



MEDIATING EMPLOYMENT AND WORKPLACE DISPUTES

This is the seventh in our series of **ADR practical guides**, designed to provide clients with essential practical guidance on various processes falling under the banner of "alternative dispute resolution" (ADR), with a particular focus on mediation.

This guide outlines how mediation can be used to resolve employment and workplace disputes and offers a number of practical tips for getting the best result. It also examines specific mediation and conciliation schemes offered by the Employment Tribunal and by Acas.

INTRODUCTION

Mediation is a confidential and flexible process whereby an independent and neutral third party (a mediator) is appointed to help the parties reach a negotiated settlement. It is voluntary and non-binding unless and until an agreement is reached. The mediator will adopt various techniques to facilitate a productive discussion on how the parties can resolve the matter without recourse to the court or Employment Tribunal. For more detail on the mediation process generally, see our [ADR Practical Guide No. 2: An introduction to mediation - what it is and how it works](#).

An independent mediator may be appointed to resolve an employment dispute in exactly the same way as for a commercial dispute, but there are additional matters to consider and specific statutory requirements in relation to the settlement documentation.

In addition, parties to employment and workplace disputes may also take advantage of:

- judicial mediation provided by the Employment Tribunal; and
- conciliation or mediation provided by the Advisory, Conciliation and Arbitration Service (Acas) (the UK body that supports employers and employees on workplace relations).

INDEPENDENT MEDIATION

Can you use mediation in relation to employment disputes?

Yes, mediation can be used effectively to resolve all types of employment disputes: disputes arising from statutory claims (eg, allegations of discrimination or harassment, unfair dismissal, detriment on grounds of whistleblowing or performance management issues) but also contractual or tortious claims (eg, relating to senior executive terminations and team moves).

The usual advantages of mediation apply just as much in the employment context:

- It allows the parties far more control over the process than typically available through the Employment Tribunal or court system
- It can lead to much earlier resolution of the dispute, considerable costs savings and a better overall outcome for the parties. In particular, the availability of witnesses for future litigation can often be jeopardised by natural attrition rates within a business; mediation can provide a useful mechanism to resolve a dispute quickly before turnover of staff depletes the source of potential witnesses
- There is scope for creative or innovative solutions, with a broader spectrum of remedies available, including non-financial remedies
- The mediation is conducted on a private and without prejudice basis in complete confidentiality. This can be particularly useful given the sensitive nature of many employment disputes and, in some circumstances, the need to preserve an on-going employment relationship

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Particular features of employment disputes to bear in mind when mediating

A breakdown in communication between an employee and employer can completely prevent a settlement if either party simply refuses to negotiate. Mediation can open up communications channels and facilitate a face-to-face meeting between the parties which may lead to a quicker resolution of the matter than where communication is simply conducted through third parties.

Different tactics are required to preserve an ongoing employment relationship; there is a greater need for a speedy resolution of the matter as lengthy (and costly) litigation will further sour relations between the parties.

Employment disputes are often highly personal and emotions can run high; consider whether any potential mediator has the necessary inter-personal skills to achieve a settlement, in these circumstances.

The mental health of the individual may be a factor in employment mediation; be ready to delay or adjust the way that the mediation process runs to accommodate an employee who is too stressed or sick to sit through the mediation. It may be appropriate to seek the individual's consent for their representative to continue negotiations on their behalf, although the individual will of course have to sign any settlement agreement.

There are specific statutory requirements in relation to the settlement documentation (see below). This can make it harder to finalise a settlement agreement on the day of the mediation unless both parties are well prepared and have representatives present.

There is a broad spectrum of remedies that can be particularly valuable in the employment context or where there is an ongoing employment relationship, including:

- an apology
- a reference
- outsourcing assistance or training to help the claimant find new employment
- an undertaking to review company procedures (eg, equal opportunities)
- an agreement to ensure management undergo training (eg, where there is evidence of institutional sexism or racism)
- a decision to take disciplinary action where appropriate
- a decision to annul a disciplinary decision
- a decision to review a particular process

Mediation may enable the parties to save face: the employer may achieve a satisfactory commercial outcome and the individual may achieve sufficient recognition of their grievance without either appearing to have capitulated during negotiations.

What's the difference between employment mediation and workplace mediation?

A mediation to resolve a dispute between the employer and a former employee is usually referred to as "employment mediation". Where there is an ongoing relationship between the employer and the employee, it is usually referred to as "workplace mediation".

Workplace mediation can be to resolve a dispute between two (or more) employees or between an employee and the employer, or between an employee, another employee and the employer. It should not be used as a substitute for proper line management; managers should be trained in having difficult conversations and how to manage employees' performance properly. But it can be very effective to bring in an external independent person to rebuild a working relationship that has deteriorated or broken down.

How does the Employment Tribunal or court process impact on the mediation process?

- The new Employment Tribunal Rules require a Tribunal "wherever practicable and appropriate" to encourage the use of alternative dispute resolution, through Acas, judicial or other mediation. Therefore, the rules encourage parties to consider alternative dispute resolution, but there is no penalty for failing to do so, which limits the impact of the new rule. By contrast, when dealing with claims in the High Court or County Court there are potentially substantial costs penalties if a party unreasonably refuses to mediate.
- The introduction of fees for bringing Employment Tribunal claims from 29 July 2013 may increase the demand for dispute resolution outside the court or Tribunal process. The introduction of a £600 fee for judicial mediation certainly makes that process more expensive.
- As part of its plans to make the Tribunal system more efficient, the government has imposed a duty on the parties and Acas to attempt early conciliation (EC) of employment disputes before a Tribunal claim is issued with effect from April 2014. The new procedure will have an impact on the time limits for submitting claims to the Employment Tribunal.

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What is the process for mediation with an independent mediator?

Mediations involving employment disputes typically involve the following stages, which are broadly the same as for mediations of commercial disputes. For more detail on each step in the mediation process, see our [ADR Practical Guide No. 2: "An introduction to mediation – what it is and how it works."](#)

- The parties decide between themselves where the mediation will take place (usually the offices of one of the parties' solicitors), how long it will last (usually one day) and how the mediator's costs will be apportioned. They will appoint a mediator. Parties usually make their own decisions as to who attends.
- The parties prepare a bundle of documents for use at the mediation. Sometimes the contents will be agreed between the parties. The bundle may include pleadings in the case, details of any previous settlement discussions and a chronology. The bundle is usually exchanged between the parties and supplied to the mediator before the mediation. The mediator will usually request that each party sets out their case in a position statement to facilitate the mediation. This will be a short case summary or submission from each side and a set of key supporting documents. The content will depend on the nature of the dispute and the type of mediation, but will usually include the party's explanation of the key issues and their position. The parties may also prepare a separate confidential briefing for the mediator on matters they consider private but significant.
- The mediator and the parties enter into a mediation agreement which sets out the agreed process and includes provisions as to confidentiality and the without prejudice nature of the mediation.
- The mediation takes place adopting a structure similar to that used in relation to commercial disputes, involving the mediator employing "shuttle diplomacy" between the parties' representatives.
- Where an agreement is reached, this will be documented in a settlement agreement which will be signed by both parties and by the legal representative of the employee. If the mediation is unsuccessful, the matter may continue through the Employment Tribunal or court system and the matters discussed during the mediation will not be referred to in any subsequent court or tribunal process.

Statutory requirements for settlement of employment disputes

Sometimes a simple settlement agreement may be sufficient. However, if the settlement includes resolution of any potential statutory claims (such as unfair dismissal or discrimination), then a statutory settlement agreement or a "COT 3 form" (negotiated with the assistance of Acas) will be needed. Certain conditions must be satisfied for a binding statutory settlement agreement. The agreement must be in writing and relate to a "particular complaint" or "particular proceedings", the employee must obtain independent advice on the terms and effect of the agreement, the independent adviser must be insured and identified in the agreement and it must state that the conditions regulating settlement agreements are satisfied.

ACAS CONCILIATION AND MEDIATION

Acas offers a [pre-claim conciliation service](#), which either party can request to attempt to resolve any workplace issue that could result in an Employment Tribunal claim. The process is confidential, voluntary, independent and free.

Acas conciliators should be impartial and not give an explicit opinion on the merits of a claim or potential claim nor advise on tactics. The conciliator will explore how the potential claim might be resolved and talk through the issues with the employer and the employee (either by telephone or face-to-face). The conciliator may discuss the options, ask questions to help clarify each party's concerns, positions and intentions and relay any proposals for a settlement. The conciliator should not make a judgment on the case or the likely outcome of a hearing. Nor should they advise either the employer or the employee whether or not to accept any proposals for settlement.

If the conciliation is successful, the agreement will be legally binding and no court or Employment Tribunal claim can then be made about the matter in question. Agreements do not have to be in writing to be legally binding, but the conciliator will record the terms of the agreement on an Acas form and send this to the employer and employee to sign as proof of the agreement.

As noted above, a new process of mandatory early conciliation was introduced in April 2014 which requires most prospective claimants to engage in Acas conciliation before they can issue a claim in the Employment Tribunal. A detailed summary of this new pre-claim conciliation regime falls outside the scope of this guide.

Acas also offers a mediation service. If there is a complaint about employment rights that could go to the Employment Tribunal, Acas offers help free of charge. If the dispute is not about a statutory employment right, a charge is made for mediation. This is often paid by the employer, but the employees may pay the cost or it can be shared. In our experience Acas mediation is not commonly used.

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JUDICIAL MEDIATION

When can it assist? Judicial mediation involves the appointment of a specially trained employment judge to mediate a dispute involving claims in the Employment Tribunal. Where a claim has been submitted to an Employment Tribunal, the employment judge may raise the possibility of judicial mediation at a directions preliminary hearing. If the parties consent, the regional employment judge will decide whether the case is suitable for mediation and consider the resources available. A £600 fee for judicial mediation was introduced on 29 July 2013, applying to all claims issued after that date; the fee is payable by the respondent to the claim.

Cases are usually considered suitable for judicial mediation if a full hearing has been fixed of at least three days, the case involves discrimination or some other complex issue, is a single claim (although occasionally judicial mediation can incorporate two or three claimants), there are no proceedings in other jurisdictions and no insolvency is involved. Judicial mediation can be particularly useful where there is an ongoing employment relationship, such as where a claimant has raised allegations of workplace discrimination.

What is the process? If judicial mediation is offered, there will be a directions preliminary hearing (usually by telephone) to make arrangements for the conduct of the judicial mediation.

Both parties should then attend the mediation meeting. The respondent's representative will need to have full decision-making authority to agree settlement terms. Legal representatives can be present. Initially both parties appear jointly before the mediating employment judge and then go to separate tribunal rooms. The employment judge will develop the settlement negotiations adopting a facilitative technique: for example, by taking views from each party separately and then relaying the information to the other side. The mediating employment judge will assess the evidence and identify the key issues.

If a settlement is achieved, the terms are agreed in writing and Acas will usually be involved in incorporating the terms into a legally binding COT3 Form. The employment judge may telephone Acas to achieve a conciliated settlement. Alternatively, the parties may finalise the settlement terms by entering into a settlement agreement.

Practical tips for successfully mediating employment disputes

- Ensure all participants are ready to engage in a process of looking for a potential way to resolve the dispute
- Be willing to agree some form of compromise; if the respondent simply wants the claimant to withdraw his/her claim or is only prepared to make the claimant a nuisance payment then mediation may well be unsuccessful. A mediation provides the opportunity to explore whether non-monetary solutions will assist as well as or instead of a payment
- Consider in advance of the mediation what the key matters of importance are and where there is scope for concession
- Agree tactics - decide whether an aggressive or conciliatory approach is likely to be most successful, and whether it would be useful for members of the negotiating team and advisers to adopt "good cop/bad cop" roles
- Choose a mediator with the appropriate skills for the particular case; the mediator will have a big impact on the success of the mediation meeting
- The claimant should bring their legal adviser to the mediation to enable a statutory settlement agreement to be executed if an agreement is reached
- Identify a person from the respondent removed from the immediate incident to be objective in relation to the dispute
- Ensure the persons attending on behalf of the employer have sufficient seniority to apologise (if required) and are authorised to settle the matter
- Bring a checklist of potential terms to be included in any settlement agreement or COT3 Form, or a draft settlement agreement. Try to agree as much of this in advance to save protracted negotiations late at night
- Consider in advance broader issues that may need to be addressed in a settlement agreement, such as potential tax treatment of any settlement sum, confidentiality provisions, whether additional restrictive covenants are necessary and if it is prudent to include a clawback of settlement monies in the event that there is a breach of a covenant/confidentiality clause
- If it is impossible to conclude a comprehensive agreement on the day of the mediation, set out in a signed heads of agreement what has been agreed and the steps to be taken to conclude the final agreement in a tight time-frame

MINI CASE STUDY OF THE SUCCESSFUL MEDIATION OF AN EMPLOYMENT DISPUTE

Over a period of 6 - 9 months, there were various incidents of inappropriate language and behaviour in the workplace by a senior manager towards a junior gay employee. The employee raised the issue informally with the human resources department but did not wish to pursue the matter formally.

After a further incident, the employee submitted a formal grievance alleging discrimination on grounds of sexual orientation against her line manager, the HR director and the company. Several days later the employee instructed a lawyer and sent a letter outlining the grievances with a statement that the individual is considering litigation if the matter cannot be resolved satisfactorily.

The company's HR director appointed a senior person in the organisation to undertake an investigation. The relevant people were interviewed. The manager was extremely angry that his comments had been taken out of context. He claimed all was said in humour. The investigator concluded her investigation and upheld some of the employee's grievances on the basis that the manager's behaviour was inappropriate, albeit not amounting to unlawful discrimination. The employee was relieved and delighted. The manager was annoyed and disappointed. Working relations between the two and with the team as a whole were strained as a result of the allegations and investigation. The company itself appointed lawyers and battle lines began to be drawn.

The company then decided to appoint an external independent mediator to conduct workplace mediation to help manage the relationship going forward.

The mediator met with the individuals involved separately to gain trust. The mediator scheduled an initial joint meeting and identified various areas of miscommunication and practical steps to improve matters. The mediator recommended that a senior individual within the organisation was appointed as a mentor to the employee. Further meetings were scheduled on an initial monthly, then quarterly basis. The mediator agreed with the parties a framework for future communications.

A year later, both individuals remain in the organisation and are working effectively as part of a team.

Outcome: The working relationship between the employee and her manager is preserved and the team functions effectively. The company saved itself the inevitably high legal costs which would have been involved in any litigation with the employee and the costs and risk to its reputation. The individual preserved her job and avoided any damaging publicity that she was in dispute with her employer which could have impeded her future career.

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Additional resources:

The following resources are useful for those engaged in employment mediations:

- Law Society [practice note](#) providing guidance to solicitors representing clients at judicial mediation
- Acas publication on [pre-claim conciliation](#)
- The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
- HM Courts and Tribunals [Statement on Tribunal Fees](#)

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