

TABLE OF CONTENTS

<i>Preface</i>	iii
1 — Mediation in the Employment Law Setting	1
1. Introduction	1
2. Models of Mediation	1
(a) Transformative Mediation.....	2
(b) Facilitative Mediation	2
(c) Settlement Mediation	3
(d) Evaluative Mediation	4
3. General Overview of Legal Issues in an Employment Law Matter.....	5
(a) Just Cause.....	6
(b) Reasonable Notice	6
(c) Mitigation	7
(d) Compensation.....	8
(e) Contract Issues.....	9
(f) Restrictive Covenants	9
(g) Other Damages	10
(h) Human Rights Considerations	10
(i) Disability	10
(j) Sexual or Other Forms of Harassment.....	11
4. Application of Mediation to an Employment Law Matter	11
5. Mediation in Other Areas of Law.....	13
6. Benefits of Mediating Employment Law Matters.....	14
7. Voluntary versus Mandatory Mediation	17
2 — Determining When to Mediate	21
1. General Considerations	21
(a) Suitability	23
(b) The Importance of Timing	23
2. Determining the Issues	25

MEDIATING EMPLOYMENT DISPUTES

(a) Continuing Employment Relationship —	
The Concept of “Workplace Mediation”.....	26
(i) Workplace Dispute Policy.....	27
(ii) Performance Issues/Disciplinary Measures	30
(iii) Human Rights Issues	32
Sexual Harrassment	32
Disability.....	34
Pregnancy/Parental Leave.....	35
Other Forms of Discrimination and Harassment.....	36
(iv) Constructive Dismissal	37
(v) Contract Dispute During the Course of Employment	39
(b) Terminated Employment Relationship	40
(i) Termination Without Just Cause.....	41
(ii) Termination With Just Cause.....	42
(iii) Allegations of Discrimination or Harassment Raised Following Termination	43
(iv) Disability Arising After Termination	43
(v) Violation of Post-Employment Obligations	44
Appendix 2A: Checklist for Developing an Internal Workplace Dispute Policy	45
3 — Setting Up the Mediation Session.....	49
1. Approaching the Other Side	49
(a) Existing Employment Relationship.....	49
(b) Terminated Employment Relationship	50
2. Selecting the Mediator.....	51
(a) Appropriate Background.....	51
(b) Appropriate Experience	52
(c) Appropriate Training	53
(d) Appropriate Methods and Style	54
(e) Conflict of Interest Check	54
(f) Fee Schedule and Availability	55
(g) Selection Process	55
3. Setting up an Informal/Internal “Workplace Mediation”	57
4. Setting up a Court-Mandated Mediation	57
5. Setting up a Mediation with the Human Rights Commission/Tribunal or other Administrative Body.....	58
6. General Mediator Characteristics.....	59

TABLE OF CONTENTS

7. Selecting the Location	59
8. Approaching the Mediator	60
9. Agreement to Mediate	60
10. Role of the Mediator	61
(a) Facilitative versus Evaluative Approach	61
(b) Mediator Styles.....	63
11. Checklist for Setting up a Non-Mandatory Mediation	65
Appendix 3A: Sample Letter from Employee to Employer.....	66
Appendix 3B: Sample Agreement to Mediate (Post-Employment or where Litigation has Ensued)	67
Appendix 3C: Sample Agreement to Mediate (Internal Workplace Mediation)	70
4 — Preparing Your Client for Mediation.....	71
1. Overview	71
2. Explaining the Mediation Process to Your Client	71
3. Determine Whether Your Client Requires Representation	75
4. Discussing Legal Fees.....	77
5. Discussing Mediation Fees	77
6. Determining the Involvement of Your Client.....	78
7. Preparing Your Client for the Mediation Session.....	79
(a) Defining the Issues and Gathering the Facts	80
(b) Reviewing Strengths and Weaknesses.....	81
(c) Identifying Interests and Goals.....	81
(d) Reviewing Settlement Options.....	83
(e) Determining Who Should Attend the Mediation	84
(f) Preparing Your Client for Uncertain Emotions.....	85
8. Checklist for Preparing Your Client for Mediation.....	86
Appendix 4A: Case Studies.....	87
5 — The Role of Counsel	91
1. Overview	91
2. Determining Your Role.....	91
3. Preparation of Mediation Materials.....	93
4. Selecting Your Client Representative	95
5. Preparation of Your Opening Statement.....	97
6. Preparation of Third Party Statements	98

MEDIATING EMPLOYMENT DISPUTES

7.	Preparation for Private Sessions	99
8.	Negotiation Strategies.....	99
(a)	Positional Bargaining	99
(b)	Collaborative Negotiation	100
(c)	Interest-based Negotiation.....	100
9.	Preparation of Draft Settlement Agreement	101
10.	Avoiding Common Pitfalls.....	102
11.	The “Do’s” of Mediation.....	103
12.	Ethical and Professional Issues	104
	Appendix 5A: Form 24.1C.....	107
	Appendix 5B: Form 24.1C — Example.....	108
6 — The Mediation Process.....		113
1.	Pre-Session Preparation	114
2.	Introduction	114
3.	Information Exchange, Defining the Issues and Generating an Agenda.....	116
4.	Issue Exploration.....	118
5.	Generating Settlement Options and Problem Solving	119
6.	Agreement and Closing Session	122
7.	Post-Mediation Activities.....	124
8.	Mediation Process in a “Workplace Mediation”	125
9.	Alternative Mediation Processes	128
(a)	“Judicial” Mediation	128
(b)	Separate Sessions	128
(c)	Shuttle Mediation.....	130
(d)	No Separate Meetings.....	130
(e)	Hybrid Process (Med-Arb)	131
(f)	Co-Mediation	132
(g)	Collaborative Mediation	134
	Appendix 6A: Mediation Process Checklist	135
7 — Creative Solutions to Employment Law Disputes.....		137
1.	Overview	137
2.	A Comparison of Solutions: Court Awards versus Mediation....	138
(a)	Reasonable Notice	138
(b)	Fringe Benefits.....	140

TABLE OF CONTENTS

(c) Pension Losses	141
(d) Overtime and Vacation Pay	143
(e) Bonus Payments.....	144
(f) Stock Options.....	145
(g) Car Allowance	146
(h) Mitigation Expenses.....	147
(i) Punitive Damages	148
(j) Mental Distress.....	149
(k) Disability Claims	150
(l) Costs and Interest	151
3. Human Rights Disputes	152
4. Internal Employment Disputes — “Workplace Mediations”	152
Appendix 7A: Termination Letter.....	154
Appendix 7B: Demand Letter	155
Appendix 7C: Minutes of Settlement	156
8 — Special Issues in Mediating Employment Law Disputes	159
1. Overview	159
2. Human Rights Mediations.....	159
3. Dealing with Power Imbalances.....	161
4. Dealing with Public Interest Issues	163
5. Dealing with Multiple Parties	164
6. Dealing with Significant Acrimony Between the Parties	166
9 — The View from the Mediator’s Chair	169
Peeling Back the Onion: Getting to a Settlement.....	171
What Makes for a Successful Mediation, From the Mediator’s Perspective?.....	179
Winning at Mediation.....	185
Mediation Hints — A Client Representation Perspective	189
Conclusion	195
Index	197