DATE (+follow up, where appropriate)** and reached agreement on the terms of a settlement. In accordance with Section 24(4) of the Act this document (agreement) forms the written record of the terms of settlement agreed by the parties to this case and has been prepared by **...Name...** Equality Mediation Officer, on the basis of the discussions between the parties at mediation.

2. Confidentiality

Mediation is conducted in private and the terms of any settlement are not published. Information furnished at mediation may not be published or disclosed except on the order of the High Court or Circuit Court or with the consent of the

person furnishing the information and of any other person to whom the information may relate. Any person who discloses information in contravention of the Act is guilty of an offence (Section 36 of the Equal Status Act, 2000)

3. Terms of Settlement

- A. It is a term of this agreement that the terms of settlement, the names of the parties and information furnished at mediation will not be disclosed by either party except in accordance with Section 36 of the Act.

[Possible option: The parties agree, however, that general information about the case, the Act, the grounds involved and its successful conclusion at mediation may be disclosed in the normal course of their activities provided the parties involved are not identified,]

(Note: In the interests of promoting mediation as an alternative dispute resolution process the Equality Tribunal reserves the right to publish, in a manner which does not identify the parties involved, information on the number of cases resolved at mediation along with sample extracts from (or outline) agreements.)

- B. TERMS OF AGREED ACTIONS INSERTED HERE
- C. The complainant agrees that the terms of this agreement are in full and final settlement of the case referred to at 1.A above

4. Enforcement by Circuit Court

Section 31(2) provides that “if a person who is party to a settlement to which Section 24 applies fails to give effect, in whole or in part, to the terms of the settlement, then... the Circuit Court may make an order directing the person affected... to carry out those terms... The Circuit Court shall not direct any person to pay any sum or do any other thing which (had the matter been dealt with otherwise than by mediation) could not have been provided for by way of redress under Section 27 of the Act.

An application under Section 31 may be made by the complainant or by the Equality Authority, with the consent of the complainant, after 42 days from the date of the written record of the settlement.

These rights are without prejudice to any additional rights which may be available to either party under contract law, consistent with the Act.

5. The parties have read and understand the contents of this agreement which they confirm is a true and accurate record of the terms of settlement agreed between the parties.

Signed by: _____

Signed by: _____

Position:
Complainant

Position:
Respondent / Duly authorised to sign on behalf of Respondent.

Representative:

Representative:

Position:

Position:

Date:

Date:

Witnessed by Name, Equality Mediation Officer

Date:

Appendix 5

Extracts from Employment Agreements

Extract Reference	Sector	Ground	Agreed Terms / Actions
1	NGO	Gender & Family Status	<p>Without admission of liability, the respondent agrees to pay to the complainant an ex-gratia sum of €4,000 net (four thousand euro) in full and final settlement of all claims under the Employment Equality Act, 1998.</p> <p>The respondent agrees to provide the complainant with a letter of apology.</p> <p>The complainant agrees that the terms of this agreement are in full and final settlement of all claims.</p>
2	Private	Disability	<p>This Agreement is made without any admission of liability whatsoever on the part of either party and the following was agreed –</p> <p>The respondent agrees to pay the complainant an amount of €99,000;</p> <p>The respondent agrees to pay €6,000 to the complainant Solicitors in discharge of legal costs herein;</p> <p>The payment will be structured to be paid in the most tax efficient method possible, commensurate with the legal obligations of the respondent in relation to the discharge of any tax that may be due, arising out of or in connection with the payment;</p> <p>The respondent agrees to provide the complainant with a reference, the terms of which have been agreed between the parties legal advisers;</p> <p>The agreed payment takes account of all the payments or benefits of whatever nature, which are claimed or may be due to the complainant, arising out of or in connection with his employment. For the avoidance of doubt, the payment includes the complainant's claims and/or entitlements to pension, car and legal costs.</p>
3	Private	Gender	<p>The respondent agrees: to insert a statement along the lines that it is an equal opportunities employer in all future advertisements for employment issued by or on behalf of it; to furnish the complainant with a verbal apology for any perceived unfavourable treatment of him in any interaction with its staff; to pay to the complainant Euro 1,500 in full and final settlement of his complaint.</p>

Extract Reference	Sector	Ground	Agreed Terms / Actions
4	Public	Race	<p>The complainant agrees: that the verbal apology delivered by the respondent is acceptable to him and brings a closure to that aspect of the settlement; that he will not divulge the terms of this agreement to any person except his immediate family members; the complainant notes that where information in respect of this settlement is divulged to any of the foregoing, the recipients are bound by the confidentiality of this agreement. The complainant agrees that the terms of this agreement are in full final settlement of his complaint.</p> <p>The respondent acknowledges that during the course of the interview... the complainant was asked an inappropriate question with a discriminatory aspect in relation to his nationality; agrees to undertake to issue to all future members of Interview Boards convened by it with a booklet outlining its policy in these matters, as part of the Interview Briefing Process it operates.</p> <p>The complainant accepts that the question referred to above did not affect his performance at interview and the subsequent outcome of the selection process.</p>
5	Private	Gender	<p>The respondent accepted that the complainant had been discriminated against on the gender ground in relation to access to employment and apologised for any distress caused by the act of discrimination. The respondent agreed to pay the complainant €4,000 in compensation for the effects of the discrimination.</p>
6	Private	Age	<p>Without admission of liability in respect of the complaint made by the Complainant the Respondent agrees to pay him a sum of €2,000 (two thousand euro) in respect of expenses incurred by him in attending the mediation and for any misunderstanding that may have arisen. This sum is in full and final settlement of all matters arising from the claim.</p>
7	Private	Disability	<p>The respondent acknowledges that during the complainant's period of employment with the company, incidents occurred which caused him distress. It accepts that these matters could have been handled more sensitively and apologises for any hurt or distress caused to the complainant as a consequence. The respondent agrees to pay the complainant €5,000 (gross) in full and final settlement of these proceedings</p>

Extract Reference	Sector	Ground	Agreed Terms / Actions
8	Private	Gender	The respondent agrees to furnish the complainant with a written reference in respect of her period of employment with it; agrees to develop and introduce a written Equal Opportunities Policy, a copy of which will be communicated to the complainant's legal representative for information purposes no later than three months from the date of this agreement; agrees to pay the complainant €7,500 by way of compensation. This payment shall comprise an initial amount of €1,500 on execution of this agreement and €1,000 per month for six months thereafter.
9	Public	Race	<p>Without admission of liability the respondent agrees to pay the complainant a sum of €5,000 (five thousand euro), in full and final settlement of any claim by the complainant, arising out of her application for employment with the respondent. The above sum will be paid to the complainant, through her Solicitors within 21 days of the signing of the Agreement.</p> <p>The respondent apologises to the complainant, for any distress and inconvenience caused as a result of errors in its recruitment process, which errors were inadvertent.</p>
10	Private	Race	The respondent acknowledges that, at the interview, there was inappropriate questioning which constitutes unfair treatment under the Act and agrees to pay the complainant the sum of nine thousand euro (€9,000) within 14 days of the date of this agreement in settlement of the case. The payment will be made via the complainant's representative.

Appendix 6

Extracts from Equal Status Agreements

Extract Reference	Sector	Ground	Agreed Terms / Actions
1	Restaurant	Family Status	<p>The respondent accepts that the complainant was refused service in the restaurant because he was accompanied by his four year old son. The respondent submits that this is not the policy of the restaurant but was a policy implemented by one of the managers for no good reason.</p> <p>The respondent acknowledges that the incident caused hurt and embarrassment to the complainant and apologises for the inconvenience and embarrassment caused to the complainant as a result of being refused entry to the restaurant.</p> <p>The respondent has implemented the following - a staff training session in the Equal Status Act, 2000; staff to sign an undertaking they have read and understand the terms of the Act; staff to sign an undertaking that whilst in the employment of the respondent they will comply with the terms of the Act; has amended the terms and conditions of employment of staff to state that "staff members shall not discriminate against another human being on the grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race, or membership of the Traveller community and to comply with the Equal Status Act, 2000 in every way"; a children's menu has been implemented in the restaurant</p> <p>As a gesture of goodwill the respondent will pay for a 2 night break, including dinner and bed and breakfast, in a Hotel for the complainant, his wife and child in full and final settlement of this case.</p> <p>The payment is to be regarded as a goodwill gesture, to be paid within 21 days of the signing of the agreement.</p>
2	Bar	Traveller Community	<p>The respondent agreed -</p> <ul style="list-style-type: none"> • to apologise, through his representative, to the complainant, • to pay the complainant €1,524 (one thousand five hundred and twenty four euro), and • not to treat the complainant differently to any other customer, Traveller or non-Traveller, subject to the respondent's rights and obligations under Section 15 of the Equal Status Act, 2000.

Extract Reference	Sector	Ground	Agreed Terms / Actions
3	Restaurant	Marital & Family Status	The respondent recognises that his approach to the situation which had developed was wrong and that he handled it badly, apologises for any embarrassment and humiliation felt by the complainant, confirms that the lessons they had learned would be developed and built into their staff training programme to ensure an improved response in the future, and would be happy to welcome the complainant and her family back to the restaurant.
4	Estate Agent	Disability	The respondent agreed, without admission of liability, to treat the complainant in the same manner as all other customers and to apologise in writing to the complainant.
5	Hotel/Bar	Traveller community	<p>The respondent accepts that the complainant was provided with one drink and then refused further service. The respondent states that the hotel does not operate any policy of discrimination against members of the Traveller community and that no person will be discriminated against in the premises.</p> <p>The respondent provided the complainant with an oral apology for any offence caused. The respondent accepts that the complainant is welcome to partake of refreshments and avail of normal facilities in the premises in the future. Without admission of liability, the respondent agrees to pay to the complainant the sum of €700 (seven hundred euro) in full and final settlement of his case. The payment is to be regarded as a goodwill gesture, to be paid on the signing of the agreement.</p> <p>The complainant agrees that the terms of this agreement are in full and final settlement of the case and that he has no further or other complaint against the respondent. The complainant also acknowledges the sincere and genuine manner in which the respondent approached and participated in the resolution of the complaint. The complainant accepted the oral apology offered by the respondent. The complainant accepts that he is welcome into the hotel, but the respondent is entitled to refuse service, in the future, if there is any behaviour which would warrant such a course of action.</p>

Extract Reference	Sector	Ground	Agreed Terms / Actions
6	Hotel	Traveller Community	<p>The respondents deny that discrimination was a factor in this case and maintain that the difficulty arose from the complainant inadvertently having been given misleading information about the availability of the hotel's function room.</p> <p>The respondents sincerely apologise to the complainant for any hurt and humiliation experienced and, as a gesture of goodwill, agree to pay a sum of €1000 (one thousand euros) in full and final settlement of this case. The payment to be made within 14 days of the signing of the agreement.</p> <p>The complainant acknowledges the sincere and genuine approach adopted by the respondents in dealing with the matter and agrees that the terms of this agreement are in full and final settlement of the case.</p>
7	Insurance	Race	<p>The respondents state that they do not apply discriminatory policies in providing insurance quotations. They accept, however, that a misleading quotation was provided in the complainant's case which was withdrawn when the company became aware of the applicant's full insurance history. The company acknowledges that the situation was not handled as well as it should have been when the complainant contacted its staff regarding the matter.</p> <p>The respondents sincerely apologise to the complainant for the hurt and humiliation suffered and agreed to issue a letter of apology to the complainant apologising for the upset and inconvenience caused by the incident.</p> <p>The complainant acknowledges the sincere and genuine approach adopted by the respondents in dealing with the matter and agrees that the terms of this agreement are in full and final settlement of the case.</p>
8	Hotel/Bar	Age	<p>The respondent acknowledges that an incident occurred at its premises which involved the complainant. The respondent also acknowledges that the complainant felt hurt and embarrassed as a result of the incident. The respondent wishes to state that no such hurt or embarrassment was intended and wishes to express its apologies to the complainant for any offence caused to him as a result of this incident.</p>

Extract Reference	Sector	Ground	Agreed Terms / Actions
9	Bar	Race & Traveller community	<p>The respondent agrees to pay to the complainant a sum of €300 in cash and a voucher for a clothes shop to the value of €100 for the distress suffered by him.</p> <p>The respondent wishes to state that the complainant is welcome in its premises at any time, subject to the provisions of the licensing laws, and gives an undertaking that should the complainant seek service in its premises at some future date, no reference whatsoever will be made to this dispute.</p> <p>The respondent agrees, without admission of liability, (a) to apologise to the complainant for any embarrassment and humiliation felt when they were refused service, (b) to treat the complainant the same as any other customer in the future, subject to the respondent's rights and obligations under Section 15 of the Equal Status Act 2000, and (c) to pay the complainant the sum of €500 (five hundred euro) as a gesture of goodwill.</p>
10	Bar	Traveller Community	<p>During the course of the mediation session, the respondent stated that the complainant was welcome in his pub. In full and final settlement of the claim, the respondent agreed to pay to the complainant the sum of €400 and to apologise in writing to the complainant.</p>