

## **Protocol to govern the conduct of Independent Investigation, Mediation and Arbitration (IIMA) in Employment Disputes in Ireland.**

### **1. Impartiality**

Independent Investigators, Mediators or Arbitrators must be able to demonstrate and maintain impartiality in a dispute resolution process. They should exercise their functions free from any relationship or interest that could indicate any possible bias in their behaviour.

Independent Investigators, Mediators or Arbitrators should not:

- represent or act ( or have represented or acted) as an advocate for either management or employees in the organisation in any 3rd party dispute resolution forum.

- be a shareholder or have any financial interest in the organisation in which they are engaged.

- have acted as a consultant or advisor or advocate to management or employees in the organisation in the past.

- have any material or contractual relationship/interest with the organisation, which could be reasonably perceived as impacting on their judgement and ability to act in an independent manner.

- use confidential information acquired during the dispute resolution process to gain any future advantage.

They should sign a declaration to this effect for each assignment they undertake.

### **2. Conflicts of Interest**

Independent Investigators, Mediators or Arbitrators should disclose all known information that could give rise to an actual or potential conflict of interest. If a potential conflict of interest casts any reasonable doubt on the integrity of the process the IIMA should not proceed. The declaration referred to in 1 above should also state that they have no conflict of interest that could prejudice or be seen to prejudice the perception of impartiality. (This should ideally be signed in the presence of the parties at the beginning of the process.)

### **3. Clarity of Role**

In all cases involving the use of Private 3rd parties the precise terms of reference governing their involvement should be clarified at the outset. In some circumstances the 3rd party may meet the parties jointly and / or separately and assist them in developing appropriate terms of reference or suggest terms of reference for adoption.

Investigators will typically be asked to establish the facts of a situation but should not be asked to recommend an appropriate outcome to an issue in dispute. In addition they should not then be asked to adjudicate on any subsequent decision that may have been taken arising from their Report. In some circumstances the terms of reference may enable them to commence an investigation and to see if an agreed outcome may be possible through mediation. There is no difficulty with this approach as long as the parties consent to it. However if the Mediation subsequently fails there may be a question about whether the Expert should continue with the investigation and this should be clarified in the terms of reference.

Mediators should encourage the parties to recognise that the resolution of a dispute rests with them and that the Expert role is to assist them in attempting to reach an informed and voluntary resolution of the dispute, that is acceptable to the organisation. The Mediator should not engage in any non-mediation role in the disputes resolution process, except with the expressed consent of the parties. Mediators should inform the parties of their rights to withdraw from mediation at any time and this should be identified in the terms of reference at the outset. The remaining options (if any) can also be set out.

Arbitrators must operate within their agreed terms of reference. The status of any output from arbitration should be clarified in the terms of reference i.e. whether it is binding or non binding. They may encourage the Parties to mediate their dispute but should not insist that he/she then acts as the Mediator. The Parties should be given the option to select another independent Mediator to deal with the case. If either before or during the Arbitration, all the Parties request that an Arbitrator facilitates a settlement, the Arbitrator should explain how his/her role and relationship to the Parties may be altered. (The willingness of the Parties to disclose certain information to the Arbitrator if acting in a Mediator role may be compromised.)

#### **4. Quality and Integrity of the Process**

IIMA must maintain the quality and integrity of the dispute resolution process. To this end, IIMA should:

not have any unilateral contact with either Party that would cast reasonable doubt on the integrity of the process.

demonstrate neutrality and remain impartial throughout the process and not demonstrate favouritism either by word or action.

ensure that a communication sent to or by one Party is copied to the other Party.

ensure the process is free from manipulative or coercive behaviour by either Party.

not accept a gift or item of value from any Party to the process.

agree a reasonable timeframe with the parties for the resolution of the case.

not be influenced by the possibility of future case referrals by either Party or their Representative(s), nor should they suggest an outcome that reflects a compromise position in order to achieve such acceptability.

#### **5. Entitlement to Representation**

Either party should be free to seek the assistance of a competent person of their choosing (acting in a personal capacity if required) to assist them in the effective preparation and presentation of their case and to attend a meeting with an external Investigator, Mediator or Arbitrator. Where either party is not represented they should be encouraged to obtain independent advice as may be necessary prior to concluding an agreement. Any settlement agreement should provide for an unrepresented party to avail of such advice prior to signing it.

#### **6. Confidentiality**

IIMA should set out their expectations concerning confidentiality to the parties. They must not disclose any matter that either party expects to be kept confidential unless given permission to release it or unless required to do so by law.

## **7. Payment of Fees**

It is normal practice for the employer to meet the costs of privately provided IIMA and in such circumstances it may create the impression that this may assist in delivering a more favourable outcome for the Employer. It would be helpful if the IIMA was unaware of who was paying or in what proportion the fees were being met by the Parties.

Fees should be paid up front where possible (or submitted on a monthly basis and not accumulated until the assignment is completed) and the fee note should not be attached to or contingent on a certain outcome being achieved.

## **8. Continuing Professional Development**

An IIMA should acquire and maintain professional knowledge and skills to enable them to provide competent problem solving and dispute resolution services that satisfies the reasonable expectations of the parties and maintains the integrity of the process.

***Liam Doherty PhD and Prof Paul Teague***